

THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
BECKER & POLIAKOFF, P.A.

PETITION

I. Jurisdiction

Pursuant to Rule 1-4.2(a) and (c), Rules Regulating the Florida Bar, Petitioner Becker & Poliakoff, P.A. (“B&P”), a Florida professional service corporation, through undersigned counsel, hereby petitions the Florida Supreme Court to rescind Florida Bar Advisory Opinion 93-4 and states as follows:

Rule 1-4.2(a) and (c), Rules Regulating the Florida Bar, *inter alia*, empower this Court to amend all actions taken by the Florida Bar’s Board of Governors and to order that actions previously taken by the Florida Bar and its Board of Governors be rescinded. Counsel for The Florida Bar has indicated that it does not intend to oppose this Court’s exercising direct jurisdiction over this matter.

Florida case law supports this Court exercising direct, immediate and exclusive jurisdiction in a case such as the instant action where a member of the Florida Bar has requested direct review of an action of the Florida Bar’s Board of Governors. The Florida Bar Re Schwarz, 552 So. 2d 1094 (Fla. 1989) (As a creation of this Court, the Florida Bar is under this Court’s supervision and subject to its regulation); The Florida Bar Re Frankel, 581 So. 2d 1294 (Fla. 1991).

At all times material hereto, B&P was and is a Florida professional service corporation organized for the purposes of providing legal services to the public. B&P presently consists of over (70) attorneys with eleven staffed offices throughout the State of Florida. The firm is organized into practice areas, including its dominant area of community association law. B&P’s principal place of

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business is in Broward County, Florida.

II. Factual Background

A. Becker & Poliakoff, P.A.'s Financial Commitment to its Attorneys

B&P's attorneys are trained throughout their tenure at B&P in various specialty practices, most particularly in the core practice area of community association law, and are encouraged to develop additional areas of expertise. The firm supports its attorneys financially and through marketing personnel to explore and take advantage of opportunities to learn, to write, to be published, and to speak at seminars developed by B&P and others.

B&P historically and through the present has made a significant commitment, financially and otherwise, to automation systems, serving not only the business side, but also technological resources to enhance the quality of law practice and to ultimately and most importantly make legal representation more cost effective for the client. Annually, B&P expends approximately \$400,000.00 on computers and two to three times that amount every three (3) years on computer upgrades so that its legal services for clients are continually improved and made more efficient.

B. B&P's Employment Agreement

Generally, B&P's attorneys are not required to sign employment agreements and are only asked to do so under limited circumstances. First, when attorneys are asked to become equity shareholders, they are required to sign a shareholder's agreement. Second, when attorneys are placed in control of a branch office and essentially entrusted by the firm with the responsibility of maintaining and developing client relationships, as well as when attorneys become non-equity shareholders, the attorneys are asked to sign an employment agreement. A sample copy of a B&P employment agreement is attached hereto as Exhibit "A."¹

Paragraph 16 of B&P's employment agreement¹ ("the agreement") states that:

Employee acknowledges that the Employer has invested its trust and confidence in the Employee and a considerable amount of time and money in training and developing the skills and expertise of the Employee in the practice of law. As a condition of employment and the benefits thereof, Employee agrees that in the event this Agreement is terminated, Employee will not, for a period of two (2) years from date of termination, interfere with the business of the Employer by:

seeking directly or indirectly, any of the Employer's clients; or

inducing, either directly or indirectly, any employee to quit or abandon the Employer.

Employee acknowledges that the above prohibitions are reasonable and necessary covenants not to interfere with the business of the Employer. In the event of a breach of any of these covenants by the Employee or in the event Employee accepts representation of a client of the Employer, it is agreed as follows:

Employee acknowledges that he (she) would work on any on-going case or on-going file matters for such client on behalf of and in the interest of the Employer and shall compensate to the Employer the greater of fifty percent (50%) of any fee received from said client or the Firm's quantum meruit.

As to subparagraph (A)(2), the Employer's damages are not readily calculable and that Employer is entitled to injunctive relief to enforce said covenants, there being no adequate remedy at law.

C. The Florida Bar Approved Paragraph 16 of B&P's Employment Agreement in 1989

The specific agreement which is the subject of this lawsuit, a copy of which is attached hereto as Exhibit "A," was drafted in 1989. At that time, B&P had been the subject of a Florida Bar grievance concerning the employment agreement in effect at that time. Specifically at issue was B&P's attempt to require its qualifying attorneys to enter into an earlier version of the employment agreement which the Florida Bar alleged, *inter alia*, violated Rule of

¹ Paragraph 16 of B&P's shareholder agreement is identical to Paragraph 16 in B&P's employment agreement.

