No. 84117

APPEAL TO

THE SUPREME COURT OF ILLINOIS

ROBERTA L. CRIPE, Guardian of the Adult and Conservator of the Estate of Roberta A. Schmitz,	)	Appeal from the Third Appellate District Court Nos. 3-96-1043
Plaintiff-Appellee,	)	Appeal from the Tenth Judicial Circuit Peoria County, Illinois Law No. 94 L 533
v.	)	
THOMAS E. LEITER and THE LEITER GROUP, an Illinois Professional Corporation,	)	Honorable John A. Barra Judge Presiding
Defendants-Appellants.	)	

BRIEF OF *AMICUS CURIAE* HALT
IN SUPPORT OF APPELLEE CRIPE

Michael A. Fleming
Cusack, Fleming, Gilfillan & O'Day
Attorneys for HALT, Inc. --
An Organization of Americans for Legal Reform
Suite 520
124 S.W. Adams
Peoria, Illinois 61602
Telephone (309) 637-5282

Of Counsel:
James C. Turner
Edward J. Tannouse
HALT, Inc.
Suite 510
1612 K Street NW
Washington, DC 20006
Telephone (202) 887-8255

No. 84117

APPEAL TO

THE SUPREME COURT OF ILLINOIS

ROBERTA L. CRIPE, Guardian of the Adult and Conservator of the Estate of Roberta A. Schmitz,	)	Appeal from the Third Appellate District Court Nos. 3-96-1043
Plaintiff-Appellee,	)	Appeal from the Tenth Judicial Circuit Peoria County, Illinois Law No. 94 L 533
v.	)	
THOMAS E. LEITER and THE LEITER GROUP, an Illinois Professional Corporation,	)	Honorable John A. Barra Judge Presiding
Defendants-Appellants.	)	

BRIEF OF *AMICUS CURIAE* HALT
IN SUPPORT OF APPELLEE CRIPE

POINTS AND AUTHORITIES

page

Introduction.. 6

I. Over-billing a Client Does Not Involve the Exercise of Professional Judgment and is not Part of the Practice of Law.. 6

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975).. 8-9

Gadson v. Newman,
807 F.Supp. 1412, 1416 (C.D. Ill., 1992)... 9

Cripe v. Leiter, 291 Ill. App. 161,
683 N.E.2d 514 (3d Dist. 1997).. 8

Frahm v. Urkovich, 113 Ill. App. 580,
447 N.E.2d 1007 (1st Dist. 1983)... 9

Feldstein v. Guinan, 148 Ill. App. 3d 610,
499 N.E.2d 535 (1986).. 10

Guess v. Brophy, 164 Ill. App. 3d 75,
517 N.E.2d 693 (1987)………………………….. 10

Lurz v. Panek, 172 Ill. App. 3d 915,
527 N.E.2d 663 (1988)…………………………….................................. 10

Rubin v. Marshall Field & Company,
232 Ill. App. 3d 522, 597 N.E.2d 688 (1st Dist. 1992)………………….................. 10

page

1991 Amendments to the Illinois Consumer Fraud Act, Ill. Rev. Stat. 121½, ¶270a(a) (1991)........ 9

American Bar Association, *Model Code of Professional Responsibility*, Canon 3, Ethical Consideration 3-5........ 7

II. Despite their Professional Status, Lawyers are Nonetheless Subject to Many Measures that Protect the Public........ 10

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)........ 11

Bates v. Arizona State Bar, 433 U.S. 350 (1977)........ 11

NAACP v. Button, 371 U.S. 415 (1963)........ 11

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964)........ 11

United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967)........ 11

United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)........ 11

Equal Employment Opportunity Commission v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975)........ 12

page

Lucido v. Cravath, Swain & Moore,
425 F. Supp. 123 (S.D. N.Y. 1977).. 12

Evans and Kunz, Ltd.,
194 NLRB 1216 (1972).. 12

United States v. Jannotti,
729 F.2d 213 (3d Cir. 1984).. 12

Park South Associates v. Fischbein,
626 F. Supp. 1108 (S.D. N.Y. 1986).. 12

III. Application of the Illinois Consumer Fraud Act to Lawyers' Business Dealings with their Clients Fully Respects the Proper Separation of Judicial and Legislative Powers.. 13

