IN THE SUPREME COURT FOR THE STATE OF FLORIDA

MARVIN CASTELLANOS,

Petitioner,

vs.

NEXT DOOR COMPANY/
AMERISURE INSURANCE CO.,
Respondents.

CASE NO.: SC13-2082
Lower Tribunal: 1D12-3639
OJCC No. 09-027890GCC

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

This brief is accompanied by an appendix containing portions of the record before the First District Court of Appeal in *Pfeffer v. Labor Ready Southeast, Inc.*,et al, No. 1D13-4779, currently pending in this Court No. SC14-738, pursuant to a certified question from the First District. This Court, by order dated 7/28/14, permitted *Pfeffer* to file a motion for leave to file an amicus curiae brief in support of the Petitioner in *Castellanos*, together with an appendix with relevant documents from *Pfeffer's* trial proceedings and the appellate proceedings in the First District Court of Appeal. The motion for leave was granted by order dated 8/7/14. Marvin Castellanos, Petitioner, will be referred to in this brief by his surname, Louis Pfeffer, one of the Petitioners in *Pfeffer*, will be referred to by his surname, and Cynthia Richardson, the Petitioner in *Richardson v. Aramark*, currently pending in this Court, No.SC14-738, will be referred to by her surname. The Respondents in Castellanos and Pfeffer will be referred to as the "employer/carrier," or "E/C". References to the appendix will be designated by the letter "App." followed by the exhibit and applicable page number in parentheses.

STATEMENT OF INTEREST

The National Employment Lawyers Association (NELA), is an organization of approximately 3,000 attorneys around the nation who

represent employees in civil rights and employment-related litigation. The Florida Chapter was founded in 1993 and has approximately 200 participating attorneys around the state. Florida NELA seeks to address the issue in this case because Florida Statute, §440.34(1)inherently and impermissibly places attorneys representing injured workers in a conflict of interest prohibited by Florida Bar Rule, DR 4-1.7, and threatens the ability of NELA lawyers to bring claims on behalf of injured workers who have been denied benefits. As Florida Statute, §440.34(1) chills the pursuit of meritorious claims and departs radically from settled law, its proper resolution is a matter of substantial concern to NELA, its members and their clients.

SUMMARY OF ARGUMENT

The Legislature has unconstitutionally encroached on the Judicial Branch's power to administer Justice and to regulate attorneys who are officers of the court. The operation of Florida Statute, Section 440.34(1) in eliminating "reasonable" attorney fees and mandating that fees be arbitrarily awarded solely on a statutory schedule, inherently and impermissibly places attorneys representing injured workers in a conflict of interest prohibited by Florida Bar Rule, DR 4-1.7, and ignores this Court's past pronouncements on the pivotal role that attorneys, as officers of the court, play in ensuring the administration of justice in

Florida courts, as well as the critical importance that "reasonable" attorneys fees play in assuring a fair and functioning Justice system.

INTRODUCTION

Worker's Compensation in Florida was once a system that provided reasonable compensation and medical benefits, along with relative ease in proving entitlement to benefits; designed as a supposed "self executing" system where attorney involvement was unnecessary. But in 1941, six years after passage of the Act, the legislature enacted a fee shifting provision: in exchange for an injured worker's attorney being paid "reasonable" attorneys fees if an employer/insurance carrier denied a claim or delayed payment, carriers were granted immunity from the Bad Faith provisions of the Insurance Code. The potential imposition of reasonable attorneys fees made the compensation system work: reasonable attorney fees served as a deterrent and corrected the relative imbalance of power between an injured worker desperate for her benefits and a carrier seeking to delay or deny benefits, either to save money or to starve a client into settlement of his/her claim.

