

IN THE SUPREME COURT OF FLORIDA

In Re: AMENDMENT TO THE RULES
REGULATING THE FLORIDA BAR
- RULE 4-1.5(F)(4)(b) OF THE RULES
OF PROFESSIONAL CONDUCT

CASE NO. SC05-1150

COMMENT OF ATTORNEY GAIL LEVERETT PARENTI

I am a member of the Florida Bar in good standing. In my practice, I represent primarily hospitals and health care providers in medical malpractice litigation. Although I currently serve as the President of the Florida Defense Lawyers Association, the comments and opinions expressed herein are strictly my own, and are not made on behalf of the Association or any client.

The undersigned respectfully submits that attorneys in Florida should be held to the same standards of fairness and candor in dealing with clients as used car salesmen. To this end, I proffered the following comment for the consideration of the committee drafting the proposed rule amendment:

The only meaningful waiver of the right conveyed by Amendment 3 is one which follows a written explanation of the impact of the waiver on those rights, using an illustration which "does the math." Such an illustration would say, in effect: "Under the constitution, if you receive a \$2 million settlement, I am entitled to recover only \$250,000 in attorney's fees.

However, if you sign this waiver, I would be entitled to recover up to \$700,000, which is a difference to you of \$450,000."

There are many instances in consumer legislation where such detailed disclosure is mandatory, in situations involving far less money. It is difficult to conceive of a justification for not requiring similarly detailed disclosure in the context of seeking a waiver of a constitutional right.

The committee and the Board of Governors have proposed a form for a "knowing" waiver which does not provide the most basic information necessary to satisfy the requirement that a waiver of rights be "knowing"; that is, the cost to the client in dollars. It matters now how many boxes the client initials. Unless at least one of those boxes fairly and clearly advises the client that signing the waiver means that he or she is agreeing to give up potentially hundreds of thousands of dollars, the waiver cannot be fairly viewed as "knowing."

An illustration applying the formulas by which attorneys fees would be calculated under the constitutional provision, and under the proposed fee agreement, is absolutely essential to ensure that clients understand the economic ramifications of the waiver of the right afforded by Article I, Section 26, of the Florida Constitution. If the first time the client sees "the math" is the closing statement, and then realizes – for the first time – the cost in dollars of the waiver of the right granted by the constitution, it will be too late.

The committee did not comment on my simple, but rather obvious, suggestion or why it was disregarded; however, it was reported to me that it was perceived as "too complicated," particularly since lien rights may be involved. If that was indeed the reason, it begs the question whether the proposed waiver form can be considered "knowing", because it is silent on the potential impact of the waiver on lien rights.

The potential abrogation of a lien against recovery, at least one based in state law, is a valuable right at least arguably given to the client by the constitution, and could represent thousands of dollars in a given case. Nevertheless, the proposed waiver form makes no reference to lien rights, meaning that the client does not know that in asking the client to waive his or her constitutional right, the lawyer is also asking for the client to waive the potential abrogation of a lien against his recovery.

Furthermore, the answer that it would be too difficult to develop an illustration to assist clients in understanding the ramifications of the waiver of rights being requested is simply unacceptable. Just as Justice Quince had confidence that the lawyers of this State could draft a proposal for settlement on behalf of vicariously liable parties which would satisfy the requirements of Rule 1.442, *see Lamb v. Matetzsch*, 906 So. 2d 1037, 1041 (Fla. 2005), there is no

reason to believe that lawyers cannot develop an illustration which will explain to clients the basic economic ramifications of the waiver in understandable terms; i.e., dollars.

Respectfully submitted,

Gail Leverett Parenti
Florida Bar No. 380164

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **John F. Harkness, Jr.**, Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300, by Federal Express on April 13, 2006.

PARENTI & PARENTI, P.A.
9155 S. Dadeland Boulevard
Suite 1504
Miami, Florida 33156
Telephone: (305) 539-3800

By: _____
Gail Leverett Parenti