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IN THE SUPREME COURT OF FLORIDA

IN THE MATTER OF THE FLORIDA BAR)

RE: AMENDMENT TO CODE OF PROFESSIONAL) Case No. 68,417

RESPONSIBILITY (Contingent Fees))

BRIEF OF RESPONDENT
ACADEMY OF FLORIDA TRIAL LAWYERS

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PREFACE

The Academy of Florida Trial Lawyers is a large, statewide association of over 3,000 attorneys specializing in all areas of litigation. However, the overwhelming majority of our members are dedicated to the preservation of the rights of injured persons who sustain personal injuries as the result of medical malpractice, products liability and other forms of negligence. Our organization's goal, as stated in our Charter, is "to promote public safety and welfare while protecting individual liberties." Our purpose is to assure that the courts of this State remain accessible to every person for the redress of any injury and that the right to trial by jury remains inviolate. Art. II, § 1(g), (h), Charter, Academy of Florida Trial Lawyers.

Accordingly, the members of the Academy and the persons they represent are acutely interested in, and will be unavoidably affected by, the Petition which has been filed by the Florida Bar to amend the Code of Professional Responsibility governing those rules applicable to contingent fee contracts in personal injury and wrongful death cases. This Brief is in response to the Petition and Brief of the Florida Bar concerning proposed amendments to DR 2-106 of the Florida Code of Professional Responsibility.

STATEMENT OF THE CASE AND FACTS

The Academy accepts the Statement of the Case and Facts of the Florida Bar. Any emphasis in this brief is that of the writer unless otherwise indicated. In this brief, the Petitioner will be referred to as the Florida Bar and the Respondent will be referred to as the Academy.

The Academy will address Points I and II of the Florida Bar's brief which concern amendment of the Code of Professional Responsibility to establish a limitation on contingent fees under Point I and the Bar's suggested contingency fee schedule under Point II.

The Academy submits that Points III, IV and V of the Bar's brief are well taken and urges this Court to grant the Florida Bar's Petition and amend the Code of Professional Responsibility accordingly.

SUMMARY OF ARGUMENT

This Court has exclusive jurisdiction to regulate members of the Bar and the ethical code governing contingency fee contracts. This power is exclusively vested in the Supreme Court by Article V, Section 15 of the Florida Constitution. Even without this specific constitutional authority, this Court has inherent power to control the conduct of its officers and the practice of law in order to assure the administration of justice in the courts. The legislative provisions of the medical malpractice reform act which purports to set attorneys' fees in medical malpractice cases are constitutionally impermissible.

This Court has repeatedly held that the independence of the Courts from the other two branches of state government does not permit any interference in the exercise of the Court's exclusive power to regulate members of the Bar. It is imperative to the continued viability of the doctrine of separation of powers in this state and the Court's ability to carry out its constitutional functions that this Court articulate its exclusive jurisdiction over this matter in response to the petition of the Florida Bar.

This Court has historically reviewed matters within its jurisdiction whenever necessary to assure the credi-

bility of the court system and the legal profession. A review of the extensive record prepared by the Florida Bar shows there is no significant abuse of the contingent fee system in personal injury cases in the State of Florida. Should the Court determine, however, that contingent fees should be more precisely regulated by the Court to assure that such fees are "fair and reasonable to allow representation of the public in medical malpractice cases" as requested by the Legislature, the Academy urges that such guidelines be limited to medical malpractice cases and be liberally drawn so as to assure that all citizens have access to the courts in such cases.

The 33-1/3%/40% provisions of the Florida Bar's Petition should be the maximum restriction placed upon the handling of medical malpractice cases. Given the complex nature of medical malpractice litigation and the substantial contingency involved, any more restrictive schedule would make it economically infeasible to properly handle many such cases. An inverse sliding fee schedule such as proposed by the Legislature would make it impossible for plaintiffs' counsel to devote the time and expense necessary to bring such matters to an early conclusion as contemplated by the medical malpractice act and would foreclose representation in many claims.

If the Court determines to adopt a schedule, it should not arbitrarily choose a level of recovery above

which the fee must be reduced or otherwise be deemed "clearly excessive". Cases involving wrongful death or catastrophic injuries are frequently under the protection of the Florida Guardianship laws and there is no evidence of any abuse of the contingent fee in such cases. Setting a cap would require the Court and the Bar to regularly review the cap to reflect the same present value as when initially adopted. Furthermore, tying a significant reduction of the fee to the amount of recovery creates an inherent potential conflict between the attorney and client.