All of this changed in 2003, when the legislature backed by powerful political forces, and allegedly facing an insurance "crisis", reformed the comp system's claims process giving insurance companies almost unfettered power to control claims in a three pronged strategy:

1. Limit the number of weeks a worker can collect temporary wage replacement benefits to 104 weeks;
2. Give the insurance companies the power to limit an injured workers medical care to treatment by "insurance company" doctors, and;
3. Take away an injured workers ability to contest the insurance companies denial of or refusal to pay benefits by limiting the workers' attorney's fees, while keeping the attorney fees of the insurance companies' own attorneys unlimited.

The net effect? The power to control claims for benefits by eliminating them quickly and cheaply with a powerless injured worker.

Following this Court's ruling in *Murray v. Mariner Health*, 994 So2d 1051(Fla.2008), the legislature swiftly amended Florida Statute Section 440.34(1) again removing "reasonable" fees for attorneys who represent injured workers, which has returned unfettered power to insurance companies to delay or deny claims. For accidents post July 1, 2009, Carriers possess carte blanche to use their own attorneys to raise numerous and often technical defenses to deny compensability of claims (as in *Castellanos*), to deny medical care (as in *Richardson*), or to deny benefits alleging injuries are preexisting/that the accident is not the "major contributing cause" (MCC) for comp and medical care (as in *Pfeffer*).

In *Pfeffer*, the carrier denied benefits to worker Ruth Zygmond contending that Zygmond's injuries were limited to a knee contusion; the carrier's own handpicked doctors mis-diagnosed

Zygmond and missed the fractured kneecap she sustained. (App.3: 245-246;4:41). But even after Pfeffer established that Zygmond's accident was the MCC for her fractured patella, the carrier continued to deny medical and compensation benefits pressing Zygmond to settle her claim (App. 3: 247-254). The carrier paid its defense attorneys over $50,000 to deny benefits to Zygmond; attorneys Pfeffer and Cerino, after expending a combined 247 hours over 3 plus years in a contentious and highly contingent claim, and obtaining the benefits due to Zygmond, were left to split a "statutory" fee of $12,497.69. (App.1:13;3:254-257;5:123).

Indisputably, patently unreasonable attorney fees--as evidenced in *Castellanos*, *Richardson* and *Pfeffer*-- severely limit an injured workers ability to fight an E/C's denial or delay in paying benefits. But unreasonable, inadequate fees also result in an equally disturbing effect on attorneys who represent injured workers: the creation of constant, almost daily ethical dilemmas in attempting to competently represent their clients. Ethical quandaries involving a lawyer's duty of undivided loyalty to the client, a lawyer's duty to competently exercise independent legal judgment for the benefit of the client, and a lawyer's duty of avoiding conflicts of interest with the client. Pfeffer provided unrebutted testimony that if he was not able to earn a "reasonable" attorney's fee, he would have never represented Zygmond, as an attorney "cannot perform his ethical duties of vigorously"

representing a client (App.3:248, 250). Zygmond was pressed by the carrier to settle her claim at an early juncture; and if Pfeffer had not "zealously, aggressively represented Ms. Zygmond", she would have been forced by her financial circumstances, of settling her case "for five, ten thousand dollars." (App.3:247,251,254,255).

Long ago, this Court recognized that removing the potential award of reasonable attorneys fees would encourage carriers to unnecessarily resist "claims in an attempt to force settlement upon an injured worker". *Ohio Casualty v. Parrish*, 350 So.2d 466, 470(Fla. 1977). This evil has now arrived. As confirmed by Pfeffer's unrebutted testimony, because of the arbitrary caps on fees under §440.34 "the whole workers' comp system has become to the point where basically it's a 'settle system'.....Carriers don't simply want you, they expect you to settle the case."(App.3:247-249). Pfeffer testified that the "only way you can survive as a claimant's attorney is by settling the cases, click, click, click" (App.3:249).

