

IN THE SUPREME COURT OF FLORIDA

IN RE: AMEMDMENTS TO THE RULES
REGULATING THE FLORIDA BAR –
BIENNIAL PETITION

CASE NO. SC16-1961

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**COMMENTS IN OPPOSITION TO PROPOSED CHANGES TO
RULE 4-1.8(h) AND RULE 5-1.1, COMMENT (SEVENTH PARAGRAPH)**

Florida Bar member Timothy P. Chinaris respectfully submits the following comments regarding The Florida Bar's Petition to Amend The Rules Regulating The Florida Bar – Biennial Petition.

COMMENTS REGARDING RULE 4-1.8(h)

It is respectfully submitted that Rule 4-1.8(h) should not be amended as proposed by the Bar. Adopting the proposed changes will create unnecessary confusion and could result in less protection for the public.

Current Rule 4-1.8(h) addresses two situations: (1) a lawyer's attempt to prospectively limit his or her malpractice liability to a client; and (2) a lawyer's conduct in settling a malpractice claim with an unrepresented client or former client. The rule is intended to address these two separate situations. *See* ABA

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Annotated Model Rules of Professional Conduct (American Bar Association, 7th ed. 2011), p. 154.¹

The first sentence of current Rule 4-1.8(h) restricts a lawyer's ability to make an agreement with a client that prospectively limits the lawyer's liability for malpractice. The second sentence prohibits a lawyer from settling *any* malpractice claim with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in making the settlement. (The phrase "such liability" in the second sentence of current Rule 4-1.8(h) refers to the "lawyer's liability to a client for malpractice.")

Neither the Bar's Petition to amend the rules nor the Exhibits to the Petition state why the Bar wishes to amend Rule 4-1.8(h). The absence of any justification or explanation may indicate that the proposed changes are intended to be non-substantive. If adopted, however, the proposed amendments to the second

¹ Rule 4-1.8(h) is the Florida counterpart to ABA Model Rule 1.8(h). The ABA rule was split into two numbered subsections in 2002. This was *not* done to change the substance of the rule, but rather "to clarify the two separate obligations under this Rule. No change in substance is intended." A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, (American Bar Association, 2006), p. 207. For an unrelated reason, The Florida Bar Special Committee to Review the ABA Model Rules 2002 recommended that The Florida Bar not ask this Court to adopt the ABA's change to Rule 1.8(h). Report to The Florida Bar Board of Governors by the Special Committee to Review the ABA Model Rules 2002, p. 70, available online at <http://www.floridabar.org/tfb/TFBComm.nsf/840090c16eedaf0085256b61000928dc/076132cfc389d63d85256eb7004e6c15?OpenDocument> .

sentence of Rule 4-1.8(h) would substantively change the ethical requirements that apply when a lawyer attempts to settle malpractice claims with unrepresented clients or former clients.

The proposed change would require lawyers to advise clients or former clients to seek independent counsel only when settling a claim of “*prospective malpractice*” (emphasis added). It is not clear what the term “prospective malpractice” means, and the rule does not define it. Under the proposed change, a lawyer settling a claim of “prospective malpractice” with an unrepresented client or former client would be required to advise that person in writing that independent representation is appropriate – but a lawyer settling any *other* (non-“prospective”) malpractice claims would not have to so advise the client. This would reduce the protections provided in the existing rule.

These problems could be cured by striking the word “prospective” from the second sentence of the proposed rule (as shown by the double strike-through), so that the proposed rule reads as follows:

A lawyer ~~shall not make~~ is prohibited from making an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer ~~shall not settle~~ is prohibited from settling a claim for ~~such liability for prospective malpractice~~ with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate ~~in connection therewith~~ making the agreement.

COMMENTS REGARDING RULE 5-1.1, COMMENT

It is respectfully submitted that this Court should not adopt the proposed changes to the seventh paragraph of the Comment to Rule 5-1.1 that would insert case citations and parenthetical explanations.²

These proposed changes concern the question of whether a lawyer who holds trust funds representing proceeds of a client's case has a duty to protect third parties who claim an interest in those funds. The answer to this question typically turns on the specific facts and circumstances involved. As The Florida Bar Professional Ethics Committee has recognized, "it is impossible for the Committee to announce any bright line rule that applies in all situations." Florida Ethics Opinion 02-4.

