

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

RE: PETITION TO AMEND

Case No. 70,366

THE RULES REGULATING

THE FLORIDA BAR

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BRIEF OF THE FLORIDA BAR IN SUPPORT
OF AMENDMENT TO RULES 4-1.5 (FEES) AND
4-7.3 (INFORMATION ABOUT LEGAL SERVICES)

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Rule 4-1.5 of the Rules of Professional Conduct Should
Be Amended To Limit The Amount Of A Referral Fee A Lawyer
May Collect For Referring A Case Unless There Is Judicial
Approval Of A Higher Fee.

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Rules of Professional Conduct

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STATEMENT OF THE CASE AND FACTS

The Special Commission to Study Contingency Fees and Referral Practices ("Special Commission") was created by the Board of Governors of The Florida Bar on May 28, 1985. The Special Commission's purpose was to review available information regarding contingency fees and referral practices in Florida with a view toward determining abuses of the system, perceived abuses of the system and the necessity for changes by the Florida Supreme Court upon the recommendation of The Florida Bar.

To carry out its responsibilities the Special Commission met six times between June 6 and November 23, 1985. A report was produced which proposed certain changes in the Code of Professional Responsibility regarding the amount of a contingent fee a lawyer could charge in certain types of cases; along with other requirements. This report also suggested further study on referral fees.

The Board of Governors considered the report at its January 1986 meeting and petitioned the Supreme Court of Florida for various changes to the Code of Professional Responsibility. On June 30, 1986, the Court issued its opinion adopting a contingent fee schedule, along with other changes to the Code of Professional Responsibility. The Bar requested clarification or rehearing on

several matters in that opinion, which was granted by the Court.

The Florida Bar, Re: Amendment to the Code of Professional Responsibility (Contingent Fees), 494 So.2d 960 (Fla. 1986).

Because the Special Commission had completed only part of its original charge and because at least two justices had indicated their concern in the above cited opinion about referral fees, President of The Florida Bar, Joseph J. Reiter, reconstituted the Special Commission to review referral fees and referral practices.

The Special Commission met and held hearings in Tampa (August 11, September 5 and October 24), Key West (September 12) and Orlando (October 3). All of the Special Commission meetings were open to The Bar's members and the public. The meetings were announced in The Florida Bar News and in a press release distributed by the Bar. There were members of the Bar at the three (3) public meetings in Tampa, Key West and Orlando.

A preliminary proposal was drafted at the September 12 Special Commission meeting and circulated to various groups for review and comment. Those comments, plus input from attendees at the October 3 meeting, were considered by the Special Commission when it adopted the proposed changes contained in its report during a conference call held on October 31. A copy of the Special Commission's report is an appendix to this brief.

The report contained four (4) recommendations constituting a comprehensive response to the perceived problems surrounding the referral fee debate.

The Board considered the Special Commission's second report at its November 1986 meeting and after extensive debate, adopted, with some amendment, three (3) of the recommendations. The fourth recommendation was amended and adopted by the Board at its January 1987 meeting. Implementation of those recommendations falls into two (2) groups: those which require approval by the Supreme Court of Florida and those which can be implemented by The Florida Bar without Court approval. To implement the two recommendations which require this Court's approval, the Board approved proposed amendments to Rule 4-1.5 and creation of Rule 4-7.3 of the Rules of Professional Conduct.

The Board now seeks the approval of this Court for those changes in the Rules of Professional Conduct, as set forth at Appendices A and B of this brief.

SUMMARY OF ARGUMENT

With the advent of limits on contingency fees in tort cases, a related need for regulation of referral fees has arisen. The Florida Bar, through the contingency/referral fee commission, has studied the subject and recommends a general limitation on referral fees subject to adjustment with trial court approval. The Bar also suggested adding advertising/disclosure requirements for lawyers practicing in areas of law in which referral fees are most common.

I.

