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ciently unequal" to warrant disregarding the analogous statute of limitations. Apparently, the court in the case at bar was motivated by several equitable considerations, to wit: the age of the plaintiff-widow; her need for the funds; the unjust enrichment enjoyed by the defendants; and the position of power in the corporation occupied by the plaintiff's daughter-in-law, who dominated the family finances, coupled with her apparent abuse of this power in refusing to compensate the plaintiff. However, the court failed to indicate which, if any, of these factors it considered determinative in reaching its decision.

The impact of the decision in *Tower* is clear. The statute of limitations can no longer be considered as an absolute bar to an action merely because of the passage of time. Where a legal action is barred by the applicable statute of limitation, but might have been brought either in law or in equity, the alert attorney can circumvent the bar of the statute by stating an equitable cause of action, assuming that the equities are "sufficiently unequal" to justify disregarding the statute of limitations.

STEPHEN G. FISCHER

ATTORNEY'S FEE EARNED PRIOR TO TESTIMONY

Plaintiff-attorney, upon learning that he would be required as a material witness on behalf of his client, withdrew from the case, and the remainder of the trial was conducted by defendant-attorney. At the trial, portions of plaintiff's testimony supported his ex-client's contentions, other portions did not, and much of his testimony was cumulative. Plaintiff sought recovery from defendant of the portion of the contingent fee which the plaintiff had earned prior to his withdrawal from the case. The trial court found that there had been an implied agreement between plaintiff and defendant that each would share in the fee and that plaintiff, prior to his withdrawal, had performed twenty percent of the total legal services; but the court ruled that plaintiff was precluded by the Code of Professional Responsibility from sharing in the contingent fee. The District Court of Appeal, First District, affirmed on appeal.¹ The Supreme Court of Florida, on conflict certiorari review, *held*, reversed: Absent bad faith or coloring of testimony affecting the outcome of the litigation, an attorney who withdraws from a case to become a material witness is entitled to the reasonable fee which he earned prior to the time he realized or should have realized the need for his testimony. *Hill v. Douglass*, 271 So.2d 1 (Fla. 1972).

The ethical requirement that an attorney withdraw from the trial of a case when he learns or reasonably should have learned that he will

1. *Hill v. Douglass*, 248 So.2d 182 (Fla. 1st Dist. 1971).

be a material witness in the case is predicated upon the well-established undesirability of one individual's acting in the dual capacity of advocate and witness.² The general prohibition against this dual role was incorporated from former Canon 19³ into the Code of Professional Responsibility⁴ as Ethical Considerations 5-9 and 5-10⁵ and as Disciplinary Rules 5-101 and 5-102.⁶ An attorney may not accept⁷ or continue⁸ employment if he learns or if it is obvious that he will be called as a witness on behalf of his client, unless either (a) the testimony will relate solely to an un-

2. Over one hundred years ago, the ethical impropriety of the dual role was widely recognized, as noted by the court in *Morgan v. Roberts*, 38 Ill. Rep. 65, 86 (1865):

This is a matter which appeals to the professional pride of an attorney, and his sense of his true position and duty. In the English courts, in several cases, it was held that an attorney cannot appear in the same cause in the double capacity of witness and advocate, and it has been so ruled in Pennsylvania and in Iowa, on the circuit. In Indiana it was held by Judge McDonald, now United States District Judge, that an attorney in a cause could not be permitted to testify to the general merits of the case. In *Frear v. Drinker*, 8 Penn. State Reports, 521, the court said that it was a highly indecent practice for an attorney to cross-examine witnesses, address the jury and give evidence himself to contradict the witness—that it was a practice to be discountenanced by court and counsel—that it was sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client. It however leads to abuse, but at the same time there was no law to prevent it. All the court can do is to discountenance the practice, and when the evidence is indispensable, to recommend to the counsel to withdraw from the cause.

3. Appearance of Lawyer as Witness for his Client.—When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client.

ABA CANONS OF PROFESSIONAL ETHICS NO. 19.

