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Sid White, Clerk
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Tallahassee, FL 32399-1927

Re: Case No. 71,672

Dear Mr. White:

Pursuant to the Court's invitation in the April 1, 1988 Florida Bar News, to submit comments on the proposed rules for presuit screening and Court ordered arbitration in medical malpractice actions, I would like to make the following comments.

The provision in paragraph 2(a) stating that the Notice of Intent to Initiate a Litigation received by any prospective defendant "shall operate as Notice to said defendant and any other prospective defendant who bears a legal relationship with the prospective defendant receiving the notice", is unusually vague in its scope and intent, and, in my opinion, creates serious problems with regard to notice. Specifically, the term "legal relationship" is nowhere defined in the proposed rules and is confusing in its application. For instance, although the rule apparently would deem notice to a particular physician to be notice to any of his partners or other members of his professional association or notice to the professional association itself, often times suit will be be brought only against the individual physician and will not be brought against the physician in his representative capacity. As such, notice that does not clearly state that suit will be filed in both an individual and representative capacity is arguably insufficient to alert the physicians, colleagues or the or the professional association that a claim is being made against their assets as well. As such, this notice should not serve to toll the Statute of Limitation as to these persons or entities or require an investigation by these persons or entities. This is particularly

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true when there are insurance policies in effect for both the individual and for his or her professional association. The failure to directly inform the prospective defendant or their insurance carrier that a claim is being made against the physician in an individual and representative capacity, raises serious questions as to appropriateness of notice.

More important questions arise as to whether other contractual relationships would meet the "legal relationship" language. One can think of a number of situations in which a contractual undertaking on the part of the physician with either a hospital, another physician, a laboratory, or other person or entity would arguably be considered notice to the contractually affiliated person or entity and would apparently place the burden upon the noticed defendant to inform that possible defendant rather than the plaintiff themselves. In this regard, would Notice of Intent to Initiate Litigation Against a Physician thereby notify a hospital at which he has staff privileges or has a contractual relationship to provide certain services, since such could be considered a legal relationship? In addition, there are questions whether notice to a person or entity that engages in a joint risk management program with another person or entity would be notice to another prospective defendant who is represented by the same risk manager. Other questions include the situation in which either a private or public university is contractually affiliated with either a private or public hospital and whether notice to one entity would be deemed notice to the other entity that a claim is being made against it as well. If notice is provided to a particular physician or entity and, for whatever reason, that physician or entity does not inform an affiliated person or institution of the fact that he is being sued and that the other entity or person may be responsible on a vicarious or direct basis, then the purpose of the notice statute is thwarted and mandatory compliance with the rule, as required by the Legislature, will not be carried out. Under the circumstances, it would be more appropriate to remove such language and require, as the Stature does, that each prospective defendant be notified directly of plaintiff's Intent to Initiate Litigation against <u>that</u> defendant in whatever capacity is deemed appropriate.

Of interest is Sub-Paragraph (b) of Paragraph 2, which requires that Notice of Intent to Initiate Litigation shall include the names and addresses of all other parties to be sued and shall be sent to each party. This seems logically incon-

sistent with Sub-Paragraph (a) since it will be unnecessary to send Notice to a party in a legal relationship with the noticed physician or entity. This will certainly create more problems than solutions. Another concern with respect to Sub-Paragraph (b) is that often times numerous defendants are served with notice. A requirement that each other prospective defendant receive a copy of the notice directed to all other proposed defendants would not only be tedious, but also may raise questions as to the appropriate remedy, if any, in the event a prospective defendant did not receive a copy of the notice directed to any other prospective defendant. In addition, a question arises as to whether there would need to be some sort of certification on each Notice that a copy thereof was sent to all other prospective defendants. Additionally, if for whatever reason a prospective defendant is not directly sent certified mail notice of Intent to Initiate Litigation against that defendant, yet receives through ordinary mail a copy of a notice directed to another defendant, would that be deemed sufficient to toll the Statute of Limitations and begin the running of the ninety (90) day period as to that person or entity. The proposed rules need to be seriously reconsidered in light of these potential complications.