Professional Conduct 4-5.6.

B&P retained Bruce Rogow, Esquire to represent its interests in the Florida Bar grievance proceedings. As part of the process of resolving the grievance, B&P agreed to re-write its then existing employment agreement to its present form attached hereto as Exhibit "A." During the resolution process, Mr. Rogow negotiated extensively directly with the Florida Bar to amend the B&P employment agreement so that it would receive ethical approval from the Florida Bar.

On September 18, 1989, Kevin Tynan, then assistant staff counsel with the Florida Bar's Broward County office, wrote a letter to Bruce Rogow which attached a letter to Mr. Tynan from Timothy P. Chinaris, then Assistant Ethics Counsel with the Florida Bar's Tallahassee office. The letter from Mr. Chinaris cited the revisions to the employment agreement as "a definite improvement over the previous provisions." The Chinaris letter also stated that he had "come across no cases in which a 'greater of 50% or quantum meruit' split between departing attorney and firm was deemed to violate" Florida Rule of Professional Conduct 4-5.6. See both letters attached hereto as Composite Exhibit "B."

On October 3, 1989, Mr. Rogow wrote a letter to Alan Becker, Esquire, of B&P which informed Mr. Becker that Mr. Tynan felt that "it was great that the employment agreements were changed." A copy of that letter is attached hereto as Exhibit "C." Further, that letter advised Mr. Becker that the Florida Bar wanted B&P to send letters to past and present employees who might be affected by the change in the employment agreement to inform them that the old agreement's provisions would not be enforced. If B&P was willing to do that, the letter advised, Mr. Tynan would recommend no further action be taken.

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As a result of B&P's willingness to amend the employment agreement and its willingness to write the requested letters concerning the previous agreement, the Florida Bar rendered a Notice of No Probable Cause And Letter of Admonishment to Respondent ("Notice of No Probable Cause"), attached hereto as Exhibit "D," which dismissed the grievance filed against B&P without any discipline.

Based on the actions of the Florida Bar and its negotiations with Mr. Rogow in 1989, it is clear that the Florida Bar, through its representatives and the process of negotiation, in practical effect approved the current form of Paragraph 16 of the employment agreement. This approval was specifically addressed in Mr. Rogow's letter dated April 1, 1992 to Gary Poliakoff, Esquire. A copy of that letter is attached hereto as Exhibit "E."

D. Florida Bar Board of Governors Advisory Opinion 93-4

Subsequently, however, in Advisory Opinion 93-4 dated February 17, 1995 ("93-4") and in direct contravention of its prior approval of Paragraph 16, the Florida Bar declared that Paragraph 16 of the agreement constitutes an impermissible restriction on an attorney's right to practice in violation of Florida Rule of Professional Conduct 4-5.6 and is therefore without force and effect. Advisory Opinion 93-4 is attached hereto as Exhibit "F."

Rule 4-5.6 states, in relevant part:

A lawyer shall not participate in offering or making:

A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement[.]

In 93-4, the Board of Governors ("the Board") essentially determined that not all termination compensation clauses in a law firm employment agreement violate Rule 4-5.6(a). The Board drew a contrast between those clauses which avoid "time-consuming, quantum-meruit analyses," which

apparently would be viewed by the Board as appropriate, with those clauses that are “intended to restrict competition.” See Exhibit “F,” p. 3. The Board concluded that B&P’s employment agreement falls in the category of restricting competition because “the firm would be entitled to 50% of any fee ultimately received by the departing associate from a client who came to the firm the day before the associate terminated employment.” See Exhibit “F,” p.3.

E. The *Miller* Decision Contradicts 93-4

On July 25, 1997, the State of Florida’s Fifth District Court of Appeal rendered an opinion in the case of Miller v. Jacobs & Goodman, P.A., 699 So. 2d 729 (Fla. 5th DCA 1997). In that case, **the appellate court held that a fee splitting agreement similar to Paragraph 16 in the subject agreement did not place an undue economic burden on a client’s freedom to choose counsel and thus was not void as against public policy.** A copy of the Miller decision is attached hereto as Exhibit “G.”

On October 17, 1997, B&P requested the Florida Bar to reconsider its 93-4 opinion and determine that 93-4 no longer applied to B&P’s shareholder employment agreement in light of the Miller decision.

