IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC05-1150

IN RE: PETITION TO AMEND RULE 4-1.5(f)(4)(B) OF THE RULES OF PROFESSIONAL CONDUCT

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COMMENTS OF MARK P. CRESSMAN, ESQUIRE FLORIDA BAR NO: 0051519 AND OBJECTIONS TO PROPOSED AMENDMENT

These comments are respectfully submitted to the Court pursuant to this Court's order dated June 29, 2005, regarding the Petition to Amend the Rules Regulating the Florida Bar- Rule 4.15(f)(4)(B)(hereinafter "Petition") as the Petition seeks to regulate contingency fees in medical negligence cases:

On its face, the Petition is yet another attempt by the professional liability insurance industry of the State of Florida to impose its will on the citizens of this state. I have been practicing law in the State of Florida since 1995. For the vast majority of my time as an attorney, I have represented insureds of many professional liability carriers, as well as personal lines of insurance such as automobile insurance, property insurance and business liability insurance. My experience in the arena of medical negligence claims dates back to 1996.

However, in 2004, after participating in several trials as a defense attorney,

I became increasingly concerned and frustrated with the insurance industry's approach to evaluating claims. I could no longer participate in what I perceived to be a great deal of injustices occurring, and being exacted, upon the citizenry of Florida by the professional liability insurance industry. As meritorious claims were being rejected, I became increasingly disillusioned with the defense practice. The ongoing refusal of the medical profession's failure to police itself, as well as the insurance industry's failure to even consider meritorious claims, led me to leave the defense practice. I have since re-directed my efforts to assist those persons and families who are victims of medical negligence.

Whether claims of medical malpractice are being brought by Plaintiffs or are being defended by Defendants and their insurance companies, the issues involved are very complex and require specialized knowledge of the laws of the State of Florida and the procedures by which these types of claims must be brought. In my opinion, very few citizens in this state have a full understanding of the nature of the process which must be complied with in order to bring a claim for medical negligence. These types of cases involve enormous expense, including the securing of medical records, detailed review of the records, review by qualified physicians and professionals before a claim is even begun. Once a claim is begun, the vast, vast majority of the claims are denied out of hand by the professional

liability insurance carriers of the state. Most times, the claims are not reviewed for their merit, but are reviewed for how the medicine can be defended.

Once the claims are denied out of hand, they then proceed to the courtroom. The process requires not only knowledge of a very specialized area of the law, these cases also require a great deal of expense, time and effort on the part of the members of the Florida Bar who have dedicated themselves to protecting the public and representing people, not insurance companies or big corporations. Even when a Complaint is filed, there is no guarantee of a favorable outcome. Generally, the outcome is not favorable for the Plaintiff given the environment which has been predicated through the guise of "tort reform."

In my estimation, most medical negligence cases require the expending of costs well in excess of one hundred thousand dollars ($100,000.00), depending on the number of Defendants in the action. In addition to the tens of thousands of dollars required to maintain a medical negligence claim, the attorneys and their staff must expend hundreds of hours to prosecute the cases. The same is true as to the defense of such cases. Many cases require the use of out-of-state expert witnesses since the environment in the state seems to create a hostile tone towards any physician in the State of Florida who believes, or is of the opinion, or is willing to stand up and state that another physician in this state was negligent.

Even the staff of several state run universities, who may believe that negligence occurred in a case, are prohibited or actively discouraged from rendering such opinions by a "wall of silence" that seems to pervade the entire medical profession. I have personally encountered this "wall of silence" when defending cases.

When these cases proceed to trial in today's environment, the chances are not very good that certain prejudices about these types of cases can be overcome. In those instances, the attorney who has set aside a great deal of time in prosecuting the case must absorb the loss of significant time and monies incurred in pursuit of the claim. For this reason, the contingency fees in personal injury cases, which has been permitted in the state for many years, is the *only* system which is fair and equitable to the citizens of the State of Florida seeking justice.

