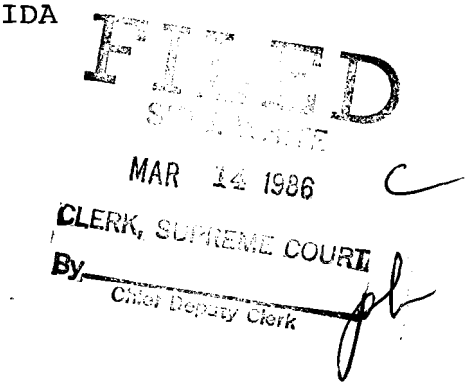
IN THE SUPREME COURT OF FLORIDA



IN THE MATTER OF THE FLORIDA BAR

RE: AMENDMENT TO CODE OF PROFESSIONAL RESPONSIBILITY (Contingent Fees)

Case No. 68,417

_____/

BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND FACTS

It is apparent this Court's ruling In The Matter of The Florida Bar, 349 So.2d 630 (Fla. 1977), has failed to put the question of contingent fees to rest. In the wake of rising insurance costs and multi-million dollar verdicts, there has been much public outcry and much acrimony hurled against the legal profession for permitting the continued use of the contingent fee system.

The Board of Governors of The Florida Bar (hereinafter the "Board") although in total accord with the view that contingent fees are, indeed, the "poor man's key to the courthouse", could not ignore the continuing flood of public sentiment, adverse publicity and, ultimately, the legislative statement which became part of the Law of the State of Florida with the passage of the Comprehensive Medical Malpractice Reform Act of 1985 (Chapter 85-175, Laws of Florida).

In response to these public expressions of concern, the Special Commission on Contingency Fees and Referral Practices ("Special Commission") was created on May 28, 1985 by the Board of Governors of The Florida Bar. The Special Commission was charged with the task of reviewing available information regarding contingency fees and referral practices in Florida with a view toward determining the existence of abuses or perceived abuses

within the system and to make its recommendations regarding the necessity for change.

The Special Commission met and held hearings in Tallahassee (June 6, 1985), Boca Raton (June 27, 1985) and Tampa (August 5 and September 4, 1985). Its preliminary report was delivered to the Board on September 20, 1985, and a final drafting session was held on October 4, 1985 in Tampa. In addition, the Tort Litigation Review Commission ("Tort Commission") was asked to review the Special Commission's final report and submit its comments to the Board. The Tort Commission met in Orlando on October 26, 1985 for that purpose.

The recommendations of the Special Commission and the Tort Commission were presented to the Board on November 15, 1985 and after much debate, the Board voted to defer the question until its January 8 - 11, 1986 meeting. The Board requested that both commissions meet once more and attempt to come up with a final joint report. The Special Commission and the Tort Commission held a meeting on Saturday, November 23 in Tampa and produced the joint report which is Appendix E to this brief.

The joint report contains eight recommendations which form a comprehensive response to the perceived problems surrounding the contingency fee debate.

The Board considered the joint report on January 10, 1986 and after extensive debate, adopted, with some amendment, all eight recommendations. Implementation of those recommendations falls into

two groups: those which require approval by the Supreme Court of Florida and those which can be implemented by The Florida Bar without court approval. To implement those recommendations which require this Court's approval, the Board approved proposed amendments to DR 2-106 of the Code of Professional Responsibility.

The Board now seeks the approval of this Court for those amendments to DR 2-106 of the Code of Professional Responsibility, as set forth at Appendix A of this brief.

SUMMARY OF ARGUMENT

To protect the public against potential abuse of the contingency fee system, the Code of Professional Responsibility should be amended to establish a limitation on contingent fees.

The fee schedule for contingency fees in medical malpractice cases contained in the Comprehensive Medical Malpractice Reform Act of 1985 should be replaced with a schedule which applies to all "personal injury and wrongful death" cases.

The contingent fee schedule proposed by The Florida Bar contains reasonable limitations which protect a client's right to contract with and retain competent counsel, while effectuating the Bar's responsibility to reduce the potential for abuse.

