

## **PLAINTIFF APPLEBAUM'S PETITION FOR LEAVE TO APPEAL**

### **INTRODUCTION**

This Court has held that the nullity rule applies to “an unlicensed person.” In direct conflict, the Appellate Court held that it applies to a licensed Illinois attorney, in good standing, never disciplined and listed on the Master Roll of Attorneys.

The decision, which conflicts with the Supreme Court’s explication of the rule and dismisses the underlying action, has far-reaching implications. To correct the First District's departure from this Court's decisions, conflicts between its opinion and other appellate court divisions’ decisions and the plenary role of this Court in attorney regulation, Michael Applebaum respectfully seeks leave to appeal.

### **PRAYER FOR LEAVE TO APPEAL**

Pursuant to Illinois Supreme Court Rule 315(a), plaintiff respectfully petitions this Court for leave to appeal the September 28, 2007 decision of the Appellate Court of Illinois, First District, in favor of defendants.

### **JUDGMENT BELOW**

On August 17, 2006, the Circuit Court ruled in favor of plaintiff, holding the nullity rule inapplicable to a licensed attorney who had opted to pay the “inactive” fee, and who filed the action as special administrator of his father’s estate. The Court found, that “the goals of protecting the public and ensuring the integrity of the court system which underpin the invocation of the nullity rule are not implicated by the facts...”

(A.12-13. From: Petition For Leave To Appeal Pursuant To Supreme Court Rule 308 R. 206-207).<sup>1</sup> On motion of the defendants and pursuant to Rule 308, the Circuit Court certified the question which was accepted by the Appellate Court on December 18, 2006. On September 28, 2007, the Court held that the nullity rule applied. A Petition for Rehearing was timely filed on November 20. On December 5, the First District denied the petition without opinion.

### **POINTS RELIED UPON FOR REVERSAL**

This Court should review this case since as a result of the decision by the First District, there are far-reaching consequences with respect to the Court's precedents, Court Rules and its authority to regulate attorney licensure.

More specifically, the First District's opinion should be reviewed and reversed for the following independent reasons:

1. In deciding that the nullity rule applies to a licensed Illinois attorney, the First District conflicts with this Court's holdings in *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371 (Ill. 2005) and *People v. Brigham*, 151 Ill. 2d 58 (1992). *Sperry* held that, "This [nullity] rule is grounded in the fact that there are risks to individual clients and to the integrity of the legal system inherent in representation by an unlicensed person..." *Sperry*, at 389-390 (2005). Contrary to *Sperry*, the First District held that the nullity rule

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<sup>1</sup> In citing to the Record, Applebaum uses the following citation format: "Slip op."

(Refers to the "Corrected Copy" of the First District's September 28, 2007 opinion); "A." (References to the page number in the Appendix). Slip op. and A. page numbers correspond.

is properly applied in the legal absence of such risks, finding that *Sperry's* holding was limited to the facts of the case. A.10/Slip op. 10

*Brigham* held that there is “an important distinction between (1) an unlicensed person (e.g., an imposter or a disbarred attorney), and (2) an attorney admitted to practice but under suspension for nonpayment of State bar dues.” 151 Ill. 2d at 67. The Appellate Court held that there is no distinction between an imposter or disbarred attorney and an attorney admitted to practice, but who has opted to be inactive and pay a lesser fee.

2. The decision of the First District is in conflict with other Appellate Court divisions and its own, which, consistent with this Court in *Sperry*, have never applied the nullity rule to a licensed Illinois attorney. Application of the nullity rule has always been limited to where “there are risks to individual clients and to the integrity of the legal system inherent in representation by an unlicensed person...” *Sperry*, at 389-390, citing *Janiczek v. Dover Management Co.*, 134 Ill. App. 3d 543, 546, 481 N.E.2d 25, 89 Ill. Dec. 673 (1985), citing *City of Chicago v. Witvoet*, 12 Ill. App. 3d 654, 655-56, 299 N.E.2d 128.

3. The First District's opinion is contrary not only to this Court's precedent, it conflicts with decisions from other jurisdictions throughout the country, cited with approval by this Court. See, e.g., *Reese v. Peters*, 926 F.2d 668, 669-670 (7th Cir. 1991) (“persons who satisfied the court of their legal skills but later ran afoul of some technical rule. Lawyers who do not pay their dues violate a legal norm, but not one established for the protection of clients...”) cited with approval, *Brigham* at 65; and cited more generally at 64-65 in a discussion of “counsel,” not limited to the criminal context.