RULE 4-1.5 OF THE RULES OF PROFESSIONAL CONDUCT SHOULD BE AMENDED TO LIMIT THE AMOUNT OF THE REFERRAL FEE A LAWYER MAY COLLECT FOR REFERRING A CASE UNLESS THERE IS JUDICIAL APPROVAL OF A HIGHER FEE.

The ability of a lawyer to collect a fee for referring a case to another attorney was recognized by the Supreme Court of Florida in In The Matter of The Florida Bar, 349 So.2d 630 (Fla. 1977). The Court specifically approved attorneys not in the same firm sharing a contingent fee under the following conditions:

- a) the client is informed of how the fees will be divided and consents in writing;
- b) each lawyer agrees to be legally liable to the client for performance of the services; and
- c) each lawyer shall be available to the client for consultation concerning the case.

Lawyers appear to utilize a wide variety of arrangements under the above guidelines for handling and referring contingency fee cases. Arrangements may go from a referring lawyer getting a fee for just making a telephone call and sending the client to another lawyer to a situation where both the referring and handling lawyers function as co-counsel on the particular matter; and every other type of arrangement in between.

The Special Commission's members were aware from their own experiences and from testimony and comments by members of the Bar of the following practices occurring in the profession today concerning referral fees in contingency fee cases:

- a) There are lawyers who regularly refer out all or a high percentage of their personal injury or wrongful death cases to other attorneys, even though they advertise to the public they handle those types of cases.
- b) Some lawyers ask and receive a referral fee approximately or equal to 50% of the fee collected; with no further involvement with the case.
- c) Some lawyers will "shop around" a personal injury or wrongful death case and refer it to the lawyer or law firm which will pay the highest referral fee.

d) Lawyers who handle a large number of personal injury matters or who limit their practice to that area often will reduce their fees to the client if there is no referral fee being paid to another lawyer. The fee is apparently seldom reduced if the handling lawyer has to pay a referral fee to another lawyer.

Some members of the Bar advised the Special Commission they did not believe there is any reason for the Bar or this Court to alter the present system or set referral fee guidelines because they believe clients are being properly served and the market place will provide the proper perspective and amount. Other members of the Bar suggested "referral fees" should be abolished, except for work actually performed.

The Special Commission concluded there was a need to propose a limitation on the amount of a referral fee a lawyer could receive for "referring" a case; while still preserving the ability of lawyers to properly share fees when they function as co-counsel on a particular case.

To accomplish these two major objectives, the Special Commission drafted an amendment to Rule 4-1.5 of the Rules of Professional Conduct which (in the absence of trial court approval) limits a referral fee to 25% of the fee earned in a particular case.

The amendment divides the fee between the primary and secondary lawyers or firms on the basis of 75% to the primary lawyer or law firm and 25% to the secondary lawyer or law firm. In the event the lawyers or law firms have substantially equal, active, participation and responsibility for the case, the fee may be divided in some other manner. However, the lawyers or law firms must apply to the circuit court for authorization of the fee division.

The Special Commission contemplated the need to seek court authorization of a fee division other than 25% to the referring (secondary) lawyer will only occur when the lawyers or law firms involved have decided upon a co-counsel relationship for the purposes of the particular legal matter. At the time authorization is sought from the circuit court, a copy of the application must be mailed to both the client and The Florida Bar, so both the client and the Bar will be on notice that a different fee arrangement was being sought by the lawyers participating in the case.

The proposed amendment to Rule 4-1.5 is set out in Appendix A. The proposed fee limitation would only apply to contingent fee cases defined in Rule 4-1.5(d)(4). There has been little, if any, input supporting a need to regulate referral fees in other areas.

At their November 1986 meeting, the Board of Governors debated the application of this proposed amendment and intended that

the restrictions shall not be applicable to those members of the Bar who reside outside of this state unless the non-resident members are practicing on matters of Florida law. The Board requests this Court to clearly indicate non-applicability to non-Florida resident Bar members in any order on these amendments.