On April 3, 1998, the Florida Bar’s Board of Governors voted to decline to issue an advisory opinion in response to B&P’s request notwithstanding the Miller case. A copy of the letter to B&P informing it of the Florida Bar’s decision is attached hereto as Exhibit “H.”

F. Impact of 93-4 on B&P

The first impact of 93-4 on B&P was that shareholders were refusing to sign as guarantors on long term leases, lines of credit, and equipment leases – all necessary and vital to help a firm grow and compete in the market place. These shareholders realized that under 93-4, departing lawyers from B&P could take clients, essentially the future income of the firm, with them while leaving behind the liabilities including, but not limited to, bank debt, leases and equipment contracts and without compensating B&P whatsoever for these clients or for the substantial financial investment that B&P made into the departing lawyer's professional and client development.

Indeed, since the Florida Bar rendered its opinion in 93-4, some B&P shareholders have terminated their employment with B&P and have taken B&P clients to their new practices without complying with Paragraph 16 of the agreement.

G. Paul Wean, Esquire Departs B&P

For example, in approximately 1988 Paul Wean, Esquire, an experienced attorney from Massachusetts, desired to move to Florida and was hired by B&P for its Sarasota office where he was trained in B&P's community association practice, including the litigation aspects thereof.

After several years, Mr. Wean requested that the firm open an Orlando office so that he could move to Orlando to be with his fiancé. Mr. Wean and B&P agreed that the Orlando market warranted a community association practice. As a result, B&P committed substantial resources to open an office in Orlando including paying for Mr. Wean's move to the Orlando area. B&P also hired and trained a replacement attorney for Mr. Wean in the Sarasota office. In addition, B&P undertook seminars and other marketing endeavors to develop the new Orlando office.

In recognition of Mr. Wean's added responsibility, Mr. Wean was required to sign the agreement attached hereto as Exhibit "A" and was subsequently made a non-equity shareholder.

As the Orlando office grew, Mr. Wean wanted to focus his practice on transactional association representation rather than the association litigation which had comprised at least half of his practice. B&P agreed and transferred a litigator from its West Palm Beach office to the Orlando office and incurred the expense of moving the West Palm Beach attorney to Orlando.

Eventually, the office grew and added two additional attorneys – one transaction attorney and one litigator. On Mr. Wean's advice, B&P moved its Orlando office to a larger space on a longer lease. After four (4) years, the office had not yet shown a profit but it was poised to do so shortly.

Abruptly in August of 1995, shortly after the publication of 93-4, Mr. Wean decided to terminate his relationship with B&P and open his own competing practice in Orlando and took the only other transactional association attorney from the Orlando office as well. Mr. Wean, in contravention of Paragraph 16 of the employment agreement, also solicited and retained numerous clients of B&P, leaving behind the lease, equipment and the non-lawyer employees on the B&P payroll. In Mr. Wean's letter of resignation, specific reference is made to Opinion 93-4. See said letter attached hereto as Exhibit "I."

Like Mr. Wean, the departing attorneys from B&P have defended their taking of B&P clients and lack of compliance with Paragraph 16 of the agreement by relying upon the Florida Bar's 93-4 opinion.

Subsequent to the Miller decision, B&P requested an accounting from Mr. Wean concerning his fees earned from B&P clients for the two years after his departure. Despite the Miller decision, Mr. Wean resisted and rejected the request.

It is no coincidence that an equity shareholder of the firm in charge of its Clearwater office, Robert Tankel, left the firm at the same time on the heels of 93-4. Mr. Tankel had joined the firm shortly after law school in 1982 and was trained in association practice. When he was transferred to

Clearwater to open that office, the firm paid for the loss on the sale of his house in Broward County, plus all moving expenses. He was made an equity shareholder . He was entrusted with all client contact in Clearwater. As in Orlando, the firm put extensive resources in marketing and, as the office grew, followed Mr. Tankel's advice and moved to larger quarters on a longer term lease. When Mr. Tankel left the firm, he attempted to take many of the clients of the firm.

Again in September, 1999, an equity shareholder in charge of the association practice in the firm's Sarasota office left the firm and is brazenly targeting the most active clients of the firm. Chad McClenathan was practicing at a small Vero Beach firm when he joined B&P in 1986. He was trained in community association law and eventually rose to shareholder in charge of the office and in charge of the association practice. At the time he left the firm, he was the sole association attorney in the office.