Unfortunately, the tenor of the proposed additions to the Comment to Rule 5-1.1 may suggest that there is a bright-line rule requiring lawyers to hold back trust account funds whenever a third party claims an interest in them. The case citations listed in the proposed addition to the Comment provide minimal guidance and may be incomplete or misleading.

² Although these comments do not address the proposed changes to the eighth paragraph of the Comment to Rule 5-1.1, it should be noted that two of the citations in the eighth paragraph should be corrected. The *Florida Bar v. Golden* is at 566 So. 2d 1286, and *The Florida Bar v. Marrero* is at 157 So. 3d 1020.

For *The Florida Bar v. Silver*, 788 So. 2d 958 (Fla. 2001), the parenthetical does not fully summarize the facts of the case. The medpay funds in question were not “assigned by” the lawyer’s letter of protection; rather, the client signed documents with the medical provider assigning the funds. The lawyer provided the medical provider with letters of protection subsequent to the client’s assignments. The lawyer and client also signed another letter of protection.

For *The Florida Bar v. Krasnove*, 697 So. 2d 1208 (Fla. 1997), the parenthetical states only that the lawyer was suspended for one year because he failed to pay medical providers from the client’s settlement. Significantly, the lawyer did more than simply fail to pay the medical providers – he paid those funds to himself. Neither the parenthetical nor the opinion indicate whether the client, the lawyer, or both had assigned or guaranteed that the medical providers’ bills would be protected.

For *The Florida Bar v. Neely*, 587 So. 2d 465 (Fla. 1991), the parenthetical states that the lawyer was disciplined for, among other violations, disbursing funds to the client that “should have been paid to doctor to whom benefits had been assigned.” The lawyer had entered into an agreement with the doctor and executed a written Notice to Attorney of Assignment of Doctor’s Lien Agreement.

While citing to these cases might provide some relevant information to lawyers, new cases will continue to be decided and current case law may change in

importance over time or be distinguished by subsequent cases. Accordingly, instead of simply adding case citations to the Comment, it is suggested that this Court consider restating some of the general principles and significant factors that should guide a lawyer who is faced with competing claims of a client and a third party to funds held in trust. Doing so would provide more useful information to lawyers who are caught between a client who demands that settlement proceeds be paid to him or her and a third party who asserts entitlement to those funds.

For example, a principle implicitly running through this Court's disciplinary cases seems to be that, in order to trigger a duty to protect funds for a third party under Rule 5-1.1, the third party's claim must directly relate to the case being handled for the client. In contrast, should a lawyer have a duty to protect funds claimed by the client's landlord based on an email that the client sent to the landlord promising to pay past-due rent when the case settled? Absent some involvement by the lawyer in the client-landlord dealings, it would appear that the lawyer would owe no duty to the landlord.

Another guiding principle seems to be that, in order to trigger an obligation under Rule 5-1.1, the lawyer must participate in, benefit from, or at least have knowledge of a client's assignment of rights to a third party (often a medical provider). In contrast, it is not clear whether or to what extent a lawyer who was not involved in and was not given a benefit as a result of an assignment executed

while the client was represented by a *prior* counsel has a duty under Rule 5-1.1. For example, assume that the client signed an assignment to a doctor while represented by prior counsel. The doctor's medical services to the client are limited to one or two visits. The doctor provides no medical records, testimony, or other information or services to prior counsel. The client then discharges prior counsel and hires new counsel. New counsel has no dealings with the doctor and the doctor provides nothing relating to the case. Upon settling the case, does new counsel have a duty to protect the doctor's claim over the client's demand for the funds?

Personal injury lawyers frequently face these types of problems. It is respectfully suggested that this Court decline to approve the proposed amendment to the seventh paragraph to the Comment to Rule 5-1.1 and instead direct The Florida Bar to draft commentary that more clearly sets out the applicable principles that should guide lawyers in resolving these issues. Alternatively, the Court may wish to cite only to Florida Ethics Opinion 02-4, which provides a detailed analysis of some common situations presented to personal injury lawyers.

CONCLUSION

For the reasons set forth above, the undersigned respectfully requests that this Court decline to adopt the proposed amendments to Rule 4-1.8(h) and the Comment (seventh paragraph) to Rule 5-1.1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was filed through the Portal and furnished to the persons listed below, by e-mail service, on this 25th day of November 2016 to:

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this document is typed in 14 point Times
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