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FILED

SID J. WHITE

MAR 5 1986

CLERK, SUPREME COURT

By *pl*
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

IN THE MATTER OF THE FLORIDA

BAR RE: AMENDMENT TO CODE

Case No.

OF PROFESSIONAL RESPONSIBILITY

(Contingent Fees)

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PETITION FOR AMENDMENT

OF THE CODE OF PROFESSIONAL RESPONSIBILITY

THE FLORIDA BAR, by the direction of its Board of Governors respectfully shows unto the Court:

1. This matter is within the exclusive jurisdiction of the Supreme Court of Florida under Article V, Section ~~2(a)~~, Florida Constitution (1968). *15*

2. This petition seeks to amend DR 2-106 of the Code of Professional Responsibility. The proposed changes are attached to this petition as Appendix A. Because there is a petition pending before this Court to replace the current Code of Professional Responsibility with the Rules of Professional Conduct, The Florida Bar, Re: Code of Professional Responsibility, Case No. 65,877, Appendix B sets forth the changes to proposed Rule 4-1.5 and its Comments which are consistent with those amendments being proposed to DR 2-106.

3. The Board of Governors submits this petition pursuant to its responsibilities as outlined in the Preamble to the Integration Rule of The Florida Bar to ". . . improve the administration of justice, and to advance the science of jurisprudence, . . .". The Board has carefully considered the disciplinary rules regulating attorneys' fees and believes the changes it proposes are in the interest of the public, the profession and this Court.

4. An additional ground for this Court involving its jurisdiction in the matter is the Florida Legislature's recent enactment of F.S. 768.575, which among other things, invites this Court to exercise its jurisdiction and authority and adopt guidelines for contingent attorneys' fees. For reasons set forth in its brief, The Florida Bar respectfully urges this Court to adopt guidelines or regulations which apply to "personal injury and wrongful death" cases, rather than just "medical negligence" cases.

5. The Board of Governors recognizes the proposed rule changes will not be without controversy within The Florida Bar. There are sections, committees and members of The Florida Bar that may have strong positions on this proposal. For that reason, a notice and summary of the petition and proposed changes will be furnished to the membership in the March 15, 1986 edition of The Florida Bar News.

6. The Florida Bar's brief in support of this petition will be filed with this Court no later than Friday, March 14, 1986. A copy of the petition and brief will be furnished to each member of The Florida Bar who requests them following publication in The Florida Bar News.

WHEREFORE, The Florida Bar respectfully petitions this Court for adoption of the attached revision to the Code of Professional Responsibility.

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Attachments:

- Appendix A - Proposed changes to Code of Professional Responsibility
- Appendix B - Proposed changes to Proposed Rules of Professional Conduct
- Appendix C - Proposed Statement of Client's Rights

DR 2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

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

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

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

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

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

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

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case, nor shall he enter into an arrangement for, charge, or collect any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

(D) Charges made by any lawyer or law firm under an approved credit plan shall be only for services actually rendered or cash actually paid on behalf of the client. No higher fee shall be charged and no additional charge shall be imposed by reason of a lawyer's or law firm's participation in an approved credit plan.

(E) Every attorney who, in connection with an action or claim for damages for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only ~~where such~~ under the following requirements:

(1) The fee arrangement is reduced to a written contract, signed by the client, and by an attorney for himself or for the law firm representing the client. No attorney or firm may participate in the fee without the consent of the client in writing.

Each participating attorney or law firm shall sign the contract or agree in writing to be bound by the terms of the contract with the client, and shall agree to assume the same legal responsibility to the client for the performance of the services in question as if the attorney or law firm were a partner of the other attorneys involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of DR 2-107 shall apply to such fee contracts.

(2) The contract shall contain the following provisions:

(a) "The undersigned client has, before signing this contract, received and read The Statement of Client's Rights, and understands each of the rights set forth therein. The undersigned client has signed the Statement and received a signed copy to refer to while being represented by the undersigned attorney(s)."

