

**IN THE SUPREME COURT OF FLORIDA**

THE FLORIDA BAR  
PETITION TO AMEND RULE  
REGULATING THE FLORIDA BAR  
4-1.5 FEES AND COSTS FOR LEGAL  
SERVICES

CASE NO. SC14-

**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 R. Regulating Fla. Bar 4-1.5 (Fees and Costs for Legal Services) 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 Petitions**

The bar's biennial submission has been divided into 4 parts, with all 4 petitions filed simultaneously. The first petition, entitled Petition to Amend Rules Regulating The Florida Bar - Biennial Filing 2014, encompasses those rules that the bar believes may require more consideration and reflection by this Court. The second petition, entitled Petition to Amend Rules Regulating The Florida Bar - Biennial Filing 2014 Housekeeping, comprises those rules that the bar believes may require less contemplation by this Court and for which this Court may be inclined to expedite review. Many amendments in the housekeeping petition involved editorial changes, housekeeping amendments to update the rules based on the passage of prior amendments, changes to codify long-standing practice, changes to court rules, and other amendments likely to require less of this Court's attention than the proposals in the first petition. The third petition, entitled Petition

to Amend Rule Regulating The Florida Bar 4-1.5 Fees and Costs for Legal Services, includes amendments solely to rule 4-1.5, addresses issues that may require more consideration and reflection by this Court, and for which the bar seeks oral argument. The fourth petition, entitled Petition to Amend Rule Regulating The Florida Bar 4-7.22 Lawyer Referral Services, includes amendments solely to rule 4-7.22, addresses issues that may require more consideration and reflection by this Court, was the subject of a study by a special committee, and for which the bar seeks oral argument.

This petition is to amend R. Regulating Fla. Bar 4-1.5 Fees and Costs for Legal Services and includes amendments to rule 4-1.5 that were the subject of study by a special committee and were approved by the Board of Governors between July 2012 and July 2014.

## **Organization of Amendments**

The bar proposes amendments to R. Regulating Fla. Bar 4-1.5 Fees and Costs for Legal Services as indicated in the listing that follows. This section provides information regarding development of the proposals to amend rule 4-1.5 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*. Each entry provides the following information: an explanation of each amendment; the reasons for each recommended change; the sources of each 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.

This rule was the subject of multiple proposed revisions that were considered at 2 different times. Those amendments are reported as separate items to better reflect the distinctive aspects of their development.

## **Amendments**

### **CHAPTER 4 RULES OF PROFESSIONAL CONDUCT SUBCHAPTER 4-1 CLIENT-LAWYER RELATIONSHIP 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 (which, if exceeded, is presumed excessive unless rebutted); that extraordinary services for subrogation and lien resolution may be referred to another only with the client's informed consent; that additional fees by the other lawyer must comply with all provisions of the fee rule; and 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. Within the comment, explains what lien resolution services are required as part of the original fee contract and what extraordinary services entail.

*Reasons:* This Court declined to adopt an amendment to rule 4-1.5 addressing lien resolution in personal injury cases in *In Re: Amendments To The Rules Regulating The Florida Bar (Biannual Report)*, 101 So.3d 807 (Fla. 2012), Case No. SC10-1967. In doing so, this Court stated:

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. 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 have 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. To the extent a lawyer who is experienced in lien resolution can properly resolve complex liens and reduce subrogation rights, injured clients benefit by receiving more of the recovery in their personal injury cases. Lawyers who are less experienced in handling complex liens may be less able to achieve results as beneficial to their personal injury clients as lawyers who have extensive experience with ERISA, Medicare, and Medicaid liens.

The amendments in this petition 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 this Court in the case above. However, the proposed amendments in this petition would allow the lawyer in the personal injury matter to either refer extraordinary lien resolution services to another lawyer or to hire another lawyer to handle extraordinary lien resolution services on behalf of the client only when the referral or hiring is in the client's best interests and with the client's informed consent. The amendments require that any separate agreement to handle extraordinary lien resolution separately comply with all ethical requirements of the fee rule. The amendments prohibit the lawyer handling extraordinary lien resolution to divide fees with the original lawyer in the matter. The bar believes that these proposed amendments should satisfy this Court's concern that the lawyer handling the underlying personal injury matter handle most lien resolution, and have only extraordinarily complex matters handled by another lawyer where the involvement of a lawyer more experienced in complex lien resolution would serve the client's best interests.

*Source:* Special Committee on Lien Resolution

*Background Information - Member Commentary/ Committee Action:*

- Special Committee on Lien Resolution approved on March 5, 2013.
- Rules Committee approved on substantive and procedural basis by vote of 6-0 on March 21, 2013.
- Budget committee approved by an e-mail vote of 7-0 on April 2, 2013.
- Program Evaluation Committee approved by vote of 8-0 on April 18, 2013.
- Board of Governors approved in concept by voice vote on May 31, 2013.
- Special Committee on Lien Resolution approved additional amendments by e-mail vote on June 4, 2013.
- Rules Committee approved the additional amendments submitted by the Special Committee on Lien Resolution and directed staff to draft changes to the rules to parallel the change to the rule, giving staff the authority to make the change without further review by the committee by vote of 7-0.
- Rules Committee approved additional amendments to the comment by 5-0 on September 6, 2013.