And more troubling, in this current Kafkaesque system, the injured worker's own attorney frequently becomes the adversary insurance company's "best friend" by "counseling" the worker to settle their case, just so the attorney—who knows they can not litigate a contingent case against an insurance company with unlimited resources in a system with no expectation of earning a reasonable fee—can earn a fee and stay afloat financially. The

constant ethical dilemmas that plague the minds of attorneys faced with the almost virtual certainty of unreasonable fees under §440.34 can be summarized by these musings:

"Should I shortchange my client, and try to simply, quickly settle this workers compensation claim for whatever the insurance company is offering and make a modest fee? How can I justify risking my own money and my time to prosecute increasingly complex and legally difficult claims using employer controlled doctors to get my client benefits that are relatively worth peanuts, when I have office rent, payroll, taxes, insurance, licensing fees to run my business, let alone needing money to survive to pay for personal rent, food, automobile, health insurance, credit cards for myself and my family? What do I do? If I take on the risk of zealously representing this client and if I win, the client may win but I thereby lose"

Against this background, the employer/carrier espouses the argument that since prevailing claimant attorney fees within §440.34 are a substantive right created by the legislature, the legislature therefore has the exclusive, absolute and unfettered power to set attorney fees whether such fees are "reasonable" or not. Respectfully, the employer/carrier is wrong. Fee shifting statutes are constitutional, but statutes that limit the fees awarded to the point where an attorneys professional independence is affected are not.

ARGUMENT

I. FLORIDA STATUTE §440.34(1) VIOLATES THE SEPARATION OF POWERS DOCTRINE AND THIS COURTS INHERENT POWER TO ASSURE A FAIR AND FUNCTIONING JUSTICE SYSTEM AND TO REGULATE ATTORNEYS AS OFFICERS OF THE COURT

A. STANDARD OF REVIEW

Because the issue presented involves a constitutional challenge, it is governed by the de novo review standard. *Bush v. Holmes*, 919 So2d 392 (Fla. 2006).

B. THE SEPARATION OF POWERS PRECLUDES THE LEGISLATURE FROM ENCROACHING ON THE JUDICIAL BRANCH'S POWER TO ADMINISTER JUSTICE AND REGULATE ATTORNEYS

The principle of Separation of Powers is embodied in Article II § 3 of the Florida Constitution, which states that "[n]o person belonging to one branch [of government] shall exercise any powers appertaining to either of the other branches. . . ." This Court adheres to a "strict separation of powers doctrine" which "encompasses [the] two fundamental prohibitions" that "no branch may encroach upon the powers of another" and "no branch may delegate to another branch its constitutionally assigned power." *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004)(citing *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991))

The separation of powers is "the cornerstone of American democracy" as the "fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty". *Bush v. Schiavo*, 885 So.2d at 329; *Chiles*, 589 So. 2d at 263; (citing to *Ponder v. Graham*, 4 Fla. 23, 42-43(1851)). The doctrine prevents "the combination in the hands of a single person or group of the basic or fundamental powers of government, that is

to protect the governed from arbitrary oppressive acts on the part of those in political authority". *In re Advisory Opinion to Governor*, 213 So.2d 716, 719 (Fla. 1968), citing 16 C.J.S. Constitutional Law § 104. The judiciary as a coequal branch of the Florida government is "vested with the *sole* authority to exercise the judicial power", and has the "duty"... "to guarantee the rights of the people to have access to a functioning and efficient judicial system". *Chiles*, 589 So. 2d at 268-69. The legislature therefore cannot take actions that would undermine the *independence* of Florida's judicial and quasi-judicial offices, including actions that would *financially impede* members of the judicial branch from carrying out their judicial duties. See, *Office of State Attorney v. Parrotino*, 628 So. 2d 1097, 1099(Fla. 1993)(subjecting judicial and quasi-judicial officers to punitive lawsuits for official actions would impinge upon the independence of these offices); *Chiles*, 589 So. 2d 260, 269 (Fla. 1991)(Substantial reductions of the judicial budget would raise constitutional concerns of the highest order in access to a functioning and efficient judicial system).