(b) "This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney(s) for the work performed during that time. If the attorney(s) have advanced funds to others in representation of the client, the attorney(s) are entitled to be reimbursed for such amounts as they have reasonably advanced on behalf of the client."

(F) The contract for representation of a client in a matter set forth in DR 2-106(E) may provide for a contingent fee arrangement as agreed upon by the client and the attorney, except as limited by the following provisions.

(1) Without prior court approval as specified below, any contingent fee which exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

(a) 33 1/3% of any recovery up to \$2 million through the time of filing of the initial Answer;

(b) 40% of any recovery up to \$2 million through the trial of the case;

(c) 30% of any recovery in excess of \$2 million;

(d) If all defendants admit liability at the time of filing their initial Answers and request a trial only on damages:

(i) 33 1/3% of any recovery up to \$2 million through trial;

(ii) 20% of any recovery in excess of \$2 million;

(e) An additional 5% of any recovery after notice of appeal is filed or post-judgment relief or action is required for recovery on the judgment.

(2) If any client is unable to obtain the attorney of the client's choice because of the limitations set forth in (F)(1), the client may petition the circuit court for authorization of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the court determines the client has a complete understanding of his or her rights and the

terms of the proposed contract. The application for authorization of such a contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under DR 2-106(A) and (B).

(3) In cases where the client is to receive a recovery which will be paid to the client on a future structured or periodic basis, the contingent fee percentage shall only be calculated on the cost of the structured verdict or settlement. If the cost is unknown, the fee percentage shall be calculated on the present money value of the structured verdict or settlement. If the damages and the fee are to be paid out over the same schedule then this limitation does not apply. No attorney may separately negotiate with the defendant for that attorney's fees in a structured verdict or settlement where such separate negotiations would place the attorney in a position of conflict.

(G) Before an attorney enters into a contingent fee contract for representation of a client in a matter set forth in DR 2-106(E), the attorney shall provide the client with a copy of the Statement of Client's Rights (in the form approved by the Supreme Court of Florida) and shall afford the client a full and complete opportunity to understand each of the Rights as set forth therein. A copy of the Statement, signed by both the client and the attorney, shall be given to the client to retain and the attorney shall keep a copy in the client's file. The Statement shall be retained by the attorney with the written fee contract and closing statement under the same conditions and requirements as (H) below.

(H) In the event there is a recovery, upon the conclusion of the representation, the attorney shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating attorney or law firm. The closing statement shall be executed by all participating attorneys, as well as the client, and each shall receive a copy. Each participating attorney shall retain a copy of the written fee contract and closing statement for six years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon Order of the Supreme Court of Florida, by a Circuit Judge in Florida, a referee, grievance committee or authorized representatives of the Board of Governors of The Florida Bar.

RULES OF PROFESSIONAL CONDUCT

4-1.5 Fees

(a) A LAWYER SHALL NOT ENTER INTO AN AGREEMENT FOR, CHARGE, OR COLLECT AN ILLEGAL OR CLEARLY EXCESSIVE FEE.

(b) A FEE IS CLEARLY EXCESSIVE WHEN, AFTER A REVIEW OF THE FACTS, A LAWYER OF ORDINARY PRUDENCE WOULD BE LEFT WITH A DEFINITE AND FIRM CONVICTION THAT THE FEE IS IN EXCESS OF A REASONABLE FEE. FACTORS TO BE CONSIDERED AS GUIDES IN DETERMINING THE REASONABLENESS OF A FEE INCLUDE THE FOLLOWING:

(1) THE TIME AND LABOR REQUIRED, THE NOVELTY AND DIFFICULTY OF THE QUESTIONS INVOLVED, AND THE SKILL REQUISITE TO PERFORM THE LEGAL SERVICE PROPERLY;