Short v. Demopolis, 103 Wash. 2d 152,
691 P.2d 163 (Wash. 1984).. 14

Heslin v. Connecticut Law Clinics of Trantolo & Trantolo, 190 Conn. 510, 461 A.2d 938 (1983)..................................... 14

Reed v. Allison & Perrone,
376 So.2d 1067 (La.App. 1979).. 15

Attorney Registration and Disciplinary Commission**,**
1996 Annual Report.. 13

page

IV. Other States Have Successfully Applied Statutory Consumer Protections to Lawyers' Business Dealings with their Clients.......... 15

Heslin v. Connecticut Law Clinics of Trantolo & Trantolo, 190 Conn. 510, 461 A.2d 938 (1983).......... 16

Short v. Demopolis, 103 Wash. 2d 152, 691 P.2d 163 (Wash. 1984).......... 16

Reed v. Allison & Perrone, 376 So.2d 1067 (La.App. 1979).......... 16

DeBakey v. Staggs, 605 S.W.2d 361 (Tex.Civ.App. 1980), *aff'd*, 612 S.W.2d 924 (Tex. 1981).......... 16

Quimby v. Fine, 45 Wash. App. 175, 724 P.2d 403 (1986).......... 17

Haynes v. Yale-New Haven Hospital, 243 Conn. 17, 699 A.2d 964 (1997).......... 17

White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture, 798 S.W.2d 805 (Tex. App. -- Beaumont 1990).......... 17

Nelson v. Ho, 222 Mich. App. 74, 564 N.W.2d 482 (1997).......... 17

Gadson v. Newman, 807 F.Supp. 1412, (C.D. Ill. 1992).......... 17

Conclusion.......... 18

Introduction

The issue presented by this case can be stated simply: Whether lawyers enjoy a blanket exemption from the requirements of the Illinois Consumer Fraud and Deceptive Practices Act. *Amicus Curiae* HALT -- *An Organization of Americans for Legal Reform* respectfully submits that there is only one answer to this question, "No."

A lawyer who overbills a client is committing fraud, not practicing law. It is outrageous to suggest that crooked lawyers are somehow above the laws that were enacted to protect consumers from garden variety fraud. The modern trend in state and federal courts across the country rejects this suggestion and requires that lawyers' business dealings with their clients comply with consumer protection statutes.

Justice Michela correctly followed this progressive trend in ruling that alleged billing fraud by a lawyer is a sound cause of action under the Illinois Consumer Fraud and Deceptive Practices Act. This Court should affirm that ruling.

I. **Over-billing a Client Does Not Involve the Exercise of Professional Judgment and is not Part of the Practice of Law**.

Courts and regulatory bodies have always recognized that the practice of law is a distinct activity that requires the *exercise of professional judgment*. Leiter (Appellant Br. 23-26, 28-35, 52-60), the Illinois State Bar Association *(Amicus Curiae*

Br. 2) and the Illinois Association of Defense Trial Counsel (*Amicus Curiae* Br. 15-20) argue that every action a lawyer takes somehow constitutes the practice of law and is therefore exempted from the statutes that apply to other individuals. Their sweeping reach for a blanket exemption for lawyers under the guise of "the practice of law" ignores the well-reasoned and prudent distinction by both federal and state courts, who have recognized that *only* a lawyer's actions that require the exercise of professional judgment constitute the practice of law.

The American Bar Association's *Model Code of Professional Responsibility* stresses precisely this distinction (Canon 3, Ethical Consideration 3-5, emphasis supplied):

> Functionally, the practice of law relates to the rendition of services for others that call for the *professional judgment of a lawyer*. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client....

There is nothing in the preparation of a bill based on an hourly rate and the number of hours worked that even remotely involves the exercise of a lawyer's professional judgment or requires one to relate "the general body and philosophy of law to a specific legal problem of a client." As Justice Michela pointed out below in

ruling that deceptive billing practices are subject to liability under the Illinois Consumer Fraud Act, "the only skills required in billing are the ability to tell time and accurately report the amount of time spent in performing legal services." *Cripe v. Leiter*, 291 Ill. App. 161, 163, 683 N.E.2d 514 (3d Dist. 1997).

