

IN THE SUPREME COURT OF FLORIDA

Case No. SC05-1150

IN RE: PETITION TO AMEND RULE 4-1.5(f)(4)(B)
OF THE RULES OF PROFESSIONAL CONDUCT

COMMENTS ON THE FLORIDA BAR'S PROPOSED AMENDMENT

Pursuant to this Court's directive, Petitioners address the following comments to the proposed amendment to Rule 4-1.5, Rules Regulating The Florida Bar, which have been submitted to the Court by The Florida Bar.

Recognizing that this Court has ruled that the contingency fee limitations contained in Article I, section 26 of the Florida Constitution can be waived by the client, Petitioners nevertheless believe that the rule proposed by The Florida Bar for this purpose flies in the face of the spirit, if not the letter of the Constitution. According to the rule proposed by The Florida Bar, in order to charge the same contingency fees for a medical liability claim as before the passage of Amendment 3, a lawyer would merely advise the potential client of the constitutional limitation on the contingency fees and have the client sign the specified waiver.

The rule proposed by The Florida Bar contains no requirement for judicial oversight of the waiver. If adopted, this rule would place this constitutional right in a second-class position as compared to other constitutional rights related to legal proceedings. By contrast, for example, clients charged with a crime who wish to

waive their constitutional rights in the course of legal proceedings, such as having a jury trial, against self-incrimination, or to the services of a lawyer, are permitted to do so only if a judge determines that the waiver is knowing and voluntary. There is even more reason for judicial oversight of the constitutional limits on medical liability contingency fees because the lawyer is negotiating with the client in order to have the client agree to give up a constitutional right so that the lawyer may receive a higher fee. The lawyer giving this advice has an inherent conflict. If the Florida Bar's proposal is adopted, judicial oversight will be required only for fee arrangements which exceed the current limits in the existing rule, yet the client will now be permitted to waive the constitutional limits without judicial oversight. It is anomalous to give more protection to the client when waiving his or her rights under a Florida Bar rule than when waiving a right established by the Florida Constitution.

Petitioners submitted to the Florida Bar Committee a proposed amendment to Rule 4-1.5(f)(4) including a waiver form and comment to address this issue, the text of which is set forth below:¹

(B) The contract for representation of a client in a matter set forth in subdivision (f)(4), other than a medical liability claim, may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions

* * *

¹ The proposal also redesignated subsection (f)(4)(C) and (f)(4)(D) as (f)(4)(D) and (f)(4)(E) in order to accommodate the additional text.

(C) The contract for representation for a client in a medical liability claim as set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as follows:

(i) The Florida Constitution places limitations on the amount of the fee which can be charged for such representation. Therefore, without prior court approval as specified in subparagraph (ii), any contingent fee which exceeds the following standards shall not be permitted:

a. 30% of the first \$250,000 in damages received by the client, exclusive of reasonable costs.

b. 10% of the damages received by a client in excess of \$250,000.

(ii) If any client is unable to obtain an attorney because of the limitations set forth in subdivision (f)(4)(C)(i), the client may petition the court in which the matter would be filed, if litigation is necessary, or if such court will not accept jurisdiction for the fee division, the circuit court wherein the cause of action arose, for approval of a fee contract in which the client knowingly waives such fee limitations and signs a notice of waiver in the form set forth below. Such authorization shall only be given if the court specifically determines that the client has an understanding of the client's rights, the merits of the client's claim, and the terms of the proposed contract and finds that after a reasonable effort the client has been unable to retain an attorney because of the fee limitations imposed by the Florida Constitution and this rule. 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. A petition under this subdivision shall contain a certificate showing service on the client and, if the petition is denied, a copy of the petition and order denying the petition shall be served on The Florida Bar in Tallahassee by the member of the bar who filed the petition.

In order to approve a waiver of the fees set forth in subdivision (f)(4)(c)(i), the court must determine that circumstances necessitate a waiver. As a general rule, a waiver from the constitutionally limited

fee is presumed inappropriate. In reaching a determination the court shall consider the wishes of the client; however, approval of the requested fee must be based on more than mere agreement between the client and lawyer.

The analysis depends heavily on the facts of each representation. It is the responsibility of the client and lawyer seeking approval of the fee to present sufficient facts to the court to enable it to determine that the fee is appropriate. The court shall inquire of the client and the lawyer of the wishes of the client; what efforts the client undertook to obtain counsel who is willing to perform the representation for a fee that meets the presumption of this subdivision; the complexity of the facts and potential damages involved in the representation; the novelty or difficulty of the legal issues presented; the length of time required for the representation; whether special demands of the client have been placed on the lawyer; and any other information demonstrating that the requested fee is appropriate. The court shall also consider all criteria of subdivision (b) when reviewing the petition.

NOTICE OF WAIVER

I, _____ (client) wish to engage the legal services of _____ (lawyer or law firm) in an action or claim for medical liability the fee for which is contingent in whole or in part upon the successful prosecution or settlement thereof, but am unable to do so because of the fee limits set forth in the Florida Constitution which have been incorporated into Rule 4 1.5(f)(4)(C)(i), Rules Regulating The Florida Bar.

I understand that under the Florida Constitution and the Rules Regulating The Florida Bar that I have a right to pay only the following attorney's fees in such representation:

30% of the first \$250,000.00 in damages received exclusive of reasonable costs; and
10% of the damages received in excess of \$250,000.00.