*Board Action:* Board of Governors approved on voice vote on December 13, 2013.

### **Rule 4-1.5 Fees and Costs for Legal Services**

*Explanation:* Within subdivision (c), defines the terms retainer, flat fee and advance fee and indicates proper placement in operating versus trust account. Within the commentary, moves commentary regarding a bonus in domestic relations matters to the section of commentary titled "Prohibited contingent fees." Within the commentary, indicates that nonrefundable fees should not be held in trust as they are earned on receipt, but that advances on fees must be held in trust. Within the commentary, indicates that nonrefundable fees remain subject to the prohibition against clearly excessive fees.

*Reasons:* The bar filed a petition to amend rule 4-1.5, which included a proposal to amend the commentary to address the terms retainer, flat fee and advance fee, as the bar's experience through disciplinary cases and calls to the Ethics Hotline is that these terms are commonly misunderstood and/or misused. This Court declined to adopt the bar's proposal to add definitions for retainer, flat fee, and advance fee in the comment to Rule 4-1.5, stating that the bar should further study the issue and that any proposed amendment should be to the rule, not the comment. *In re Amendments to the Rules Regulating The Florida Bar*, 24 So.3d 63 (Fla. 2009), Case Number SC08-1890. After further study, the bar determined that the Florida Ethics Opinion 93-2 defines these terms and indicates whether the specific situations in which funds should be held in trust or placed in the operating account and recommends that the definitions be placed in the rule, with further clarification regarding the nature of nonrefundable fees, including that they are earned on receipt and should not be held in trust.

*Source:* Board of Governors member Andrew B. Sasso

*Background Information - Member Commentary/ Committee Action:*

- Rules Committee approved in concept by vote of 6-0 on May 2, 2013.
- Rules Committee voted 5-0 on September 6, 2013 to defer and direct staff to draft amendments to the comment indicating that nonrefundable fees are subject to the prohibition against excessive fees.
- Rules Committee approved on substantive and procedural basis 4-1 by voice and e-mail vote on November 18, 2013.
- Program Evaluation Committee approved by vote of 13-0 on December 12, 2013.

- Rules Committee reconsidered to discuss the term "reasonable" at the request of Board of Governors member William H. Davis on January 10th, 2014.
- Budget Committee approved by on January 9, 2014.
- Rules Committee voted to reconsider its November 18, 2013 decision by vote of 5-0 on January 10, 2014.
- Rule Committee voted 5-1 to disapprove addition of word "reasonable" to subdivision (a) on January 10, 2014.
- Rules Committee approved remainder of the amendments 6-0 on January 10, 2014.

*Board Action:* Board of Governors approved by voice vote with objection on March 28, 2014. A small minority of the Board of Governors was of the opinion that nonrefundable fees should be held in trust and drawn against in the same way advance fees are held in trust.

### **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 August 15, 2014 issue of the bar *News*. A copy of that published notice, printed from the Internet version of that *News* issue is included with this petition, in Appendix C. This notice can also be found at

<http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/Articles/13895FEBD04AE96D85257D260049FFB>

### **Discrepancy with West's Online 2014**

During the preparation of this petition, the bar noted a minor spacing 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 and notified West's Publishing Company.

## **Editorial Corrections and Request for Waiver of Rules Procedures**

During the preparation of this petition, the bar detected one minor editorial error within these proposals as officially noticed, which was striking out an extra space in the comment to the rule. This editorial error was not reviewed by the Board of Governors, but was made under the authority granted to bar staff to correct errors in this Court's administrative order AOSC06-14, dated June 14, 2006. This editorial correction was not shown in the official bar *News* notice.

The bar submits that this deviation from the requirements of R. Regulating Fla. Bar 1-12.1 is minimal and the amendment itself is non-controversial. The bar therefore requests that this additional revision be accepted by this Court, and that this Court waive approval by the Board of Governors as to the edit and Board of Governors approval and official notice in the print version of the bar *News* for this rule, pursuant to R. Regulating Fla. Bar 1-12.1(i).

All other requested amendments in this petition were promulgated in full compliance with applicable rules and policies.

## **Other Pending Amendments**

One petition to amend R. Regulating Fla. Bar 1-7.3, filed by more than 50 members of the bar in good standing, is pending before this Court in case SC14-1165. The proposed amendments within this filing are unrelated to the pending petition in case SC14-1165 and may be considered independent of it. There are no other proposed amendments to rule 4-1.5 pending before this Court and no proposed amendments to rule 1-7.3 are contained in this petition.

## **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 rule 4-1.5 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.

Relevant Florida and out-of-state ethics opinions and correspondence of note are provided in Appendix D.

### **Comments in Response to Amendments**

During the development of these proposed amendments, the Garretson Firm, a private company that handles lien resolution, made comments. Those comments are provided in Appendix D. No comments were received by the bar after publication of official notice to file these amendments.

### **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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John F. Harkness, Jr.  
Executive Director  
Florida Bar Number 123390

**CERTIFICATE OF READ-AGAINST**

I certify that the Rules Regulating The Florida Bar set forth in this petition have been read against the on-line version of *West's Florida Rules of Court*.

/s/ John F. Harkness, Jr.

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John F. Harkness, Jr.  
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