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LISA BALDUCCI, Plaintiff/Respondent, v. BRIAN M. CIGE, Defendant/Petitioner.	SUPREME COURT OF NEW JERSEY Docket No. 081877 Appellate Division Docket No.: A-3068-16T2 Sat Below: Hon. Carmen H. Alvarez, J.A.D. Hon. William E. Nugent, J.A.D. Hon. Richard J. Geiger, J.A.D

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

The Appellate Division's decision in this action went far further than needed to decide the case. The Appellate Division then engaged in improper rulemaking and published the case, creating a statewide precedent with binding effect on New Jersey attorneys and the legal services they provide. The court below expanded written disclosure requirements and imposed other duties and obligations for retainer agreements in fee-shifting cases. The Appellate Division also ruled that attorneys must now engage in market research of their competitors regarding legal services and pricing, and possibly refer potential clients to these same competitors. This action effectively amended the Rules of Professional Conduct by fiat, and usurped a plenary authority vested exclusively in the Supreme Court to govern the practice of law.

The New Jersey State Bar Association (NJSBA) is concerned that the lower court's holding will have a substantial impact on lawyers who practice in solo and small firms, as they are often on the front line of advocating for clients in fee-shifting cases, including discrimination matters, consumer fraud and many others. Approximately ninety-four percent of New Jersey law firms are in the solo and small firm category, as determined by the New Jersey Office of Attorney Ethics in their 2017 Annual

Report, with fifty-two percent of New Jersey lawyers practicing in firms of less than five attorneys. Office of Attorney Ethics, 2017 State of the Attorney Disciplinary System Report, fig. 20 at 59.

The NJSBA respectfully urges the Supreme Court to grant certification in this matter and submits that the portion of the Appellate Division's decision that creates these new ethical mandates for attorneys in fee-shifting cases, without those having first been exposed to the crucible of the rulemaking process, should be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The NJSBA shall rely upon the Procedural History and Statement of Facts as presented by the parties.

LEGAL ARGUMENT

I. In establishing disclosure and notice provisions that must be included in attorney fee agreements for fee-shifting cases, the Appellate Division exceeded its authority and engaged in broad rulemaking without proper comment or input and therefore certification should be granted and the Appellate Division decision should be reversed.

In its published decision in this matter, the Appellate Division went far beyond the facts presented in this specific case and unilaterally amended the Rules of Professional Conduct. It drastically expanded the written disclosure requirements for all fee-shifting cases. Such rulemaking authority is vested exclusively in the Supreme Court, and the Appellate Division's determination improperly infringes on this Court's plenary jurisdiction. Accordingly, the NJSBA submits that the Supreme Court should grant certification and reverse the portion of the Appellate Division's decision that creates new duties and retainer agreement disclosure requirements for attorneys in fee-shifting cases, since it has not been first exposed to the crucible of the rulemaking process.

The NJSBA has identified seven specific new requirements that are now imposed on New Jersey attorneys under the published decision below:

> [1] If an attorney's fee in a Law Against Discrimination (LAD) or statutory fee-shifting case is based in whole or in part on an hourly rate, then the attorney is ethically obligated to advise the client of the ramifications. Balducci v. Cige, 456 N.J. Super. 219, 242 (App. Div. 2018).

[2] The attorney must inform the client that if the case becomes complex and protracted, the hourly rate-based fee the client is responsible to pay can approach or even exceed his or her recovery. Id.

[3] The attorney must inform the client other competent counsel represent clients in similar cases solely on a contingent fee basis, without an hourly component, and might also advance costs. Id.

[4] The attorney should provide examples of how much hourly fees have totaled in similar cases. Id.

[5] If the attorney has no such experience with similar cases, consideration should be given to referring the case to a certified civil trial attorney. Id.

[6] The attorney should undertake research and report to the prospective client how much hourly fees have totaled in the same types of cases found in case law. Id.

[7] If the client is required to advance costs for deposition and expert fees, the attorney must give examples of those costs and the attorney must disclose that "other competent counsel who represent clients in similar cases advance litigation costs." Id. at 243.

These requirements go well beyond the current Rules of Professional Conduct. For example, while R.P.C. 1.4(c) states that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," there is no indication in this Rule that specific information regarding the billing practices of competing firms must be included in an initial retainer agreement.

Similarly, R.P.C. 1.5, which sets forth attorney ethical requirements for setting and collecting fees, contains no special requirements for fee-shifting cases, nor does it suggest including the fee structure and cost-charging practices of other counsel. R.P.C. 1.5(b) requires only that when a lawyer has not regularly represented the client, "the basis of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation." R.P.C. 1.5(c) specifically addresses contingent fees and requires, in relevant part, that:

> A contingent fee agreement must be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

The Appellate Division's opinion exceeds these simple, understandable rules and requires attorneys in fee-shifting cases to evaluate many issues, including: whether another attorney is competent; what rates that attorney might charge; and whether that attorney might charge a contingent fee and/or advance costs and summarize the costs incurred in prior similar cases so that they may comply with what is, essentially, a new rule of professional conduct.

