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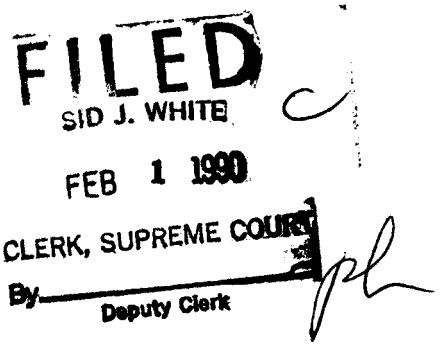

THE SUPREME COURT STATE OF FLORIDA

IN RE: AMENDMENT TO FLORIDA RULES OF CIVIL PROCEDURE 1.700-1.780 (MEDIATION)

CASE NO. 75,151

FLORIDA MEDICAL MALPRACTICE CLAIMS COUNCIL, INC.'S COMMENTS ON PROPOSED AMENDMENTS TO MEDIATION RULES

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OBJECTIONS TO PROPOSED CHANGE OF RULES 1.720(b) AND 1.730(c)

COMES NOW the Florida Medical Malpractice Claims Council, Inc. (hereinafter referred to as "FMMCCI"), by and through its undersigned general counsel, and files this its objections and suggestions regarding the proposed amendments to Rules 1.720 and 1.730 of the Florida Rules of Civil Procedure.

INTRODUCTION

FMMCCI is a nonprofit Florida corporation composed of a membership represented by members of self-insured medical trusts and other similar entities, commercial carriers, risk managers, attorneys representing physicians, hospitals and other similar healthcare providers, claims representatives, physicians, nurses, and structured settlement experts. FMMCCI promotes cooperation at the local and state level of healthcare providers and entities which insure them. This ultimately benefits the patient population of the State of Florida.

OBJECTIONS TO RULE 1.720(b) AS PROPOSED

The fundamental concept of mediation is to encourage the amicable resolution of matters in controversy. Rule 1.720 permits either party the opportunity of applying to the court for mediation which supplements Rule 1.700, permitting the court to refer the parties to mediation. Alternative Dispute Resolution (ADR) is a concept designed to promote discussion of settlement with the concomitant effect of reducing the costs of litigation,

the numbers of cases on the docket assigned to judges, and permitting a speedier resolution which ultimately benefits the injured party.

Proposed Rule 1.720(b) entitled "Sanctions for Failure to Appear" has broadened the definition of who must appear at the mediation from simply a party-defendant and a representative of an insurance company (if one exists) to the party-defendant and a representative of the insurance carrier "who has full authority to settle without further consultation." The stated Reason for Change is as follows:

> With respect to insurance carriers, the rule requires a physical presence of a direct representative of the carrier who has the ability to enter into a settlement pledging the full benefits of the policy involved. The intent is to avoid situations in which insurance representatives appear at mediation sessions with limitations on their authority which serve to place an absolute, unconditional barrier on settlement. While there is no intent in this rule to mandate any party to settle any case in mediation, it is the intent to have each party participating in a mediation directly vested with the ability to resolve the dispute. The only exception to this rule spelled out in the last paragraph which provides for participation in mediation sessions by parties who, by statute, are precluded from making decisions outside public hearing process. [Emphasis added]

The proposed amendment to the definition of the representative from the insurance carrier who has the ability to enter into a settlement pledging the full benefits of the policy,

is in conflict with **5627.7262,** Fla.Stat., Nonjoinder of Insurers, which provides in §§(1) and **(2)** as follows:

> (1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
>
> **(2)** No person who is not insured under the terms of a liability insurance policy shall have any interest in any policy, either as a third-party beneficiary or otherwise, prior to first obtaining a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy. [Emphasis added]

The Legislature, by enacting the statute, has prohibited insurance companies being joined as parties defendant to the action. The Proposed Rule change requires a representative of the insurance ccmpany to attend the mediation (who has the ability to enter into a settlement pledging the full benefits of the policy involved) when the insurance company is not a party-defendant and cannot, by statute, be made a party-defendant. Therefore, the Proposed Rule change attempts to accomplish through the back door that which a party-plaintiff cannot do through the front door; which is to require the insurance company representative to not only participate in the proceedings but to participate by having already secured the entire policy limits prior to attending the mediation. Subsection (1) mandates a condition precedent to having a cause of action against the liability insurer that a

judgment be obtained against the insured covered by the policy. Subsection (2) specifically states the legislative intent that no person who is not the insured shall have any interest in any policy prior to obtaining a judgment against the person who is the insured under the terms of the policy. Section 627.7262, supra.

