

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-

PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR

The Florida Bar (the bar), pursuant to R. Regulating Fla. Bar 1-12.1, petitions this court for an order amending the Rules Regulating The Florida Bar and states:

Authority to File Petition

This petition has been authorized by the Board of Governors of The Florida Bar (Board of Governors).

Organization of Amendments

The bar proposes amendments to Rule Regulating The Florida Bar 4-1.5 Fees and Costs for Legal Services after this Court granted the bar's request to file an alternate proposal addressing fees for lien resolution in personal injury cases on September 17, 2015, in case number SC14-2112. This section provides information regarding development of this proposal as required by Part III of this Court's administrative order number AOSC 06-14 of June 14, 2006 in *In Re: Guidelines for Rules Submissions*. The following information is provided: an explanation of the amendment; the reasons for the recommended change; the source of the proposal; the names of groups or individuals who commented or collaborated on a proposal during its development; voting records of pertinent committees and the Board of Governors; and dissenting views within the Board of Governors.

Amendments

CHAPTER 4

SUBCHAPTER 4-1

Rule 4-1.5 FEES AND COSTS FOR LEGAL SERVICES

Explanation: Within Rule 4-1.5(f)(4), adds new subdivision (E) that the lawyer in a personal injury or wrongful death case charging a contingent fee must provide ordinary lien resolution as part of the lawyer's representation of the client under the fee contract; that the lawyer may not charge any additional fee to the client for providing any lien resolution services if all fees for the personal injury matter plus lien resolution exceed the contingent fee schedule; that extraordinary services for subrogation and lien resolution may be referred to another lawyer only with the client's informed consent; that additional fees by the other lawyer must comply with all provisions of the fee rule; that the lawyer providing the extraordinary subrogation and lien resolution services may not divide fees with the lawyer handling the personal injury or wrongful death claim; providing definitions of extraordinary versus ordinary lien resolution services; requiring a disclosure at the outset of representation that the personal injury lawyer would not provide extraordinary lien resolution services; defining the fee that may be charged for extraordinary lien resolution services if the fee is contingent; requiring court approval of the extraordinary lien resolution fee if it together with the personal injury fee exceeded the contingent fee schedule set forth in Rule 4-1.5; and permitting the court reviewing the agreement for extraordinary lien resolution services to adjust the fee of the primary lawyer (the lawyer handling the underlying personal injury matter). Within the comment, explains what lien resolution services are required as part of the original fee contract and what extraordinary services entail.

Reasons: This amendment has a somewhat lengthy history. This Court declined to adopt an amendment relating to lien resolution in personal injury cases, that was developed by the Special Committee on Lien Resolution, in *In Re: Amendments To The Rules Regulating The Florida Bar (Biannual Report)*, 101 So.3d 807 (Fla. 2012), Case No. SC10-1967, stating:

Indeed, we take this opportunity to clarify that lawyers representing a client in a personal injury, wrongful death, or other such case charging a contingent fee should, as part of the representation, also represent the client in resolving medical liens and subrogation claims related to the underlying case.

The Special Committee on Lien Resolution was reconvened and redrafted amendments to address how lien resolution is handled in personal injury cases. The special committee determined previously that some aspects of lien resolution, particularly involving ERISA and medicare, have become so complex, they may require the services of a lawyer who devotes a substantial part of his or her practice to resolving those liens. The more complex liens sometimes involve additional litigation and knowledge of federal as well as state law involving liens. The special committee determined that, although lawyers customarily negotiated liens as part of the lawyer's services in the personal injury case, lawyers should not be required to resolve more complex and difficult liens as part of the original contingent fee contract in a personal injury case.

The amendments developed by the special committee would require the lawyer to handle ordinary lien resolution as part of the client's case and prohibit the lawyer from charging the client a fee for ordinary lien resolution that, if combined with the fee for the personal injury case, would exceed the contingent fee schedule, as required by the Supreme Court of Florida in the case above. However, the amendments would allow the lawyer in the personal injury matter to either refer the extraordinary lien resolution services to another lawyer or to hire another lawyer to handle the extraordinary lien resolution services on behalf of the client only when the referral/hiring is in the client's best interests and with the client's informed consent. The amendments would require that any separate agreement to handle extraordinary lien resolution separately comply with all ethical requirements of the fee rule. The amendments also would prohibit the lawyer handling extraordinary lien resolution to divide fees with the original lawyer in the matter.

