

FLORIDA BAR STAFF OPINION 43725

May 3, 2023

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A member of The Florida Bar has requested an advisory ethics opinion concerning whether a personal injury lawyer may sign—or honor without signing—an agreement with a lien resolution expert that the inquirer will honor the inquirer's client's wishes to pay a health lien resolution specialist a “reverse contingency fee” on any amounts that the specialist saves the inquirer's client. The inquirer states that the amount saved would be more than the current amount that the client's health plan has agreed to reduce the lien to. As an example, the inquirer explains that if the lien resolution specialist reduces the lien another \$15,000 more than the inquirer was able to reduce the lien, then the inquirer would pay the lien resolution specialist a percentage fee on the savings from their client's portion of the personal injury recovery. The inquirer also explains that the agreement would not be signed until after the inquirer has settled a personal injury case against an alleged tortfeasor, paid themselves for lawyer fees, and the inquirer has exhausted reasonable efforts to negotiate down their client's health plan lien.

It would be ethically impermissible for the inquiring lawyer to sign, or honor without signing, a client's agreement to pay a lien resolution expert or specialist if the proposed “reverse contingency fee” is charged to the client, as such a cost would amount to an excessive cost as contemplated by the rules.

Under the Rules Regulating The Florida Bar, a lawyer's utmost responsibility in the representation of a client is to provide competent representation. Rule 4-1.1, the competence rule, provides:

A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

In light of the foregoing, it is clear that a lawyer's first duty is to provide competent representation to a client and this duty of competence cannot be ethically restricted or limited in any way. See Rule 4-1.2(c), Rules Regulating The Florida Bar. A personal injury lawyer customarily attempts to negotiate down a client's liens against the settlement, and The Florida Supreme Court has indicated that this work should be done in personal injury cases without additional cost to clients.

In declining to adopt an amendment to Rule 4–1.5 (Fees and Costs for Legal Services), Rules Regulating The Florida Bar, the Court addressed subrogation and lien resolution services in personal injury and wrongful death cases involving a contingent fee. First, in *In re Amendments to the Rules Regulating the Florida Bar (Biannual Report)*, 101 So.3d 807 (Fla. 2012), the proposed amendment provided:

(1) that a lawyer handling a personal injury or wrongful death case charging a contingent fee must include in the fee contract information about the scope of the lawyer's representation relating to subrogation and lien resolution services; (2) that the lawyer shall not charge any additional fee to the client for providing subrogation and lien resolution services if the total fee for the primary personal injury matter together with the lien resolution matter would exceed the contingent fee schedule; (3) that extraordinary services for subrogation and lien resolution may be 'handled by others outside the primary lawyer's firm who will charge additional fees or costs' only with the client's informed consent; (4) that additional fees or costs charged by the lawyer providing the extraordinary subrogation and lien resolution services must comply with all provisions of the fee rule; and (5) that the lawyer providing the extraordinary subrogation and lien resolution services may not divide fees with the lawyer handling the primary personal injury or wrongful death claim.

In re Amendments to Rule Regulating The Florida Bar 4-1.5--Fees & Costs for Legal Services, 202 So. 3d 37, 38 (Fla. 2016).

Although the Court declined to adopt this amendment, the Court clarified "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." *In re Amendments to the Rules Regulating the Florida Bar (Biannual Report)* at 808.

The Florida Bar proposed subsequent amendments to Rule 4-1.5 which provided that:

[T]he 'primary lawyer' in a personal injury or wrongful death case charging a contingent fee: (1) must provide ordinary lien resolution as part of the lawyer's representation of the client under the fee contract; (2) must disclose to the client at the outset of representation whether the matter may involve extraordinary lien and subrogation services requiring additional fees; and (3) may not charge additional fees to the client for providing any lien and subrogation resolution services if those fees, combined with the lawyer's fee for handling the underlying personal injury matter, exceed the contingent fee schedule. The proposal further provide[d]: (1) that an 'extraordinary lien and subrogation lawyer' may charge a fee for extraordinary lien and subrogation services that, when combined with the fees for the underlying personal injury matter, exceeds the contingent fee schedule, but only if the services are in the client's best interests, the client consents in writing, and only with prior court approval; (2) fees charged by the extraordinary lien and subrogation lawyer must comply with all provisions of the fee rule; (3) the extraordinary lien and subrogation lawyer may not divide fees with the primary lawyer handling the personal injury or wrongful death claim; and (4) the court reviewing a fee agreement for extraordinary lien resolution services may adjust the fee of the primary lawyer. Finally, the proposal define[d] ordinary versus extraordinary lien and subrogation services, and within a comment to rule 4-1.5, explain[ed] what lien resolution services are required as part of the original fee contract and what extraordinary services entail.

