# Supreme Court of Florida

No. 68,417

The Florida Bar re Amendment to the Code of Professional Responsibility (Contingent Fees).

REVISED

[June 30, 1986]

PER CURIAM.

The board of governors of the Florida Bar has petitioned the Court to amend disciplinary rule 2-106 of the Code of Professional Responsibility. The proposed amendment deals with contingent fee contracts and provides for a statement of client's rights and a three-day contract cancellation period as well as establishing a schedule of fees which can be charged in contingent fee contracts. We rejected a similar proposal in 1977 "due to the absence of competent evidence demonstrating any significant abuse of contingent fee arrangements." The Florida Bar re Amendment to Code of Professional Responsibility, 349 So.2d 630, 632 (Fla. 1977).[1]

The legal profession has generally viewed contingent fees as the "poor man's keys to the courthouse," and there is still no hard evidence that the contingent fee system is being abused. As the board of governors points out, however, it appears that the public perceives contingent fees to be abusive in the wake of rising insurance costs and large verdicts. The state legislature also appears to have discerned abuses in the contingent fee system because it enacted section 768.595, Florida Statutes

[1] Limitations on contingent fees have been declared unconstitutional in at least 2 states: Heller v. Frankston, 504 Pa. 528, 475 A.2d 1291 (1984); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

(1985), which contains a schedule of permissible attorney's fees in medical malpractice actions.[2]

In May 1985 the board of governors established a special commission on contingent fees and charged it with reviewing the available information on such fees in order to determine the existence of actual or perceived abuses and to make recommendations for changes, if necessary. After holding several hearings, the special commission delivered a preliminary report to the board. The board asked the bar's tort litigation commission to review that preliminary report and, subsequently, to work with the special commission in preparing a final report. In January 1986 the board adopted the substance of the commissions' recommendations, but amended the recommended fee schedule upward.

We have reviewed numerous comments and suggestions regarding the proposed amendment. Individual lawyers and members of the public, as well as groups such as the Academy of Florida Trial Lawyers, the Florida Medical Association, and Associated Industries of Florida, have responded. Their comments and suggestions range from basic philosophical differences as to whether a schedule of contingent fees needs to be or should be adopted to seeking to have section 768.595 declared unconstitutional to whether the recommended fee schedule is too high or too low to technical changes in the proposed amendment.

In its 1977 opinion this Court expressed its belief (possibly, its hope) that lawyer advertising would create greater public awareness regarding attorneys' fees and services and that competition would provide a self-regulator on fees. 349 So.2d at 632. After studying the proposed amendment and the responses we have received, such does not appear to be the case. We therefore

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[2] The fee schedule is contained in § 768.595(7), which also provides that paragraph (7) will be superseded by a contingent fee schedule adopted by this Court. Paragraph (7) is hereby superseded.

adopt, with some changes, the board's proposed amendment of disciplinary rule 2-106.[3]

As the major change from the board's proposal, the Court originally adopted the commissions' final report. On rehearing the board explained in a more satisfactory fashion why it did not adopt the commissions' recommendations and asked that we modify 2-106(F). After further consideration, we have adopted the modifications proposed on rehearing. Those changes have been incorporated into the attached rule.[4] As the schedule now stands, it covers "recovery" in all personal injury and wrongful death contingent fee contracts, not just those in medical malpractice cases. It may be that, in the future, it can be demonstrated that further amendment is needed to, for example, adjust the percentages or dollar caps or to provide for net recovery. If such is shown, we will entertain further amendment to disciplinary rule 2-106. We have also added the demand for appointment of arbitrators to 2-106(F)(1)(b). The amended text of disciplinary rule 2-106 is set out following this opinion.[5] This amendment will be effective at 12:01 a.m., July 1, 1986, for contingent fee contracts entered into on or after that date.

It is so ordered.

