No. 121297

IN THE SUPREME COURT OF ILLINOIS

FERRIS, THOMPSON & ZWEIG, LTD,	) On Appeal from the Appellate Court of) Illinois, Second District No 2-15-1148
Plaintiff-Appellee	)
	) On Appeal from the Circuit Court of) the Nineteenth Judicial District, Lake
vs.	) County, Illinois
	)
	) General No. 13 L 483
	)
	) Honorable Thomas Schippers
ANTHONY ESPOSITO,	) Trial Judge
	)
Defendant-Appellant.	)

AMICUS CURIAE BRIEF BY ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE

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IN THE SUPREME COURT OF ILLINOIS

FERRIS, THOMPSON & ZWEIG, LTD, Plaintiff-Appellee vs. ANTHONY ESPOSITO, Defendant-Appellant.	) On Appeal from the Appellate Court of) Illinois, Second District No 2-15-1148)) On Appeal from the Circuit Court of) the Nineteenth Judicial District, Lake) County, Illinois)) General No. 13 L 483)) Honorable Thomas Schippers) Trial Judge))

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TABLE OF CONTENTS

INTRODUCTION

The plaintiff's brief in *Ferris* was provided to ITLA counsel on February 3, 2017, after it had been filed and after the deadline for any amicus brief to support the plaintiff expired. ITLA has reviewed the plaintiff's brief, and while it supports plaintiff's argument that the motion to dismiss should have been denied, it differs with plaintiff on some interpretations of *Rule of Professional Conduct 1.5*. Because almost all of ITLA's 2000 lawyer-members refer or receive referrals of contingent fee cases, the decision of this Court will impact our membership and its clients to a very significant extent. For this reason, ITLA respectfully requests leave to file its brief *amicus curiae instanter,* recognizing that this request asks the Court to excuse the minor untimeliness of the filing. Defendant's brief is not due to be filed until March 5, 2017 so he should not be prejudiced by this request.

RULE 1.5 IS A CLIENT-PROTECTION RULE

While *Rule 1.5* deals with relations between referring and receiving lawyers, most importantly, it is intended to protect clients. At issue in this appeal is *Rule 1.5(e)(1)* and *(2)*. The current rule, effective in 2010, states:

Rule 1.5

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client 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 agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable. *(Emphasis added)*

DEFENDANT CANNOT AVOID THE CONTRACT HE SIGNED

Defendant argued below that the agreement with the client, that both the plaintiff firm and defendant signed, failed to use the phrase "joint financial responsibility" and is, therefore, invalid. The contract is more specific and detailed than many contracts used in referral arrangements and adequately advises the client of what *Rule 1.5(e)* requires. The client hired the FTZ firm in the first paragraph; the client was also informed in in that paragraph that FTZ contracted with Mr. Esposito to pursue the case for the client. The contract identified specific things that FTZ would do for the client in the second paragraph and it specified the things Mr.

Esposito would do for the client in the third paragraph. The second and third paragraphs detailed the fee division between the firms.

On reading the contract, the client is informed of the identities of the lawyers retained; the client knows the fee division between the lawyers; and the client knows that both firms owe him a duty with respect to the third-party case that was referred. All the foregoing was approved in a writing signed by the client, FTZ and Mr. Esposito.

Nothing more is required to comply with *Rule 1.5.* The phrase "joint legal responsibility" does not appear in the contract but the concept is made clear in the agreement. The Rule does not require those specific words to appear in the contract; the concept is required and the contract here complied. The client specifically "retained and employed FTZ" so there can be no question that the firm was jointly responsible for the case with Mr. Esposito.

The defendant is trying to avoid his duty to pay a referral fee by claiming a referral fee agreement that he signed does not comply with *Rule 1.5.* If that is truly the defendant's legal view, and since there is no other contract between the client and the lawyers, defendant should forfeit any fee claimed. It would be wrong to claim a fee agreement is invalid yet seek to collect a contingent fee from the client. *Rule 1.5(c)* requires contingent fees to be in writing; since this is the writing, if defendant believes it is invalid, defendant should be barred from any fee recovery.

ITLA'S POINTS OF DIFFERENCE WITH PLAINTIFF'S BRIEF

A. *Rule 1.5* requires the client to be informed that the lawyers have accepted joint financial responsibility for the case.

Plaintiff argues in his brief:

> To the extent *Fohrman* is read to require that the attorney-client agreement inform the client in writing of the referring and receiving attorneys' joint financial responsibility, the Plaintiff respectfully requests that this Court overrule the decision.

ITLA differs with plaintiff on this point and believes that the contract between client, referring lawyer and receiving lawyer should make clear that the lawyers owe the client a joint financial responsibility. The exact words "joint financial responsibility" are unnecessary if the concept is conveyed to the client in writing as it was here. The client needs to be informed that both the receiving and referring lawyers owe a legal duty for the case. This is required by the language of *Rule 1.5 (e)(1)* and *(2)*.