The Florida Bar's opinion in 93-4 has had a chilling effect on B&P's ability to enforce its employment agreement, its ability to retain and maintain client relationships and its ability to maintain cost effective legal services for its clients.

III. Argument

A. The Miller Decision Must Negate 93-4

The Miller case involves an employment agreement between a law firm and its various associates. Id. at 730. The agreements provided that an associate of the law firm would not solicit clients of the firm upon departing from the firm and provided a procedure for associates and the law firm to notify clients of the departure. Id. at 730. Similar to the subject provisions in the instant case, the employment agreements in Miller provided, *inter alia*, that if a client followed a departing associate, the original law firm would receive 75%² of the fees earned from that client. Id. at 730.

Two departing associates in Miller refused to comply with the fee apportionment provisions of

their employment agreements based upon their view that such provisions were unenforceable and unethical. Id. at 731. The law firm instituted an action for injunctive relief against the departing associates to require that any fees generated from clients who followed the departing associates be deposited with the Court and distributed pursuant to the terms of the employment agreement. Id. at 731. The lower court found that the record evidence supported a breach of the employment agreement by the departing associates and awarded the law firm, *inter alia*, 75% of the fees generated from clients who followed the departing associates. Id. at 731.

At the appellate level, the departing associates argued that the employment agreement was unenforceable because it violated public policy and because it placed an economic burden upon a client's freedom to choose counsel. Id. at 731. Essentially, the departing associates' rationale was that these termination provisions, similar to the subject B&P provision, have the effect of restricting the practice of law and thereby limiting a client's choice of counsel. Id. at 731.

The Fifth District Court of Appeal rejected the departing associates' public policy argument. In support of this decision, the appellate court stated:

Several Florida decisions have held that Florida Rule of Professional Conduct such as 4-5.6 (which prohibits attorneys from making agreements restricting the right to practice law following the termination of an employment relationship) or Rule 4-1.5 (which prohibits attorneys from entering into an agreement to collect excessive fees) may not be used to invalidate or render void fee splitting agreements. See Harvard Farms, Inc. v. National Cas. Co., 617 So. 2d 400 (Fla. 3d DCA 1993) (quoting preamble to Rules of Professional Conduct, court notes that the rules only create an ethical responsibility in attorneys); Lee v. Florida Dept. of Ins. and Treasurer, 586 So. 2d 1185 (Fla. 1st DCA 1991) (rule 4-5.6 may not be used to invalidate, or as a defense to, a private contract action); Mary J. Kaufman, P.A. v. Davis & Meadows, P.A., 600 So. 2d 1208 (Fla. 1st DCA 1992) (attorney cannot rely upon ethical Rule 4-1.5 to avoid his contractual obligations pursuant to fee-splitting agreement). See *also* Professional Ethics of the Florida Bar, Opinions 94-1 and 84-1 (specifically state that the fee splitting arrangement between a departing associate and a law firm, in the event a client of the firm elects to hire the associate, **is not an ethics issue but instead is a matter of contract** to be decided between the

associate and the firm); Informal Opinion No. 870 (1965) of the ABA committee on Professional Ethics (states an attorney should not interpose as a reason for not carrying out the agreement the attorney made that the agreement was not ethical because the matter of ethics should have been recognized and adhered to by the attorneys before they entered into the agreement).

If that client chooses to have [the departing associates] represent them or her, [the departing associates] must simply make the decision whether to accept representation after considering such factors as the economics of representation, the effort required to bring the matter to a close, potential conflicts, inclination or competency to represent in that particular matter, or an infinite number of other factors that exist whenever an attorney is asked to accept representation. Some of these factors may preclude an individual from obtaining counsel of choice and the amount of compensation that an attorney may expect to realize from a particular engagement may be one of these factors.

In sum, we hold lawyers are free to enter into agreements which provide for post termination allocation of client fees. (Emphasis added)

Id. at 732.

The Fifth District Court of Appeal did, however, find that the termination provision constituted an invalid liquidated damages clause because, unlike the subject B&P provision, that provision was not an agreed upon sole remedy and the law firm was free to pursue additional damages. Id. at 733. Accordingly, the termination provision was held to be unenforceable. The subject B&P provision on its face is clearly an agreed upon sole remedy – B&P is entitled to the greater of its quantum meruit or 50% of the generated fees. There is no language in the B&P agreements which allow B&P to claim any additional damages.

