

APPENDIX B

SELECTED TEXT OF PROPOSED AMENDMENTS WITH REASONS FOR CHANGE

March 17, 2017

RULES REGULATING THE FLORIDA BAR

CHAPTER 4 RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER CHAPTER 4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. Subject to subdivisions (c) and (d), a lawyer ~~shall~~ must abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, ~~shall~~ must reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer ~~shall~~ must abide by a client's decision whether to settle a matter. In a criminal case, the lawyer ~~shall~~ must abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) No Endorsement of Client's Views or Activities. [no change]

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing, except that a lawyer giving advice in a short-term limited legal services program under rule 4-6.6 is not required to obtain the consent in writing. If the ~~attorney~~ lawyer and client agree to limit the scope of the representation, the lawyer ~~shall~~ must advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer ~~shall~~ must not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal

Thomson Reuters' 2016 *Florida Rules of Court* has a period after the rule number (4-1.2). The bar verified that there is no period after the rule number by reviewing this Court's orders in the last 2 opinions adopting amendments to this rule: *Amendments to Rules Regulating the Florida Bar and the Florida Family Law Rules of Procedure (Unbundled Legal Services)*, 860 So.2d 394 (Fla. 2003) and *In re Amendments to the Rules Regulating The Florida Bar*, 933 So.2d 417, (Fla. 2006). The bar has notified the publisher, which has responded that the added period is part of the publisher's numbering convention and does not consider it an error that the publisher will correct.

The amendment is proposed as a companion to related proposed rule 4-6.6, which slightly relaxes application of conflicts rules in the context of short term, limited representation through a nonprofit organization, court, government agency, bar association or an American Bar Association-accredited law school. There

consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Comment

Allocation of authority between client and lawyer

Subdivision (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. The decisions specified in subdivision (a), such as whether to settle a civil matter, must also be made by the client. See rule 4-1.4(a)(1) for the lawyer's duty to communicate with the client about ~~such~~ these decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer ~~shall~~ must consult with the client as required by rule 4-1.4(a)(2) and may take ~~such~~ action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. If ~~such~~ these efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See rule 4-1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See rule 4-1.16(a)(3).

are numerous legal aid, court and local bar sponsored programs that offer limited legal services, including weekend or day clinics, hotlines, consultations, forms, and counseling of pro se litigants. It is difficult for lawyers to obtain written consent of clients, particularly where the consultation or advice occurs over the telephone or over the Internet. This slight relaxation of the rules would encourage lawyers to agree to engage in these limited representations, which will increase access to justice.

At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 4-1.4, a lawyer may rely on ~~such~~the an advance authorization. The client may, however, revoke ~~such~~this authority at any time.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to rule 4-1.14.

Independence from client's views or activities

[no change]

Agreements limiting scope of representation

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms ~~upon~~ upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. ~~Such limitations~~Limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent, or which the client regards as financially impractical.

Although this rule affords the lawyer and client substantial latitude to limit the representation if not prohibited by law or rule, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief consultation. ~~Such a~~ This limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the

client could rely. In addition, a lawyer and client may agree that the representation will be limited to providing assistance out of court, including providing advice on the operation of the court system and drafting pleadings and responses. If the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate "Prepared with the assistance of counsel" on the document to avoid misleading the court, which otherwise might be under the impression that the person, who appears to be proceeding pro se, has received no assistance from a lawyer. If not prohibited by law or rule, a lawyer and client may agree that any in-court representation in a family law proceeding be limited as provided for in Family Law Rule of Procedure 12.040. For example, a lawyer and client may agree that the lawyer will represent the client at a hearing regarding child support and not at the final hearing or in any other hearings. For limited in-court representation in family law proceedings, the ~~attorney shall~~ lawyer must communicate to the client the specific boundaries and limitations of the representation so that the client is able to give informed consent to the representation.

Regardless of the circumstances, a lawyer providing limited representation forms ~~an attorney-a~~ client-lawyer relationship with the litigant, and owes the client all attendant ethical obligations and duties imposed by the Rules Regulating The Florida Bar, including, but not limited to, duties of competence, communication, confidentiality and avoidance of conflicts of interest. Although an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See rule 4-1.1.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and law. For example, the client may not be asked to agree to representation so limited in scope as to violate rule 4-1.1 or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, fraudulent, and prohibited transactions

[no change]

RULE 4-6.6 SHORT-TERM LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization, court, government agency, bar association or an American Bar Association-accredited law school, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to rules 4-1.7 and 4-1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to rule 4-1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by rule 4-1.7 or 4-1.9(a) with respect to the matter.

(b) Except as provided in subdivision (a)(2), rule 4-1.10 is inapplicable to a representation governed by this rule.

Comment

Legal services organizations, courts, government agencies, local and voluntary bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services, such as advice or the completion of legal forms, that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. These programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., rules 4-1.7, 4-1.9 and 4-1.10.

A lawyer who provides short-term limited legal services under this rule must

This proposed rule slightly relaxes application of conflicts rules in the context of short term, limited representation through a nonprofit organization, court, government agency, bar association or an American Bar Association-accredited law school. There are numerous legal aid, court and local bar sponsored programs that offer limited legal services, including weekend or day clinics, hotlines, consultations, forms, and counseling of pro se litigants. These services are usually limited to a single meeting between lawyer and client where the lawyer gives limited advice to a person or assists the person in filling out legal forms. It is difficult for lawyers to perform a conflicts of interest check in these situations. There is little risk in these situations that a lawyer will have or use confidential information to the detriment of an existing client of the lawyer or firm, or that the lawyer's loyalty to an existing client will be compromised, because of the limited nature of the representation. If the lawyer knows of a conflict of either the lawyer or the lawyer's firm, the lawyer would be precluded from giving the limited assistance and that person would be referred to another lawyer from a different firm. This slight relaxation of the rules would encourage lawyers to agree to engage in these limited

obtain the client's informed consent to the limited scope of the representation. See rule 4-1.2(c). However, a lawyer is not required to obtain the consent in writing. Id. If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Rules of Professional Conduct, including rules 4-1.6 and 4-1.9(b) and (c), are applicable to the limited representation.

Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, subdivision (a) requires compliance with rules 4-1.7 or 4-1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with rule 4-1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by rules 4-1.7 or 4-1.9(a) in the matter.

Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, subdivision (b) provides that rule 4-1.10 is inapplicable to a representation governed by this rule except as provided by subdivision (a)(2). Subdivision (a)(2) requires the participating lawyer to comply with rule 4-1.10 when the lawyer knows that the lawyer's firm is disqualified by rules 4-1.7 or 4-1.9(a). Because of subdivision (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, rules 4-1.7, 4-1.9(a) and 4-1.10 become applicable.

representations, which will increase access to justice.

As approved by the Board of Governors and published in the official bar *News* notice, the chapter reference was inadvertently omitted from all the of the rules citations within the rule and comment. E.g., “rule 4-1.7” was approved and noticed as “rule 1.7.”