Florida Supreme Court Declines to Adopt New Rules on Lien Resolution Outsourcing

The Supreme Court of Florida recently published the Biannual Report on Proposed Amendments to the Rules Regulating the Florida Bar (April 12, 2012). Much discussion has been given to one section of the 59 page report which covers the outsourcing of lien resolution and subrogation claims. Specifically, the proposed amendment to Rule 4-1.5 (Fees and Costs for Legal Services).

Facts

The Florida State Bar proposed a new subdivision to Rule 4-1.5, (f)(4)(E) and related commentary addressing subrogation and lien resolution services in contingent fee cases. This subdivision would provide that a lawyer in 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; the rule would also provide that some medical lien and subrogation claims may be referred to another attorney for resolution with the client's informed consent.

The Court, after considering the concerns, declined to adopt new subdivision (f)(4)(E). The Court stated that "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."

Analyst’s Comment

The old saying "much ado about nothing" comes to mind here. Or, perhaps, "business as usual." What the Court was primarily saying with the comment it added in connection with the denial was that when a lawyer is representing a plaintiff, it is that attorney (regardless of the experts or resources used) who remains ultimately responsible for the representation of the client, including addressing issues like lien resolution as part of such representation.

This is consistent with the ABA Model Rule 1.1, which provides that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation. A reasonably competent plaintiff's lawyer should know that with the growing complexity of Medicare and Medicaid, retaining an expert who works on the lien resolution piece is not only necessary, it is arguably required under Model Rule 1.4 (a), which provides that a lawyer shall reasonably consult with the client about the means by which the client’s objectives are to be accomplished. Resolving a client's medical liens would certainly fall within the intended scope of this rule.
Meanwhile, as long as plaintiff attorneys maintain representation of the plaintiff and disclose in their engagement agreement that they may engage third party experts such as lien resolution specialists to help facilitate settlement and conclusion of the case at the plaintiff’s cost, we continue to believe that the original Rule 4-1.5 (which is still in effect) does not prohibit an attorney from paying a third party lien resolution expert for their assistance and charging such as a case cost (similar to how other experts and third party provider’s services are charged as case costs). The Court, in declining to adopt the proposed amendment did not make specific comment about fees for such services; rather, the court focused its comment solely on the issue of ensuring that the plaintiff’s counsel maintain their representation. We reiterate that we believe this comment from the Court was implicitly aimed at highlighting that attorneys must provide competent representation by effectively dealing with all applicable liens in a given case (whether they do so themselves or with the help of a third party expert and charge for such as a case cost).