BOYD, C.J., and OVERTON, McDONALD and EHRLICH, JJ., Concur
OVERTON, J., Concurs specially with an opinion
EHRLICH, J., Concurs specially with an opinion
BARKETT, J., Concurs in part and dissents in part with an opinion, in which ADKINS and SHAW, JJ., Concur

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[3] Several other states have limited contingent fees either through legislation or through court rule. The schedule we adopt is somewhere between the apparent extremes of California (10% of any recovery exceeding $200,000 in claims against health care providers, Cal. Bus. & Prof. Code § 6146(a)(4) (Deering 1986)) and Oklahoma (50% of net amount of judgment, Okla. Stat. tit. 5, § 7 ((1981)).

[4] The changes are: removal of the fee limitation prior to filing suit; clarification of the post-judgment fee limit; clarification regarding multiple defendants; and modification of the provision regarding excessive fees.

[5] At the executive director's request we have also substituted the bar headquarters telephone number for the toll-free number in the statement of clients' 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 keep 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 clearly excessive:

(a) 33 1/3% of any recovery up to $1 million through the time of filing of an answer or the demand for appointment of arbitrators.

(b) 40% of any recovery up to $1 million through the trial of the case;

(c) 30% of any recovery between $1-2 million;

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

(e) 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 $1 million through trial;

(ii) 20% of any recovery between $1-2 million;

(iii) 15% of any recovery in excess of $2 million;

(f) 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 an attorney of the client's choice because of the limitations set forth in (F)(1), the client may petition the circuit court for approval 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 paragraphs (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 or, if the cost is unknown, on the present money value of the structured verdict or settlement; whichever is less. If the damages and the fee are to be paid out over the long term future 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.

## 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 three (3) business days to reconsider the contract. You may can the contract without any reason if you notify your lawyer in writing within three (3) business days of signing the contract. If you withd from the contract within the first three (3) business days you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. 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 three-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 your 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 interests 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.

7. 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.

8. 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 lawyer or law firm working on your case sign this closing statement.

9. 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.

10. 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.

11. 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 904-222-5286, 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.

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| CLIENT SIGNATURE | ATTORNEY SIGNATURE |
| DATE | DATE |

OVERTON, J., concurring specially.

I concur. I agree with Justice Ehrlich that the legal profession and this Court in the near future must address the matter of referral fees.

EHRLICH, J., concurring specially.

I join in and concur with the Court's decision and opinion, but feel constrained to express a few thoughts of my own in this area which is important to both the judicial system as a whole, the bar and the public.

In 1977 The Florida Bar filed a petition for amendment of the Code of Professional Responsibility with this Court and included therein was a proposed maximum contingent fee schedule. This Court approved portions of the petition but declined to adopt the suggested maximum contingent fee schedule. In the Matter of The Florida Bar, 349 So.2d 630 (Fla. 1977).

The reasoning advanced by the Court for declining to adopt a maximum contingent fee schedule has lost none of its cogency and is as valid today as it was then. We have been given no competent evidence of overall abuse of the contingent fee system which would warrant limiting or curtailing the right of contract between attorney and client.

However, one significant event has occurred which causes me to reconsider this question and to take a second look at a proposal for a maximum contingent fee schedule. The Florida legislature enacted the Comprehensive Malpractice Reform Act of 1985 which imposes a schedule on attorneys' contingency fees in medical negligence cases. § 768.595, Fla. Stat. (1985). The Act provides that if this Court adopts a fee schedule, that the latter shall supersede the statutory schedule. While I seriously question the constitutional authority of the legislature to adopt a schedule of attorney's fees because of the doctrine of separation of powers, I construe this as a request from the legislature that this Court promulgate a contingency fee schedule in medical malpractice actions to assure that contingency fees are not "inadequate or excessive" and that such fees are "fair and reasonable to assure proper representation" of the public in medical malpractice cases. I do not take lightly any request from a coordinate branch of government. For this reason alone, and with great misgivings and trepidation about taking the first critical step which impinges upon the constitutional guarantee of freedom of contract and the right of citizens to contract freely

without governmental restraints so long as no fraud or deception is practiced, I am of the opinion, albeit reluctantly, that we should adopt a schedule of maximum contingency fees.