No mistake should be made when reviewing the Petition before this Court. The Petition is not filed on behalf of the citizens of the State of Florida. The vast number of attorneys who signed the Petition have probably never represented victims in the State of Florida. The real client behind the Petition is, in all likelihood, the Florida Medical Association, the Florida Hospital Association and the several professional liability insurance carriers doing business in the State of Florida, who would like to see more barriers placed in the way of the citizens of

the State of Florida ability to seek redress of wrongs committed upon them or their loved ones by negligent physicians. The goal of the Florida Medical Association, the Florida Hospital Association and a vast majority of physicians in this state is clear - if they can limit the attorney's fees collected in these types of cases, more and more qualified and knowledgeable attorneys will stop representing victims of medical negligence, and the end result will be a virtual elimination of this form of remedy without a corresponding policing of the medical profession.

Even more egregious is the fact that there was never any public outcry for a reduction in attorney's fees in medical negligence cases until the General Election of 2004 when, for the first time, the issue of attorney's fees in medical negligence cases was raised. Thereafter, it became one more front in the war of "tort reform" as Amendment 3was placed on the ballot. Thereafter, through skillful advertising, such as a lawyer standing in front of an ATM machine spitting money at him, the Florida Medical Association, the Florida Hospital Association and their memberships were able to hoodwink the citizens of the State of Florida into thinking that the passage of Amendment 3 would improve their healthcare and/or result in significant "savings" in the net amount to be realized by the client.

In reality, if the Petition is granted and the Rules of Professional Conduct are changed, it will, in all likelihood, have the opposite effect as fewer and fewer well

qualified attorneys undertake representing the victims of medical negligence, and no group is left to police the medical profession but itself. Unlike the legal profession, which vigorously polices itself, the medical profession has no such history of being able to ensure those who are the greatest offenders of medical negligence are no longer allowed to practice their negligence on the citizens of the State of Florida.

First, the Petition should not be granted, and should be unanimously rejected by the Court because the interpretation and application of Amendment 3 is a substantive legal issue to be addressed through appropriate litigation in the Courts of this State. On its face, the Amendment does not limit attorney fees, but in reality puts a cap on the amounts by which awards can be reduced for expenses other than attorney's fees, including Medicare, Medicaid and hospital liens. Only until this provision is interpreted through appropriate litigation, the amendment of the Rules of Professional Conduct is seriously premature.

Secondly, and more importantly to the laws and values upon which the United States of America was founded, the request in the Petition violates the Constitutions of the United States and the State of Florida. It would have the very real effect of preventing victims of medical negligence to receive due process, freedom of association, equal protection and access to the courts of this state. Just

as a *Miranda* right can be waived, so too should this be waivable. As for the equal protection violation, the provisions called for in the Petition do not in any way attempt to limit the amount of fees which can be charged by those attorneys defending medical negligence, or the amount of money expended by the professional liability insurance carriers of the state in seeking ways to defend the medicine instead of evaluating meritorious claims.

In addition to interfering with the rights of the citizens and victims of medical negligence in the State of Florida, the Petition also seeks to interfere with my right, as a practicing attorney to contract with my client for a fair and reasonable fee.

In conclusion, the Petition is simply a veiled attempt to achieve before this Court that which the Florida Medical Association, the Florida Hospital Association and the several professional insurance carriers could not achieve through their lobbying efforts in Tallahassee, but instead chose to achieve through deceptive advertising and playing into the emotions of the voting public. The Petition is simply another front on the war of tort reform to bypass the constitutional questions involved in the passage of Amendment 3 itself. Any consideration of changing the Rules of Professional Conduct should and must wait until litigation as it relates to the constitutionality of Amendment 3 is resolved.

I would respectfully request that the Supreme Court reject the proposed amendments to Rule 4-1.5(f)(4)(B) and allow the rule to remain in its current form.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 9th day of September, 2005, by U.S. Mail to: Clerk of the Florida Supreme Court, 500 South Duval Street, Tallahassee, FL 32399-1927, also via electronic filing at e-file@flcourts.org, and also by U.S. Mail to: John Harkness, General Counsel, Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; and Stephen H. Grimes, Counsel for Petitioner, Holland & Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810.

Respectfully submitted,

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