Thus, unlike the termination provision in Miller, the subject B&P provision is absolutely a valid liquidated damages clause. Accordingly, following the rationale of Miller, this Court should rescind 93-4 and rule that the subject B&P termination provision is not in violation of rule 4-5.6 as an impermissible restriction on an attorney's right to practice and is therefore enforceable.

B. Rule 4-5.6, As Applied, and 93-4 Violate Federal and Florida Constitution Guarantees of

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Equal Protection

Florida Statute § 542.33 permits **all Florida businesses** to impose restrictive covenants on employees and permits courts of the State of Florida to possess authority over only the reasonableness of time and area restrictions.

Rule of Professional Conduct 4-5.6, as applied, and Advisory Opinion 93-4 are contrary to the standards set forth in Florida Statute § 542.33 and regulates business competition agreements between lawyers differently from all other occupations and professions without rational basis. Accordingly, Rule of Professional Conduct 4-5.6 and Opinion 93-4 violate the XIVth Amendment to the United States Constitution and Article 1, § 9 of the Florida Constitution in that they deny and deprive B&P of equal protection of the laws.

To challenge the constitutionality of a certain act, the complaining party must demonstrate a sufficiently close nexus between the State and the challenged action so that the action may be treated as that of the State. Gassner v. Bechtel Const., 702 So. 2d 548 (Fla. 1st DCA 1997) (citing Jackson v. Metropolitan Edison Co., 95 S.Ct. 449 (1974)). As part of the judicial branch of the State of Florida and because of its responsibility for the regulation of the State of Florida's legal profession and its attorneys, rulings by the Florida Bar through its Board of Governors, such as 93-4, certainly constitute state action.

In order to survive equal protection scrutiny under the Florida and Federal Constitutions, the contested state action must have a rational basis. Shevin v. Bocaccio, Inc., 379 So. 2d 105 (Fla. 1979). The Board's apparent rational basis in 93-4 for treating lawyers and law firms differently than all other professions by precluding B&P from entering into a reasonable non-compete agreement with its attorney employees and shareholder is that such an agreement violates Rule 4-5.6 by restricting an attorney's right to practice law. There is no rational basis, however, for the implementation of this

particular higher standard for lawyers in light of the evolving nature of the practice of law wherein it has significant business and financial aspects and obligations.

The California Supreme Court agrees. In Howard v. Babcock, 25 Cal. Rptr.2d 80 (Cal. 1993), a partnership agreement existed between law partners which stated in part essentially that withdrawing partners would forego certain contractual withdrawal benefits if they competed with their former law firm partnership. Id. at 81. After trial, the Court of Appeal held that the withdrawal provision violated an ethical rule similar to Rule 4-5.6. Id. at 83-84.

The California Supreme Court disagreed with the lower appellate court and recognized the need for termination provisions similar to the subject B&P provisions due to the evolving nature of the practice of law as follows:

“The traditional view of the law firm as a stable institution with an assured future is now challenged by an awareness that even the largest and most prestigious law firms are fragile economic units.” (Hillman, Law Firm Breakups (1990) § 1.1, at p.1.) Not the least of the changes rocking the legal profession is the propensity of withdrawing partners in law firms to “grab” clients of the firm and set up a competing practice. (Pensack, Abandoning the Per Se Rule Against Law Firm Agreements Anticipating Competition: Comment on Haight, Brown & Bonesteel v. Superior Court of Los Angeles County (1992) 5 Geo.J. Legal Ethics 889, 890 [hereafter Abandoning the Per Se Rule])

In response, many firms have inserted noncompetition clauses into their partnership agreements. (Abandoning the Per Se Rule, supra, 5 Geo.J. Legal Ethics at p. 890.) These noncompetition clauses have grown and flourished, despite, or in defiance of, the consistent holding of many courts across the nation that a noncompetition clause violates the rules of professional conduct of the legal profession. It is evident that these agreements address important business interests of law firms **that can no longer be ignored.** (Emphasis added)

The firm has a financial interest in the continued patronage of its clientele. (citations omitted) The firm’s capital finances the development of a clientele and the support services and training necessary to satisfactorily represent the clientele. In earlier times, this investment was fairly secure, because the continued loyalty of partners and associates to the firm was assumed. (citations omitted) But more recently, lateral hiring of associates

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and partners, and the secession of partners from their firms has undermined this assumption. (citations omitted) **The practical fact is that when partners with a lucrative practice leave a law firm along with their clients, their departure from and competition with the firm can place a tremendous financial strain on the firm.** (emphasis added)

As Chief Justice Renquist has observed: “Institutional loyalty appears to be in decline. Partners in law firms have become increasingly ‘mobile,’ feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them.” (citations omitted) Not only is the income from the clientele of the firm diminished when partners withdraw and take clients with them, but the expenses attributable to the remaining partners may increase as withdrawing partners seek to escape liability for mutually incurred debt. (citations omitted)

Recognizing these sweeping changes in the practice of law, we can see no legal justification for treating partners in law firms differently in this respect from partners in other businesses and professions. (emphasis added)

Id. at 87.