I recognize and appreciate that the legislative request is for a maximum contingency fee schedule confined to medical malpractice cases, but I cannot rationalize why such a schedule should be confined solely to the medical malpractice field and not to the entire area of personal injury cases. I am truly impressed by the studies made by and the joint report of The Special Commission to Study Contingent Fees and Referrral Practices and the Tort Litigation Review Commission, and I defer to their considered judgment that the schedule be not confined to medical malpractice cases.

The bar's petition is confined to DR 2-106 of the Code of Professional Responsibility entitled "Fees for Legal Services." I am of the opinion that we are making a mistake in seeking to amend DR 2-106 without at the same time amending DR 2-107 entitled "Division of Fees Among Lawyers." I do not believe we can deal fairly with attorneys' fees without addressing the matter of referral fees. The legislature has expressed its view in this area in section 768.595(4), Florida Statutes (1985).[1] Here again, I am of the opinion that the matter of division of fees among lawyers lies within the exclusive domain of the judiciary, but we should give heed to an expression by the legislature.

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1. § 768.595(4) reads:
(4) Each attorney or law firm sharing in a fee shall be legally liable to the claimant for any professional malpractice of any other attorney or law firm sharing in the fee to the same extent as if they were partners. No attorney shall share in any fee unless the attorney shall be available to the claimant for consultation concerning the matter. No attorney or any other person shall receive any fee merely for referring a claimant to another attorney for representation. The terms for sharing of any fee shall be disclosed to and approved by the client in a written document signed by the client and all attorneys or law firms sharing in the fee. The court shall inquire into the division of fees among attorneys and shall have the power to modify the division of fees between attorneys.

The fact of life today in the practice of law is specialization, particularly in the personal injury field. The proper handling of most medical malpractice cases requires a high degree of expertise which can only be acquired through time consuming experience. The same can be said for product liability cases. Referral of these cases and others in the personal injury field may well be the rule rather than the exception. Therefore it is difficult to talk about a fee which the attorney charges the client without also considering how the lawyer has to divide his fee with the referring attorney.

If we are going to put a cap on the amount of fee that can be charged a client, we should also put a cap on referral fees. The division of fees among lawyers directly affects the fee to be retained by the lawyer who carries the laboring oar in the litigation, and it is difficult, to say the least, to consider one without considering the other.

I well appreciate that the selfsame constitutional argument against a maximum fee schedule in contingency fee cases can be made against putting a cap or otherwise regulating the division of fees among lawyers. Having already crossed that first hurdle for the reasons previously expressed, I have no problem with the matter of division of fees among lawyers.

It is my earnest hope that the bar will study the question of the division of fees among lawyers with the same objectivity and scholarship that it gave to the matter of contingency fees, and that it will make an early report thereon to the Court along with its recommendations.

BARKETT, J., concurring in part, dissenting in part.

I concur with the adoption of the rule established by the majority except for the limitations imposed on contingency fee agreements, to which I dissent.

This matter comes before us upon the invitation of the Bar (in turn acting upon the "invitation" of the legislature*) to regulate business contracts between freely contracting parties. I have grave reservations about both the manner in which this cause arrives before us and the constitutional propriety of infringing upon a party's right to contract. I cannot express my concerns any better than former Justice Alan Sundberg did in his minority opinion to the Joint Report of The Commission to Study Contingency Fees and the Tort Litigation Review Commission:

