

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR

Case No.: SC10-1967

**COMMENTS OF THE SWOPE, RODANTE P.A. LAW FIRM
REGARDING PROPOSED AMENDMENTS TO RULE 4-1.5 OF THE
RULES REGULATING THE FLORIDA BAR**

Comes now, the Swope, Rodante P.A. law firm, who submits the following comments in opposition to The Florida Bar's Petition in the above-styled case requesting that this Court amend Rule 4-1.5 of the Rules Regulating the Florida Bar to add Rule 4-1.5(f)(4)(E).

As practitioners who have handled numerous personal injury cases over the past thirty years, including cases with both routine and extremely complex liens and subrogation claims and contingency fee contracts, the Swope, Rodante P.A. law firm believes that the proposed amendment is ill-advised and potentially harmful to the public. We hold this view for the following reasons:

First, the proposed amendment, authorizing additional attorney's fees over The Florida Bar's maximum contingency fee without court approval, is unnecessary. Almost without exception, *extraordinary* lien or subrogation resolution services will be necessary only in personal injury cases where the damages recovered are also *extraordinarily* large. Up until now, personal injury attorneys who handle these types of claims have either assumed the responsibility for ascertaining and resolving all liens and subrogation claims or have sought specialized co-counsel to resolve them, with the client's consent under a fee-sharing arrangement. This is done at no additional charge to the client beyond the maximum contingency fee, even if the personal injury attorney outsources this work to another attorney.

It may be true that, given the increased complexity of modern litigation, there will be some cases where the amount of work required to resolve a lien is more than initially anticipated. The notion of the percentage fee contract,

however, contemplates that there will be some cases that are supremely profitable for the lawyers handling the claim and others that are supremely unprofitable. That risk and reward is built into the contingency fee contract, and it seems unfair to ask the client to honor the contract by paying the full percentage fee, even if the effort proves less than originally expected, but then ask the client to pay an extra fee in those cases that ultimately prove to be more difficult. In the rare instances in which the fee generated by the personal injury case is expected to be insufficient for the work of resolving any outstanding lien, the attorney and client can seek leave of court pursuant to Rule 4-1.5(f)(4)(B)(ii) of the Rules Regulating the Florida Bar to obtain an increased fee appropriate for the circumstances of the specific case.

The existing rule requires the lawyer handling the case to handle both ordinary and extraordinary lien and subrogation issues, and to charge no fees greater than the maximum fee contingency for that work, unless leave of court is obtained. There is, needless to say, absolutely NO shortage of personal injury attorneys and law firms who have been eager to accept large and complex cases under this arrangement. The proposed amendment to Rule 4-1.5 authorizing additional attorney's fees over The Florida Bar's maximum contingency fee simply provides no benefit to the public.

Secondly, the proposed rule is inconsistent because it allows the client to be charged greater fees for "extraordinary services," but only if the primary law firm outsources the extra work--not if it performs the extra work in house. Simply stated, either this work is so outside the scope of handling a personal injury case that additional compensation is justified, or it is not. There is no logical basis for saying an additional fee is only justified IF the law firm outsources it to others.

The principal effect of making the rule more favorable to the lawyer who outsources the work will likely be: (a) the creation of a cottage industry of lawyers or non-lawyers built on doing the primary lawyer's outsourced lien resolution work at a greater expense to the client, and (b) interference with the client's ability to hire the lawyers of his or her choice to handle the extraordinary lien resolution issues.

Florida courts have often stated that infringing on a client's right to be represented by his or her chosen counsel is an extraordinary measure that

should rarely be allowed. Yet, the Florida Bar seeks to have this Court adopt a rule that will infringe on that right without any discretion or consideration of the particular circumstances of the situation. If the personal injury client decides that he or she wants the primary law firm to handle the matter, this Court should not impose rules that would impair or possibly even disrupt that choice.

We respectfully request that the Supreme Court of Florida reject The Florida Bar's proposed amendment.

Respectfully submitted on November 30, 2010

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399, this 30th day of November, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the 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).

HENRY G. GYDEN