II.

RULE 4-7.3 OF THE RULES OF PROFESSIONAL CONDUCT SHOULD BE ESTABLISHED TO REQUIRE LAWYERS OR LAW FIRMS ADVERTISING THEIR AVAILABILITY TO REPRESENT CLIENTS IN ACTIONS, CLAIMS OR CASES UNDER RULE 4-1.5(d)(4) TO FURNISH WRITTEN FACTUAL INFORMATION, UPON REQUEST, TO POTENTIAL CLIENTS.

The Special Commission heard testimony and was personally aware of the fact that lawyers are in increasing number using the media to advertise their legal services. Much of the advertising does not contain detailed factual information about the lawyer or law firm advertising their services. In the area of personal injury or wrongful death, the advertising is generally of the "no recovery - no fee" type.

The Board of Governors and the Special Commission were also aware of the fact that there is a great deal of misinformation available to the public about the experience or training of particular lawyers or law firms. Many clients simply lack any information about lawyers. The business of retaining a lawyer for a matter is more complex today than at any other time in our past. A consumer who does not know a lawyer to contact is faced with a

confusing array of advertising about whom to hire. The Bar's ability to educate consumers about what to do or ask when retaining a lawyer will be helpful, as will the fact clients may now receive the client's statement of rights. However, no amount of effort by the Bar will completely solve every consumer's dilemma.

The Board therefore recommends the rules be amended to require lawyers who advertise their availability to represent clients in "personal injury and wrongful death" matters as described in Rule 4-1.5(d)(4) to maintain written information about their practices, experience and expertise which will be furnished upon request to any consumer who wants to review it for the purpose of retaining a lawyer. The proposed rule also requires lawyers who advertise to set forth in their advertisement the availability of such information.

The purpose of the rule is to give consumers the ability to evaluate factual information which they have requested without having a lawyer attempting to "sign the client up." It will also give the client an opportunity to quietly reflect on whether the consumer wants to retain a particular lawyer or a "broker" for their legal matter. Use of this rule by consumers will not guarantee they will always get the best lawyer, nor will it be a substitute of interviewing a lawyer. It should allow a consumer to initially

differentiate between some of the lawyers who are advertising for their legal business.

The Board and the Special Commission believes it is imperative that any proposal to alter the current referral practice rule be accompanied by a rule which provides the consumer with a way to objectively evaluate various lawyers. Merely limiting the referral fee will not give consumers the ability to intelligently select an appropriate lawyer to handle their legal matters. Requiring lawyers to furnish factual information will be extremely valuable to consumers.

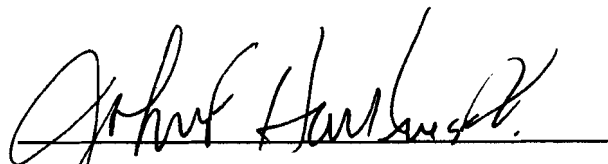
In proposing the establishment of a rule which requires lawyers advertising their availability to do "personal injury and wrongful death" work to furnish written information, upon request, to potential clients the Board understands the controversial nature of its proposal. This proposal is not designed to "penalize" or "discourage" lawyers from advertising. It is designed to provide consumers with an additional way to evaluate the lawyer they are considering retaining as a result of an injury to them or a member of their family.

Proposed Rule 4-7.3 is set forth as Appendix B to this brief.

CONCLUSION

The Florida Bar Board of Governors respectfully requests that this Court adopt the proposed changes in of the Rules of Professional Conduct attached to the petition and brief filed in this matter. The Board further requests this Court make a determination that the schedule of fees set forth in Florida Statutes 768.595(4) is to be superseded by the proposed guidelines and that referral fees in medical negligence cases should be governed by the same rules as those set forth in Rule 4-1.5 as amended.

Respectfully submitted,



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Executive Director

The Florida Bar