Moreover, the contemporary changes in the legal profession to which we have already alluded make the assertion that the practice of law is not comparable to a business unpersuasive and unreflective of reality. Commercial concerns are now openly recognized as important in the practice of law. **Indeed, we question whether any but the wealthy could enter the profession if it were to be practiced without attention to commercial success. In any event, no longer can it be said that law is a profession apart, untouched by the marketplace. Not only has law firm culture changed but, as in other businesses, lawyers may now advertise their services and may even communicate by letter with persons unknown to them, suggesting the possibility of employment.** (emphasis added).

Id. at 89.

It seems to us unreasonable to distinguish lawyers from other professionals such as doctors or accountants, who also owe a high degree of skill and loyalty to their patients and clients. The interest of a patient in a doctor of his or her choice is obviously as significant as the interest of a litigant in a lawyer of his or her choosing. Yet for doctors, reasonable noncompetition agreements binding upon withdrawing partners are permitted. (citations omitted)

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We are confident that the interest of the public in being served by diligent, loyal and competent counsel can be assured at the same time as the legitimate business interest of law firms is protected by an agreement placing a reasonable price on competition. We hold that an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area is not inconsistent with rule 1-500² and is not void on its face as against public policy.

Id. at 90.

Referring to Rule 1-500, the California Supreme Court concluded:

We are not persuaded that this rule was intended to or should prohibit the type of agreement that is at issue here. An agreement that assesses a reasonable costs against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice.

Id. at 86.

In the reality of the modern age the rationale of the California Supreme Court in Howard simply makes sense and this Court should similarly hold that there exists no rational basis for essentially disallowing B&P from entering into non-competition agreements with its attorney employees and shareholders as all other professions are permitted to do under Florida Statute § 542.33. In fact, the B&P provision is far less onerous than a typical non-compete agreement and may more accurately be characterized as a non-interference agreement. The practice of law today with its increasing complexity and technological demands is as much a business as any other profession. Without a reasonable ability to protect themselves from the damaging loss of clients by departing partners, shareholders or associates, law firms such as B&P will be unfairly and unjustifiably disadvantaged as investments in technology and other essentials of the modern day practice of law

² California Rule 1-500 provides in relevant part that “a member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law.”

increase. Instability and breakups of law firms with a consequent loss of faith by the public will likely increase. This will occur not only because of the loss of clients, but also because of the lost investment both in equipment and training dedicated to attorneys who ultimately depart from the law firm with law firm clients. Placing this burden on lawyers and law firms exclusively is patently unfair, serves no rational public purpose and, for the reasons described herein, is unconstitutional.

Thus, this Court should rescind 93-4 as violating the equal protection clauses of both the United States and Florida constitutions.

C. Rule 4-5.6, As Applied, and 93-4 Are Unconstitutional In That They Impair Contractual Rights

Rule of Professional Conduct 4-5.6, as applied, and Opinion 93-4 directly impair B&P's right to enforce Paragraph 16 of the agreement and hence violate Article 1, Section 10 of the Florida Constitution and Article I, Section 10 of the United States Constitution which provides: "No State shall pass any law impairing the Obligation of Contracts."

The State of Florida affords the highest degree of protection to contracts from retroactive rulings of the State. For example, this Court stated in Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979) that "virtually no degree of contract impairment is tolerable in this state." Id. at 780. This Court continued in Pomponio that:

To determine how much impairment is tolerable, we must weigh the degree to which a party's contractual rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.

Id. at 780. See Yamaha Parts Distributors Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1979).

As discussed hereinabove, the balancing test as applied to the subject B&P agreement

weighs heavily in favor of protecting B&P's contractual rights. The apparent interest of the Florida Bar to protect an attorney's right to practice is not diminished whatsoever by a termination provision such as that set forth in Paragraph 16 of the B&P agreement. The departing attorneys are not precluded from practicing law to any extent. Should the departing attorney decide to take clients from B&P, the departing attorney will knowingly bear certain reasonable economic consequences. There is nothing in the agreement which precludes, however, the departing attorney from practicing as an attorney for former B&P clients or for any clients whatsoever.