Plaintiff also argues:

> Written disclosure of a referring lawyer's potential malpractice liability in a fee splitting agreement should not be mandatory.

ITLA disagrees that the Rule requires this. The phrase "joint financial responsibility" means that the lawyers assume joint financial responsibility in the contract as though they were partners. The liability of a referring lawyer for any negligence of the receiving lawyer is not dependent on whether there was a "negligent referral" as plaintiff suggests.

Rather, the referring lawyer is liable as though he were the partner of the receiving lawyer who may have acted negligently.[1]

The phrase "joint financial responsibility" is new in the 2010 version of the Rule. The Court's *Comment* to the rule describes exactly what it means: "Joint financial responsibility for the representation entails financial responsibility for the representation as if the lawyers were associated in a general partnership." This is in keeping with the Rule as it existed in predecessor versions and does not represent a change in the law.[2]

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[1] There is no claim in this case that either the referring or receiving lawyers were negligent with respect to plaintiffs' cases. This is simply a case where the receiving lawyer is refusing to perform per the written referral fee agreement.

[2] When Illinois first permitted fee sharing between lawyers not in proportion to work performed, it was promulgated in *107 Ill.2d R. 2-107.* Section *(a)(2)(b)* specified that the referring and receiving lawyers were to be treated as each other's partners. "(a) A lawyer shall not divide a fee ... unless (2) the division is made in proportion to the services performed and responsibility assumed by each, except where the primary service performed by one lawyer is the referral of the client to another lawyer and ... (b) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as if he were a partner of the receiving lawyer.

In 1990, The *Rules of Professional Conduct* superseded the earlier rules. On this topic, *Rule 1.5(g)* also provided that the referring and receiving lawyers were treated as partners with respect to the case referred: "(2) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer."

The ordinary meaning of the phrase suggests the lawyers are jointly responsible for the case and that includes responsibility for professional negligence. Per *Rule 1.5(e)(2),* the client must agree to the arrangement in writing. The "arrangement" includes the things set forth in *Rule 1.5(e)(2)* and *(2).* The most reasonable conclusion to draw is that the rule requires the contract to set forth the idea that the lawyers have accepted joint responsibility for the case. The actual phrase "joint responsibility" or "joint financial responsibility" need not appear in the contract if the concept is there. This interpretation of the 1990 version of the Rule was approved by *In re Storment,* 203 Ill.2d 378, 393 (2002).

B. In referral fee arrangements, the lawyers are treated as though they were in a general partnership.

The plaintiff also argues:

> If one accepts the notion that a person should be accountable for his own actions, a trier of fact would be hard-pressed to find a referring lawyer accountable for the handling lawyer's negligence.

This argument is exactly why the Court requires referring and receiving lawyers to accept joint financial responsibility. They are liable as though they were partners. *Rule 1.5(e)* Comment.

C. It is reasonable for all lawyers who are to receive a fee for representing a contingent fee plaintiff to act with due care.

Plaintiff argues that it is too much to ask a referring lawyer to monitor the case:

> Also, it is not reasonable to expect the referring attorney to monitor the receiving attorney's compliance with critical filing and discovery deadlines.

ITLA cannot support that argument or its implications. A lawyer accepting professional responsibility for a case and expecting to receive a fee should be expected to monitor to the case for the client's protection as well as her own. As *Rule 1.5* is intended to protect clients, no legitimate purpose would be served by adopting plaintiff's expectation. ITLA asks that the Court reject plaintiff's suggestion.

CONCLUSION

There have been many litigated referral fee disputes. This one, however, is unusual: both lawyers had a duty to prepare a contract that complied with *Rule 1.5*; both lawyers signed the contract as did the client; and now one lawyer claims that the agreement he signed violates the Rule and refuses to pay a referral fee. ITLA submits that defendant's argument is one of litigation-convenience and should be overruled by this Court. The contract complies with *Rule 1.5* and the motion to dismiss should have been denied.

Respectfully submitted,

/s/Bruce R. Pfaff

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(1), is 8 pages.

/s/Bruce R. Pfaff

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NOTICE OF FILING

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PLEASE TAKE NOTICE that on February 7, 2017, the undersigned electronically filed with the Clerk of the Supreme Court of Illinois, the attached Illinois Trial Lawyers Association Brief Amicus Curiae, a copy of which is hereby served upon you.

/s/Bruce R. Pfaff

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT OF SERVICE

The undersigned, a non-attorney, hereby certifies that a copy of the foregoing Notice of Filing and attached Illinois Trial Lawyers Association Brief Amicus Curiae were served electronically on February 7, 2017, upon the following:

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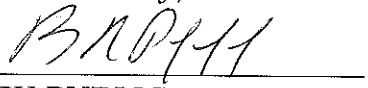
SUBSCRIBED AND SWORN to before me
this 7th day of February, 2017.



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