(2) THE LIKELIHOOD, IF APPARENT TO THE CLIENT, THAT THE ACCEPTANCE OF THE PARTICULAR EMPLOYMENT WILL PRECLUDE OTHER EMPLOYMENT BY THE LAWYER;

(3) THE FEE CUSTOMARILY CHARGED IN THE LOCALITY FOR SIMILAR LEGAL SERVICES;

(4) THE AMOUNT INVOLVED AND THE RESULTS OBTAINED;

(5) THE TIME LIMITATIONS IMPOSED BY THE CLIENT OR BY THE CIRCUMSTANCES;

(6) THE NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENT;

(7) THE EXPERIENCE, REPUTATION, AND ABILITY OF THE LAWYER OR LAWYERS PERFORMING THE SERVICES; and

(8) WHETHER THE FEE IS FIXED OR CONTINGENT.

(c) WHEN THE LAWYER HAS NOT REGULARLY REPRESENTED THE CLIENT, THE BASIS OR RATE OF THE FEE SHALL BE COMMUNICATED TO THE CLIENT, PREFERABLY IN WRITING, BEFORE OR WITHIN A REASONABLE TIME AFTER COMMENCING THE REPRESENTATION.

(d) AS TO CONTINGENT FEES:

(1) A FEE MAY BE CONTINGENT ON THE OUTCOME OF THE MATTER FOR WHICH THE SERVICE IS RENDERED, EXCEPT IN A MATTER IN WHICH A CONTINGENT FEE IS PROHIBITED BY PARAGRAPH (3) OR BY LAW. A CONTINGENT FEE AGREEMENT SHALL BE IN WRITING AND SHALL STATE THE METHOD BY WHICH THE FEE IS TO BE DETERMINED, INCLUDING THE PERCENTAGE OR PERCENTAGES THAT SHALL ACCRUE TO THE LAWYER IN THE EVENT OF SETTLEMENT, TRIAL OR APPEAL,

LITIGATION AND OTHER EXPENSES TO BE DEDUCTED FROM THE RECOVERY, AND WHETHER SUCH EXPENSES ARE TO BE DEDUCTED BEFORE OR AFTER THE CONTINGENT FEE IS CALCULATED. UPON CONCLUSION OF A CONTINGENT FEE MATTER, THE LAWYER SHALL PROVIDE THE CLIENT WITH A WRITTEN STATEMENT STATING THE OUTCOME OF THE MATTER AND, IF THERE IS A RECOVERY, SHOWING THE REMITTANCE TO THE CLIENT AND THE METHOD OF ITS DETERMINATION.

(2) EVERY LAWYER WHO ACCEPTS A RETAINER OR ENTERS INTO AN AGREEMENT, EXPRESS OR IMPLIED, FOR COMPENSATION FOR SERVICES RENDERED OR TO BE RENDERED IN ANY ACTION, CLAIM OR PROCEEDING, WHEREBY THE LAWYER'S COMPENSATION IS TO BE DEPENDENT OR CONTINGENT IN WHOLE OR IN PART UPON THE SUCCESSFUL PROSECUTION OR SETTLEMENT THEREOF SHALL DO SO ONLY WHERE SUCH FEE ARRANGEMENT IS REDUCED TO A WRITTEN CONTRACT, SIGNED BY THE CLIENT, AND BY A LAWYER FOR THE LAWYER OR FOR THE LAW FIRM REPRESENTING THE CLIENT. NO LAWYER OR FIRM MAY PARTICIPATE IN THE FEE WITHOUT THE CONSENT OF THE CLIENT IN WRITING. EACH PARTICIPATING LAWYER OR LAW FIRM SHALL SIGN THE CONTRACT WITH THE CLIENT, AND SHALL AGREE TO ASSUME JOINT RESPONSIBILITY FOR THE REPRESENTATION. THE CLIENT SHALL BE FURNISHED WITH A COPY OF THE SIGNED CONTRACT AND ANY SUBSEQUENT NOTICES OR CONSENTS. ALL PROVISIONS OF THIS RULE SHALL APPLY TO SUCH FEE CONTRACTS.