With respect to discovery methods and procedures, the requirement that parties make discoverable information available without formal discovery, although tracking the language of the Statute, offers no guidance as to what procedures to follow if a dispute arises as to whether a particular document or other information is "discoverable". Although, I would assume that this language is intended to be as broad as possible in order to allow access to as much information as necessary to investigate the claim, often times requests for documentary production include requests for things that are arguably nondiscoverable. During the course of any litigation, the issue of discoverability of any particular document is often disputed, and usually must be resolved by the trial court. However, during the presuit screening period there is apparently no avenue by which an objection to discovery could be addressed and the prospective defendant, the defendant's insurer or the plaintiff may be in a position whereby they must choose between the lesser of two evils--produce a document or answer a question which is otherwise nondiscoverable or refuse to comply with the request for production or refuse to answer any particular question and then face possible sanctions by trial court after suit is filed. Although the Florida Rules of Civil Procedure with respect to discovery abuses will apply during the taking of unsworn statements, one questions whether

the provisions of Rule 1.310(d) which allow termination of a deposition until further order of court would allow the participants to seek a court order as to whether or not taking of an unsworn statement can continue during the presuit stage. If not, and there is no way to seek review of the termination of a deposition for discovery abuses, or to seek review of objections to production of various documents, then there is a potential complication in that presuit discovery may be thwarted with respect to the party seeking the discovery, while on the other hand, the person objecting to such discovery will be in the untenable position of having to make a choice on a discovery matter which may subsequently work to the detriment of themselves or their client. In that respect, the proposed rules leave open very importation questions which may affect the future right of a party to pursue or defend an action. As such, I feel that there needs to be more particular procedures by which presuit discovery problems can be addressed. Perhaps any problems could be referred to a specific judge, special master, or magistrate for resolution during the presuit screening so that the laudible goal of allowing full and complete investigation and determination of the merits of an action prior to filing suit, will not be diminished. If, however, it is the Court's intention to address the question of failure to comply with good faith requirements of the Statute only after suit is filed, then it creates an unworkable situation since an after the fact determination of whether a particular objection or termination of an unsworn statement proceeding was in good faith, could conceivably affect the ability to defend the action, in the future. Clearly, if an attorney is involved in the presuit process, as the rules allow and from a practical standpoint require, the attorney should not be placed in the position whereby he or she could be compromising the client's position while attempting to protect his client from unreasonable intrusions.

Another concern is with regard to the provisions excluding presuit work product from subsequent proceedings. The phrase "verbal or or written communications" is extremely vague and does little to define the language of the statute, which is seemingly broader in that it speaks of "statement, discussions, written documents, reports or other work product." Any number of things could be considered to be a "communication." A question also arises regarding what effect the work product exclusion has if such information is obtained independently during the course of the investigation or trial or could have been independently obtained.

In addition, it seems purposeless to allow a physical examination of the plaintiff, yet require that any report or testimony from the examining physician is inadmissible in any subsequent litigation. Clearly, if a report is favorable to either party or if the selected physician is one in which the defendant has a belief as to their credentials and credibility as a witness, the parties should not be precluded from using such a physician in any subsequently filed lawsuit. A question also arises as to whether the physician could perform a subsequent examination after the litigation starts and testify as to the results of that examination without running afoul of the prohibition with respect to information gained during the presuit investigation itself. Furthermore, if a second examination is performed, by the same or a different physician, which derives different results even though there has been no change in the plaintiff's condition, the inability to use the earlier report as impeachment or rebuttal evidence would have a marked effect upon the fairness of the trial.

Finally, the provisions with respect to time requirements, contained in paragraph 4(c), provide that suit will not be barred by the applicable Statute of Limitations if it is filed within sixty (60) days or within the remainder of the time on the Statute of Limitations, whichever is greater, after the earliest of particular events. However, in a circumstance in which the Statute of Limitations would run prior to the end of the sixty (60) days, a provision which allows additional time within which to file suit has no basis in the language of the Statute itself. Specifically, § 768.57 clearly states:

> Upon receiving notice of termination of negotiations in an extended period, the claimant shall have sixty (60) days or the remainder of the period of the Statute of Limitations, whichever is greater, within which to file suit.

This language does not apply to the original ninety (90) day period itself or the tolling provisions with regard thereto, but applies only to a stipulated extension of the ninety (90) day period by the parties. As such, I believe that the interpretation of this provision reflected in the proposed rules is incorrect. Although such a requirement would seemingly lend consistency to the Statute, it adds an additional extension to the Statute of Limitations, where there is no provision for such in the underlying statutory language.

Thank you very much for your attention in this regard. I hope that the aforementioned comments will be of assistance with the Committee and the Court.

Yours sincerely,

Steven E. Stark

SES:sj