The opinion generates many more questions than it answers about the information an attorney is obligated to provide to potential clients, and could potentially lead to misleading information provided in good faith. For example, it does not explain whether counsel is obligated to rely upon only published opinions when describing prior similar cases or how far back in time an attorney must search to locate cases which describe fees and costs charged.

a. The New Jersey Constitution bestows plenary authority on the state Supreme Court to impose ethical requirements on New Jersey attorneys.

The language of the New Jersey Constitution explicitly delineates the rulemaking body for the practice of law and administration of the courts. It states, "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." N.J. Const. Art. VI, § 2, par. 3. This provision provides "plenary responsibility for the administration of all courts in the State." State v. DeStasio, 49 N.J. 247, 253 (1967).

In exercising its constitutional power, the Supreme Court has promulgated Rules of Professional Conduct that govern

attorneys in New Jersey. Those rules "'serve as a road map for the conduct of attorneys to guide them in their relationships with their clients, other attorneys, the courts, and the public.'" Tax Authority, Inc. v. Jackson Hewitt, Inc., 187 N.J. 4 (2006), quoting In re Greenberg, 155 N.J. 138, 152 (1998), cert. denied, 526 U.S. 1132, (1999). "The rules deal comprehensively with attorneys' obligations to their clients because that is what the practice of law is about--the representation of persons and entities in need of legal services." In re Greenberg, supra, 155 N.J. at 152.

b. The Rules of Professional Conduct are subject to rigorous review that includes committee consideration and public participation.

The Rules of Professional Conduct, embodied in the Rules Governing the Courts of the State of New Jersey (Court Rules), are a critical foundation to the practice of law. Changes to the Court Rules are not taken lightly; rather changes are typically only adopted after extensive consideration and debate by relevant court committees, and input from various constituents, including the NJSBA and the public. This is clear from the "Foreward" to the Court Rules written by Chief Justice Weintraub in 1969, which states, "To aid it in the rule-making process, the Supreme Court has appointed committees to study and make recommendations, and has solicited the assistance of the bench

and bar generally." Pressler & Verniero, Current N.J. Court Rules, Foreward (2019).

In the case at issue, the Appellate Division has not followed the traditional rulemaking process. The Court has not had the benefit of committee review and recommendation, and affected parties, such as private practitioners and the NJSBA, have not had an opportunity to review or comment upon the Appellate Division's drastic expansion of the scope of R.P.C. 1.5.

It is noteworthy that the Appellate Division itself seems to have recognized that it may have overstepped its authority and that traditional rule-making practices led by the Supreme Court are better equipped to address some of the broad issues raised in this case. Footnote 8 of the Appellate Division opinion states:

> These issues are recurring. See A.W. [v. Mount Holly Twp. Bd. of Educ. (In re Costello & Mains, LLC), 453 N.J. Super. 110 (App. Div. 2018)], 453 N.J. Super. at 113-114 (involving a fee agreement requiring the client to pay the greater of forty-five percent - an arguably excessive and unconscionable contingent fee – of the net recovery, including negotiated or statutory legal fees, or the firm's hourly rate). We are also aware of attorneys seeking payment of a substantial contingent fee plus a statutory fee award. One such case has been decided within the past month. The Civil Practice Committee or some other appropriate Supreme Court Committee should perhaps address these issues.

Balducci, supra, 456 N.J. Super. at 240 (Emphasis supplied.)

Thus, we are met with a situation where the Appellate Division Panel acknowledges the proper procedure, but nonetheless, created and imposed new standards in a *sua sponte* fashion that conflicts with that established process.

The NJSBA urges the Court to remain true to its past practice and address any concerns it may have with the ethical issues raised by this case through referral to the appropriate committee for recommendation and consideration by this Court. See, e.g. In re Prof'l Ethics Opinion 705, 192 N.J. 46, 58 (2007) (referring matter to the Professional Responsibility Rules Committee for a reevaluation of R.P.C. 1.11 and directing the Committee to draft, for the Court's consideration, a proposed rule in harmony with N.J.S.A. 52:13D-17) and Tax Authority, Inc. v. Jackson Hewitt, Inc., supra, 187 N.J. 4 (referring matter to the Commission on Ethics Reform for consideration and recommendation to this Court re: whether "majority rule" settlements should be permitted).