(3) A LAWYER SHALL NOT ENTER INTO AN ARRANGEMENT FOR, CHARGE, OR COLLECT:

a. ANY FEE IN A DOMESTIC RELATIONS MATTER, THE PAYMENT OR AMOUNT OF WHICH IS CONTINGENT UPON THE SECURING OF A DIVORCE OR UPON THE AMOUNT OF ALIMONY OR SUPPORT, OR PROPERTY SETTLEMENT IN LIEU THEREOF; OR

b. A CONTINGENT FEE FOR REPRESENTING A DEFENDANT IN A CRIMINAL CASE.

(4) A LAWYER WHO ENTERS INTO AN ARRANGEMENT FOR, CHARGES, OR COLLECTS ANY FEE IN AN ACTION OR CLAIM FOR PERSONAL INJURY OR FOR PROPERTY DAMAGES OR FOR DEATH OR LOSS OF SERVICES RESULTING FROM PERSONAL INJURIES BASED UPON TORTIOUS CONDUCT OF ANOTHER, INCLUDING PRODUCTS LIABILITY CLAIMS, WHEREBY THE COMPENSATION IS TO BE DEPENDENT OR CONTINGENT IN WHOLE OR IN PART UPON THE SUCCESSFUL PROSECUTION OR SETTLEMENT THEREOF SHALL DO SO ONLY UNDER THE FOLLOWING REQUIREMENTS:

a. THE CONTRACT SHALL CONTAIN THE FOLLOWING PROVISIONS:

(i) "THE UNDERSIGNED CLIENT HAS, BEFORE SIGNING THIS CONTRACT, RECEIVED AND READ THE

STATEMENT OF CLIENT'S RIGHTS, AND UNDERSTANDS EACH OF THE RIGHTS SET FORTH THEREIN. THE UNDERSIGNED CLIENT HAS SIGNED THE STATEMENT AND RECEIVED A SIGNED COPY TO REFER TO WHILE BEING REPRESENTED BY THE UNDERSIGNED ATTORNEY(S)."

(ii) "THIS CONTRACT MAY BE CANCELLED BY WRITTEN NOTIFICATION TO THE ATTORNEY AT ANY TIME WITHIN 3 BUSINESS DAYS OF THE DATE THE CONTRACT WAS SIGNED, AS SHOWN BELOW, AND IF CANCELLED THE CLIENT SHALL NOT BE OBLIGATED TO PAY ANY FEES TO THE ATTORNEY(S) FOR THE WORK PERFORMED DURING THAT TIME. IF THE ATTORNEY(S) HAVE ADVANCED FUNDS TO OTHERS IN REPRESENTATION OF THE CLIENT, THE ATTORNEY(S) ARE ENTITLED TO BE REIMBURSED FOR SUCH AMOUNTS AS THEY HAVE REASONABLY ADVANCED ON BEHALF OF THE CLIENT."

b. THE CONTRACT FOR REPRESENTATION OF A CLIENT IN A MATTER SET FORTH IN RULE 4-1.5(d)(4) MAY PROVIDE FOR A CONTINGENT FEE ARRANGEMENT AS AGREED UPON BY THE CLIENT AND THE LAWYER, EXCEPT AS LIMITED BY THE FOLLOWING PROVISIONS.