The second set of proposed amendments were filed with this Court on October 28, 2014 in *In Re Amendments to Rules Regulating The Florida Bar - 4-1.5 Fees and Costs for Legal Services*, 175 So.3d 276 (Fla. 2015), case no. SC14-2112. After oral argument, the bar requested and received a partial stay to allow the bar to further study the issue and provide alternative proposals. This Court's September 17, 2015 order in that case required the bar to file any alternative proposal as a separate petition on or before January 15, 2016. The chair of the Special Committee on Lien Resolution worked with some of the bar members who filed comments on the bar's second proposal to create further amendments. The further refinements to the bar's proposal were drafted to address concerns raised by this Court in oral argument, including: providing definitions of extraordinary versus ordinary lien resolution services; requiring a disclosure at the outset of representation if the primary lawyer in the underlying personal injury matter will not provide extraordinary lien resolution services; defining the fee that may be charged for extraordinary lien resolution services if a contingent fee is charged;

and requiring court approval of the extraordinary lien resolution fee if it together with the personal injury fee exceeded the contingent fee schedule set forth in Rule 4-1.5. The Board Review Committee on Professional Ethics, in reviewing the proposal as the substantive reviewing committee of the Board of Governors, voted to include a further provision stating that the court reviewing the agreement for extraordinary lien resolution services to adjust the fee of the primary lawyer (the lawyer handling the underlying personal injury matter). The bar believes that it has fully addressed all concerns raised by this Court in the prior petitions and at the oral argument in case no. SC14-2112.

Source: Special Committee on Lien Resolution

Background Information – Member Commentary / Committee Action: This Court's order in *In Re Amendments to Rules Regulating The Florida Bar - 4-1.5 Fees and Costs for Legal Services, Case No. SC14-2112* was entered on September 17, 2015. Board Review Committee on Professional Ethics reviewed the order and proposed amendments on October 15, 2015 and directed staff to draft further amendments that address the issues of the requirement for the primary lawyer (on the personal injury matter) providing ordinary lien services either personally or through another as long as the fee is not increased, and to allow the court reviewing the fee agreement for extraordinary lien resolution services to adjust the fee of the primary lawyer depending on the circumstances. Board Review Committee on Professional Ethics voted 5-3 via e-mail to approve alternative 1, in which the court reviewing the fee agreement may adjust the primary lawyer's fee, on November 10, 2015. Program Evaluation Committee approved on strategic basis by vote of 10-0 on December 3, 2015. Rules Committee voted against approval on procedural basis by voice and e-mail vote of 3-2 on December 8, 2015.

Board Action: Board of Governors approved 26-17 on hand count and voted to waive second reading on December 4, 2015. Dissenting members of the Board of Governors generally did not agree with the provision that stated that the court reviewing the fee agreement of the lawyer providing extraordinary lien services could adjust the fee of the primary lawyer (the lawyer responsible for handling the underlying personal injury matter). Dissenters stated that including the provision creates a disincentive for the primary lawyer handling the underlying personal injury matter to refer clients to a lawyer to provide extraordinary lien resolution services when the primary lawyer is not competent to handle the matter or reaches an impasse with a provider or insurance company.

Official Notice of Amendments

Pursuant to R. Regulating Fla. Bar 1-12.1(g), formal notice of intent to file all the proposals in this petition was published in the December 15, 2015 issue of the bar *News*. To meet this Court's deadline of January 15, 2016, the official notice included both versions of the amendments that were under consideration by the Board of Governors, because the Board of Governors had not yet voted by the bar *News* publishing deadline. A copy of that notice, as published in the Internet version of the December 15, 2015 bar *News* issue, is included with this petition in Appendix C. This notice can also be found at the following link:

<http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/56e91c4742ad5c4f85257f14004f17eb!OpenDocument>

Discrepancy with West's Online 2015

A minor discrepancy between the Rules Regulating The Florida Bar as maintained by the bar and the Rules Regulating The Florida Bar as published online in the most recent version of West's Florida Rules of Court was discovered during the read-against with West's. West's contains an extra space between "4-1.5" and "(e)" in the comment. The extra space was stricken in this Court's opinion in *In Re: Amendments to the Rules Regulating The Florida Bar (Biannual Report)*, 101 So.3d 807 (Fla. 2012), Case No. SC10-1967. Appendix A and Appendix B to this petition are correct. West's has been notified of the error. A representative of West's has informed the bar that the error will be corrected.