Justice Michela thus properly distinguished between the practice of law, which requires the exercise of professional judgment, and the mere business aspects of lawyers' relations with their clients. This distinction was recognized by the United States Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975), where Virginia lawyers' sought "total exclusion from antitrust regulation," so they could establish minimum fee schedules. Writing for a unanimous Court, Chief Justice Burger rejected this blanket exemption argument as applied to "fee control activities" and concluded that "[i]t is no disparagement on the practice of law as a profession to acknowledge that it has this business aspect" (id.).

Goldfarb has particular application to the facts in this case, because it involved improprieties committed by lawyers in billing their clients. If lawyers acting as a group are not allowed to claim a blanket exemption so they can engage in prohibited price fixing, than an individual lawyer should not be able to claim a blanket exemption so he can over-bill his clients.

Leiter (Appellant Br. 26), the State Bar Association (*Amicus Curiae* Br. 12)

and Association of Defense Trial Counsel (*Amicus Curiae* Br. 4) mistakenly rely upon *Frahm v. Urkovich*, 113 Ill. App. 580, 447 N.E.2d 1007 (1st Dist. 1983), to argue that lawyers are exempt from coverage by the Illinois Consumer Fraud Act. Their reliance is misplaced, however, because after *Frahm* was decided, the Illinois State Legislature amended the Consumer Fraud Act and eliminated a key premise for Justice O'Connor's interpretation of that statute.

After the 1991 amendments, the Consumer Fraud Act explicitly provides that "Proof of a public injury, a pattern, or an effect on consumers generally shall not be required" (Ill. Rev. Stat. 121½, ¶270a(a) (1991)). The Legislature thus expressly repudiated the imposition of a requirement for a general public injury to invoke coverage by the Consumer Fraud Act. As Judge Mills concluded in *Gadson v. Newman*, 807 F.Supp. 1412, 1416 (C.D. Ill., 1992), *Frahm* has "dubious application to the current Illinois Consumer Fraud Act."

Equally misplaced is the reliance by Leiter and supporting *amici* on other decisions construing the Illinois Consumer Protection Act prior to the adoption of these critical amendments, *i.e., Feldstein v. Guinan*, 148 Ill. App. 3d 610, 499 N.E.2d 535 (1986), *Guess v. Brophy*, 164 Ill. App. 3d 75, 517 N.E.2d 693 (1987), *Lurz v. Panek*, 172 Ill. App. 3d 915, 527 N.E.2d 663 (1988). As Justice McCormick explicitly pointed out in *Rubin v. Marshall Field & Company*, 232 Ill. App. 3d 522, 597 N.E.2d 688, 694 (1st Dist. 1992), decisions construing

the earlier version of the Consumer Fraud Act, such as *Frahm*, have been superseded by the 1991 amendments.

II. **Despite their Professional Status, Lawyers are Nonetheless Subject to Many Measures that Protect the Public.**

Leiter (Appellant Br. 49-51), the State Bar Association (*Amicus Curiae* Br. 3-6) and the Association of Defense Trial Counsel (*Amicus Curiae* Br. 13-15) erroneously suggest that there is some novelty or something unseemly in requiring lawyers to conduct their business dealings in accordance with measures that protect the public from deceptive and unfair practices. This position flies in the face of decades of case law.

It is well-established that lawyers must comply with legal protections that assure the free flow of information to the public and foster consumer choice. On no fewer than six occasions, the United States Supreme Court has rejected arguments that lawyers enjoy a blanket exemption as a profession, and ordered state or local Bar associations to cease practices which violate the Constitution or the Sherman Antitrust Act. *NAACP v. Button*, 371 U.S. 415 (1963)(Virginia court injunction enforcing state anti-solicitation rules against NAACP lawyers violates the First and Fourteenth Amendments); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964)(injunction against union-sponsored lawyer referral service relying on state bar regulations

violates the First and Fourteenth Amendments); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967)(state bar use of unauthorized practice of law regulations to prevent union from hiring attorneys on salary basis violates the First and Fourteenth Amendments); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971) (injunction secured by state bar against union-sponsored legal services and lawyer referral program violates the First and Fourteenth Amendments); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)(minimum legal fee schedules violate the Sherman Antitrust Act); *Bates v. Arizona State Bar*, 433 U.S. 350, 383 (1977)(blanket prohibition on attorney advertising violates the First Amendment).