Rule changes should not be made through piecemeal, *ad hoc* decisions rendered by lower courts in response to one set of facts, especially decisions that drastically expand the scope of responsibilities for lawyers and potentially serve as the basis for new forms of malpractice actions. There is a clear, established process involving public participation and the input

of the regulated community that has been effective and should continue to be utilized.

Accordingly, the NJSBA urges the Court to grant certification and reverse the Appellate Division's decision regarding the duties of attorneys and the retainer agreement disclosure requirement in fee-shifting cases.

II. The Appellate Division's decision will create a significant negative impact on the ability of attorneys, especially solo and small-firm attorneys, to acquire, retain and serve clients, and is not realistic or feasible.

As noted above, the published Appellate Division decision imposes a new, binding standard on New Jersey attorneys that has statewide, precedential effect, requiring them to revise their retainer agreements in fee-shifting cases to include new ethical requirements. The requirements have not been subjected to the rigorous rulemaking process that is required of new ethics rules, yet they will now be mandated for all New Jersey lawyers. Moreover, the state's lawyers must now engage in market research and effectively refer their prospective clients to competing counsel along with a troubling suggested retail price for legal services and commentary on the competitor's legal acumen. Balducci, supra, 456 N.J. Super. at 242-43.

a. The Appellate Division's opinion was published and precedential.

Although the Appellate Division did not explicitly create a new ethics rule, the opinion creates a standard which will govern future attorney-client disputes since the opinion was published.

R. 1:36-2(a) sets forth that "[o]pinions of the Appellate Division shall be published only upon the direction of the panel issuing the opinion." R. 1:36-2(d) identifies eight standards under which an Appellate Division panel may choose to publish

its opinion. The panel must have concluded that its opinion invoked one or more of these eight guidelines and considered the opinion important enough to govern all future attorney-client activity in fee-shifting cases.

As a published case, the Appellate Division opinion is binding in future trial court proceedings and will impact future ethics decisions and fee disputes. Therefore, it creates a *de facto* new rule of professional conduct. Accordingly, if left to stand, the court's conclusions will guide and direct future trial courts and tribunals confronting contingency fee agreement challenges, without any notice to the regulated community. This will force attorneys to choose to either conform to the current, published, and established attorney ethics rules governing fees and retainer agreement disclosure requirements or, adapt to these new and untested requirements set down by the instant case in an effort to protect themselves from ethics charges, fee disputes and/or malpractice lawsuits.

Therefore, the Supreme Court should grant certification and the opinion below should be reversed to the extent that it creates and imposes new retainer agreement requirements for fee-shifting cases on all attorneys.

b. Other fee-shifting cases are implicated by the broad-brush holding below.

Although this case only involves the fee-shifting provisions of the LAD, other statutory fee-shifting cases will be affected. The Appellate Division went beyond the scope of the LAD, holding that, "we conclude that if an attorney's fee in a LAD or a statutory fee-shifting case…" (emphasis supplied) then the new disclosure and fee agreement requirements must be satisfied. Balducci, supra, 456 N.J. Super. at 242.

R. 4:42-9(a)(8) allows for an award of attorney's fees "in all cases where attorney's fees are permitted by statute." Some examples of statutorily permitted attorney fee awards include:

- Civil Rights. N.J.S.A. 10:6-2f: "In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs."

- Consumer Fraud. N.J.S.A. 56:8-19: "In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit."

- Landlord-Tenant. N.J.S.A. 46:8-21.1 allows the court to award "reasonable attorney's fees" if a landlord wrongfully fails to return a security deposit.

- Open Public Records Act (OPRA). N.J.S.A. 47:1A-6: "If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee."

This is not a conclusive list. See Comment 2.8.2 to the New Jersey Court Rule 4:42-9 (Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:42-9 (2019)) (listing additional fee-shifting causes of action). See also Encyclopedia of New Jersey Causes of Actions and supplement/pocket part, "Attorneys Fees," page 312-314, *NJ Law Journal* (citing approximately 175 causes of action under New Jersey law providing for attorneys' fees).

The Appellate Division's decision is unnecessarily broad and encompasses numerous fee-shifting causes of action which were not briefed or before the court. Certification should be granted and the decision below should be reversed to the extent it imposes new fee retainer agreement requirements on all New Jersey attorneys.

c. The Appellate Division's "rules" are not professionally or commercially viable.