Request for Waiver of Rules Procedures Due to Time Constraints

Because of the relatively short time period between this Court's order of September 17, 2015, and this Court's deadline of January 15, 2016 to submit a new petition to offer an alternative rule amendment, the Board of Governors was unable to "read" these amendments at 2 subsequent board meetings as required by Florida Bar Standing Board Policy 1.60, and the Board of Governors voted to waive the second reading. Additionally, the Board of Governors Rules Committee was unable to complete a vote until after the December 4, 2015 Board of Governors meeting. Fiscal review also was not completed until after the final Board of

Governors vote on December 4, 2015. Finally, the official notice included both alternatives offered to the Board of Governors: the first approved by the Board Review Committee on Professional Ethics; the second offered by the chair of the Special Committee on Lien Resolution. The 2 alternatives differed only as to the treatment of a court action relating to the fee of the primary lawyer in the underlying personal injury matter.

Other than as noted above, all requirements of R. Regulating Fla. Bar 1-12.1 and Standing Board Policy 12.60 were met as to substantive amendments. The bar requests that this Court waive any portions of the rule and policy that the bar was unable to meet due to time constraints.

Editorial Corrections

Additionally, during the preparation of this petition, the bar detected minor editorial errors within proposals as officially noticed. These editorial errors were not reviewed by the Board of Governors, but were made under the authority granted to bar staff to correct errors in this Court's administrative order AOSC06-14, dated June 14, 2006. These editorial errors were not corrected in the official bar *News* notice, but are show in legislative format in Appendix A and both shown in legislative format and noted in Appendix B. The following editorial errors were noted in the comment to the rule:

- a space appears between “Rule 4-1.5” and “(f)(4)(B)(iii)” in the first sentence of the 8th paragraph under the header “Contingent fee regulation”;
- “Article 1” should be “Article I” in the first sentence of the 8th paragraph under the header “Contingent fee regulation”; and
- The word “plans” should be lower case in the header “Credit Plans” in the comment.

The bar submits that the above editorial errors are minimal deviations from the requirements of R. Regulating Fla. Bar 1-12.1. The bar therefore requests that these additional revised proposals be accepted by this Court, and that this Court waive approval by the Board of Governors as to the above edits and Board of Governors approval and official notice in the print version of the bar *News*, pursuant to R. Regulating Fla. Bar 1-12.1(i).

Other Pending Amendments

A petition to adopt new subchapter 6-30, a new area of certification in condominium and planned development law, is currently pending in case number SC15-824. The proposed amendments within this filing are unrelated to the rules proposed to be adopted in case number SC15-824 and may be considered independent of them.

Contents of Appendices

The complete text of all proposals is included in Appendix A to this petition, in legislative format (i.e., deleted language struck through, shown first, followed by new language underlined).

A separate two-column presentation follows in Appendix B, which includes extracted text of affected rules with proposed amendments in legislative format and an abbreviated recitation of the reasons for the changes.

The notice of intent to file this petition is provided in Appendix C.

Comments in Response to Amendments

No comments were received by the bar in response to these amendments. The bar provided a copy of the proposed amendments as approved by the Board of Governors to those bar members who filed comments in *In Re Amendments to Rules Regulating The Florida Bar - 4-1.5 Fees and Costs for Legal Services*, 101 So.3d 807 (Fla. 2012), Case No. SC14-2112, via e-mail on December 14, 2015.

Oral Argument Requested

The bar seeks oral argument regarding these amendments.

Effective Date Request

As to all amendments sought in this filing, the bar requests that any changes be made effective no sooner than 60 days from the date of this Court's order so that the bar can educate its members regarding any amendments.

The bar requests that this Court enter an order amending the Rules Regulating The Florida Bar as requested in this petition.

Respectfully submitted,

/s/ John F. Harkness, Jr.

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CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Times New Roman Regular type.

/s/ John F. Harkness, Jr.

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CERTIFICATE OF READ-AGAINST

I certify that the Rules Regulating The Florida Bar set forth within this petition have been read against the most recent copy of *West's Florida Rules of Court* as noted in this petition.

/s/ John F. Harkness, Jr.

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