To assure to all individuals the right of access to courts of this state and to the lawyer of his or her choice, the proposed schedule provides a procedure for pre-litigation authorization of a contingent fee contract which exceeds the proposed schedule.

All persons entering into contingent fee agreements should be furnished with a Statement of Client's Rights and should be given a three business day reconsideration period in which they may cancel the contingent fee contract without being obligated to pay a fee to the lawyer.

Lawyers should be prohibited from receiving a full contingent fee on the total long-range amount of a structured recovery.

I

THE CODE OF PROFESSIONAL RESPONSIBILITY SHOULD BE AMENDED TO ESTABLISH A LIMITATION ON CONTINGENT FEES.

In 1977, in rejecting The Florida Bar's petition to amend Disciplinary Rules 2-106 and 2-107 of the Code of Professional Responsibility to establish a contingent fee schedule, this Court concluded the Bar had not demonstrated there was any significant abuse of the contingency fee system which would warrant adoption of the proposed fee schedule. See, In The Matter of The Florida Bar, 349 So.2d 630 (Fla. 1977).

Why does The Florida Bar ask the Supreme Court of Florida to again consider this issue? The most recent compelling factor is HB 1352 enacted by the 1985 Florida Legislature as Chapter 85-175, Laws of Florida. This legislation is known as the Comprehensive Medical Malpractice Reform Act of 1985 (the "Act") and it substantially revises all practice and procedure regarding medical malpractice. The bill is the Florida Legislature's response to the "medical malpractice crisis."

The Act (now F.S. 768.575) imposes a schedule on attorneys' contingency fees in medical negligence cases ranging from fifteen percent (15%) to forty-five percent (45%); setting fifteen percent (15%) as the presumed reasonable fee limitation on amounts recovered in excess of two million dollars ($2,000,000.00). The Act also

provides for review by a court of competent jurisdiction to determine whether any contingency fee is illegal or excessive and states that the court "shall inquire" into referral fees, with the power to modify the division of fees. This Act becomes effective July 1, 1986 unless the Supreme Court of Florida adopts its own guidelines. The relevant portion of the Act is attached as Appendix D.

As this Court so aptly stated "it is irrefutable that the poor and least fortunate in our society enjoy access to our courts, in part, because of the existence of the contingent fee..." In the Matter of The Florida Bar, 349 So.2d 630, 633 (Fla. 1977) and the right of all citizens "to make their own contracts absent any demonstrable, overriding public policy" must be preserved. However, to preserve this valuable "key to the courthouse" against a rising tide of public opinion which apparently does not fully comprehend the true value and necessity of contingent fees, the Board feels that it is incumbent upon this Court to establish a system which will allow adequate compensation to those attorneys who undertake to prosecute causes on behalf of injured parties, while providing guidelines which will deter instances of overreaching.

To permit F.S. 768.575 to become law without adoption by this Court of guidelines or a schedule which will supersede the statute, will create exactly the kind of chilling effect which in the long run will hurt the very people it was designed to protect,

by limiting the availability of legal counsel for individuals who have medical malpractice claims.

In addition, permitting the Act to go into effect without a superseding schedule will create a favored class of defendants. If the rationale for a fee limitation in medical malpractice cases is to protect the public from potential abuse of contingent fees and to provide successful claimants with additional money out of the recovery, then the same logic should be applied to all cases for personal injury.

There seems to be no compelling reason to limit contingent fees in commercial litigation, and none is proposed hereunder.

Although the contingent fee system is basically sound and necessary, it is clear that the public and the media perceive there are some lawyers who are abusing the contingent fee system. Both the Special Commission and the Tort Commission found there was a need for adoption of a contingent fee schedule and both groups reached that conclusion after months of study and public testimony on the subject. It is true that within the Disciplinary Rules there is already a prohibition against charging a fee which is "clearly excessive." However, there are no guidelines on what is, or is not, "clearly excessive" and that becomes a purely subjective determination.