C: FLORIDA STATUTE §440.34(1)UNDERMINES THE PIVOTAL ROLE PLAYED BY ATTORNEYS REPRESENTING INJURED WORKERS IN THE WORKERS COMPENSATION SYSTEM

Article V, §1 of the Florida Constitution gives the Judicial Branch the *sole* authority to exercise the judicial power to

administer Justice and to protect the rights of people in a functioning and efficient justice system. *Chiles,* 589 So. 2d 260(Fla. 1991). The Judicial branch is composed of judges and attorneys, both of whom are duty bound by their Oaths taken and their respective Codes of Ethics to continuously pursue Justice through the legal system. *In the Matter of John E. McCarey*, 105 So. 2d 813, 815 (Fla.1st DCA 1958)(members of the bar and the bench are engaged together in the administration of justice).

In order to practice law, an attorney must be admitted to and maintain membership in the Florida Bar, a Bar which exists as an agency of the judicial branch of the government of Florida. *Petition of Florida State Bar Association,* 40 So. 2d 902, 907 (Fla. 1949) An attorney is "not only a representative of the client, but also an officer of the court". *Moakley v. Smallwood*, 826 So. 2d 221, 224, 225 (Fla. 2002)(A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice). The practice of law is "intimately connected with the exercise of judicial power in the administration of justice". *In re Hazel H. Russell*, 236 So. 2d 767, 769 (Fla. 1970); See also, *Petition of Florida State Bar Association,* 40 So. 2d at 907. As noted by the Court in *In re The Florida Bar; In re Petition for Advisory Opinion Concerning Applicability of Chapter 74-177,* 316 So. 2d 45, 48 (Fla 1975):

> Lawyers are independent professionals, yet as "officers of the Court" they are part of the governmental structure involved with the administration of justice. They have a professional responsibility and an obligation, as a condition to their authority to practice law, to perform functions necessary for the operation of the judicial system. It is their professional duty honestly and ably to assist the courts in securing the efficient administration of justice.

An attorney is such an important factor in the administration of justice that this Court has held that a lawyer's responsibility to the public rises above his responsibility to his client. *Petition of Florida State Bar Association*, 40 So. 2d at 908. "The right to representation by counsel is not a formality. . . . It is of the essence of justice." *Kent v. United States*, 383 U.S. 541, 561 (1966). Attorneys representing injured workers in the adversarial work comp system play a critical role as an advocate searching for the truth. In describing the crucial role played by attorneys for the legal system to "work properly for all segments of our society", the Court in *In re Amendments to Rules Regulating the Florida Bar- 1-3.1(a) and Rules of Judicial Administration*, 573 So. 2d 800, 804(Fla. 1990) held:

> In our common law adversary system, the lawyer plays the role of an advocate. In the courtroom, lawyers present evidence and examine witnesses to aid the judge and the jury in their search for the truth...Lawyers as advocates are essential to our common law adversary system. **An adversarial system of justice requires legal representation on both sides in order for it to work properly**. Without adversaries, the system would not work. (Emphasis supplied)

Evidence of the crucial role attorneys representing injured workers play in the search for truth is borne out in *Castellanos, Richardson* and *Pfeffer*. Without competent counsel, the truth would have been hidden and all three injured workers would have been "as 'helpless as a turtle on its back.'" *Davis v. Keeto*, 463 So. 2nd 368, 371(Fla. 1st DCA 1985), citing to, *Neylon v. Ford Motor Company*, 99 A.2d 665 (N.J. 1953).

D. FLORIDA STATUTE §440.34(1)VIOLATES THE SEPARATION OF POWERS BY SUBVERTING THE JUSTICE SYSTEM FOR INDIVIDUALS AND THE PUBLIC AT LARGE

In order to competently carry out their duties to both client and the public at large, attorneys as officers of the court must be paid a "reasonable" fee or the system will not work properly. Almost eighty years ago, in *Baruch v. Giblin*, 164 So. 831, 833 (Fla.1935), this Court stressed the importance of awarding attorney fees that are fair and reasonable:

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.

