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GOVERNOR

CHARLES T. CORLEY
SECRETARY

MEMORANDUM

TO: AAA Executive Directors **Notice #: 111313-1-I-IE**

FROM: Charles T. Corley, Secretary

DATE: November 7, 2013

SUBJECT: Notice of Instruction: Clarification on policies affecting the Older Floridians Legal Assistance Program – Attorney / Client Privilege and Grievance Procedures.

The purpose of this notice is to provide clarification on provisions in the Florida Department of Elder Affairs Programs and Services Handbook that pertain to 1) the protection of the attorney-client privilege in the provision of legal services funded under the Older Americans Act; and 2) minimum guidelines for recipient grievance procedures for Older Floridians Legal Assistance Program (OFLAP) providers.

Protection of the Attorney / Client Privilege:

Rule 4-1.6, Rules Regulating the Florida Bar, states that attorneys have a professional responsibility to not reveal information relating to representation of a client. This privilege belongs to the client and can only be waived by the client's informed consent.

From the Comment to Rule 4-1.6:

"A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based

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upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.”

This privilege is protected by the Older Americans Act. 42 U.S.C. §3026 (e) states, “An area agency on aging may not require any provider of legal assistance under this title to reveal any information that is protected by the attorney-client privilege.”

The Florida Department of Elder Affairs Programs and Services Handbook, Chapter 4, also prohibits the state and state agencies from requiring any provider of legal assistance under Title III to reveal any information that is protected by the attorney-client privilege.

It follows that AAAs may not require OFLAP providers to seek waivers of client confidentiality from Title IIIB or Title IIIE clients as a condition of representation. Doing so deprives the client of the right to a voluntary waiver. Monitoring practices to verify compliance with the conditions of the contract should be reasonable and not require a breach of a duty owed to a client.

Minimum Guidelines for Recipient Grievance Procedures

The Florida Department of Elder Affairs Programs and Services Handbook, Appendix D, lays out minimum guidelines for recipient grievance procedures. However, special consideration must be provided in the review of grievance procedures for Older Floridian Legal Assistance Programs (OFLAP) funded under Title IIIB and Title IIIE.

In the context of the provision of legal services, grievances may arise when legal services are denied or when clients are dissatisfied about the manner or quality of legal assistance provided. With respect to a denial of service, several opinions of the Florida Bar Ethics Committee have emphasized the importance of a lawyer exercising independent judgment in matters related to the representation of a client. An attorney's decision to accept a case for representation, change the legal strategy in a case, withdraw from representation, or close a case is most commonly related to the legal aspects of the case, an evaluation of its legal merits, and the ability to maintain a functional attorney-client relationship. According to the Rules Regulating the Florida Bar, the lawyer must exercise independent professional judgment in making such decisions and in advising clients of the possible effect of legal alternatives. Non-attorneys are not permitted to second-guess or substitute their opinions or wishes for those of the attorney.

With respect to client dissatisfaction about the manner or quality of legal services provided, the Florida Supreme Court delegates its authority to investigate and enforce the standards of ethical conduct of lawyers to the Florida Bar. The Florida Bar accepts complaints against attorneys, investigates those complaints and prosecutes attorneys who engage in unethical conduct. For individuals who are unsure if a lawyer has acted ethically or who are dissatisfied and wish to consider whether filing a complaint may be appropriate, The Florida Bar operates the Attorney Consumer Assistance Program (ACAP).

All OFLAP providers must have an internal grievance procedure in place that addresses both denial of service and complaints by clients about manner or quality of legal assistance. At a minimum, the procedure must provide applicants with:

- 1) adequate notice of the grievance procedures;
- 2) information on how to file a grievance or complaint; and
- 3) an opportunity for review of that complaint by the Executive Director or the Executive Director's designee.

Most legal providers already have grievance policies in place by way of being required to do so by other major funding sources such as the Legal Services Corporation (LSC), or because it is a business best practice. Grievance policies that comport with LSC requirements are sufficient to meet DOEA requirements.

Given the Rules Regulating the Florida Bar stated above, as well as the existence of a general grievance and complaint process for all legal clients through the Florida Bar, it is inappropriate for OFLAP clients to be directed to appeal the decision on their grievance review to the Area Agency on Aging. However, AAAs may request that legal providers maintain a file of complaints and statement of disposition of those complaints, with redacted client identifying information, for examination by the AAA during monitoring.

Technical Assistance for the Older Floridians Legal Assistance Program

If the AAA should require technical assistance in establishing monitoring practices for OFLAP providers that ensure protection of the attorney-client privilege, or in reviewing grievance procedures of OFLAP providers, please contact Sarah Halsell, State Legal Services Developer, at halsellsk@elderaffairs.org or (850) 414-2389. Thank you for your cooperation.