POINT I

THE SUPREME COURT HAS EXCLUSIVE JURISDICTION TO REGULATE THE LEGAL PROFESSION.

The Florida Bar has filed a petition for amendment of the Code of Professional Responsibility so as to provide for a contingent fee schedule in all personal injury cases. The impetus for the Bar's petition is the action of the Florida Legislature in passing Section 768.595, Florida Statutes (1985), establishing an attorneys' fee schedule in medical malpractice cases, effective July 1, 1986. The Academy respectfully submits that it is essential to maintenance of the constitutional principle of separation of powers and the judiciary's ability to perform its constitutionally mandated functions that this Court expressly assert its constitutional prerogative in this area.

A. Regulation of Fees Charged by Lawyers in Cases Involving Non-statutory Causes of Action is Within the Inherent and Constitutionally Exclusive Jurisdiction of the Court to Regulate Conduct of Attorneys and Judicial Practice and Procedure in this State.

In In the Matter of The Florida Bar, 349 So.2d 630 (Fla.1977), this Court refused to adopt a fee schedule in contingent fee cases. Although basing its decision on several grounds, some of which are not present today, the

controlling consideration was that the contingent fee was the " 'poor man's key to the courthouse,' " which this Court recognized as essential to providing constitutionally guaranteed access to the courts to the poor and less fortunate in our society. 349 So.2d at 633. Preservation of the contingent fee is not only essential to implementing the philosophy of Article I, Section 21, but regulation of attorneys' fees is an integral and inherent part of the Supreme Court's exclusive jurisdiction mandated by Article V, Section 2 and Section 15, Constitution of the State of Florida.

In Petition of Florida Bar, 61 So.2d 646 (Fla.1952), this Court recognized the importance of maintaining the separation of legislative and judicial powers to assure that neither the Legislature nor the Court encroached on the other branch's constitutional authority. In its pre-Article V opinion analyzing the legislature's authority with respect to the State Board of Law Examiners, this Court made the following observations about its inherent authority under the separation of powers doctrine:

> "Inherent power has to do with the incidents of litigation, control of the court's process and procedure, control of the conduct of its officers and the preservation of order and decorum with reference to its proceedings. . . .
>
> ". . . .

> ". . . This doctrine [of separation of powers] was embedded in both the State and Federal Constitutions at the threshold of constitutional democracy in this country. The distribution of powers into three departments was not designed to promote haste or efficiency but to head off autocratic power and insure more careful deliberation in the promulgation of governmental policy. Reason and forethought are its great components. The makers of the Constitution knew the evils of arbitrary power and used every means at hand to prevent it."

61 So.2d at 647.

Under the Constitution of the State of Florida as revised in 1968, the people of the State of Florida re-emphasized the importance of the doctrine of separation of powers. By Article V of the 1968 Constitution, the Supreme Court was invested with complete and exclusive jurisdiction over the administration of justice in the State of Florida and the practice and procedure of the courts and attorneys practicing law in the state. This Court has assiduously adhered to the philosophy of the 1968 Constitution and has refused to allow encroachment of one branch of the government upon the purview of another.

In In re The Florida Bar, 316 So.2d 45 (Fla.1975), the Court made it clear even with respect to such laudable legislative goals as financial disclosure for public officials, that the Legislature has no constitutional authority to regulate the conduct of judicial officers or attorneys serving as officers of the court. In discussing its

exclusive jurisdiction to adopt regulations for the judiciary and the Bar, the Court stated:

> "The authority for each branch to adopt an ethical code has always been within the inherent authority of the respective branches of government. Prior to 1968 only the judicial branch exercised this authority . . . .
>
> ". . . .
>
> "The judicial branch has both a code of conduct for the judiciary and a code of professional responsibility for lawyers, and, in addition, has the procedure to interpret them and the authority to enforce them . . . ."

316 So.2d at 47.

The Court went on to unequivocally express its exclusive authority over matters having to do with conduct of attorneys:

> "We hold that [attorneys] regulation is exclusively within the power of the judicial branch pursuant to Article V, Section 15, of the Florida Constitution. This Court in 1964, with Chief Justice Drew presiding, said:
>
> " '. . . The power of courts to discipline attorneys at law is as ancient as the common law itself. . . . The independence of the Courts of the other two coordinate and equal branches of our state government does not permit of any interference by either of said branches in the exercise by the Courts of this state of their inherent and constitutional power to discipline members of the Bar. Any statute enacted by the Legislature which attempted to do so would of necessity be stricken down as unconstitutional. . . . ' "
>
> "Even without this specific constitutional authority, this Court and courts in other

> jurisdictions have uniformly held that the legislature has no power to control members of the Bar." (Emphasis provided by the Court.)