Despite their professional status, lawyers must comply with federal statutes protecting citizens against civil rights violations, unfair labor practices, and illegal conspiracies and racketeering. Thus, a law firm qualifies as an "employer" and Title VII of the Civil Rights Act of 1964 covers its employment practices, one of the business aspects of a lawyer's activities. *See, e.g., Equal Employment Opportunity Commission v. Rinella & Rinella*, 401 F. Supp. 175 (N.D. Ill. 1975); *Lucido v. Cravath, Swain & Moore*, 425 F. Supp. 123, 126 (S.D. N.Y. 1977). Similarly, the National Labor Relations Board has the authority to assert jurisdiction over law firms for unfair labor practices in the appropriate circumstances. *See Evans and Kunz, Ltd.*, 194 NLRB 1216 (1972). And a law firm can be an "enterprise" subject to both civil and criminal provisions of the Racketeer

Influenced and Corrupt Organizations Act. *See United States v. Jannotti*, 729 F.2d 213, 227 (3d Cir. 1984; *Park South Associates v. Fischbein*, 626 F. Supp. 1108, 1112 (S.D. N.Y. 1986).

As demonstrated by the judiciary's willingness to bring lawyers within the sweep of these prophylactic measures, lawyers have not been, and should not be afforded blanket exemptions from laws meant to protect the public. Requiring lawyers to conduct their business affairs in accordance with the requirements of the Illinois Consumer Fraud Act is fully supported by the weight of authority in court decisions construing other statutes that protect the public, and would effectuate the Act's objective of protecting consumers from deceptive and unfair business practices.

III. Application of the Illinois Consumer Fraud Act to Lawyers' Business Dealings with their Clients Fully Respects the Proper Separation of Judicial and Legislative Powers.

This Court's role in regulating and supervising the practice of law in Illinois is not open to question. Contrary to the claims of Appellant Leiter and supporting *amici,* requiring lawyers to comply with the Illinois Consumer Fraud Act is fully consistent with and complementary to this Court's regulation of the practice of law.

The current system of attorney discipline through the Attorney Registration and Disciplinary Commission does not establish a mechanism for providing meaningful compensation to the victims of lawyers who over-bill or otherwise make fraudulent misrepresentations in business dealings with their clients. With its $10,000 limit, the

ARDC's Client Protection Program is unable to make victims whole. For example, according to figures presented in the ARDC's *1996 Annual Report* (p. 17), the average payment made under the Client Protection Program was $4,053 to 40 claimants in 1994, $4,213 to 108 claimants in 1995, and $4,178 to 122 claimants in 1996 (*see Amicus Curiae* Association of Defense Trial Counsel Br. Appendix A).

As the record in the instant case demonstrates (*see* Appellee Cripe Br. Supplemental Statement of Facts), over-billing can amount to tens of thousands of dollars. Allowing consumers of legal services in Illinois access to the prophylactic provisions of the Consumer Fraud Act will remedy this situation and spare this Court the unnecessary burden of serving as a consumer ombudsman in cases of simple fraud.

Nor does such complementary regulation by multiple branches of government run afoul of the separation of powers doctrine. The Supreme Court of the State of Washington carefully assessed and then rejected a similar claim in *Short v. Demopolis*, 103 Wash. 2d 152, 691 P.2d 163, 170 (Wash. 1984), concluding that the Washington State Consumer Protection Act "does not trench upon the constitutional powers of the court to regulate the practice of law." Similarly, in *Heslin v. Connecticut Law Clinics of Trantolo & Trantolo*, 190 Conn. 510, 461 A.2d 938, 945-46 (1983), the Connecticut Supreme Court concluded that the Connecticut Unfair Trade Practice

Act, with its emphasis on "prevention of injury to the consumer of legal services and redress to those injured" is fully compatible with the attorney discipline system where the "emphasis is consistently ethical and regulatory."

The same reasoning was applied in *Reed v. Allison & Perrone*, 376 So.2d 1067, 1068 (La.App. 1979), where the Louisiana Court of Appeals for the Fourth Circuit explicitly overruled a trial court conclusion that "the discplinary rules of the bar association are the sole regulatory device to be placed upon attorneys' advertising, and . . . may be enforced only by the bar association and the Supreme Court."