4. The First District's decision infringes on this Court's exclusive and plenary jurisdiction over attorney regulation. As *Sperry* points out, this Court has "created a comprehensive scheme to regulate attorneys and discipline them for misconduct.... [and] has promulgated detailed rules which prescribe the appropriate discipline when the Rules of Professional Conduct are violated." 214 Ill. 2d at 383. Also, the First District declared that an attorney admitted to practice in this state by the Illinois Supreme Court, who paid bar dues on time pursuant to Rule 756, was never disciplined and who was listed on the Master Roll of Attorneys, is "not licensed." A.10/Slip op. at 10. This conflicts directly with the Court's rules on attorney licensure. Ill. Sup. Ct., R 756 (2007)

#### **STATEMENT OF FACTS**

On December 2, 2003, Joseph Applebaum died while hospitalized. The underlying action was timely filed on December 1, 2005 by his son, Michael (plaintiff herein), a licensed Illinois attorney and practicing Doctor of Medicine. Michael, an only child, was sole heir to his father's estate which had no creditors, no other parties in interest and was not opened to probate. He was also special administrator.

In early 2005, Applebaum had placed his license on inactive status. Prior to filing the underlying action and during its course, Applebaum was in contact with ARDC. At the time of the initial status hearing, February 2006, the court and defendants were informed of Applebaum's license status. In July 2006, Applebaum paid the fee differential changing his license status to active. An ARDC investigation, including

formal testimony in August, concluded in September 2006, without discipline.<sup>2</sup> A.14.

From: Brief and Argument of Appellants, p. 13.

On June 8, 2006, a “Motion To Dismiss Based On The Plaintiff’s Unlicensed Practice of Law” was filed. All defendants joined. The trial court denied the motion on August 17, 2006.

Pursuant to Supreme Court Rule 308, the trial court certified the following question:

Whether the nullity rule should be applied in a wrongful death action where the plaintiff is an attorney who has passed the bar and was on inactive status at the time of the filing of the complaint, was the special administrator, sole beneficiary and son of the decedent and prior to the hearing on the motion whose license was reinstated.

On December 18, 2006, the Appellate Court granted leave to appeal. On September 28, 2007, the Court issued an opinion dismissing the action. A Petition for Rehearing was timely filed on November 20 (an extension had been granted). The First District denied the petition on December 5.

## ARGUMENT

### **1. The Opinion Below Squarely Conflicts With This Court's Decisions In *Sperry* And *Brigham***

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<sup>2</sup> As the ARDC is an instrumentality of this Court, Plaintiff respectfully requests that it take judicial notice of these proceedings. *Walsh v. Union Oil Co.*, 53 Ill. 2d 295, 299 (Ill. 1972): court may take notice of its own proceedings.

This Court has been clear and definitive on the matter of the nullity rule:

“This rule is grounded in the fact that there are risks to individual clients and to the integrity of the legal system inherent in representation by an unlicensed person: The purpose of the nullity rule is \*\*\* to protect litigants against the mistakes of the ignorant and the schemes of the unscrupulous and to protect the court itself in the administration of its proceedings from those lacking requisite skills.” *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 389-390.

In *Sperry* the nullity rule was held by circuit and appellate courts to render an attorney fee petition by a professional corporation that had neglected to register pursuant to Illinois Supreme Court Rule 721 void *ab initio*. However, this Court reversed, finding that the nullity rule was inappropriately applied because the “goals of protecting the public and ensuring the integrity of the court system which underpin the invocation of the nullity rule were not implicated by the facts in the instant cause.” *Id* at 390-391.

An attorney on inactive status immediately returns to active status simply by paying the fee differential, as plaintiff did. Ill. Sup. Ct., R 756(a)(5) (2007). He or she retains the same attorney registration number, requires no additional credentialing, further examination or fitness of character evaluation, etc. *Id*. Nor need he or she petition to resume active status. Ill. R. Att’y Regis. & Disc. Comm’n, R 400 (2007) and *et seq*. The rules recognize no competency or fitness difference between active and inactive status, and therefore impose no requirements other than simply transferring funds. Ill. Sup. Ct., R 756. Clearly, as in *Sperry*, the “goals of protecting the public and ensuring the integrity of the court system which underpin the invocation of the nullity rule were not implicated by the facts in the instant cause.”