This Court has the inherent authority to regulate the practice of law and has held "...the law practice is so intimately connected with the exercise of judicial power in the administration

of justice that the right to define and regulate the practice naturally and logically belongs to the judicial department of the government..." See, Petition of Florida State Bar Association, 40 So.2d 902, 907 (Fla. 1949). Also, The Florida Bar vs. McCain, 330 So.2d 712 (Fla. 1976); In Re Florida Board of Bar Examiners, 353 So.2d 98 (Fla. 1977); Ciravolo vs. The Florida Bar, 361 So.2d 121 (Fla. 1978); and Pantori, Inc. vs. Stephenson, 384 So.2d 1357 (Fla. 5th DCA 1980).

The regulation of the conduct of attorneys admitted in this state is through enforcement of the Code of Professional Responsibility. Petitioner therefore, respectfully suggests that the only appropriate place for a guideline for contingent fees is within the Disciplinary Rules and such guidelines should be adopted as an amendment to DR 2-106.

The Board, the commissions, the Academy of Florida Trial Lawyers, and many outstanding attorneys for the defense and for the plaintiffs have debated this question long and hard. Although neither of the two commissions nor the Florida Legislature cite any specific findings of abuse of the contingent fee system, all recognize that there is a potential for abuse, not only in the enormous verdicts which have been rendered for catastrophically injured victims but, even more importantly, in the smaller cases where a contingency fee of fifty percent (50%), even if the case is settled with a phone call, leaves little for the client. Such cases generally have not received media attention or public debate but

there is no question that in such cases there is an abuse. The legal profession must demonstrate its willingness to recognize the concerns of the public and to police its own members who would exceed the limits of that which is fair and just and not leave it to the legislature to determine those limits, bit by bit.

Approximately twenty (20) other states regulate or control contingency fees. About one-half (1/2) of those jurisdictions allow courts to review fees for reasonableness. The other one-half (1/2) of those states impose percentage limits and sliding scales. The State of California is apparently one of the most restrictive jurisdictions in that it limits medical malpractice fees to forty percent (40%) of the first fifty thousand dollars ($50,000.00) of recovery, with a sliding scale and ultimate limitation of ten percent (10%) of amounts in excess of two hundred thousand dollars ($200,000.00). See, a study prepared by Mr. F. Townsend Hawkes, staff attorney, Florida House of Representatives. That study is Exhibit D in Appendix E to this brief. Recently the United States Supreme Court refused to accept jurisdiction of a case challenging the constitutionality of the California statute limiting attorneys fees because it found there was no substantial federal question. See Roa v. Lodi Medical Group, Inc., 106 S. Ct. 421 (1985).

In presenting this matter to the Court, the Board is aware of the potential constitutional question about who has the authority to regulate attorneys fees: this Court or the Florida Legislature. Article II, Section 3 of the Florida Constitution (1968) provides

"...no person belonging to one branch shall exercise any power appertaining to either of the other branches unless expressly provided herein".

However, by approving the guidelines being proposed by the Bar, this Court does not have to reach the Separation of Powers issue in that the Florida Legislature has recognized this Court's authority in this area by the language it adopted in F.S. 768.575(7)(a) which provides in pertinent part:

> "The Legislature recognizes that the contingent attorney's fee system provides a method by which the citizens of this state are able to seek access to the courts as guaranteed by Art. I, s. 21 of the Constitution of the State of Florida. Additionally, the Legislature recognizes that the Supreme Court of Florida has the jurisdiction and authority to adopt rules for the practice of law before all Florida courts, including the regulation of attorney's fees. Until such time as the Supreme Court adopts guidelines, the following schedule shall be presumed reasonable and not excessive..."

The Florida Legislature has, in fact, invited the Court to adopt its own guidelines.

The Board also respectfully urges that this Court need not address the question of the potential infringement of the constitutional rights guaranteed to all citizens to make their own contracts, in that the proposed amendment provides an alternate procedure whereby any client who is knowledgeable and fully informed

of his or her rights and options may obtain prelitigation authorization to execute a contingent fee contract which exceeds the proposed schedule.

The guidelines which the Board recommends to this Court would apply to any contingency fee contract entered into between an attorney and a client "...in connection with an action or claim for damages for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another..."