316 So.2d at 47-48.*

The importance of this principle was explained in Simmons v. State, 36 So.2d 207 (Fla.1948).

> "The preservation of the inherent powers of the three branches of government - legislative, executive, and judicial - free from encroachment or infringement by one upon the other, is essential to the safekeeping of the American system of constitutional rule."

36 So.2d at 208.

This Court has enforced this principle in numerous contexts where legislative actions have impermissibly infringed on the Court's sole authority to regulate attorneys. For example, in In re Florida Board of Bar Examiners, 353 So.2d 98 (Fla.1977), the Court held that the Legislature could not constitutionally provide rules for examination of the blind or deaf insofar as it affected admission of persons to the practice of law, and in Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla.1978), it was held that a grant of immunity under law could not

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* It should be noted that although holding that the Legislature could not constitutionally impose regulations on the judiciary or the Bar, this Court nevertheless accepted the legislative action as indicative of the need of the Court to scrutinize its disclosure procedures and the Court initiated steps to address the issue. 316 So.2d at 49.

constitutionally interfere with the court's exclusive jurisdiction over regulation and discipline of attorneys.

Unquestionably, regulation of attorneys' fees is an integral part of the Court's inherent power and exclusive constitutional jurisdiction. In In re The Florida Bar, 316 So.2d at 48, in discussing areas of the Court's exclusive jurisdiction, the Court gave as an example the provisions of the Code of Professional Responsibility governing the profession's duty to make legal counsel available (Canon 2), which includes regulation of fees as well as the obligation to provide legal services to the indigent. As stated in EC 2-16 of the Code of Professional Responsibility:

> "The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them."

Florida courts have historically recognized that the fixing of attorneys' fees is an integral part of the administration of justice and that control of fees is essential to the court's carrying out the functions for which it was created.

> "The matter of fixing attorney's fees often involves the most delicate technique of the lawyer's art. . . .
>
> ". . . Lawyers are officers of the

> court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys its power to perform adequately the function of its creation."

Baruch v. Giblin, 122 Fla.59, 63, 164 So.831, 833 (1935).

Accordingly, this Court has not hesitated to regulate and discipline attorneys in regard to their fees. See, e.g., The Florida Bar v. Gentry, 475 So.2d 678 (Fla.1985); The Florida Bar v. Moriber, 314 So.2d 145 (Fla.1975). Recently, this Court reiterated the importance of attorneys' fees to "the credibility of the court system and the legal profession" and acknowledged the special role the contingent fee plays within the court system. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1149 (Fla.1985).

It was specifically because of these considerations and State constitutional provisions which are in all material respects the same as Article V, Sections 1, 2 and 15 of the Florida Constitution, that in Heller v. Frankston, 76 Pa.Commw.294, 464 A.2d 581 (1983), aff'd, 475 A.2d 1291 (Pa.1984), the court held that a legislatively enacted

contingent fee schedule was violative of the principle of separation of powers. The Court stated:

> "The principle of separation of powers is the cornerstone of our democratic form of government. From the historical perspective presented by Hamilton, Jay, and Madison to the present time, it has been, and remains, a vital doctrine determining the structure of both our state and federal systems, and is the statement of the parameters within which each of the branches of government operates. . . .
>
> "The provision of the Pennsylvania Constitution which records the power of the Supreme Court to prescribe general rules for admission to and regulation of the bar . . . has been held to include 'the continuous monitoring of the practice of law.' . . .
>
> "Included in that 'regulated' conduct of attorneys which falls well within the ambit of the constitutionally discrete power of the judiciary is the fee charged by lawyers. . . . We conclude that [the legislative contingent fee schedule] infringes upon the exclusive power of the courts of this Commonwealth to govern the activities of attorneys relative to their contingent fee agreements, and is thus unconstitutional." (Citations and footnotes omitted.)

464 A.2d at 585-86.

The fact that the Legislature may have authority to set fee schedules in worker's compensation cases or in suits against the government is not material to the Court's inherent authority over attorneys' fees in causes of action which were not created by the Legislature. In dispensing with such arguments by the proponents of the

legislatively enacted fee schedule in Pennsylvania, the Court stated:

> "We find such assertions unpersuasive, for in each of these enactments the general assembly created the remedy, which had not previously existed as a common law cause of action, as did medical malpractice." (Emphasis provided by the Court.)