(i) WITHOUT PRIOR COURT APPROVAL AS SPECIFIED BELOW, ANY CONTINGENT FEE WHICH EXCEEDS THE FOLLOWING STANDARDS SHALL BE PRESUMED, UNLESS REBUTTED, TO BE CLEARLY EXCESSIVE:

(a) 33 1/3% OF ANY RECOVERY UP TO \$2 MILLION THROUGH THE TIME OF FILING OF THE INITIAL ANSWER;

(b) 40% OF ANY RECOVERY UP TO \$2 MILLION THROUGH THE TRIAL OF THE CASE;

(c) 30% OF ANY RECOVERY IN EXCESS OF \$2 MILLION;

(d) IF ALL DEFENDANTS ADMIT LIABILITY AT THE TIME OF FILING THEIR INITIAL ANSWERS AND REQUEST A TRIAL ONLY ON DAMAGES:

- i. 33 1/3% OF ANY RECOVERY UP TO \$2 MILLION THROUGH TRIAL;
- ii. 20% OF ANY RECOVERY IN EXCESS OF \$2 MILLION;

(e) AN ADDITIONAL 5% OF ANY RECOVERY AFTER NOTICE OF APPEAL IS FILED OR POST-JUDGMENT RELIEF OR ACTION IS REQUIRED FOR RECOVERY ON THE JUDGMENT.

(ii) IF ANY CLIENT IS UNABLE TO OBTAIN THE LAWYER OF THE CLIENT'S CHOICE BECAUSE OF THE LIMITATIONS SET FORTH IN (d)(4)b.(i), THE CLIENT MAY PETITION THE CIRCUIT COURT FOR AUTHORIZATION OF ANY FEE CONTRACT BETWEEN THE CLIENT AND A LAWYER OF THE CLIENT'S CHOOSING. SUCH AUTHORIZATION SHALL BE GIVEN IF THE COURT DETERMINES THE CLIENT HAS A COMPLETE UNDERSTANDING OF HIS OR HER RIGHTS AND THE TERMS OF THE PROPOSED CONTRACT. THE APPLICATION FOR AUTHORIZATION OF SUCH A CONTRACT CAN BE FILED AS A SEPARATE PROCEEDING BEFORE SUIT OR SIMULTANEOUSLY WITH THE FILING OF A COMPLAINT. PROCEEDINGS THEREON MAY OCCUR BEFORE SERVICE ON THE DEFENDANT AND THIS ASPECT OF THE FILE MAY BE SEALED. AUTHORIZATION OF SUCH A CONTRACT SHALL NOT BAR SUBSEQUENT INQUIRY AS TO WHETHER THE FEE ACTUALLY CLAIMED OR CHARGED IS CLEARLY EXCESSIVE UNDER RULE 4-1.5 (a) and (b).

(iii) IN CASES WHERE THE CLIENT IS TO RECEIVE A RECOVERY WHICH WILL BE PAID TO THE CLIENT ON A FUTURE STRUCTURED OR PERIODIC BASIS, THE CONTINGENT FEE PERCENTAGE SHALL ONLY BE CALCULATED ON THE COST OF THE STRUCTURED VERDICT OR SETTLEMENT. IF THE COST IS UNKNOWN, THE FEE PERCENTAGE SHALL BE CALCULATED ON THE PRESENT MONEY VALUE OF THE STRUCTURED VERDICT OR SETTLEMENT. IF THE DAMAGES AND THE FEE ARE TO BE PAID OUT OVER THE SAME SCHEDULE THEN THIS LIMITATION DOES NOT APPLY. NO LAWYER MAY SEPARATELY NEGOTIATE WITH THE DEFENDANT FOR THAT LAWYER'S FEES IN A STRUCTURED VERDICT OR SETTLEMENT WHERE SUCH SEPARATE NEGOTIATIONS WOULD PLACE THE LAWYER IN A POSITION OF CONFLICT.

c. BEFORE A LAWYER ENTERS INTO A CONTINGENT FEE CONTRACT FOR REPRESENTATION OF A CLIENT IN A MATTER SET FORTH IN RULE 4-1.5 (d)(4), THE LAWYER SHALL PROVIDE THE CLIENT WITH A COPY OF THE STATEMENT OF CLIENT'S RIGHTS AND SHALL AFFORD THE CLIENT A FULL AND COMPLETE OPPORTUNITY TO UNDERSTAND EACH OF THE RIGHTS AS SET FORTH THEREIN. A COPY OF THE STATEMENT, SIGNED BY BOTH