4. The CANONS OF PROFESSIONAL ETHICS, adopted by the American Bar Association in 1908 and by Florida in 1941, were replaced by the CODE OF PROFESSIONAL RESPONSIBILITY, consisting of Ethical Considerations, Disciplinary Rules, and renumbered and revised Canons. The CODE OF PROFESSIONAL RESPONSIBILITY became effective for American Bar Association members on January 1, 1970 and was adopted by Florida effective October 1, 1970.

5. Ethical considerations [hereinafter cited as EC] are aspirational objectives toward which members of the profession should strive. CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement.

6. Disciplinary rules [hereinafter cited as DR] are mandatory. *Id.*

7. DR 5-101(B) provides:

A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

- (1) If the testimony will relate solely to an uncontested matter.
- (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
- (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
- (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

8. DR 5-102(A) provides:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

contested matter, (b) the testimony will relate solely to a formal matter and no substantial evidence is reasonably expected to be offered in opposition to the testimony, (c) the testimony will relate solely to the nature and value of legal services rendered by the attorney or his firm to the client, or (d) refusal to testify would work a substantial hardship on the client.⁹ However, he may accept and need not withdraw from employment if it is unlikely that he will be called as a witness because, if he were called, his testimony would be merely cumulative.¹⁰ Although there is no express provision in the Code of Professional Responsibility which denies a legal fee to an attorney who testifies on behalf of his client,¹¹ an examination of the following reasons underlying the prohibition against the dual advocate/witness role will demonstrate how the question of impropriety of a fee in such a case arises.

One who must argue his own credibility is in an unseemly and ineffective position:

The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.¹²

He is a less effective witness, because he renders himself more easily impeachable for credibility.¹³ Conversely, the opposing counsel may be handicapped when attempting to attack the testifying attorney's credibility.¹⁴ The attorney's desire to serve his client, coupled with his position as a witness for his client, might invite perjury.¹⁵ Furthermore, the unseemly dual role may create a poor public image of the legal profession and invoke embarrassing criticism, even if the attorney were actually able to effectively disassociate his two roles:

Although his zeal as a lawyer might not influence his testimony as a witness, an ever critical public is only too apt to place such a construction upon it. A lawyer should avoid not only all improper relationships but should likewise, in order to maintain the profession in public confidence and esteem, avoid all relationships which appear to be improper.¹⁶

Not only is the attorney who violates the rules subject to discipline, but he may be precluded from testifying for his client. Florida courts take the position that if an attorney who has not withdrawn from the case attempts to testify on behalf of his client, and if such testimony

9. DR 5-101(B)(1)-(4) and DR 5-102(A).

10. EC 5-10.

11. 271 So.2d at 3.

12. EC 5-9.

13. *Id.*

14. *Id.*

15. COMM. ON PROFESSIONAL ETHICS OF THE FLA. BAR, OPINIONS, No. 67-30.

16. ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, OPINIONS, No. 50 (1931).

would be contrary to the Code of Professional Responsibility, an objection by the opposing attorney on these grounds will exclude the testimony.¹⁷

An attorney whose failure to withdraw from the case violates the Code of Professional Responsibility is precluded from sharing in the legal fee, under the reasoning that to award such a fee would be to condone the ethical breach.¹⁸ However, where there has been no ethical violation, *i.e.*, where the attorney meets one of the exceptions which permit him to take or remain on the case, or where, as in the instant case, the attorney has withdrawn, the question is more difficult of solution. Although his role is ethical, he is nevertheless confronted with the considerations underlying the Code of Professional Responsibility.

In response to an inquiry as to whether an attorney would be permitted to testify concerning material matters on behalf of a client whose case he was handling on a contingency basis, the Florida Bar Professional Ethics Committee replied that if such testimony were necessary, the attorney should withdraw from the case and not participate in any fees, particularly where the fee is contingent.¹⁹ Although the inquiry was not directed to the question of compensation for work done prior to withdrawal, the committee noted that nonparticipation in fees might "create some hardship in view of the work already done," indicating its belief that a fee even for prior work would be impermissible. The main reason for this holding is the possibility of misunderstanding by the public and by the jury, with a consequent adverse effect on the client's case and on the legal profession in general.