The Board is proposing that this Court adopt a contingency fee schedule which would replace the schedule adopted by the Florida Legislature and apply to more cases than just "medical negligence" cases because:

(a) To permit such limitations only in medical negligence cases would create a favored class of defendants.

(b) If there is a need for fee limitation in medical malpractice cases, then the same need must be applicable to all cases involving "...an action or claim for damages for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another..." as currently governed by DR 2-106.

(c) The recent flood of editorial criticism and public perception of overreaching and abuse compels affirmative action on the part of The Florida Bar to discipline those few of its members

who do abuse the system and requires that we be given the tools with which to effectively pursue that discipline.

(d) The guidelines are reasonable and provide protection to both the attorney and the client; along a method by which an exception can be made by the client. The proposal removes the question of discipline for an "illegal or clearly excessive fee" under DR 2-106(A) from the purely subjective rationale of the prosecutor or referee and provides a clear guideline, to all of our members who must make the initial decision whether to undertake such litigation, and if so, the maximum amount that they can charge upon recovery.

In this Court's 1977 opinion there was a feeling expressed that advertising by lawyers would make the public more aware of their ability to shop and bargain with attorneys before signing a contract for representation. Widespread current advertising of contingent fees, however, is predominantly of the "no recovery--no fee" nature, with little emphasis on or information regarding the rate of fee to be charged when there is a recovery. Although lawyer advertising may yet result in a greater public awareness concerning attorney services and fees, the Board does not feel that the adoption of a maximum schedule will in any way impede the eventual "open marketplace" competition promoted by such advertising. The schedule sets only the upper limits - it in no way purports to be a minimum schedule.

II

DR 2-106 SHOULD BE AMENDED TO ESTABLISH LIMITATIONS ON THE AMOUNT OF A CONTINGENT FEE AN ATTORNEY MAY CHARGE A CLIENT UNLESS THE FEE HAS BEEN AUTHORIZED IN ADVANCE BY AN APPROPRIATE COURT

The Board recommends that DR 2-106 be amended to provide that:

(a) Subject always to the prohibition that a lawyer may not charge or collect an illegal or clearly excessive fee, a lawyer may not enter into a contract (without prior court approval) which provides for a contingent fee greater than:

(i) Thirty-three and one-third percent (33 1/3%) of any recovery up to two million dollars ($2,000,000.00) through the filing of an Answer;

(ii) Forty percent (40%) of any recovery up to two million dollars ($2,000,000.00) through the trial of the case;

(iii) Thirty percent (30%) of any recovery in excess of two million dollars ($2,00,000.00).

(b) If all defendants admit liability at the time of filing their initial Answers and request a trial only on damages:

(i) Thirty-three and one-third percent (33 1/3%) of any recovery up to two million dollars ($2,000,000.00) through trial;

(ii) Twenty percent (20%) of any recovery in excess of two million dollars ($2,000,000.00);

(c) An additional five percent (5%) of any recovery after notice of appeal is filed or in the event any post judgment relief or action is required for recovery of the judgment.

The specific language to implement the Board recommendation is set forth as DR 2-106(F)(1) in Appendix A. [Because there is presently a petition pending before this Court to replace the current Code of Professional Responsibility with the Rules of Professional Conduct, The Florida Bar, Re: Code of Professional Responsibility, Case No. 65,877, Appendix B sets forth the proposed changes to proposed Rule 4-1.5 and its Comments which coincide with the changes being proposed to DR 2-106.]

Once it is determined that a maximum contingent fee schedule should be established, there is no question there are many divergent views on what the permitted percentages should be, at what point they should change, and what additional provisions should be made for post judgment work. The Board believes that the proposed guidelines adequately compensate the attorney, provide protection to clients in both the usual or normal award cases and the rare jumbo award cases, and avoids potential for conflict between attorney and client in the handling of a case. The proposal also recognizes that in the small percentage of cases where the defendants admit liability and the case is left to proceed on the issue of damages only, there is less of a contingent factor and the maximum fee should therefore be less. Hopefully, the schedule will encourage admissions of liability by defendants and will also encourage

settlements. To accomplish all these goals, the proposed schedule is more detailed and complicated than the proposal submitted to the Court by The Florida Bar in 1977.