The holding and teaching of *Baruch* regarding the importance of

awarding "reasonable" attorney fees has repeatedly been cited by Florida Courts. *Travieso v. Travieso,* 474 So. 2d 1184, 1188 (Fla. 1985); *Dade County v. Oolite Rock Company*, 311 So. 2d 699, 703 (3rd DCA 1975) (reasonable fees essential to establish and retain public confidence in the judicial process);*The Florida Bar v. Richardson*, 574 So. 2d 60 (Fla. 1990)(Attorney suspended for charging excessive fee); *Uhnlein v. Department of Revenue*, 662 So. 2d 309 (Fla. 1995)(lodestar approach of *Rowe* provides a suitable foundation for objective structure in establishing reasonable attorney fee in common fund case rather than percentage approach); *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 114 (Fla.1985) (recognizing the importance of reasonable attorneys' fees on the credibility of the court system and the legal profession).

Professor Timothy Chinaris, the Ethics Director for the Florida Bar from 1989 to 1997, testified in *Pfeffer* about the importance of "reasonable" attorneys fees in ensuring competent representation and protecting the public (App.2: 132-190):

> If [that] lawyer's fees are too high, people won't be able to afford lawyers, people will forego lawyers in cases where they really need protection or need representation or advice and the clients suffer, the public suffers, people are more easily taken advantage of, and our system of -- kind of our free-market system of people being able to contract and take care of themselves, it doesn't work as well as it should if one side has legal representation, the other side can't afford it because the lawyer might be charging an unreasonably high fee. On the other hand, you have to be concerned if a fee is too low, because it's been recognized in a variety of areas that if a lawyer is

> forced to take a fee that is too low, lawyers being human, there is always that incentive that a lawyer may not provide the client with the -- enough time or enough effort into the case to provide the kind of representation that really we consider competent representation. (App.2:154-156)

Attorney fees must be "reasonable": if fees are too low, justice for individual clients and the public suffers; if fees are too high, the credibility of the legal system is called into question. Florida Courts have not hesitated to overturn attorney fees that are either excessive or inadequate in accordance with the Rules of Professional Conduct. See, *Marchion Terrazzo v. Altman*, 372 So. 2d 512 (Fla. 3rd DCA 1979)(inadequate fee award constitutes abuse of discretion and must be reversed under the principles in the Code of Professional Responsibility which apply not only where the fee is found to be excessive, but also where it is found to be inadequate); *Flagala Corporation, v. H.E. Hamm*, 302 So. 2d 195, (Fla. 1st DCA 1974)(unduly low fee unreasonable and abuse of discretion considering factors set forth in DR 2-106); *Urbieta v. Urbieta* 446 So. 2d 230, (Fla.3rd DCA 1984)(award of fees so inadequate where fee not reflective of time expended and the importance of legal services rendered); *Canal Authority v. Ocala Manufacturing Ice and Packing Company*, 253 So. 2d 495; (Fla. 1st DCA 1971)(considering factors in Code of Professional Responsibility award of inadequate attorney fees was an abuse of judicial discretion).

This Court has stated that allowance of fees is a "judicial

action". *Lee Engineering & Construction Company v. Fellows*, 209 So2d 454, 457(Fla 1968). It is submitted that awarding *specific* fees is "judicial action" or judicial power *precisely* because it is the judicial branch---and not the legislative nor executive branch---that is duty bound to protect access to justice and the rights of individuals. These goals cannot be realized without fees that are reasonable, fees that are based upon evidence and which take into account the factors set forth in the Code of Professional Responsibility.

E. FLORIDA STATUTE §440.34(1)ENCROACHES ON THIS COURT'S EXCLUSIVE POWER TO REGULATE ATTORNEYS

If access to justice, the search for the truth, public confidence in the courts, and the credibility of the legal profession, are the goals of the justice system, then the seeds to achieving these goals are sown in this Court's adoption and continuous enforcement of the Code of Professional Responsibility.