The Florida Bar Professional Ethics Committee established a guideline for the testifying attorney whereby he may remain on the case if his continued employment is essential to the ends of justice, as permitted under the "substantial hardship" exception to the disciplinary rules. However, a contingent fee is impermissible in such circumstances, although there has been no violation of the rules of ethical conduct.²⁰

In another opinion, the Florida Bar Professional Ethics Committee stated that it would be improper for an attorney who referred a client to

17. *Millican v. Hunter*, 73 So.2d 58 (Fla. 1954); *Dudley v. Wilson*, 152 Fla. 752, 13 So.2d 145 (1943); *In re Estate of Freeman*, 240 So.2d 656 (Fla. 3d Dist. 1970); see *Beavers v. Conner*, 258 So.2d 330 (Fla. 3d Dist. 1972). *But cf.* *Pastorius v. Whidby*, 76 Fla. 571, 80 So. 513 (1918). Florida's view is contrary to the weight of authority, which holds that when an attorney's testimony violates rules of professional conduct, it is not thereby rendered incompetent or inadmissible, although the attorney may be subject to disciplinary proceedings and his credibility may be adversely affected. *E.g.*, ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, OPINIONS, No. 50 (1931); *United States v. Fiorillo*, 376 F.2d 180, 185 (2d Cir. 1967); *Food Fair Stores, New Castle, Inc. v. Howard*, 58 Del. 558, 212 A.2d 405 (1965); *Swaringen v. Swanstrom*, 67 Idaho 245, 248-49, 175 P.2d 692, 693-94 (1946), and authorities cited therein. See also *Morgan v. Roberts*, 38 Ill. Rep. 65 (1865), *supra* note 1.

18. *Hubbard v. Hubbard*, 233 So.2d 150 (Fla. 4th Dist. 1970).

19. COMM. ON PROFESSIONAL ETHICS OF THE FLA. BAR, OPINIONS, No. 65-40.

20. COMM. ON PROFESSIONAL ETHICS OF THE FLA. BAR, OPINIONS, No. 67-30. Some support for this conclusion was found in PHILADELPHIA BAR ASS'N COMM. ON PROFESSIONAL GUIDANCE, OPINIONS, No. 8 (1941), which stated that a contingent fee would be improper where an attorney acted as witness and his partner acted as counsel.

another attorney, and who later served as a witness in the litigation, to share in the contingent fee.²¹ Although this opinion was based upon the assumption that there had been no legal services performed for the client by the attorney seeking the fee, and that the fee was therefore prohibited by former Canon 34 as being merely a referral fee,²² the opinion notes that former Canon 19 has been interpreted to preclude a testifying attorney's participation in a contingent fee.²³

Opinions of the Professional Ethics Committees of the Florida and American Bar Associations are persuasive authority in interpreting the Code of Professional Responsibility, but are not binding upon the courts.²⁴ Therefore, the Supreme Court of Florida in *Hill v. Douglass* was able to examine the construction which had been given to the Code of Professional Responsibility by the Florida committee in relation to fees where the advocate/witness rule was involved, since there was no express provision in the Code concerning this subject.²⁵

Although agreeing with the disallowance of a fee for services earned after an attorney becomes a witness if his testimony and failure to withdraw violate the Code of Professional Responsibility,²⁶ the court in *Hill v. Douglass* considered the propriety of awarding a fee for services rendered prior to testimony where the testimony did not violate the Code. The court weighed the negative effect of disallowing a fee for services earned by the attorney prior to his becoming a witness against the negative effect of allowing such a fee. Disallowance of such a fee would be unjust since it would deprive the attorney, who has withdrawn from the trial of the case in accordance with the Code of Professional Responsibility, of compensation which he had earned for services previously performed. Such deprivation "should no more apply to an attorney than to any other profession or trade."²⁷ Not only would disallowance be unfair to the attorney who would not be compensated for his services, but it would result in unjust enrichment to the attorney who replaced him and who would be compensated for the work of both attorneys.²⁸

Where more than one attorney is handling a case, the possibility

21. COMM. ON PROFESSIONAL ETHICS OF THE FLA. BAR, OPINIONS, No. 68-19.

22. The subject matter of former CANON 34 is now covered by EC 2-22 and DR 2-107, which prohibit a division of fees unless there has been a division of services.

