

FLORIDA BAR RULES

Florida Bar Rules: Attorney's Fees

***In re Amendment to the Rules Regulating The Florida Bar-
Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct,
939 So. 2d 1032 (Fla. 2006)***

A medical liability claimant may knowingly and voluntarily waive his or her rights under amended Article 1, Section 26 of the Florida Constitution. Judicial review of such a waiver is not required.

FACTS AND PROCEDURAL HISTORY

In November 2004, Florida voters approved an amendment to the Florida Constitution. The amended language of Article I, Section 26 provides as follows:

In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants.

In re Amendment, 939 So. 2d at 1036.

Fifty-five members of The Florida Bar then filed a petition to amend Florida Bar Rule 4-1.5(f)(4)(B), which governs legal service fees and costs. This petition sought to add the following language:

- (iii) Notwithstanding the preceding provisions of subdivision (B), in medical liability cases, attorney fees shall not exceed the following percentages of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants:

- a. Thirty percent (30%) of the first \$250,000.00.
- b. Ten percent (10%) of all damages in excess of \$250,000.00.

Id. at 1036–1037.

The Florida Bar opposed the rule amendment on the ground that it did not contain a provision allowing a medical-liability claimant to waive the rights provided for in the constitutional amendment. The Florida Supreme Court ordered The Florida Bar to submit its own proposed amendment to Rule 4-1.5(f)(4)(B) that would acknowledge the amendment to Article I, Section 26 of the Florida Constitution, require an attorney to notify a potential client of the medical-liability-claim provisions, and include a provision for a knowing waiver of the potential client's rights. This new amendment was submitted to the Court and printed in *The Florida Bar News*.

The original fifty-five attorneys then opposed The Florida Bar's amendment, raising concerns about whether the rights granted by the constitutional amendment can be waived because the Section applies to certain policies that are beyond the claimant's control. The attorneys also questioned whether a court must approve such a waiver. They argued that all waivers should be subject to judicial approval and that judicial approval should only be given if the claimant is unable to obtain legal counsel because of the fee limitations specified in the constitutional amendment. The Court adopted The Florida Bar's proposed amendment and determined that the rights could be waived and that judicial review of the waiver was generally unnecessary.

ANALYSIS

The Court determined that claimants could waive their rights under Article I, Section 26. The Court reasoned that Article I, Section 26 unquestionably created a personal right because the Section is entitled "Claimant's right to fair compensation." *Id.* at 1038. Further, the Court noted that even the most fundamental rights, such as the right to representation and the right to remain silent, can be knowingly and voluntarily waived.

The Court decided that the waiver provision proposed by those in opposition to the rule amendment went far beyond ensuring that any waiver is knowing and voluntary. On the other hand,

the Court reasoned that The Florida Bar's proposed waiver requirement would place a burden on the potential client to make a "reasonable effort" to retain counsel before waiving his or her rights. *Id.* at 1039. It would also place a burden on the courts to determine whether the waiver was "necessary" and whether the fee agreement was reasonable. *Id.* Thus, the Court rejected the opposition's proposed waiver requirements and asserted that the court's role is limited to ensuring that any waiver is knowingly and voluntarily made.

Finally, the Court determined that the provisions of The Florida Bar's proposed amendment coupled with existing restrictions on contingency fees were "sufficient to protect the client's interests when negotiating a contract for representation with counsel of choice and to ensure that if the client agrees to waive his or her rights under [A]rticle I, [S]ection 26, the waiver is knowingly and voluntarily made." *Id.* at 1040.

Justice Wells concurred in part and dissented in part, determining that the conflict between an attorney's financial interest and a client's financial interest in the constitutional limitation, in conjunction with the superior bargaining position of the attorney, warrants a judicial-review provision in the new amendment to the rules. Justice Wells pointed out that judicial review is required for contingency-fee agreements that exceed the percentages set out in Rule 4-1.5(f)(4)(B)(ii) and argued that the constitutional right of a claimant to recover a percentage of damages is at least as important as the charging of a fee in excess of a Florida Bar rule.

SIGNIFICANCE

In re Amendment determines a claimant's right to waive his or her rights under the amended Article I, Section 26 of the Florida Constitution. The opinion makes clear that a claimant may waive these rights without being subject to judicial review as long the waiver is knowingly and voluntarily made. This waiver is now incorporated into Florida Bar Rule 4-1.5(f)(4)(B).

RESEARCH REFERENCE

- Eric S. Matthew, Student Author, *A New Prescription: How a Thorough Diagnosis of the "Medical Malpractice" Amend-*

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ments Reveals Potential Cures for Florida's Ailing Citizen Initiative Process, 14 U. Miami Bus. L. Rev. 331 (2006).

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