Nor can it be concluded that the option afforded Illinois attorneys to maintain their registration at a lower fee when not practicing law, has as its “primary purpose the protection of the public safety.” Manifestly it does not, as return to active practice is immediate upon payment of the fee differential. *Sperry*, at 383-384. Even under the recent continuing education requirements, which were not yet in effect at the time suit was filed, a return to active status remains effective instantly upon paying the fee difference, with fulfillment of MCLE required within 24 months thereafter. Ill. Sup. Ct., R 791 (2007).

Plaintiff, under the rules, would be no more qualified or fit to practice had he continued to pay the full fee, as he had prior to 2005, or if he had paid the difference prior to filing suit.

Indeed, this Court has already held that under similar circumstances there is “an important distinction between (1) an unlicensed person (e.g., an imposter or a disbarred attorney), and (2) an attorney admitted to practice but under suspension for nonpayment of State bar dues.” *Brigham*, 151 Ill. 2d at 67. The Appellate Court distinguished *Brigham* on the grounds that it involved a criminal defendant’s Sixth Amendment right to counsel when his attorney was stricken from the Master Roll due to his failure to pay fees. (A.8/Slip op. at 8). Yet this Court specifically cited *Brigham* as analogous and persuasive in reaching its conclusion in *Sperry* that no harm to the public was caused by the professional corporation’s failure to register. *Sperry* at 388. See also, *Joseph P. Storto, P.C. v. Becker*, 341 Ill. App. 3d 337, 341 (2003) (reasoning that failure of a law firm to register as a corporation is analogous to an attorney disqualified by failure to pay

bar dues and therefore not requiring the harsh sanction of nullifying its right to fees) (cited at length and with approval in *Sperry*, 214 Ill. 2d at 386-387).

In short, for purposes of the nullity rule, the Appellate Court erred in equating “inactive” with “not licensed.” A. 10/Slip op. at 10. Plaintiff, in good standing and listed on the Master Roll of Attorneys, with dues current and paid pursuant to Rule 756, was not an “unlicensed person” as contemplated by the nullity rule or in general parlance. See, e.g., *Hill v. State* (Tex. Crim. App. 1965), 393 S.W.2d 901, 904 (“status of a delinquent attorney not being a member of the State Bar \* \* \* does not place him in the position of being ‘unlicensed to practice law’ ...”) cited with approval, *Brigham* at 67.

The statute prohibiting the unauthorized practice of law, Ill. Rev. Stat. 1975, ch. 13, par. 1 (which subsequently became 705 ILCS 205/1) “is intended to prevent the practice of a profession *by one who has not first complied with the licensing requirements.*” *Rathke v. Lidisky*, 59 Ill. App. 3d 560, 562 (1978) (emphasis added). Cases involving the nullity rule speak of the rule’s purpose of preventing the unqualified practice of law. *Ratcliffe v. Apantaku*, 318 Ill. App. 3d 621, 627 (2000) (“not an attorney licensed to practice law”); *Chicago v. Witvoet*, 12 Ill. App. 3d 654, 655 (1973) (“a layman”); *Berg v. Mid-America Indus.*, 293 Ill. App. 3d 731, 737 (1997) (“a layperson,” “the lay agent”); *Blue v. People*, 223 Ill. App. 3d 594, 596 (1992) (“a nonlawyer,” “lay people”).

Plaintiff complied with the licensing requirements and “obtained a license” “to practice as an attorney or counselor at law within this State” “from the Supreme Court of this State.” 705 ILCS 205/1 (2007). Payment of the higher active fee, much like registration by the professional corporation in *Sperry*, would have allowed Plaintiff to

offer his legal services to the public. The optional “inactive status” registration was promulgated for the benefit of those already found fit and competent to practice law in this State—not to protect the public from fraud or incompetence.

And this is the distinction between this case and *Fruin v. Northwestern Medical Faculty Foundation, Inc.*, 194 Ill. App. 3d 1061 (1990) which the Appellate Court found controlling. (A 10/Slip op. at 10). *Fruin* involved a case filed by a Wisconsin attorney. This Court does not control or oversee foreign attorneys and only allows them to practice before our courts if they have certain demonstrated competence and experience. See Ill. Sup. Ct., R 701 (2007). Moreover, unlike the attorney in *Fruin*, this Court retains its disciplinary power over attorneys, such as Plaintiff, on the Master Roll.

