IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1150

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

COMMENTS OF DAN CYTRYN, ESQUIRE OF
LAW OFFICES CYTRYN & SANTANA, P.A.

1. This Court has held that any person may waive their constitutional rights. *Abell v. Town of Boynton*, 117 So.2d 507 (Fla. 1928).

2. The constitutional provision that is the subject matter of this petition was allegedly enacted for the protection of the claimant, not for the protection of any other person, as the constitutional section is entitled "*Claimant's* right to fair compensation" (emphasis added).

3. Therefore, in voting on this constitutional amendment, the people of the State of Florida enacted a provision which they thought would enhance the protection of persons ("Claimant's") injured due to medical negligence.

4. Unfortunately, the reality is that the effect of the provision is to do the opposite, i.e., claimants will find it impossible to find attorneys to handle medical negligence cases unless claimants have the ability to pay the attorney hundred of thousands of dollars in fees and costs to pursue the average medical negligence claim.

5. No qualified medical negligence attorney will be able to afford to take these cases on the fee schedule set forth in the petition, as medical negligence cases are generally thought of as the most costly and complicated type of personal injury cases to try.

6. At this time, a review of the Florida Jury Verdict Reporter in the past year will show that Plaintiffs are only winning at trial approximately 15% of these cases, whereas, historically, before all of the negative publicity, plaintiffs in Florida generally won these cases approximately 30% of the time.

7. The undersigned has handled cases that are both pending and have since terminated involving physicians operating on the wrong level of the spine, physicians negligently failing to tell a patient for a year that she had breast cancer, ultimately resulting in her death, physicians doctoring medical records and rewriting them to cover themselves in order to attempt to prevent a successful malpractice result, and numerous other circumstances of incompetence that the medical negligence lawsuit is, in part, designed to try to prevent.

8. The undersigned is familiar with a Plaintiff attorney who actually had to file for bankruptcy, in part due to losing or mistrying four consecutive medical negligence cases, after having expended an actual out-of-pocket costs of approximately $400,000.00 per case in pursuing justice for various individuals,

which sum does not include thousands of hours of time expended in pursuing those cases.

9. These cases are the most difficult for a personal injury lawyer to pursue in the first place, because of the cost, the intricacies of the medicine, and the fact that the ability of the defense to obtain experts is so much greater than that of the Plaintiff.

10. In fact, there are numerous expert medical witnesses who testify in medical negligence cases who refuse to testify for Claimants, whereas there are virtually no medical negligence expert witnesses who refuse to testify for doctors or others in the medical profession.

11. Perhaps if this act had been called "Medical providers' right to protection from lawsuits", then the argument that there should be no constitutional waiver allowed because protection of the medical profession is required, however; that is not what the act is entitled, and that is not what the people voted on; the people voted to protect the claimant.

12. If the claimant needs to have a waiver of his constitutional right to protect "claimant's right to fair compensation", then the claimant can certainly do so under the general law that a constitutional right can be waived.

13. There is a substantial public policy in allowing these lawsuits against incompetent medical providers to continue; and that public policy is that there has

to be a reasonable method of policing the medical profession to ensure that the lowly standard of medicine that is presently practiced in the State of Florida, particularly in South Florida, is not allowed to become worse than it already is.

14. Often, disciplinary actions against physicians are prompted by a medical negligence attorney who brings the incompetence and gross negligence of a medical provider to the appropriate board's attention, or as a result of newspaper publicity emanating from a lawsuit or a jury verdict, and not from a disciplinary agency acting on its own accord.

15. The Grimes Special Interest group has one interest in mind, and it is certainly not that of the *claimant*; the Grimes group's interest is for the protection of their clients, the insurance companies and the medical profession committing the medical malpractice.

16. There are numerous arguments why this provision shouldn't have even initially been placed on the ballot, but its enactment and ultimate enforcement will violate the right of access to court of those people who are unable to pay out-of-pocket tens or hundreds of thousand of dollars to an attorney to pursue a medical negligence claim.

17. If the amendment is ultimately found to be an appropriate amendment, and is not found to conflict with any other provisions of the state or U.S. Constitutions, there probably does have to be an amendment to Rule 4-

1.5(f)(4)(B), and it can be by the addition of a provision *similar to* the one proposed by the Petitioner, but the wording should be as follows (just adding the words" unless waived by the claimant" to the words proposed by the petition):

> (iii) Notwithstanding the preceding provisions of subdivision (B), in medical liability cases, unless waived by the claimant, attorney fees shall not exceed the following percentage of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants:
>
> a. Thirty percent (30%) of the first $250,000.00.
>
> b. Ten percent (10%) of all damages in excess of $250,000.00.

18. However, this language should only be added after the Florida Supreme Court ultimately rules on the merits of whether this constitutional provision violates any other existing constitutional provision under either state or federal law.

19. The following language is language that can be added to a contract to allow the client to make a knowing and intelligent waiver of their constitutional right:

WAIVER OF ARTICLE I, SECTION 26 OF THE FLORIDA CONSTITUTION

The provision of the Florida Constitution that I am waiving and giving up my right to is as follows:

> **Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a**

contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,00.00 exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

_____ **I understand that under the Florida Constitution, I have the right to be**
initial **charged an attorney's fee not to exceed 30% of the first $250,000.00 in any damages recovered, and not more than 10% of any such recovery in excess of that amount, exclusive of reasonable and customary costs.**

_____ **I have been explained this constitutional right and it has been**
initial **discussed in detail.**

_____ **I understand that the attorney's fees set forth immediately below are**
initial **greater than those set forth in the Florida Constitution.**

_____ **I knowingly, voluntarily, and intelligently agree to waive this**
initial **constitutional right, and agree to the contingency fee provisions set forth in this contract.**

Respectfully submitted,

_____
Dan Cytryn, Esquire

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to: Executive Director of The Florida Bar, John F. Harkness, Jr., 651 E. Jefferson Street, Tallahassee, FL 32399-2300, and Stephen H. Grimes,

Holland & Knight LLP, Post Office Drawer 810, Tallahassee, FL 32302 this ____ day of _____, 2005.

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