464 A.2d at 586.

It is thus clear that under the inherent authority of the Court as defined by decisions of the Florida Supreme Court and under the philosophy and express authority of Article V of the Constitution of the State of Florida, the Florida Supreme Court has the sole and exclusive jurisdiction to regulate attorneys' fees in medical malpractice cases and other cases which do not involve a remedy created by the Legislature. The Academy submits that it is imperative to the continued viability of the doctrine of separation of powers in this State and the Court's ability to carry out its constitutionally mandated functions that this Court articulate its exclusive jurisdiction over regulation of the contingent fee in response to the petition of the Florida Bar.

B. In Light of the Legislature's Action, the Court Should Readdress the Question of Contingent Fees in Medical Malpractice Cases.

The Academy agrees with The Florida Bar that this Court should again address the question of contingent fee

contracts in the State of Florida. The Academy submits, however, that the only area in which contingent fee contracts should be subjected to greater scrutiny by this Court is in the area of medical malpractice.

In 1977, this Court determined not to adopt the Bar's proposed contingent fee guidelines for personal injury cases for basically four reasons: (1) The prospect that newly permitted lawyer advertising would provide a greater dissemination of information regarding fees and "be a self-regulating factor in the establishment of fees" (349 So.2d at 632); (2) no demonstrable public policy was presented to justify the Court's adoption of a rule which would impair the right of contract (349 So.2d at 634); (3) the schedule as proposed did not bear a substantial relationship to the avowed or ostensible purpose intended and, in fact, would more likely have the converse effect (349 So.2d at 634-35); and (4) no record was offered to support any remarkable or substantial abuse of the contingency fee system in Florida so as to justify encumbering the "poor man's key to the courthouse," which was viewed as essential to effecting the philosophy of Article I, Section 21, of the Florida Constitution. 349 So.2d at 634-35.

The Academy acknowledges that circumstances have changed since 1977 which may justify the Court responding

to the issues raised by the legislative effort to regulate attorneys' fees in medical malpractice cases. However, there is no substantial or competent evidence in the record before this Court demonstrating a need to adopt a maximum schedule on contingency fees in all personal injury and wrongful death cases as requested by the Florida Bar.

One thing has remained unchanged since 1977: The Florida Bar, as evidenced by its brief, supporting documentation and statistics, has acknowledged that there is no substantial evidence of abuse of the contingent fee system [Brief for The Florida Bar (hereinafter cited as "Bar Brief") at 8; Florida Bar, Joint Report of The Special Commission To Study Contingency Fees and Referral Practices and The Tort Litigation Review Commission (hereinafter cited as "Joint Report"), January 1986 at 5, 7]. That fact was succinctly pointed out by Alan Sundberg, Esquire, a member of the Special Commission on Contingency Fees and Referral Practices (hereinafter "Special Commission"), in his minority opinion. (Joint Report at 15-17.) The actual facts and statistical studies prepared and submitted by the Bar show there is no abuse of the contingent fee system for all personal injury and wrongful death cases in the State of Florida. According to the Florida Bar Study on Contingency Fee Disciplinary Cases which

examined 596 Supreme Court orders entered from July 1982 to July of 1985, of those 17 disciplinary cases dealing solely with fee disputes, only four involved contingency fees. (Joint Report, Appendix C). In addition, this same study confirms that a minute percentage of the total complaints received by the Florida Bar deal with contingent fee contracts.

It is apparent from the arguments in the brief of the Florida Bar that it is concerned, and rightly so, with "the continuing flood of public sentiment" and "adverse publicity" that has prompted its recommendations concerning an overhaul of the contingent fee system. (Bar Brief at 1, 4, 6, 7 and 11.) Nevertheless, the Florida Bar concedes that "the most recent compelling factor" for its proposed changes to our contingent fee system is enactment by the 1985 Florida Legislature of Chapter 85-175, Laws of Florida, now known as Florida Statute, Section 768.575, the Medical Malpractice Reform Act of 1985. (Bar Brief at 1, 5.) However, the Bar goes too far from addressing contingent fees in medical malpractice cases as expressly requested by the Legislature to adopting regulation of contracts in all personal injury and wrongful death cases. Believing that impairment of the right of contract between attorney and client is an extreme measure and one that should be approached with caution given constitutional

considerations, the Academy urges that this Court limit its intrusion into this area to the matter specifically addressed by the Legislature: medical malpractice cases.