Finally, even if the cases refusing to impose the nullity rule dealt only with a narrow “innocent litigant” exception as the Appellate Court holds, they still stand for the proposition, as does *Sperry*, that the harsh sanction of the nullity rule should not be invoked where the purpose of the rule will not be furthered. *Janiczek v. Dover Management Co.*, 134 Ill. App. 3d 543, 546 (1985) (disbarred attorney); *Pratt-Holdampf v. Trinity Med. Ctr.*, 338 Ill. App. 3d 1079, 1085 (2003) (layperson); *McEvers v. Stout*, 218 Ill. App. 3d 469, 472 (1991) (foreign attorney).

## **2. This Decision Of The First District, Fourth Division Is In Conflict With Other Appellate Court Divisions And Its Own Decisions**

Courts considering the nullity rule are, consistent with *Sperry*, unanimous in concluding that it applies only to an “unlicensed person” and they specify who the term comprises:

- “a layman” *Chicago v. Witvoet*, 12 Ill. App. 3d 654, 655 (Ill. App. Ct., First District, First Division 1973)
- “not an attorney licensed to practice law” *Ratcliffe v. Apantaku*, 318 Ill. App. 3d 621, 627 (Ill. App. Ct., First District, Second Division 2000)
- “one not licensed to practice law,” “nonattorney agents,” “nonattorney,” “lay agent” *Janiczek v. Dover Management Co.*, 134 Ill. App. 3d 543, 545 (Ill. App. Ct., First District, Fourth Division 1985)
- “a layperson,” “the lay agent” *Berg v. Mid-America Indus.*, 293 Ill. App. 3d 731, 737 (Ill. App. Ct., First District, Fifth Division 1997)
- “a person not licensed to practice in Illinois” *Fruin v. Northwestern Medical Faculty Foundation, Inc.*, 194 Ill. App. 3d 1061, 1063 (Ill. App. Ct., First District, Sixth Division 1990)
- “a nonlawyer,” “lay people,” “a person who is not licensed to practice law,” “one not licensed to practice law” *Blue v. People*, 223 Ill. App. 3d 594, 596 (Ill. App. Ct., Second District 1992)
- “one not licensed to practice law,” “nonattorney agents,” “a layperson” *People v. Dunson*, 316 Ill. App. 3d 760, 765 (Ill. App. Ct., Second District 2000)
- “a person not licensed to practice in Illinois” *Pratt-Holdampf v. Trinity Med. Ctr.*, 338 Ill. App. 3d 1079, 1083 (Ill. App. Ct., Third District 2003)
- “persons [not] licensed by our supreme court” *McEvers v. Stout*, 218 Ill. App. 3d 469, 471-472 (Ill. App. Ct., Fourth District 1991);

Application of the nullity rule to a licensed Illinois attorney is not and never has been intended. See *Remole Soil Service, Inc. v. Benson*, 68 Ill. App. 2d 234, 237 (Ill. App.

Ct. 1966), citing *People v. Hubbard*, 313 Ill. 346, 350 (Ill. 1924) (“the act to prevent and punish frauds in the practice of law” is “on the same subject matter” as the “act [that] provides that no person, without having previously obtained a license for the purpose, shall be permitted to practice as an attorney or counselor at law, or to commence, conduct or defend and action or suit in which he is not a party concerned.”)

Applying it to this matter, as the First District has, is contrary to all precedent and purpose.

### **3. The First District's Opinion Conflicts With Decisions From Other Jurisdictions Throughout The Country, Cited With Approval By This Court, Further Supporting The Need For Supreme Court Review**

This Court recognizes that the fee differential between active and inactive status does not change the underlying competence and fitness recognized by admission to the Bar. *People v. Brigham*, 151 Ill. 2d 58, 70-71 (1992). Nothing in the structure of the rules can support the inference that differential fees paid by such persons are a judgment that preventing their practice is a regulation enacted to protect the public. Cf. *Reese v. Peters*, 926 F.2d 668, 669-670 (7th Cir. 1991) (“persons who satisfied the court of their legal skills but later ran afoul of some technical rule. Lawyers who do not pay their dues violate a legal norm, but not one established for the protection of clients...”) cited with approval, *Brigham* at 65; and cited more generally at 64-65 in a discussion of “counsel,” not limited to the criminal context.