In re Amendments to Rule Regulating The Florida Bar 4-1.5--Fees & Costs for Legal

Services, 202 So. 3d 37, 39 (Fla. 2016).

Again, the Court declined to adopt the proposed amendments to Rule 4–1.5. *Id.* Instead, the Court reemphasized “that lawyers representing clients in personal injury, wrongful death, or other cases where there is a contingent fee should, as part of the representation, also represent those clients in resolving medical liens and subrogation claims related to the underlying case.” *Id.* Further, the Court stated:

This should be done at no additional charge to the client beyond the maximum contingency fee, even if the attorney outsources this work to another attorney or non-attorney. Although 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 contemplates that there will be some cases that are profitable for the lawyer handling the claim and others that are unprofitable. That risk and reward is built into the contingency fee contract. If the circumstances of a particular case are such that the fee generated under the contingency fee agreement 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.

Id. at 39-40.

Certainly, if liens were not negotiated down, it may be impossible to settle cases since the settlement that clients are willing to accept depends on what amounts the lawyer will have to pay out on behalf of the client. To charge separately for this through a third party-owned lien resolution company or lien resolution expert or specialist could possibly result in the charging of an excessive fee, exceeding Rule 4-1.5(f)(4)(B) fee schedule in terms of the overall fee charged for services rendered.

Additionally, Florida Consolidated Opinion 76-33 and 76-38 states “[i]n billing a client a lawyer may separately itemize for legal research and other similar services performed by salaried nonlawyer personnel, but care should be taken to avoid the double-billing that could result if such charges are already accounted for in overhead.” (Copy enclosed). Thus, lawyers are only permitted to charge for certain kinds of work performed and must be careful not to double-bill for something that is normally included as part of the lawyer’s initial fee calculation.

Further, the proposed arrangement raises potential ethical concerns regarding the unlicensed practice of law. Rule 4-5.5(a), Florida Rules of Professional Conduct, provides as follows:

(a) Practice of Law. A lawyer shall not practice law in a jurisdiction other than the lawyer’s home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession of the lawyer’s home state or assist another in doing so.

Ethics counsel may not render legal opinions and may not, therefore, give an opinion as to what is or is not the practice of law. It is unclear from the inquiry whether the lien resolution expert or specialist is a lawyer or belongs to a law firm. If they are not a lawyer or do not belong to a law

firm, then this raises potential ethical concerns regarding the unlicensed practice of law. In general, however, a non-lawyer cannot provide, or offer to provide, legal services. Similarly, a corporation cannot provide legal services even if those legal services are performed by a member of The Florida Bar. See, Rule 4-5.5(b); *The Florida Bar v. Consolidated Business and Legal Forms, Inc.*, 386 So.2d 797 (Fla. 1980); and Florida Ethics Opinions 77-8, 92-3, 95-2 and 97-3 (copies of ethics opinions enclosed). Whether the negotiation of liens by the lien resolution expert or specialist constitutes the unlicensed practice of law is a legal question, beyond the scope of an ethics opinion. Any such inquiries should be directed to the Bar's Unauthorized Practice of Law ("UPL") Department. If it is the practice of law and the firm's lawyer is assisting the lien resolution expert or specialist in the provision of the legal services, the firm's lawyer could be assisting the unlicensed practice of law.

Pursuant to Rule 4-8.4(a), a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, **or do so through the acts of another**" (emphasis added). Therefore, even if the inquirer did not sign the agreement, but chose only to honor the agreement, per their client's instruction, doing so would run afoul of rule 4-8.4(a).

Therefore, in response to inquirer's questions: 1) the inquirer may only sign, prepare, honor, or otherwise be involved with an agreement to use a third-party lien resolution expert or specialist to resolve a client's personal injury liens if no additional fee is charged to the client and the client gives informed consent; and 2) the proposed "reverse contingency fee" charged by the lien resolution business should not be billed to the client, as such a cost would amount to an excessive cost as contemplated by Rule 4-1.5 and the opinions noted above.

Index: 4-1.1, 4-1.2, 4-1.5, and 4-8.4(a)