In 1977, when this issue was last visited by the Court, no public body had questioned the need for more specific guidelines for contracts between attorneys and their clients. As part of its comprehensive medical malpractice reform act, the Legislature expressed the concern that contingent fees in this type of litigation should be more precisely controlled by the Court to assure that they are not "inadequate or excessive" and that such fees are "fair and reasonable to allow representation of the public in medical malpractice cases." See Section 768.595(7)(b), Fla.Stat. Significantly, as observed by this Court in its decision in 1977, any such regulation must have a real and substantial relationship to the avowed or ostensible purpose intended. The schedule purportedly adopted by the Legislature to go into effect in July 1986 would, in fact, have the converse effect.

Recognizing its lack of expertise and authority to devise an appropriate schedule to carry out the stated purposes of the Act, the Legislature expressly requested this Court to adopt guidelines to assure access to the courts as guaranteed by Article I, Section 21, of the Florida Constitution. This Court has frequently con-

sidered legislative concerns regarding issues within the Court's exclusive jurisdiction and has taken appropriate action to assure the administration of justice in such areas. See, e.g., Carter v. Sparkman, 335 So.2d 802, 806 (Fla.1976), cert. denied, 429 U.S.1041 (1977); In re The Florida Bar, 316 So.2d at 49. If a contingent fee schedule should be adopted in medical malpractice cases, this Court must promulgate a different regulation than proposed by the Legislature. A schedule such as suggested by the Legislature would make it impossible for injured plaintiffs to obtain representation in many types of cases; it would create a conflict of interest between plaintiffs' attorney and client in almost every case; and it would discourage, rather than encourage, the primary purpose of the Medical Malpractice Reform Act, which is to dispose of medical malpractice claims early and without the exposure of trial.

The Academy submits that the legislative fee schedule should be stricken as an unconstitutional infringement on the exclusive jurisdiction of the Court. The Academy is very cognizant, however, of the importance of maintaining "the credibility of the court system and the legal profession," Florida Patient's Compensation Fund v. Rowe, 472 So.2d at 1149. Regardless of whether criticism about attorneys' fees is justified, maintenance of public confidence in the court system is essential to preserving civil

liberty and the administration of justice. Should the Court determine to adopt a contingent fee schedule, the Academy submits that guidelines for contingent fee contracts in medical malpractice cases should be adopted which are consistent with the general purposes of the medical malpractice act and the constitutional right to access to the courts and fair and equal representation. The proposals of the Florida Bar are generally in keeping with this objective. To the contrary, however, the legislative fee schedule would greatly interfere with and, in many cases, foreclose representation.

1. The Proposed Legislative Schedule Is Inconsistent with the Ostensible Purpose of the Act and Will Impair Proper Representation to Plaintiffs in Most Cases.

The proposed schedule in § 768.595, Fla.Stat., provides for an inverse sliding fee from 15% of the recovery if the case is settled prior to suit up to 40% of the recovery after entry of judgment and before appeal. The Medical Malpractice Reform Act of 1985 sets up a very complex procedure of pre-litigation notice, pre-litigation informal discovery and peer review, pre-litigation informal arbitration and post-suit arbitration. These complex and time-consuming procedural stepping stones are intended to precipitate a resolution of most claims without going to trial. However, having created a procedural system which mandates that plaintiffs' counsel extensively

prepare the case prior to suit, and which depends upon thorough and time-consuming informal discovery both prior to and during the early stages of litigation, the inversely graduated fee scale will make it impossible for plaintiffs' counsel to be properly compensated if he does the work contemplated by the Act.

For example, in order to obtain the anticipated pre-litigation expert witness opinions (§ 768.495(1), Fla. Stat.) and to properly pursue informal discovery and prepare the case sufficiently to prompt the defendant to make an offer of settlement without pre-litigation arbitration (§ 768.57, Fla.Stat.), plaintiffs' counsel will usually be required to expend thousands of dollars in cost and time. However, under § 768.595(7)(a)1., Fla.Stat., he would only be entitled to a fee of 15% of any such settlement.