The utmost importance of this reasonable contractual provision, however, to B&P and to all other law firms in the State of Florida is clear. Without such protection, B&P and other law firms with multiple attorneys will simply suffer significant diminution of their ability to survive. The investment and training in its attorneys which is necessary in today's legal climate to zealously serve its clients will be wasted with little or no return each and every time that an attorney departs B&P with B&P clients. Essentially, B&P and other similar law firms would not only be training its lawyers and affording them the financial resources to develop a practice, but they would be giving them a client base to take with them at the expense of B&P should they decide to depart from the firm. The unfairness of such a proposition is clarion clear on its face.

Should 93-4 be allowed to stand, it will effectively eliminate the ability of any law firm to prevent departing attorneys from literally stealing clients. In addition, many attorneys and new graduates may ultimately be left without the financial ability to practice in multiple attorney law firms. A likely scenario is that only the wealthiest attorneys and law firms will survive. This in turn will likely result in an even greater concentration of power into a select few law firms leaving most others to practice as solo practitioners or in very small firms without the benefit of the mentoring of experienced lawyers and will potentially decrease the overall level of service received by clients of Florida lawyers.

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Thus, the balancing test in Pomponio mandates the rescission of 93-4 as an unconstitutional impairment of contracts.

D. Rule 4-5.6, As Applied, and 93-4 Are Unconstitutional Because B&P Has Been Deprived of Its Constitutional Right to Due Process

Opinion 93-4 was adopted after submission of briefs to and limited oral argument before the Florida Bar's Board of Governors. B&P was not afforded the opportunity to present evidence, call or cross examine witnesses, or engage in any type of discovery. In that an employer's ongoing professional relationship with its clients is a legitimate business interest, Opinion 93-4 deprives B&P of property without due process of law in violation of the XIVth Amendment of the United State Constitution and in violation of Article 1, § 9 of the Florida Constitution.

E. Based on the 1989 Approval, The Florida Bar is Estopped From Finding Paragraph 16 to be Unethical/Unenforceable

The Florida Bar should be estopped from asserting that Paragraph 16 of Exhibit "A" hereto is in violation of any ethical rule based upon the Florida Bar's representatives' prior actions and negotiations with Mr. Rogow in 1989 concerning B&P's amendment of the employment agreement to comply with the ethical rules and the concerns of the Florida Bar representatives.

The essential elements of equitable estoppel are:

A representation by the party estopped to the party claiming the estoppel as to some material fact, which representation is contrary to the condition of affairs later asserted by the estopped party;

A reliance upon this representation by the party claiming the estoppel; and

A reliance upon this representation by the party claiming the estoppel to his detriment, caused by the representation and his reliance thereon.

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Enegren v. Marathon Country Club Condominium West Ass'n, Inc., 525 So. 2d 488 (Fla. 3d DCA 1988); Jewett v. Leisinger, 655 So. 2d 1210 (Fla. 4th DCA 1995); State of Fla. Dept. of Environmental Regulation v. C.P. Developers, Inc., 512 So. 2d 258 (Fla. 1st DCA 1987).

Equitable estoppel may be applied against the State and subdivisions thereof where it is necessary to prevent manifest injustice and wrongs to private individuals, provided that the restraint placed upon the governmental body to accomplish such purpose does not interfere with the exercise of governmental power. Trustees of Internal Improvement Fund v. Cloughton, 86 So. 2d 775 (Fla. 1956).

Clearly in 1989, the Florida Bar, through Kevin Tynan, Esquire, approved the subject B&P termination agreement. The current form of the agreement was drafted to comply with the specific requests of the Florida Bar. Without even addressing the law of equitable estoppel, to decide six years later that the B&P agreement is in some way unethical and in violation of Rule 4 -5.6 is unjust and unfair. An application of these facts to the law of equitable of estoppel as discussed hereinabove crystallizes the point – the Florida Bar's inconsistency on this issue is impermissible and warrants rescission of 93-4.

The final factor to be considered on the issue of equitable estoppel is whether B&P detrimentally relied upon the Florida Bar's representations in 1989 concerning the subject agreement. Certainly B&P detrimentally relied upon the Florida Bar's acquiescence to the subject agreement. Until 93-4 was rendered in 1995, B&P continued to invest in new offices and equipment and train its attorneys knowing that in the event that a B&P attorney departed and took B&P clients, B&P would be able to, at least in part, recoup its investment in the departing attorney by realizing a portion of the fees earned by the departing attorney pursuant to the terms of the subject agreement. But for the Florida Bar's representations, B&P would

have been considerably more prudent and selective in its expansion and training and hiring practices in order to protect its client base and the financial security of the law firm.