The Appellate Division held that "a client should understand that other competent counsel may accept the case solely on a contingent fee basis." Balducci, supra, 456 N.J. Super. at 242. Perhaps clients *should* investigate possible alternative fee arrangements and alternative choices of counsel before making a final decision. However, attorneys should not be the instruments of a client's marketplace investigations and comparisons of pricing and services. Likewise, attorneys cannot practically or realistically survey colleagues' theoretical fee

arrangements for every possible statutory fee-shifting case. Attorneys do not customarily share this information with their competitors, nor would they have the obligation to do so. Attorneys' relationships with their colleagues would be fraught with new minefields as they seek to obtain information about billing rates, fee practices and whether firms are willing to advance costs or take particular types of cases on a full contingency basis. Fulfilling the Appellate Division's "rule," that an attorney "has the ethical obligation to [] inform a client" of other attorneys who "may accept the case solely on a contingent fee basis" would therefore be unworkable or completely impossible.

The Appellate Division's decision assumes that other attorneys would be willing to share their own fee arrangements with competitors. Most fee arrangements, especially when statutory fee-shifting is possible, are unique to the facts of each case, the needs of the client, and the business and legal judgment of each firm. Attorneys are also prohibited by R.P.C. 1.6 from sharing confidential information about clients or their cases with other attorneys and this is true even for *potential* clients. As such, there is no accurate way to compare the facts and legal issues currently being litigated by competitor firms with those presented by a potential new client.

The details of fee arrangements are simply not publicly available, *e.g.* on an attorney's website. Even if an attorney is generally familiar with a competitor there can be no realistic way to ensure that this information is complete or accurate. The Appellate Division's mandate that attorneys look to prior reported fee-shifting decisions to obtain and disclose this type of information is equally unworkable. It leads to a number of unanswerable questions: How can an attorney determine whether competitors are still using the same fees, rates and cost structures years after a decision is published? How can an attorney differentiate factual and legal differences from prior published opinions and explain them to a client at this initial stage? What should an attorney do if a new fee-shifting cause of action is created but there are no published decisions discussing how they have been awarded?

There are no real answers to these questions, yet attorneys will be forced to grapple with them every day if the Appellate Division decision is left to stand. Therefore, the NJSBA urges the Court to grant certification and reverse the lower court decision to the extent it imposes new fee-shifting retainer requirements on attorneys.

d. The Appellate Division requirements may undermine other consumer safeguards and may result in potential clients not being represented in fee-shifting cases.

Attempting to acquire or acquiring information about attorney competitors, and then disseminating this information, is likely prohibited for other reasons that were not considered by the court below. For example, federal antitrust statutes, such as the Sherman Act of 1890 (15 U.S.C. §§ 1 to 7), the FTC Act of 1914 (15 U.S.C. §§ 41 to 58), or the Clayton Act of 1914 (15 U.S.C. §§ 12 to 27, 29 U.S.C. §§ 52 to 53) and their progeny, designed to protect consumers, may be offended by attorney compliance with the Appellate Division requirements. New Jersey statutes with similar goals may also be implicated. See, e.g., N.J.S.A. 56:9.

The NJSBA recognizes the lower court's understandable and laudable interest in ensuring that clients in fee-shifting cases are well-represented and not subject to unfair terms. The Appellate Division earlier stated that "statutory fee-shifting provisions and awards are 'designed to attract competent counsel' to advance the public interest through private enforcement of statutory rights that the government alone cannot enforce." Pinto v. Spectrum Chem. & Lab. Prods., 200 N.J. 580, 593 (2010) and Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989). As true as this statement may be, it does not immediately follow that attorneys should be forced to represent clients in fee-

shifting cases solely on a contingency basis - or to disclose the identity of a competitor who will. The Appellate Division's assertion that "there is no dearth of competent, civic-minded attorneys" willing to litigate fee-shifting cases purely on contingency is conjecture and would likely favor larger law firms that are in a better position to bankroll litigation and its attendant costs.

If attorneys are either induced into representing clients in fee-shifting cases solely on contingency, or are forced to find and suggest other attorneys who would, the Appellate Division's understandable desire to ensure that clients are compensated for economic and non-economic loss will be turned on its head. While attorneys can and do work to vindicate clients' statutory rights, they currently do so through a wide range of billing arrangements that are differentiated to account for specific facts, legal issues, firm business judgment, and client needs. Many attorneys, especially solo and small-firm attorneys, will be unfairly impacted and may even be unable or unwilling to take fee-shifting cases if the stringent requirements set forth by the Appellate Division are left untouched.

Therefore, the Supreme Court should grant certification and the Appellate Division's opinion should be reversed to the extent that it creates and imposes new fee-shifting retainer agreement requirements on all attorneys.

CONCLUSION

For the reasons noted above, the NJSBA respectfully urges the Supreme Court to grant certification and reverse that portion of the Appellate Division decision that imposes new fee-shifting retainer agreement requirements on all attorneys.

Respectfully submitted,

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Dated: 12/6/18