According to the Insurance Commissioner's Medical Malpractice Closed Claim Study (attached as Appendix A) for 1984, over 60% of all medical malpractice claims paid were resolved for $50,000.00 or less. See Appendix A at 2. Thus, in the majority of "successful" cases, the costs advanced and the time devoted to such a contingent matter would simply not be justified or practical given the legislatively proposed fee limitations. The same is also true if the claim is settled at the second stage contem-

plated by the schedule, when the fee is limited to 20%.*

Unfortunately, the effect of the schedule as proposed by the Legislature would be that most experienced and competent attorneys in medical malpractice matters would either decline to handle any case other than those few involving huge damages (only 10% of claims in 1984 paid indemnities over $100,000.00, Appendix A at 2-3), or plaintiffs' counsel would be put in the untenable position of limiting his preparation and time in the case until he reached a stage of the litigation where the fee would justify the time and expense necessary to resolve the matter. Only by permitting an attorney to charge a contingent fee which will justify and permit the time and expense of early and thorough preparation of the medical malpractice case can there be any reasonable prospect of the claim being fairly resolved early in the litigation. Although the time and expense of preparing a medical malpractice case is almost always substantial and the contingency risk is very high (in 1984 approximately 75% of

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* Indeed, under the legislative schedule, the fee is limited to 30% even though the plaintiffs' attorney may have been required to thoroughly investigate and prepare the case prior to filing the pre-litigation notice; engage in informal pre-litigation discovery; engage in pre-litigation arbitration with one of multiple defendants; file suit and engage in in-suit discovery; engage in non-binding in-litigation arbitration with one or more defendants; attend the mandatory settlement conference where a defendant finally admits liability; and then go through trial on the issues of damages.

claims were resolved against plaintiff, Appendix A at 1), this same principle is applicable in all types of personal injury litigation.

Since contrary to the "public perception," less than 10% of all medical malpractice claims are paid more than $100,000.00 (Appendix A at 2-3), it is clear that a fee schedule such as proposed by § 768.595, Fla.Stat., will deprive the great majority of citizens of this State injured by medical negligence of the right and ability to obtain adequate representation. The Academy of Florida Trial Lawyers submits that the provisions of the petition of the Florida Bar which provide for 33-1/3% of any recovery through the time of filing the initial Answer and 40% of any recovery through the trial of the case are the maximum restrictions which should be placed upon the handling of medical malpractice cases. If there are isolated cases where such fees are excessive, there are adequate procedures and safeguards to deal with such cases. See In the Matter of The Florida Bar, 349 So.2d at 635. To more severely restrict the right of the public to engage counsel on a contingent fee basis would surely result in locking the door "to the courthouse" against many citizens.*

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* In research funded by the Health Care Financing Administration, U.S. Department of Health, Education, and Welfare, P.Danzon, "Contingent Fees for Personal Injury Litigation" (1980) (hereinafter the "Rand study"), (portions of which are attached as Appendix B), the commission concluded that the contingent fee truly is the poor man's key to the court [footnote continued on following page]

2. The Legislatively Proposed Schedule Creates an Irreconcilable Conflict Between Plaintiffs' Attorney and Client.

An inversely graduated fee schedule as provided in § 768.595, Fla.Stat., creates an inherent conflict between the attorney's obligation to "represent a client zealously within the bounds of the law" (Canon 7, Code of Professional Responsibility), and the practical necessity that the lawyer be reasonably compensated for his time and the contingent risk incurred. Furthermore, the legislative six-step pre-appeal graduated fee schedule creates a recurrent conflict between the attorney's obligation to exercise independent judgment regarding the reasonableness of settlement offers versus the economic reality that the adequacy of his compensation will be significantly impacted by the stage at which he recommends settlement.

Furthermore, the provisions of § 768.595(2), Fla. Stat., regarding the trial court reviewing fee agreements to determine whether they are excessive, and the provi-

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* [Footnote continued from preceding page] system; that "the effective hourly earnings of attorneys paid on a contingent basis are similar to the hourly earnings of defense attorneys paid by the hour" (Appendix B at vii); that "[c]eilings on the contingent fee percentage may significantly reduce the number of hours an attorney will spend on a case and effectively bar certain cases from trial" (Appendix B at vii); and that "[r]estriction on contingent fees would also tend to be regressive, deterring low- and middle-income plaintiffs from filing even meritorious suits" (Appendix B at vii-viii).

sions of § 768.595(4), Fla.Stat., mandating inquiry into division of fees when there is more than one attorney involved, create a potential conflict between attorney and client in literally every medical malpractice case. The Florida Bar has addressed this point at pages 16-17 of its Brief. We concur with the Bar that these provisions would create the potential in every successful case of pitting the client against the attorney in an effort to reduce the fee after the contingency has occurred.