Article V, § 15 of the Florida Constitution and this Court's inherent judicial power give this Court "exclusive" jurisdiction to regulate attorneys. *In Re The Florida Bar*, 316 So.2d 45 (Fla. 1975)(Legislature has no power to control members of the Bar by requiring financial disclosure statement). Such *exclusive* jurisdiction is not merely limited to the "admission" or "discipline" of attorneys; This Court has the "inherent right to supervise the bar as an incident to this Court's power to control,

admit to practice, and discipline attorneys. *In re The Florida Bar; In Re Advisory Opinion Concerning the Applicability of Chapter 119, Florida Statutes*,398 So.2d 446,448 (Fla. 1981). Indisputably, this Court has the *exclusive* province to prescribe rules of professional conduct, the breaching of which renders an attorney amenable to discipline. *Times Publishing Company v. Williams*, 222 So. 2d 470, (Fla. 2nd DCA 1969).

Recognizing the import of "reasonable" attorney fees, this Court has spoken through Rule 4-1.5 (a)(1) and (b) of the Rules of Professional Conduct which, in regulating the setting, charging and collecting of fees, prohibit "clearly excessive" fees and mandate that fees be "reasonable". This Court's requirement for "reasonable" attorney fees is not new. In "Standards of Conduct for Lawyers: An 800-Year Evolution",57 SMU L. Rev. 1385 (2004), Professor Carol Rice Andrews notes that after analyzing the standards for conduct of lawyers over the past 800 years, six traditional "core duties" emerge: litigation fairness, competence, loyalty, confidentiality, *reasonable fees,* and public service. These six duties were the primary duties of lawyers in medieval England, and they continue as the central duties of lawyers today.

If this Court has the *exclusive* power to regulate attorneys, then it follows that the legislature is without such power. If the legislature passed a law banning attorneys from zealously or competently representing an injured worker, no one could seriously

argue that such a law would be blatantly unconstitutional. But just as the legislature's "power to tax is the power to destroy", *McCulloch v. Maryland, 17 U.S.316 (1819)*, the power to arbitrarily limit attorneys fee to unreasonably low fees is the power to regulate attorneys and an attorney's conduct.

The employer/carrier is correct that entitlement to attorneys fees arise by either contract or by a fee shifting statute as a prevailing party fee. Yet, the employer/carrier maintains that Florida attorneys are free to accept wholly inadequate attorneys fees or can be forced to a accept a wholly inadequate statutory fee. Not so according to the Florida Bar. See, Comments to Rule 4-1.5 (the test for reasonableness of legal fees found in rule 4-1.5(b) applies to *all types of legal fees* and contracts related to them). The Florida Bar recognizes that there is a direct correlation between reasonable attorney fees and competent and zealous representation that is free of conflicts of interest; and that attorneys who receive inadequate fees are, as part of human nature, subject to shirking their professional obligations to provide competent and zealous representation.

In *Florida Bar Ethics Opinion 98-2(*June 18, 1998) the Bar ruled that an attorney may not ethically enter into flat fee agreement in which "the set fee is so low as to impair her independent professional judgment or cause her to limit the representation" of a client. In so ruling, the Florida Bar adopted

verbatim an opinion from the Ohio Bar, *Ohio Ethics Opinion 97-7* which concluded:

> an attorney or law firm may enter into a contract with a liability insurer in which the attorney or law firm agrees to do all or a portion of the insurer's defense work for a fixed flat fee. **However, the fee agreement must provide reasonable and adequate compensation; it must not be excessive or so inadequate that it compromises the attorney's professional obligations as a competent and zealous advocate. The fee agreement must not adversely affect the attorney's independent professional judgment; the attorney's representation must be competent, zealous, and diligent;** and the expenses of litigation, in addition to the flat fee, must ultimately be borne by the insurer. (Emphasis supplied)

