

**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR RE:  
PETITION TO AMEND RULES  
REGULATING THE FLORIDA BAR –  
4-1.5 FEES AND COSTS FOR LEGAL SERVICES  
(LIEN RESOLUTION)**

**CASE NO.: SC16-104**

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**COMMENTS OF THE ELDER LAW SECTION OF THE FLORIDA BAR  
AND THE ACADEMY OF FLORIDA ELDER LAW ATTORNEYS IN  
SUPPORT OF PROPOSED AMENDMENTS TO RULE 4-1.5 OF THE  
RULES REGULATING THE FLORIDA BAR**

COMES NOW, David Hook, Esq. as Chair of, and on behalf of, the Elder Law Section of the Florida Bar, and Cary Moss, Esq. as President of, and on behalf of, the Academy of Florida Elder Law Attorneys, who submits the following comments in support of The Florida Bar's Petition in the above styled case requesting that this Court amend Rule 4-1.5(f)(4)(E), and states in support thereof:

1. The Elder Law Section of the Florida Bar ("ELS") was established in 1991 to cultivate and promote professionalism, expertise and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs, and advocate on behalf of its members. In 2014-2015 it has over 1800 members. The Academy of Florida Elder Law Attorneys ("AFELA") was founded in 1993 as a professional association of attorneys who are dedicated to improving the quality of legal services provided to the elderly and to people with disabilities. AFELA is one of the largest and most active State chapters of the National Academy of Elder Law Attorneys, and it is also a sister organization to the Elder Law Section of the Florida Bar. The primary focus of both ELS and AFELA is on education through the sponsorship of continuing legal education programs for elder law attorneys. Both also provides publications and educational materials to its members on a wide range of elder law topics, and seek to support other organizations who serve the elderly and disabled. Last, while neither provide direct legal services of any kind, both ELS and AFELA analyze and actively advocate on public policy issues facing the elderly and disabled.

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2. ELS and AFELA members are all attorneys licensed in Florida in private practice. Elder law covers a broad spectrum of issues that frequently arise as people age or experience disabilities. This spectrum includes issues and representation relating to abuse, neglect, and exploitation; health insurance; long-term care insurance; retirement benefits; estate planning; probate; guardianship; and planning for, and preserving, eligibility for public programs such as Social Security Disability (SSDI), Supplemental Security Income (SSI), Medicare, and Medicaid.

3. The members of ELS and AFELA support adoption of the proposed amendment because we believe it is in the public's interest and that not adopting it has the potential to harm the public. First, adopting the amendment is in the public's interest because it preserves the status quo by clarifying that the attorney must provide ordinary lien and subrogation services as part of the primary personal injury or wrongful death matter. In addition, the amendment protects the public by making sure that any fees charged by separate counsel for extraordinary lien or subrogation services comply with the current rules on fees. This provision of the amendment ensures that clients will have the opportunity to make fully informed choices because the fee and scope of representation will be discussed and agreed to in advance just as it is with any other legal representation. Flat fee and hourly arrangements will be agreed to as they currently are, and contingency agreements will be within the maximum contingency allowed by the current Florida Bar rules.

4. Ensuring that clients have every opportunity to make informed decisions and be able to hire the best-suited attorney of their choice is important to ELS and AFELA members because of their experience with abused and exploited clients who most often have been deprived of the ability to make an informed choice. As discussed above, the proposed amendment will encourage informed decision making because it complies with the current rules on fees. By contrast, not adopting the amendment could be potentially harmful to the public because attorneys will be prohibited from making referrals when such a referral would be in a client's best interests. In addition to harming clients, such a prohibition will also create a conflict by putting an attorney in the untenable position by not being able to exercise her or his professional judgment by making a referral to another attorney whose services can benefit the client.

5. Returning to the issue of maximum contingency fees, the proposed amendment does not authorize additional attorney fees in excess of what is currently allowed by the Florida Bar rules because the fees for extraordinary lien and subrogation services are fees for entirely separate services and representation. While such services can fairly be categorized as derivative, they are no more an integral part of the original personal injury or wrongful death action than are other derivative services such as probate, guardianship, public benefit preservation, or tax planning. To the best understanding of the undersigned, there has never been a question as to whether the original attorney should also resolve probate, guardianship, tax, or public benefit issues that arise from the primary personal injury or wrongful death. The propriety of making a referral to another attorney for such services has never been questioned by the Florida Bar or presented to this Court.

6. While ELS and AFELA only have a few members who provide extraordinary lien and subrogation services, the practices of most if not all of our members have given them meaningful exposure to lien and subrogation issues. For example, a significant number of our membership provide, or have provided, probate, guardianship, public benefit preservation, or tax services in connection with personal injury or wrongful death actions. Not only can these members attest to the growing complexity of health care liens and subrogation rights asserted against settlement recoveries, but they can also attest to the benefit that clients receive when the services of separate counsel with extensive experience in resolving lien and subrogation claims are engaged to reduce these liens and claims when ordinary services are not sufficient. When given the information to make an informed choice, it is the rare client who is not willing to engage the services of separate experienced counsel for the resolution of claims against her or his settlement. This is because the client understands that the separate attorney fee will be far outweighed by the greater net amount that can be obtained by the extraordinary lien and subrogation services.

7. In sum, the proposed rule should be adopted because: it will clarify when ordinary lien and subrogation services should be provided by the primary personal injury or wrongful death attorney; it will help preserve clients' ability to make informed decisions; it will prevent conflict by allowing referrals for extraordinary services when the primary attorney reasonably believes it to be in a client's best interest; it will facilitate the ability of clients to hire their attorney of choice; and, it will provide clients with an opportunity to realize larger net

recoveries. For all of these reasons, the members of ELS and AFELA reasonably believe that adoption of the proposed rule will provide clear benefit to the public while not adopting the rule presents potential harm.

WHEREFORE, we respectfully request that the Supreme Court of Florida adopt The Florida Bar's proposed amendment to Rule 4-1.5(f)(4)(E) of The Rules Regulating The Florida Bar.

Respectfully submitted on February 16, 2016.

David Hook, Esq.  
Florida Bar Board Certified Elder Law Attorney  
Chair, Elder Law Section of The Florida Bar  
The Hook Law Group  
4918 Floramar Terrace  
New Port Richey, Florida 34652-3300  
(727) 842-1001  
[dhookesq@elderlawcenter.com](mailto:dhookesq@elderlawcenter.com)

/S:/ David Hook  
DAVID HOOK, ESQ.  
Fla. Bar No.: 13549

Cary Moss, Esq.  
President, Academy of Florida Elder Law Attorneys  
Sawyer & Sawyer  
8913 Conroy Windermere Rd.  
Orlando, Florida 32835-3127  
(407) 909-1900  
[cmoss@sawyerandsawyerpa.com](mailto:cmoss@sawyerandsawyerpa.com)

/S:/ Cary Moss  
CARY MOSS, ESQ.  
Fla Bar No.: 157351

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to John F. Harkness, Jr., The Executive Director of the Florida Bar, ([jharkness@flabar.org](mailto:jharkness@flabar.org) and [eto@flabar.org](mailto:eto@flabar.org)), The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this 16th day of February, 2016.

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that type style and size used herein is Times New Roman 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a).

*/s:/ David Hook*  
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DAVID HOOK, ESQ..