Further, there is nothing in the caselaw to suggest that for an attorney admitted to the Bar, in good standing and registered on the Master Roll of Attorneys, “unauthorized”

under the rules has ever been equated with “unlicensed.” Cf. *Hill v. State* (Tex. Crim. App. 1965), 393 S.W.2d 901, 904 (“status of a delinquent attorney not being a member of the State Bar \* \* \* does not place him in the position of being ‘unlicensed to practice law...’”) cited with approval, *Brigham* at 67.

The fact that the First District disagrees with this Court and other courts cited with approval by this Court is another reason why this Court should review and reverse the opinion.

**4. The First District’s Decision Infringes On This Court’s Exclusive And Plenary Jurisdiction Over Attorney Regulation. Its Opinion Renders Cases Subject To Collateral Attack.**

As *Sperry* points out, this Court has “created a comprehensive scheme to regulate attorneys and discipline them for misconduct.... [and] has promulgated detailed rules which prescribe the appropriate discipline when the Rules of Professional Conduct are violated..” 214 Ill. 2d at 383. “The purpose of this regulatory scheme is to protect the public and maintain the integrity of the legal profession.” *Cripe v. Leiter*, 184 Ill. 2d 185, 196 (Ill. 1998). The nullity rule serves as a form of disciplinary rule with respect to nonlawyers where no comprehensive regulatory scheme is in place and the risks posed by one who has never qualified to practice law are clearly different. To apply it in this case would therefore unduly interfere with and usurp the comprehensive scheme put in place by the Supreme Court which does not even contemplate this harsh option among its disciplinary choices. Ill. Sup. Ct., R 770 (2007) Cf. *Cripe*, at 197 (reasoning that attorney-client relationship, unlike merchant-consumer relationship, is closely regulated

by Supreme Court, and therefore not appropriate to apply Illinois Consumer Fraud Act to attorney-client cases). See also, *Lustig v. Horn*, 315 Ill. App. 3d 319, 325-28 (2000) (denial of attorney fees, imposed solely as a sanction for unprofessional conduct would constitute impermissible infringement on the exclusive power of the Supreme Court, acting through the ARDC, to adjudicate disciplinary matters.)

In its opinion, the First District determined that an attorney admitted to practice in this state by the Illinois Supreme Court, who paid bar dues on time pursuant to Rule 756, was never disciplined and who was listed on the Master Roll of Attorneys is “not licensed.” A.10/Slip op. at 10. By declaration of the First District, plaintiff had his license “taken away.” “The license to practice law is a privilege granted only by the Supreme Court and can only be delimited, restricted or taken away by that court or by statutory enactment.” *Remole Soil Service, Inc. v. Benson*, 68 Ill. App. 2d 234, 236-237 (Ill. App. Ct. 1966). Further this Court has prescribed a specific regulatory scheme for regulating attorney licensure. *Sperry* at 383. The decision of the Appellate Court infringes on that scheme and imperils the licenses of other attorneys. If left standing, this decision shifts all qualified Illinois attorneys on inactive status to unlicensed status.

The opinion also jeopardizes the finality of decisions rendered by competent courts in this state as the technical matter of any fee differential/shortfall would render cases void *ab initio* and open to collateral attack at any time. Agreement by this Court that the failure of a qualified, licensed attorney to pay an appropriate fee is tantamount to representation

by a non-lawyer (e.g., one who has never qualified to practice law, impostor, etc.) might give new hope to disappointed litigants.<sup>3</sup>

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<sup>3</sup> The Court might take judicial notice that at least one high profile attorney (and Supreme Court nominee) and high stakes litigator, Harriet Meirs, was suspended from the bar for failure to pay her bar fees. *See, e.g.,* “Senators Assail Miers's Replies, Ask for Details” *The Washington Post*, October 20, 2005; Page A01 available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/19/AR2005101902402.html>.

## CONCLUSION

An Illinois licensed attorney maintains his or her license unless it is lost under the regulatory scheme devised by the Illinois Supreme Court. An attorney does not become unlicensed while on inactive status. The nullity rule applies to “unlicensed persons” as unequivocally stated in *Sperry*. Underlying the rule are clearly stated public policy reasons. In the instant case, none of them are applicable. Accordingly, plaintiff respectfully requests that the Court grant this Petition, and reverse the judgment below.

Respectfully Submitted,

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