The Board also recognizes this proposal, or any schedule ultimately established by this Court, may have to be reevaluated at some future date because of inflationary trends. In 1977 the Bar recommended five hundred thousand dollars ($500,000.00) as the level above which a lower percentage should be charged; today that five hundred thousand dollars ($500,000.00) figure would have to be translated into approximately one million dollars ($1,000,000.00). The Florida Legislature used two million dollars ($2,000,000.00) as the upper limit in its medical malpractice act. However, the Board feels that the necessity of constant reevaluation is a positive situation as it will ensure continued monitoring by the Bar and this Court.

The proposed rule further specifically provides that if a client is unable to obtain the lawyer of his or her choice within the proposed limitations on fees, then the client can apply to an appropriate circuit court for an authorization to execute a different fee contract. The trial judge will be expected to inquire only as to the client's understanding of the contract and understanding of his or her right to negotiate and bargain for the amount of fee to be paid. The trial judge should authorize the execution of the higher fee contract if the client possesses a complete understanding of the contract and all relevant

circumstances. No inquiry into the merits of the cause is anticipated or permitted. The petition for authorization can be filed as a separate proceeding before suit or may be filed along with the complaint and thereafter this aspect of the file may be sealed or otherwise made confidential, except as may otherwise be discoverable under the Florida Rules of Evidence. The Board expects these authorization proceedings will be a rarity. The Board's recommendation for amending the Code to establish this mechanism is set out at DR 2-106(F)(2) in Appendix A.

The Special Commission also gave substantial consideration to the Legislature's directive (in the Medical Malpractice Act) giving a circuit court the jurisdiction to review contingency fees for excessiveness. Post-trial review of fees was not recommended by the Special Committee. Such review would have the effect of abrogating a contract after one side has successfully completed all of the work. Further, such post-trial review would place the lawyer and the client in directly opposing positions. After a case has been won or settled, it would always be in the client's interest to at least ask the trial court to reduce the lawyer's fee. This foreseeable conflict would undermine the lawyer's ability to represent the client with unlimited vigor and commitment and would equally undermine the status of the profession and the confidence and trust of the clients. Clients and lawyers cannot enter into a relationship and work harmoniously together throughout an entire case, with each knowing full well that the eventual result will be a

fee dispute. The Board respectfully believes that DR 2-106 should be amended to provide that the contingency fee schedule annexed hereto in Exhibit A should be adopted together with the provision providing for its modification upon the client's request.

III

CLIENTS ENTERING INTO CONTINGENCY FEE AGREEMENTS SHOULD BE FURNISHED WITH A STATEMENT OF CLIENT'S RIGHTS WHICH ADVISES THE CLIENT OF GENERAL RIGHTS REGARDING CONTINGENCY FEES AND REFERRAL PRACTICES

An informed public is its own best defense against contingency fee abuses. Despite the prevalence of lawyer advertising and the Bar's efforts to advise the public of their right to negotiate fees and to "comparison shop," the public generally believes that a fixed fee schedule already exists in contingent fee matters. Clients should be made aware of the fact that lawyers do negotiate contingency fees as well as any other fee and the Board knows of no better way of making sure that the concerned individual is made aware of his or her rights than requiring that a "Statement of Client's Rights" ("Statement") be furnished every client entering into a contingency fee contract involving a personal injury or wrongful death matter.

The proposed Statement advises the client, in easily understood language, of his or her general rights regarding contingency fees and referral practices. It is not intended that this Statement be a part of the contract but that each member of the Bar signing a contingency fee contract would be required to furnish a copy to the client prior to the execution of the contract. Within the Statement, the client is directly advised as to the

negotiability of fees. It was clear to the Special Commission and to the Board there is both a lack of information and a good deal of misinformation in the public's mind about the client's rights when retaining a lawyer under the contingency fee arrangement. A copy of the proposed Statement of Client's Rights is attached as Appendix C. The specific requirement for attorneys to utilize and retain this Statement is set forth as new DR 2-106(G) in Appendix A.