The Academy respectfully submits that for all of the foregoing reasons, the provisions of § 768.595, Fla.Stat., would severely impair the constitutional right to access to the courts and the administration of justice in medical malpractice cases and that such a schedule would create an intolerable conflict between attorney and client in these types of cases.

Although the Legislature does not have constitutional authority to regulate attorneys' fees as proposed in § 768.595, Fla.Stat., the Legislature has articulated a public concern regarding more precise regulation in medical malpractice litigation. The Legislature has obviously sought to avoid a constitutional confrontation by asking this Court to adopt a fee schedule which will be reasonable and proper to assure representation in such cases. Clearly, a schedule such as proposed by the

Legislature would severely impair the constitutional right to access to the courts in medical malpractice cases. The Academy respectfully submits that if this Court determines to exercise its jurisdiction, that the proposal of the Florida Bar should be the maximum limitation placed on the right to enter into contingent fee contracts. It is further submitted that such limitations should be applied only in medical malpractice cases and without the $2,000,000 cap.

POINT II

THE AMOUNT OF THE RECOVERY SHOULD NOT BE A FACTOR IN ANY CONTINGENT FEE SCHEDULE.

The Academy believes it is appropriate and necessary that the Bar's proposal include the provision that a larger fee may be permitted if the client cannot obtain counsel of his choice and such a fee is approved under the procedures provided in proposed DR 2-106 (F)(2). Especially in cases involving relatively small damages with complex questions of liability, the proposed fee schedule may be inadequate. Likewise, the proposed fee schedule is a maximum fee schedule, and attorneys will continue to be obligated to reduce their fees where appropriate to comply with their ethical obligations to the client. In this

regard, it is submitted that it is unnecessary and inappropriate to arbitrarily mandate a reduction in the permissible fee when a certain amount of recovery is made.

In its Petition, the Florida Bar has chosen the amount of two million dollars as the threshhold for arbitrarily reducing the recoverable contingent fee. As it acknowledges in its Brief (Bar Brief at 15), in 1977 the Bar chose the number $500,000 as the level at which a lower percentage should be charged. Clearly, in today's economy, such a threshhold would be much too low. The Academy respectfully submits that no arbitrary level for reducing the fee should be imposed for the following reasons:

Notwithstanding the grossly disproportionate media attention given to large verdicts and settlements, there are relatively few recoveries in medical malpractice cases in excess of $1,000,000. According to the closed claims study, only approximately .4% of claims closed in 1984 resulted in recoveries in excess of $1,000,000. (Appendix B at 2-3). These cases frequently involve unique questions of fact and tax the resources of plaintiffs' counsel to the extreme.

The Academy of Florida Trial Lawyers would represent to the Court that in the experience of its members, it is

not uncommon for plaintiffs' counsel to have to advance $50,000 - $100,000, or more, in preparation and trial of cases involving such substantial losses. It is also not unusual for trials involving catastrophic injuries and very large damages to involve many days of trial and hundreds if not thousands of hours of attorneys' time. When such cases are lost, it is not only a great loss to the claimant but can have catastrophic economic consequences to plaintiffs' counsel. To arbitrarily choose a level of recovery above which the fee must be reduced or otherwise be deemed "clearly excessive" is an unnecessary and inappropriate restriction on the right to contract and does not serve any countervailing public purpose.

The present Code of Professional Responsibility and Disciplinary Rules provide adequate authority to the Bar to regulate any attorney who may charge an excessive fee in those cases where verdicts in excess of two million dollars are recovered. See generally The Florida Bar v. Gentry, supra; The Florida Bar v. Moriber, supra. Furthermore, the Court can take judicial notice from appeals before it that the great majority of such cases involve catastrophically injured plaintiffs who are usually under the protection of the Florida guardianship laws. In such cases and cases involving the wrongful death of adults leaving minor children, the Florida guardianship laws

require that any fee be approved by the Court. Thus, there is already in place an adequate screening process which governs most of these types of cases. Furthermore, it is submitted, that if there were a problem with attorneys charging excessive fees in these types of cases, there would be a ready record by virtue of the trial courts of this State regularly passing on the reasonableness of such fees under the Florida guardianship laws. There is no such record. It must be presumed that there has not been any abuse in this area.

To pick a number as has the Florida Bar, whether it be two million or more, will necessarily require that the Bar and this Court constantly reconsider the cap in light of changes in the economy; or else the cap will become clearly restrictive. Such a process is cumbersome in the least. There are no assurances that the Bar will regularly reassess the cap to determine what adjustments should be made to make a cap reflect the same present value dollars as a cap adopted in 1986. Without some showing of an overwhelming necessity to have such a cap, and without some predetermined method of adjusting the cap to conform with economic changes, it should not be permitted.