In short, this Court's authority to regulate the practice of law does not shield lawyers from liability for fraudulent misconduct under the prophylactic statutes enacted by the legislature. It is an affront to this Court to suggest that it should interpose itself in the guise of separation of powers to frustrate the remedial purposes of the Illinois Consumer Fraud Act. As the ultimate arbiter of conduct by the legal profession in the State of Illinois, this Court should send a clear message that consumer protections apply with full force to the lawyers practicing before it.

IV. Other States Have Successfully Applied Statutory Consumer Protections to Lawyers' Business Dealings with their Clients.

Obviously, the vast majority of honest and ethical lawyers, who do not engage in fraudulent or deceptive billing practices, have nothing to fear from coverage by the

Consumer Fraud Act. Nonetheless, Leiter (Appellant Br. 49-51) and the Association of Defense Trial Counsel (*Amicus Curiae* Br. 20-21) speculate that bringing lawyers under the coverage of the Consumer Fraud Act will somehow disrupt the practice of law in Illinois. These "chicken little" predictions ignore the experience in other states where the courts have recognized that consumer protections apply to the business aspects of lawyers' business dealings with their clients.

For over a decade, consumer protections have applied to lawyers in Connecticut, Washington State, Lousiana and Texas. Yet, the paucity of reported decisions in those states strongly suggests that the fears presented by Appellant Leiter and supporting *amicus* are not bona fide grounds for concern.

In the fifteen years since the Connecticut ruling, only 3 reported decisions in that state even cited *Heslin*; in the fourteen years since the Washington State ruling, only 6 reported decisions in that state cited *Short*; and in the nineteen years since Louisiana ruling, there has not been a single reported decision in the state that cited *Reed.* Finally, Texas has applied even broader consumer protections to lawyers since 1980, *DeBakey v. Staggs*, 605 S.W.2d 361, 633 (Tex.Civ.App. 1980), *aff'd*, 612 S.W.2d 924 (Tex. 1981). Yet in the eighteen years since that ruling, there have only been 10 reported decisions in Texas that cited it. The experience in other states that have applied consumer protections to lawyers thus demonstrates that the flood of new

litigation and confusion that Appellee Leiter counsels this Court to avoid is illusory.

Similarly, many of these same states have applied consumer protections to the business aspects of conduct by members of other learned professions with no untoward effects. *See Quimby v. Fine*, 45 Wash. App. 175, 724 P.2d 403 (1986) (doctors), *Haynes v. Yale-New Haven Hospital*, 243 Conn. 17, 699 A.2d 964 (1997) (doctors), *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 798 S.W.2d 805 (Tex. App. -- Beaumont 1990) (architects), *Nelson v. Ho*, 222 Mich. App. 74, 564 N.W.2d 482 (1997) (doctors; collects cases).

Significantly, with the ruling in *Gadson v. Newman*, 807 F.Supp. 1412, 1422 (C.D. Ill. 1992), the Illinois Consumer Fraud Act has been construed to cover the business aspects of conduct by members of the medical profession. Although over five years have now passed since the *Gadson* ruling, there is no evidence that there has been any disruptive effect on the practice of medicine in Illinois.

The experience in other states and with other learned professions demonstrates that accountability through the civil justice system is effective and prudent public policy. This Court should follow the reform trend of modern jurisprudence, and unambiguously announce that lawyers who dishonor their profession through fraudulent misconduct in business dealings with their clients will be held accountable under the Illinois Consumer Fraud Act.

Conclusion

For the foregoing reasons, *Amicus Curiae* HALT, Inc. -- *An Organization of Americans for Legal Reform* respectfully prays that this Court affirm the decision of the Appellate Court, Third District, holding that the Illinois Consumer Fraud Act applies to the business aspects of lawyers' relations with their clients.

Respectfully submitted,

By:

Michael A. Fleming
Cusack, Fleming, Gilfillan & O'Day
Attorneys for HALT, Inc. --
An Organization of Americans for Legal Reform
Suite 520
124 S.W. Adams
Peoria, Illinois 61602
Telephone (309) 637-5282

Of Counsel:
James C. Turner
Edward J. Tannouse
HALT, Inc.
Suite 510
1612 K Street NW
Washington, DC 20006
Telephone (202) 887-8255