I have made a reasonable effort to obtain other attorneys to represent me in this matter but I have been unable to do so because of such fee limits.

I wish to waive any right to such fee limits and hereby state such wish and request court approval of this waiver.

I understand that waiver is a voluntary decision and hereby acknowledge that (initial each provision):

_____ this waiver releases important personal rights;

_____ (lawyer or law firm) has advised me, in writing, that the decision to waive these important personal rights is one that I am free to make as I determine to be in my best interest;

_____ (lawyer or law firm) has advised me, in writing, that I should not make this decision without considering the advice of another lawyer or law firm;

_____ I have been given a reasonable amount of time to obtain independent advice about executing the waiver;

_____ I understand that this waiver has no effect unless and until approved by the appropriate court;

_____ I understand that under the terms of this waiver the fee that I agree to pay is:

_____ (insert terms of fee agreement here)

_____ I have obtained independent advice about the advisability of executing this waiver;

_____ It is with the above understanding that I hereby give notice of waiver of my rights to these fee limits. This _____ day of _____, _____.

(Client)

COMMENT

_____ Upon petition by a client seeking waiver of the constitutional limitations on attorneys' fees in medical liability claims pursuant to Rule 41.5(f)(4)(C), the trial court should inquire into the merits or details of the particular action or claim in order to evaluate the likelihood of success and make certain that the client fully understands his or her constitutional rights before granting the request for waiver.

The Petitioners' proposed amendment quoted above was modeled after two additional paragraphs that The Florida Bar originally submitted to this Court as part of its most recent proposed amendment to Rule 4-1.5. Presumably, because of complaints from personal injury lawyers, the Florida Bar later withdrew these paragraphs from the proposed rule amendment. The point is, however, that at that time The Florida Bar believed that an even more comprehensive judicial oversight was needed in order to obtain a waiver of a rule that had no constitutional underpinning. They have now retreated dramatically from that position.

In the Notice of Filing, The Florida Bar tried to explain why the committee rejected the idea of judicial review. According to The Florida Bar, members of the judiciary had reported that the usual practice of obtaining judicial review of a waiver of the existing limits on contingency fees was perfunctory and constituted form over substance. Such a purported justification for dispensing with judicial oversight of the waiver process is at odds with very common sense notion of protecting constitutional rights. If Judges treat this process as perfunctory, then they are not doing their jobs.

The process of waiving a constitutional right should not be perfunctory, and the hearing before the judge contemplated by the rule proposed by Petitioners would not be perfunctory. Moreover, it is unlikely that many hearings would be required. There has been no showing whatsoever that clients cannot obtain

lawyers for the reduced fees. The whole premise of the constitutional amendment is that there are many qualified lawyers available to handle these cases under the constitutional limitations if the client merely asks them to do so. Hearings would only be necessary in those instances in which a client with a meritorious claim could not find a competent lawyer to handle it for the constitutional limits because of its limited damage potential. Surely, it makes more sense to have the determination of whether a waiver was knowing or voluntary at the outset rather than at the end of the case when a disgruntled client decides that he really could have obtained a competent lawyer for a lesser fee if he had only understood what he was doing.

Adoption of the Florida Bar's proposal would put this Court's official seal of approval on a process whereby without any judicial oversight a lawyer could advise a client to waive the client's constitutional right so that the lawyer could charge the client a higher fee. Approval of the Florida Bar's proposal by this Court would give the appearance that the Florida Bar and the Court are willing to relax judicial oversight of constitutional rights when it results in higher legal fees.

The Florida Bar also suggested that there could be delays in obtaining a hearing in some areas of the State. In those instances where the statute of limitations was about to run, the lawyer could take such action as necessary to protect the client's rights with the understanding that if the waiver was not ultimately approved, the lawyer would be reimbursed on a quantum meruit basis.

Doctors and lawyers view this amendment from vastly different perspectives. However, it was the people of Florida who overwhelmingly voted for it. They are entitled to have it treated as requiring more than a meaningless exercise where the lawyer simply gets another piece of paper signed. Petitioners urge the Court to reject the proposal submitted by the Florida Bar and to adopt the rule amendment and comment that were submitted to the Florida Bar Committee as stated above.

Respectfully submitted this _____ day of April, 2006.

HOLLAND & KNIGHT LLP

Stephen H. Grimes (FBN 0032005)
Jerome W. Hoffman (FBN 258830)
P.O. Drawer 810
Tallahassee, FL 32302
Ph. (850) 224-7000
Fax (850) 224-8832

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States mail, this _____ day of April, 2006, to the following:

John F. Harkness, Jr.
John Anthony Boggs
The Florida Bar
651 East Jefferson St.
Tallahassee, FL 32399-2300

Henry M. Coxe III
Bedell Dittmar Devault, et al.
101 E Adams St
Jacksonville, FL 32202

Barry Richard
Greenberg Traurig, PA
P. O. Drawer 1838,
Tallahassee, FL 32302

Major B. Harding
Ausley & McMullen
P. O. Box 391
Tallahassee, FL 32302

Alan B. Bookman
Emmanuel, Sheppard & Condon
P. O. Box 1271
Pensacola, FL 32591

Attorney

CERTIFICATE OF FONT

I HEREBY CERTIFY that this document was prepared using Times New Roman 14 point type, a font that is proportionately spaced.

Attorney

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