THE CLIENT AND THE LAWYER, SHALL BE GIVEN TO THE CLIENT TO RETAIN AND THE LAWYER SHALL KEEP A COPY IN THE CLIENT'S FILE. THE STATEMENT SHALL BE RETAINED BY THE LAWYER WITH THE WRITTEN FEE CONTRACT AND CLOSING STATEMENT UNDER THE SAME CONDITIONS AND REQUIREMENTS AS RULE 4-1.5 (d)(5).

(5) IN THE EVENT THERE IS A RECOVERY, UPON THE CONCLUSION OF THE REPRESENTATION, THE LAWYER SHALL PREPARE A CLOSING STATEMENT REFLECTING AN ITEMIZATION OF ALL COSTS AND EXPENSES, TOGETHER WITH THE AMOUNT OF FEE RECEIVED BY EACH PARTICIPATING LAWYER OR LAW FIRM. THE CLOSING STATEMENT SHALL BE EXECUTED BY ALL PARTICIPATING LAWYERS, AS WELL AS THE CLIENT, AND EACH SHALL RECEIVE A COPY. EACH PARTICIPATING LAWYER SHALL RETAIN A COPY OF THE WRITTEN FEE CONTRACT AND CLOSING STATEMENT FOR SIX YEARS AFTER EXECUTION OF THE CLOSING STATEMENT. ANY CONTINGENT FEE CONTRACT AND CLOSING STATEMENT SHALL BE AVAILABLE FOR INSPECTION AT REASONABLE TIMES BY THE CLIENT, BY ANY OTHER PERSON UPON JUDICIAL ORDER, OR BY THE APPROPRIATE DISCIPLINARY AGENCY.

(e) A DIVISION OF FEE BETWEEN LAWYERS WHO ARE NOT IN THE SAME FIRM MAY BE MADE ONLY IF:

(1) THE DIVISION IS IN PROPORTION TO THE SERVICES PERFORMED BY EACH LAWYER OR, BY WRITTEN AGREEMENT WITH THE CLIENT, EACH LAWYER ASSUMES JOINT RESPONSIBILITY FOR THE REPRESENTATION;

(2) THE CLIENT IS ADVISED OF AND DOES NOT OBJECT TO THE PARTICIPATION OF ALL THE LAWYERS INVOLVED; AND

(3) THE TOTAL FEE IS REASONABLE.

(f) CHARGES MADE BY ANY LAWYER OR LAW FIRM UNDER AN APPROVED CREDIT PLAN SHALL BE ONLY FOR SERVICES ACTUALLY RENDERED OR CASH ACTUALLY PAID ON BEHALF OF THE CLIENT. NO HIGHER FEE SHALL BE CHARGED AND NO ADDITIONAL CHARGE SHALL BE IMPOSED BY REASON OF A LAWYER'S OR LAW FIRM'S PARTICIPATION IN AN APPROVED CREDIT PLAN.

Comment:

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its

computation. It is sufficient, for example, to state the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Rule 4-1.8(e) should be consulted regarding a lawyer's providing financial assistance to a client in connection with litigation.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 4-1.16 (d). A lawyer is not, however, required to return retainers which, pursuant to an agreement with a client, are not refundable. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 4-1.8(i). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Rule 4-1.5(d)(3) does not apply to lawyers seeking to obtain or enforce judgments for arrearages.

Contingent Fee Regulation

Rule 4-1.5(d)(4) should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context.