Finally, anytime a significant reduction in the fee is tied to the amount of the recovery, it creates a

potential conflict between the attorney's obligation to zealously prosecute the claim to the maximum benefit of the client and his personal interest in being fully compensated for the work done. It is respectfully submitted that unless there is some overwhelming public policy to the contrary, this Court should not adopt a fee structure that by its nature incorporates an apparent conflict of interest between the attorney and client.

The Florida Bar acknowledges the potential conflict in the Legislature's proposals that all fee contracts be reviewed by the Court after the contingency has occurred. By the same reasoning, the Florida Bar should acknowledge that its proposal to reduce the fee on amounts recovered in excess of two million dollars creates the same type of potential economic conflict of interest between the attorney and client. The fact that the two million dollar level involves only a few cases or that 30% of a recovery above two million dollars may sound adequate is not material to the issue of whether such a provision should be adopted. What is material is that such a provision has not been shown to be necessary, it will not accomplish any stated objective and, on its face, creates a potential economic conflict of interest between attorney and client in those cases where it may come into play.

For the foregoing reasons, the Academy of Florida Trial Lawyers respectfully submits that the two million dollar level reduction in the proposed fee schedule should not be adopted. Specifically, if the Court determines to adopt a fee schedule, the Academy would ask the Court to grant the petition of the Florida Bar in part so as to provide as follows: (a) 33-1/3% of any recovery through the time of filing of the initial Answer; (b) 40% of any recovery through the trial of the case; (c) if all the defendants admit liability at the time of filing the initial Answers and request a trial only on damages, 33-1/3% of any recovery through trial; and (d) an additional 5% of any recovery after notice of appeal is filed or post-judgment relief or action is required for recovery on the judgment.

Furthermore, there being no articulated public policy reasons for regulating contingency fees in any area other than medical malpractice, the Academy would respectfully submit that the Petition of the Florida Bar providing for a fee schedule should be limited to medical malpractice cases as requested by the Florida Legislature.

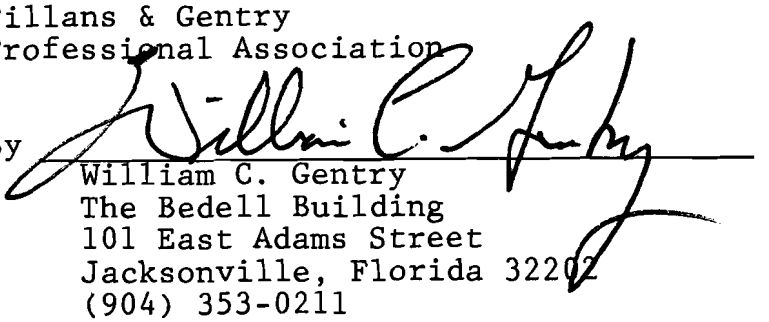
CONCLUSION

For the foregoing reasons, the Academy respectfully urges this Court to express its' exclusive jurisdiction

over the regulation of attorneys' fees and to adopt the petition of the Florida Bar insofar as it recommends procedures to assure better public awareness of their rights with respect to attorneys and to codify this Court's decision in The Florida Bar v. Gentry, supra, into the Code of Professional Responsibility. Should the Court determine that contingent fees should be more precisely addressed by the Code of Professional Responsibility, this Court should adopt the Florida Bar's proposed contingency fee schedule, without the reduced cap for recoveries over two million dollars ($2,000,000), and apply such schedule to medical malpractice actions only.

Respectfully submitted,

Bedell, Dittmar, DeVault
Pillans & Gentry
Professional Association

By 
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to: Patrick G. Emmanuel, President, The Florida Bar, Post Office Box 2171, Pensacola, Florida 32596; John Beranek, Chairman, Special Commission to Study Contingent Fees and Referral Practices, Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401; Rayford H. Taylor, General Counsel, The Florida Bar, 600 Apalachee Parkway, Tallahassee, Florida 32301; Joseph J. Reiter, President-Elect, The Florida Bar, 2000 Palm Beach Lakes Boulevard, Suite 800, West Palm Beach, Florida 33409; and to John F. Harkness, Jr., Executive Director, The Florida Bar, 600 Apalachee Parkway, Tallahassee, Florida 32301, by mail, this 2nd day of April, 1986.

William C. Gentry