In the event that the insurance company or its representative is unable to secure such settlement authority of policy limits, the Proposed Rule permits the trial court to impose sanctions against the party-defendant (the insured), including an award of mediator and attorney's fees and other costs which the trial court deems appropriate. This constitutes an unwarranted intrusion into the contractual relationship existing between insured and insurer. It further raises the potential of a conflict of interest arising between the insured and the insurance carrier, and permits the plaintiff and the trial court to become involved in the interactions of the insured and the insurance carrier before there is a judgment obtained by the plaintiff.

The proposed sanctions provision of Rule 1.720(b) would require the trial court to make inquiry as to why full settlement authority was not obtained prior to the time of mediation. This would permit the trial court to get involved in the claims activities and processes of the insurance carrier, a self-insured trust fund, or the inner workings of a hospital board of trustees which must meet and convene to discuss disposition of threatened litigation and claims. This exceeds the bounds of the

jurisdiction of the trial court. An evidentiary hearing would be necessary under such circumstances which would permit plaintiffs and their counsel access to information which is otherwise not subject to discovery. An insured and/or the insured's representative would have to prove good cause contemplating the very type of evidentiary hearing which would have a coercive impact on the insured and the insurer. Having the trial court become involved in the imposition of sanctions against the insurance carrier of a party-defendant who is an insured opens the door to affecting the impartiality of the judge who will try the case on its merits.

The Proposed Rule change assumes that there is a "policy" which is subject to disposal by one representative of the "insurance carrier." By virtue of the malpractice crises which this Court has recognized and which the Legislature recognized in 1985, when it enacted the Medical Malpractice Reform Act of 1985, the traditional "insurance carrier" has become increasingly replaced by self-insured retention funds, self-insured trust funds, offshore captives, which may but most often do not have one decision making person who has the "authority" to pledge policy limits. Because of the crises, those numbers of rapidly declining physicians who have professional liability insurance have obtained it through self-insured trust funds, such as Physicians Protective Trust Fund. (See, Physicians Protective Trust Fund's Comments on Proposed Amendments to Proposed Mediation Rules.)

Many hospitals have been required to increase the levels of self-insured retentions in order to obtain excess and reinsurance. It is not uncommon for hospitals in Dade County to have a self-insured retention level as high as $2 million. Commonly such self-insured retention levels can only be committed after an involved process of consultation by risk managers, administration officials, standing hospital committees, and in some instances, the board of trustees of the institution. The self-insured retention fund is just the first or primary layer of coverage in most instances for hospitals. (The Proposed Rule implicitly assumes a single limits policy but does not address self-insured retention funds, excess policies, or reinsurance policies.) There is excess coverage usually in the amounts of several million dollars. The excess policies commonly provide multiples of several millions of dollars. Such policies are written in the United States but final authority customarily must come from Underwriters at Lloyds in London, England. The Proposed Rule amendment has not considered the involved claims process as outlined above for hospitals or other healthcare facilities which are not part of a municipality, a governmental entity, or a public health trust. The Proposed Rule change makes no distinction between primary excess and reinsurance policies. The Proposed Rule change is impractical as applied to hospitals.

The Proposed Rule change 1.720(b) further draws a distinction between public versus private institutions. It

exempts public institutions which must conduct their decisions inside public hearing process. As the "Reason for Change" explains:

> The only exception to this rule is spelled out in the last paragraph which provides for participation in mediation sessions by parties who, by statute, are precluded from making decisions outside public hearing process.

There is no compelling state interest nor is there a rational relationship to support such a distinction which is clearly done as a matter of convenience. Private institutions should be afforded no less opportunity to participate in the mediation process without the duress and hardship which would be imposed upon such private institutions under the Proposed Rule change. Since private healthcare facilities, particularly hospitals, far outnumber their public counterparts, the exception created becomes even more tenuous.

The particular application of this Proposed Rule amendment has a disproportionate impact on private hospitals for another reason. Private institutions do not have governmental immunity which serves as a cap on their liability exposure. Private institutions have been subjected to increasing theories of exposure and liability over the past decade in spite of the continued medical malpractice crisis. The District Courts of Appeal have subjected private hospitals and institutions to increasing liability on the basis of ostensible agency rendering such institutions liable for the acts or omissions of emergency

room physicians, anesthesiologists, pathologists, radiologists, and therapists. The Fourth District Court of Appeals has gone so far as to find that a hospital can be liable for a joint venture, Arango v. Reyka, 507 So.2d 1211 (4th DCA 1987) because a hospital received a percentage of the fee charged by the anesthesiology group for services performed at the private hospital. This court, as recently as 1989, has adopted the corporate negligence doctrine, Insinga v. LaBella, 543 So.2d 209 (Fla. 1989), wherein this Court specifically held at page 213:

> The corporate negligence theory raised here has broad implications because it essentially establishes a new independent duty that a hospital owes to a patient to select and maintain competent medical staff to treat hospital patients. Medical staff in this context expressly includes independent private practicing physicians who have been approved for staff privileges and, as such, may admit and treat their patients in the hospital.