The ethical requirement of reasonable and adequate compensation applies equally to fees arising by statute. This Court has long held that the legislature is without any authority to *directly or indirectly interfere* with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court. See, *The Florida Bar v. Massfeller*,170 So.2d 834 (Fla.1964); *State ex rel. Arnold v. Revels*, 109 So.2d 1 (Fla.1959). Recently, this Court reaffirmed this principle in *Abdool v. Bondi*, 2014 Fla. LEXIS 1887, June 12, 2014, remarking:

> This Court has the inherent authority to adopt and enforce an ethical code of professional conduct for attorneys. See *In re The Florida Bar*, 316 So. 2d 45, 47 (Fla. 1975) ("The authority for each branch to adopt an ethical code has always been within the inherent authority of the respective branches of government. . . . The judicial branch has . . . a code of professional responsibility for lawyers, and, in addition, has the procedure to interpret them and the authority to enforce them . . . ."). The Legislature, therefore, is without

> authority to directly or indirectly interfere with an attorney's exercise of his or her ethical duties as an officer of the court....(citations omitted)...A statute violates the separation of powers clause when it interferes with the ethical duties of attorneys, as prescribed by this Court.

Without the prospect of reasonable attorneys fees being paid for an attorney's professional labor, conflicts of interest arise.

F. FLORIDA STATUTE §440.34(1) INHERENTLY PLACES A CLAIMANT'S ATTORNEY IN A PROHIBITED CONFLICT OF INTEREST

Rule 4-1.7(a)(2)of the Florida Rules of Professional Conduct provides that "... a lawyer shall not represent a client if.... there is a substantial risk that the representation of 1 or more clients will be materially limited... by a personal interest of the lawyer." The Comments to Rule 4-1.7 under "Lawyer's interests" provide:

> The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a **reasonable** fee. See Rules 4-1.1 and 4-1.5. (Emphasis supplied)

An attorney's failure to avoid prohibited conflicts of interest constitute grounds for disciplinary proceedings. *The Florida Bar, v. Brown*, 978 So.2d 107 (2008); *Florida Bar v. Shannon*, 398 So.2d 453 (Fla.1981).

Professor Chinaris, former Ethics Director for the Florida Bar from 1989 to 1997, opined after reviewing the circumstances of

Pfeffer's representation of Zygmond, opined that Chapter 440.34's limitation of fees based purely on the value of benefits obtained impermissibly creates a conflict of interest for a claimant's attorney. (App.2:132-190). Professor Chinaris testified that a lawyer is not even "*supposed to represent a client*" if there's a substantial risk that the lawyer's representation might be materially limited by personal interest (App.2:167-168). As summarized and stated by Professor Chinaris:

> The ethics rules, particularly 4-1.7, the conflict-of-interest rule, points out that a lawyer is not supposed to represent a client if there's a substantial risk that the lawyer's representation of the client might be materially limited by any number of things, including the lawyer's own personal interest. And the lawyer obviously has a personal interest in making a fee that is at least enough to break even in a case. And so below a certain level, a lawyer is just going to feel that the lawyer is not going to be compensated enough to be able to put in proper representation and, therefore, under the conflict rule really should decline to take the case. That creates an impermissible conflict of interest.(App.2:167-168)

CONCLUSION

Unreasonable and inadequate attorney fees continue to perpetuate an injustice to injured workers, claimant attorneys and the integrity of the workers compensation system as a whole. It is submitted that this Court should hold the fee formula provided in section 440.34(1), Florida Statutes (2009) as facially unconstitutional and unconstitutional as applied as the Act violates the Separation of Powers under the Florida Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail on this 12th day of August 2014, to:

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CERTIFICATE OF FACETYPE COMPLIANCE

The undersigned counsel for Appellant certifies that this brief was computer generated using Courier New 12 point font.

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