23. See COMM. ON PROFESSIONAL ETHICS OF THE FLA. BAR, OPINIONS, No. 67-30.

24. *Hill v. Douglass*, 248 So.2d 182, 183 (Fla. 1st Dist. 1971).

25. Because of the absence of express provisions, the court stated: "It is therefore with more justification that we examine into [*sic*] this interpolation than if there were an express or clearer prohibition in the canon itself regarding a fee." 271 So.2d at 3.

26. 271 So.2d at 3-4.

27. *Id.* at 4. In *Brass v. Reed*, 64 So.2d 646, 648 (Fla. 1953), the court similarly failed to find any distinction between an attorney's and a non-attorney's right to compensation for services rendered, holding that an attorney is no more entitled to maintain a cause of action in equity for his fees than is any other person for services rendered, or for labor, supplies and materials.

28. 271 So.2d at 4.

of such unjust enrichment to the nontestifying attorney might tempt one of the attorneys to name the other as a witness, knowing that if the other were to withdraw from the case, the entire fee would be awarded to the attorney who called him.²⁹ That same possibility might tempt an attorney whose failure to testify would work a substantial hardship on his client to nevertheless refuse to testify. The attorney would know that if he did testify, he would lose the right to compensation for services rendered prior to and after the need for his testimony arose. It might also encourage the "devious division of dividends" to avoid the harshness of such a rule.³⁰

The only negative effects which might result from allowing the prior earned fee and which would be alleviated by disallowing it, are the possibility of perjury by the attorney/witness in order to increase his fee and the possibility of giving an appearance to the public that his testimony might be affected by his having performed prior services for the client. The possibility of perjury is greatly diminished by the court-established requirement that for allowance of the fee there must be neither bad faith nor coloring of testimony affecting the outcome of the litigation. As to the second possibility, the public image of the legal profession is unlikely to be adversely affected by permitting the attorney to recover the fruits of his labor:

Denial of a prior earned fee is unduly stretching the possibility that an attorney's later testimony would be viewed as affected by the fact that he had done earlier work in the case for which he should be rightfully paid.³¹

Thus, the negative effects of disallowing the fee greatly outweigh any possibility of perjury or of an adverse effect on the attorney's public image, and the testifying attorney is entitled to his prior earned fee.

The amount of the fee to be allowed was held in *Hill v. Douglass* to be the reasonable value of the testifying attorney's services performed prior to the time he knew or should have known of the need for his testimony. However, what was in issue was the right of the plaintiff-attorney to a portion of the fee, and not the amount thereof. Having determined that the correct measure of the fee was the reasonable value of plaintiff's services, the Supreme Court of Florida accepted the trial court's determination of the amount of that reasonable value. The portion of the total contingent fee awarded the plaintiff was equal to that portion of the total services performed which the plaintiff's services prior to his testimony comprised. Since plaintiff had performed twenty percent of the total services, the reasonable value of his services was found to be twenty percent of the total contingent fee.³²

29. *Id.* at 4.

30. *Id.* at 5.

31. *Id.* at 4.

32. The total contingent fee was stated by the trial court as \$58,892.97 in one portion of

It is submitted that although the method of computing the amount of plaintiff's fee was not in issue, it was correctly determined in the instant case. The amount of the total contingent fee had already been established, and once it was determined that both plaintiff-attorney and defendant-attorney were entitled to some portion thereof, the reasonable value of either attorney's services was correctly measured as the portion of that contingent fee equal to the portion of the total services which that attorney performed. Although as a general rule the reasonable value of an attorney's services is not determined by the amount agreed upon as a contingent fee, this rule has been applied in cases setting the reasonable value of attorney's fees to be paid by a party who had no opportunity to participate in setting the contingent fee,³³ rather than, as in *Hill*, where an established contingent fee amount is sought to be divided between two attorneys.