Hospitals have been subjected to the "broadening" exposure imposed upon them. This, coupled with the circumstance of many physicians electing to not acquire professional liability insurance, has adversely affected hospitals in their evaluation of liability exposure which exists in claims of alleged medical negligence. The garden variety medical negligence case is not that difficult to evaluate as experience dictates. Nonetheless, in the face of notice pleadings and the abuses of Rule 1.280, Rules of Civil Procedure, by the plaintiffs in failing to disclose the identity of their expert witnesses and the theories of

negligence against each defendant until the verge of trial (an abuse which wreaks havoc on all malpractice defendants in attempting to evaluate claims of medical negligence particularly when there has been no such disclosure at the time of mediation required by the trial court), the defendants are being asked to appear with complete and full settlement authority when the nature extent and specifics of the allegations are not even known in many instances. The Proposed Rule change does not address this type of abuse of the discovery process. Private hospitals cannot be placed in the position anticipated and intended by Proposed Rule 1.720(b).

The foundation of the Proposed Rule amendment is an assumption that is unwarranted and unsupported by experience. The assumption is that each and every medical negligence case filed is meritorious. In a study conducted by Chief Judge Gerald T. Wetherington in the Eleventh Judicial Circuit (Dade County), statistics indicated that better than 80 percent of the cases tried to verdict resulted in a defense verdict in cases of alleged medical negligence. Applying those facts and statistics in the Eleventh Judicial Circuit, that would mean that over 80 percent of the time cases sent to mediation would require an insurance representative to appear with policy limits settlement authority in a case which is going to result in a defense verdict if tried. The threat of sanctions and reprisals in the Proposed Rule, should it be approved, would only benefit plaintiffs but it would do

nothing to serve the rights of accused healthcare professionals who wish to have their cases tried by a jury.

PROPOSED RULE AMENDMENT 1.720 EXCEEDS WHAT IS REASONABLE OR NECESSARY

Whether a liability insurer acts in good faith or in bad faith, the remedy exists under current Florida statutes for the insured to sue the insurer for failing to settle the case. American Fire & Casualty Co. v. Davis, 146 So.2d 615 (1st DCA 1962), and the Civil Remedy statute, §624.155, Fla.Stat. Therefore, there is a statutory remedy as well as common law remedy, in the event the insurer does not act in good faith. The mediation process is but one aspect, albeit an important one, in the handling of litigation. It is axiomatic that the insurer must demonstrate good faith handling from the outset of the claim through its conclusion. Since remedies exist by statute and at common law, the Proposed Rule amendment is not only unnecessary, but the harm which would be accomplished, were it to be approved, far outweighs any demonstrated benefit that could be derived from It under these circumstances.

OBJECTION TO PROPOSED RULE 1.730(C)

Once again, the proposed amendment to the Rules of Civil Procedure is unwarranted and unnecessary. Proposed Rule 1.730(C) attempts to impose sanctions in the event of a breach of failure to perform under the terms of a settlement agreement reached pursuant to mediation. Section 627.4265, Fla.Stat. provides that the insurer has 20 days after such settlement is reached to tender

the settlement proceeds unless other agreement is reached, and failure to tender the settlement proceeds within 20 days subjects the insurer to an interest rate of 12 percent from the date of the agreement. Therefore, a settlement reached by virtue of mediation is enforceable by Florida statute. The proposed amendment to the Rules of Civil Procedure seeks to extend the sanctions above and beyond the Florida statute enacted by the Legislature adding costs and attorney's fees. There is no provision in Florida statutes for such a sanction. The rule, as proposed, would then be in effect legislating substantive rights as opposed to procedural matters. The proposed amended rule exceeds that which is prudent or necessary.

CONCLUSION

It is respectfully submitted that the Standing Committee on Mediation and Arbitration Rules has made two recommendations which should not be approved by this Court. It is indeed unfortunate that no representative of the insurance industry was invited to be a member of the Standing Committee or to serve in an ad hoc capacity to the Committee. Part of the difficulty lies in the fact that the Committee has attempted to fashion mediation rules which would apply to all cases and controversies in an effort to provide a framework for dispute resolution on a statewide basis. The difficulty of application of the generalized proposed amended rules to the particular defendants in a medical

negligence case, be it private physician or private hospital, does not fit such a general category.

Adequate remedies exist at common law, and codified by statute to address the difficulties addressed by the Standing Committee in Proposed Rules 1.720 and 1.730. It is respectfully submitted that the proposed changes not be adopted in the interest of protecting the remaining insurance entities and trusts which afford professional liability insurance to healthcare providers in Florida.

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