> On July 14, 1977, the Supreme Court of Florida published its opinion in the case of In the Matter of The Florida Bar, 349 So.2d 630 (Fla. 1977), wherein The Florida Bar's petition to impose a maximum contingent fee schedule was rejected. The petition was rejected because of the absence of competent evidence of abuse necessary to impose a restriction upon the lawyer's constitutional guarantee of freedom of contract. In denying the petition the Court reminded the Bar of some principles related to freedom of contract protected by both the federal and Florida Constitutions which I believe bear repeating. Quoting from State v. Ives, 123 Fla. 401, 167 So. 394 (1936), a case dealing with legislation granting to the Board of Barber Examiners the authority to establish minimum charges for barbering services, it was said:
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> > "The right to make contracts of any kind, so long as no fraud or deception is practiced and the contracts are legal in all respects, is an element of civil liberty possessed by all persons who are sui juris." (citations omitted).
> >
> > "It is both a liberty and property right and is within the protection of the guaranties against the taking of liberty or property without due process of law". (citations omitted).
> >
> > "It follows, therefore, that neither the federal nor state governments may impose any arbitrary or unreasonable restraint on the freedom of contract."
> >
> > "'That freedom however is not an absolute, but a qualified right and is therefore subject to a reasonable restraint in the

*We are not called upon at this time to rule upon the validity of the legislative "invitation" contained in section 768.595(7)(a), Florida Statutes (1985).

> interest of the public welfare.'" (citations omitted).
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> "Freedom of contract is the general rule; restraint is the exception, and when it is exercised to place limitations upon the right to contract, the power, when exercised, must not be arbitrary or unreasonable, and it can be justified only by exceptional circumstances." (citation omitted).

It is difficult to address a "problem" (the "problem of contingency fees") which even the majority perplexingly concedes does not exist. The apparent consensus is that there is still no competent evidence of abuse of the contingency fee system. Indeed, The Florida Bar's brief expressly notes:

> [N]either of the two commissions nor the Florida legislature cite any specific findings of abuse of the contingency fee system. . . .

Moreover, mechanisms presently exist to adequately correct any specifically determined abuse. I cannot approve the establishment of a general rule applicable to all to address a problem which may be created by a few. In my opinion, the wiser course would be to correct the excesses as they occur.

In addition, the impetus for this rule change is the great cost of medical malpractice. I am reluctant to concur with the majority without evidence that the curtailment of the right to contract will reduce the costs of medical malpractice. The jury award to the injured plaintiff will, presumably, remain the same. I can perceive no valid correlation between the limitations on contingency fee agreements and the costs of medical malpractice. As the New Hampshire Supreme Court said in Carson v. Maurer, 120 N.H. 925, 424 A.2d 825, 839 (1980):

> There is no "direct evidence that juries consider attorney's fees in coming to a verdict . . ." and "at least one study shows that juries do not include an assessment of the lawyer's contingency fee in their allotment of damages." Jenkins, 52 S.Cal.L.Rev. at 943. Reapportionment of damage awards, therefore, is likely to have an insignificant effect on the size of awards, thereby doing little to reduce medical malpractice insurance rates or to control health care costs.

Moreover, the majority only deals with a small part of the perceived problem. The majority's proposed solution, for example, fails to address the high cost (consisting primarily of

expert witness fees) of presenting such cases to juries. If we must act, I would (reluctantly) limit the fee schedule only to medical malpractice cases and subsequently determine whether the change has effectuated the desired result before applying it to any other areas.

I also fail to discern any rational basis for the adoption by the majority of the fee schedule recommended by the Commission instead of that of The Florida Bar. (Although I concede that neither suggested schedule even purports to be based on empirical data but is rather arbitrarily chosen.)

Lastly, and most importantly, I am reluctant to tamper with a system that does indeed provide the proverbial key to the courthouse door. Without the contingency fee system, the vast majority of our citizens would be unable even to enter the arena, much less to fight evenly against those who, knowing their advantage, would (by virtue of human nature alone, never mind malice or bad motives) not hesitate to press it.

ADKINS and SHAW, JJ., Concur

Original Proceeding - Florida Bar Code of Professional Responsibility

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