In *Security Trust Co. v. Grant*,³⁴ an attorney filed the plaintiff's complaint, which included a statement that plaintiff had agreed to pay his attorney a reasonable fee for his services if judgment were entered in favor of plaintiff. Eight months later, before the answer was filed, the original attorney withdrew from the case for a reason not disclosed in the record, and new counsel appeared for plaintiff. During the trial, the original attorney testified for plaintiff as to matters within the Dead Man's Statute, which statute would bar the testimony of a person "interested in the event."³⁵ Defendant contended that the testifying attorney was entitled to a fee under the contingent fee alleged in the complaint, for the proportionate part of the work he had performed prior to his withdrawal, and that he was therefore barred by the Dead Man's Statute from testifying. However, the court held that the attorney was not a person "interested in the event" because there was nothing to show that his compensation for prior services would be on a contingency basis. The rationale for this holding was that there existed no

its opinion and as \$56,892.97 in another portion of the opinion, and the court based its twenty percent calculation on the \$58,892.97 figure, resulting in reasonable value to plaintiff of \$11,778.59. The district court correctly stated the trial court's finding at \$11,778.59, but stated the total fee as \$56,892.97. Thus the basis of the reasonable value calculation is not clear from the district court's opinion. See *Hill v. Douglass*, 248 So.2d 182 (Fla. 1st Dist. 1971).

33. The rule against utilization of a contingent fee as a measure of reasonable value has been applied where a contract between plaintiff and defendant provided that in case of suit, defendant would pay plaintiff's attorney's fees, *Ronlee, Inc. v. P. M. Walker Co.*, 129 So.2d 175 (Fla. 3d Dist. 1961); and where an insurer was obligated by statute to pay a reasonable sum for plaintiff's attorney's fees if judgment were rendered against the insurer and in favor of plaintiff, *Travelers Insurance Co. v. Davis*, 411 F.2d 244 (5th Cir. 1969); *Allstate Insurance Co. v. Chastain*, 251 So.2d 354 (Fla. 3d Dist. 1971); *Old Colony Insurance Co. v. Bunts*, 250 So.2d 291 (Fla. 3d Dist. 1971). The rationale for such decisions is that because of the risk involved, a contingent fee is usually set higher than a flat fee. In addition, a plaintiff would be inclined to be liberal in arranging a fee with his attorney if the defendant were required to pay any fee which was arranged, regardless of its amount.

34. 155 So.2d 805 (Fla. 3d Dist. 1963).

35. FLA. STAT. § 90.05 (1971).

presumption that the contingent fee arrangement continued after the attorney withdrew. It was presumed, although not decided, that his compensation would be on a quantum meruit basis, based upon the rule concerning discharge of an attorney by his client.³⁶

Security Trust is distinguishable from *Hill v. Douglass* on several bases. In *Security Trust* the reason for withdrawal was not known,³⁷ and the presumption that compensation would be on a quantum meruit basis was based upon the rule which applies when an attorney has been discharged by his client. An implied agreement between the attorneys that each would share in the fee was found to exist in *Hill*, but the existence of such an agreement was not mentioned in *Security Trust*. Furthermore, the court in *Security Trust* did not decide, but only presumed, what the basis of compensation would be.

Although it may be argued that to base the reasonable value of the testifying attorney's prior earned fee upon the contingent fee would increase the risk that the attorney might perjure himself to enhance his fee, the allowance of the fee on a quantum meruit basis would do little to decrease this risk. Where the fee is on a contingency basis the testifying attorney will recover nothing, regardless of how the reasonable value might otherwise be computed, unless his client is successful. He cannot receive the full reasonable value of his services, however measured, unless the total fee is large enough to cover both attorneys' services. Consequently, perjury might be invited as readily to provide a fund out of which a quantum meruit-based fee might be paid as to increase his portion calculated as a percentage of a contingent fee. Furthermore, as noted previously, the requirement that there be no bad faith or coloring of testimony greatly alleviates the perjury problem.

The decision in *Hill v. Douglass* has terminated the trend which had been developing in Florida Ethics Committee opinions toward extending the Code of Professional Responsibility to unreasonable lengths in depriving the ethical attorney of due compensation earned for services rendered. The Supreme Court of Florida has impliedly given effect to the obvious principle that "[t]he legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered"³⁸

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36. See *Winn v. City of Cocoa*, 75 So.2d 909 (Fla. 1954).

37. The principle to be applied in fixing the amount of the fee cannot be determined unless the reason for and nature of discharge are known. *Rosenkrantz v. Hall*, 161 So.2d 673, 674-75 (Fla. 3d Dist. 1964).

38. EC 2-16.