Rule 4-1.5(d)(4)b. is intended to apply only to contingent aspects of fee agreements. In the situation where a lawyer and client enter a contract for part non-contingent and part contingent attorney's fees, Rule 4-1.5(d)(4)b. should not be construed to apply to and prohibit or limit the non-contingent portion of the fee agreement. An attorney could properly charge and retain the non-contingent portion of the fee even if the matter was not successfully prosecuted or if the non-contingent portion of the fee exceeded the schedule set forth in Rule 4-1.5(d)(4)b. Rule 4-1.5(d)(4)b. should, however, be construed to apply to any additional contingent portion of such a contract when considered together with earned non-contingent fees. Thus, under such a contract a lawyer may demand or collect only such additional contingent fees as would not cause the total fees to exceed the schedule set forth in Rule 4-1.5(d)(4)b.

The limitations in Rule 4-1.5(d)(4)b.(i)(d) are only to be applied in the case where all the defendants admit liability at the time they file their initial answer and the trial is only on the issue of the amount or extent of the loss or the extent of injury suffered by the client. If the trial involves not only the issue of damages but such questions as: proximate cause, affirmative defenses, seat belt defense, or other similar matters; the limitations are not to be applied because of the contingent nature of the case being left for resolution by the trier of fact.

Rule 4-1.5(d)(4)b.(ii) provides the limitations set forth in paragraph (d)(4)b.(i) may be waived by the client upon approval by a circuit court judge. This waiver provision may not be used to authorize a lawyer to charge a client a fee which would exceed Rule 4-1.5(a) or (b). It is contemplated that this waiver provision will not be necessary except where the client wants to retain a particular lawyer to represent him or her, or the case involves complex, difficult or novel questions of law or fact which would justify a contingent fee greater than the schedule but not a contingent fee which would exceed Rule 4-1.5(b).

Upon a petition by a client, the trial court reviewing the waiver request must grant that request if the trial court finds the client:

a) Understands his or her right to have the limitations in Rule 4-1.5(d)(4)b. applied in the specific matter, and

b) Understands and approves the terms of the proposed contract.

The consideration by the trial court of the waiver petition is not to be used as an opportunity for the court to inquire into the merits or details of the particular action or claim which is the subject of the contract.

The proceedings before the trial court and the trial court's decision on a waiver request are to be confidential and not subject to discovery by any of the parties to the action, or by any other individual or entity except The Florida Bar. However, terms of the contract approved by the trial court may be subject to discovery if the contract (without court approval) were subject to discovery under applicable case law or rules of evidence.

Rule 4-1.5(d)(4)b.(iii) prohibits a lawyer from charging the contingent fee percentage on the total, future value of a recovery being paid on a structured or periodic basis. This prohibition does not apply if the lawyer's fee is being paid over the same length of time as the schedule of payments to the client.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, the most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 4-5.1 for purposes of the matter involved.

Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

STATEMENT OF CLIENT'S RIGHTS

Before you, the prospective client, arrange a contingency fee agreement with a lawyer, you should understand this Statement of your rights as a client. This Statement is not a part of the actual contract between you and your lawyer, but as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with one lawyer you may talk with other lawyers.

2. Any contingency fee contract must be in writing and you have 3 business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within 3 business days of signing the contract. If you withdraw from the contract within the first 3 days you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. But if your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training and experience. If you ask, the lawyer should tell you specifically about his or her actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingency fee contract with you, a lawyer must advise you whether he or she intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers he or she should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least one lawyer from each law firm must sign the contingency fee contract.

5. If your lawyer intends to refer a case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers,

you should sign a new contract which includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interest and is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will be or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus the costs.

8. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money which you might have to pay to your lawyer for costs, and liability you might have for attorney's fees to the other side.

9. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement you need not pay any money to anyone, including your lawyer. You also have the right to have every law firm working on your case sign this closing statement.

10. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

11. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

12. If at any time, you, the client, believe that your lawyer has charged an excessive or illegal fee, you, the client, have the right to report the matter to The Florida Bar, the agency

that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar, call 800-342-8060, or contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit.

CLIENT SIGNATURE

ATTORNEY SIGNATURE

DATE

DATE