Pursuant to Florida case law and in the interests of fairness and justice, the Florida Bar must be estopped from declaring that the subject B&P agreement is in violation of any ethical rule and 93-4 must be rescinded.

F. The Case Law Relied Upon in 93-4 Is Clearly Distinguishable

First, 93-4 cites to Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982) for the proposition that “clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships.” 93-4 at 2. The Rosenberg case, however, involved a discharged lawyer attempting to receive quantum meruit fees from a settlement obtained by a successor lawyer. Essentially, the discharged lawyer’s original contract with the client was on a contingent basis, but the discharged lawyer sought quantum meruit fees in excess of the total fee he would have received under the contract had he settled the case for the same amount as the successor lawyer. This Court held that quantum meruit must be limited to the contract amount. Otherwise, the client would be penalized for substituting counsel by paying a greater fee than that called for in the contract.

In the instant case, however, the total fees paid by the clients are in no way increased by the subject B&P agreement. The total fee is divided between the departing attorney and B&P. Thus, the concern in Rosenberg is not present in the instant case and should not be a consideration. 93-4’s reliance on Rosenberg, for these reasons, is misplaced.

Second, 93-4 relies upon Dwyer v. Jung, 336 A. 2d 498 (N.J. Super.Ct.Ch.Div. 1975) for the proposition that termination agreements among lawyers are scrutinized more closely than restrictive covenants found in traditional commercial settings. 93-4 at 2. In Dwyer, the

court held that a law firm partnership termination agreement was void as against public policy. The agreement in that case, however, absolutely precluded, without exception, the departing partners from representing specific clients for five (5) years. Id. at 345. Clearly in that context, attorneys are being restricted from practicing and clients are deprived of their right to choose counsel. In the instant case, no such absolute restriction exists. Departing attorneys can represent former B&P clients and former B&P clients have complete freedom to choose their counsel. For these reasons, 93-4's reliance upon Dwyer is misplaced.

Request for Relief

For the reasons stated, Rule of Professional Conduct 4-5.6 and Florida Bar Opinion 93-4 are unconstitutional on their face and/or as applied to B&P's employment agreement. In addition, the Miller decision renders 93-4 invalid and inapplicable to B&P's employment agreement. Finally, the Florida Bar is estopped from concluding in 93-4 that B&P's employment agreement is unethical in any respect in light of the Florida Bar's representatives' actions and negotiations with Mr. Rogow in 1989.

B&P faces immediate and substantial economic harm if its rights are not declared by this Court.

For the reasons addressed hereinabove, 93-4 must be rescinded.

WHEREFORE, Becker & Poliakoff, P.A. requests this Court:

Accept jurisdiction of this action pursuant to Rule 1-42.(a) and (c), Rules
Regulating the Florida Bar to rescind 93-4.

Rescind 93-4.

Declare that Florida Rule of Professional Conduct 4-5.6 and Florida Bar
Opinion 93-4, on their face and/or as applied to B&P's employment

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agreement, violate Article I, Section 10 of the United States Constitution and the XIVth Amendment of the United States Constitution.

Declare that the Fifth District Court of Appeal's decision in Miller renders Florida Bar Opinion 93-4 inapplicable to Paragraph 16 of B&P's employment agreement.

Declare that the Florida Bar is estopped from concluding that Paragraph 16 of B&P's employment agreement is in violation of any ethical rule in light of the Florida Bar's representatives' actions and negotiations with Mr. Rogow in 1989.

Award such supplemental relief as may be appropriate under the circumstances.

Award B&P its costs incurred in prosecuting this action and any other further relief this Court deems just and proper.

Date: ___ day of November, 1999.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petition has been furnished to Barry S. Richard, Esquire, Attorney for the Florida Bar, Holland & Knight, 101 East College Avenue, Post Office Box 1838, Tallahassee, FL 32302-1838 this _____ day of November, 1999.

Gerald F. Richman

¹ B&P has temporarily suspended the requirement that qualified attorneys execute the employment agreement pending resolution of the ethical issues surrounding Paragraph 16 of the employment agreement discussed fully hereinbelow.

² The subject B&P agreement requires a fifty percent (50%) fee division.

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