In the hopes that furnishing each client with this Statement will improve the public's understanding of its rights and improve its knowledge about the legal system and a lawyer's responsibility to them as clients, the Board urges this Court to approve the new DR 2-106(G) as set forth in Appendix A.

IV.

DR 2-106 SHOULD BE AMENDED TO PROVIDE THAT CLIENTS ENTERING INTO A CONTINGENCY FEE ARRANGEMENT HAVE A THREE (3) BUSINESS DAY RECONSIDERATION PERIOD IN WHICH THEY MAY DISCHARGE THEIR ATTORNEY AND NOT OWE THEIR ATTORNEY A FEE.

The withdrawal or "reconsideration period" concept has been successful in many types of consumer contracts. Since many contingency fee contracts are entered into shortly after some sort of serious personal injury or other emotionally traumatic occurrence in a client's life, the same rationale which protects the public in other areas supports a reconsideration period in contingency fee contracts. Because of the potential for a client to be subjected to active solicitation through advertising and other means shortly after a traumatic occurrence and because the Statement of Client's Rights may not be fully digested or understood in the setting of the lawyer's office, a client should be granted a reasonable period of time within which to withdraw from the contract without payment of a fee.

The public testimony received by the Special Commission indicated that most people are happy with the lawyer they retain to represent them as a plaintiff. However, it is no secret that many people who do retain a lawyer do so shortly after suffering a traumatic or serious occurrence and that the retaining of a lawyer

to file a suit for serious injury is often that individual's first exposure to the legal system and lawyers. The vast majority of lawyers in Florida deal with such individuals on an entirely ethical and proper basis. However, a contract, once signed, is a binding and continuing obligation and with a very short reconsideration period, the Special Commission and the Board felt that no harm would be done and much benefit may be derived from giving a client an opportunity to reconsider the retaining of a particular lawyer if he or she should decide that they acted in haste as a result of being pressured or because of their injury or accident.

The period of three (3) business days was considered to be an appropriate period of time to prevent any harmful delay in preparation of the cause and provide sufficient time to permit the client to absorb and consider the information set forth in the Statement of Client's Rights furnished under the preceding recommendation. Under the proposed amendment, even though the client may void the contract and not owe the attorney a fee, the client must still reimburse the lawyer for costs actually expended on behalf of the client during the reconsideration period.

The Board respectfully requests that the specific language to be included in contracts as set forth in DR 2-106(E)(2)(b) in Appendix A be approved.

V.

DR 2-106 SHOULD BE AMENDED TO PROHIBIT AN ATTORNEY FROM CHARGING A CONTINGENT FEE ON THE TOTAL LONG RANGE AMOUNT OF A STRUCTURED SETTLEMENT OR RECOVERY.

With the advent of extremely large personal injury settlements or recoveries which have to compensate a victim for their lifetime, structured payments have become commonplace.

Abuses regarding attorney's fees on structured recoveries do represent a potential problem which the Bar should address. A structured recovery usually provides for long-term future payment of sums of money at specific times, either lump sums or on a periodic basis, as opposed to a lump sum to be paid immediately. The computation of a fee in such an instance should be based on the present value of the settlement or recovery and other appropriate factors. No separate fee negotiation should occur, in that attorneys should not negotiate a client's damages and then separately negotiate their own fees. The Board recommends a specific rule revision governing fees on structured recoveries. That recommendation is set forth as DR 2-106(F)(3) in Appendix A. If the damages and the fee are to be paid over the same long-term future schedule, then this limitation does not apply.

Adoption of this recommendation will codify this Court's recent decision in The Florida Bar v. Gentry, 475 So.2d 678 (Fla.

1985), holding that it was unethical for an attorney to base a contingent fee on a structured settlement without first reducing that settlement to present value.

CONCLUSION

The Florida Bar Board of Governors respectfully requests that this Court adopt the proposed changes in DR 2-106 of the Code of Professional Responsibility attached to the petition and brief filed in this matter. The Board further requests this Court make a determination that the schedule of fees set forth in Florida Statutes 678.575(7)(a) is to be superseded by the proposed guidelines and that contingent fees in medical negligence cases should be governed by the same rules as those set forth in DR 2-106, as amended.