Supreme Court of Florida

Case No. SC05-1150

In Re Petition to Amend Rules
Regulating The Florida Bar,
Rule 4-1.5(f)(4)(B) of the
Rules of Professional Conduct./

COMMENTS OF THE DADE COUNTY TRIAL LAWYERS ASSOCIATION AND OBJECTIONS TO PROPOSED AMENDMENT

A. Introduction:

Pursuant to Rule 1-12.1(g) of the Rules Regulating The Florida Bar, the Dade County Trial Lawyers Association ("DCTLA") submits these comments objecting to the proposed amendment to Rule 4-1.5(f)(4)(B). The Court should dismiss or deny the petition for any and all of the following four reasons:

- The petition should be dismissed because the purported "Petitioners," acting at the behest of non-lawyer client the Florida Medical Association ("FMA"), have misused a procedure intended to permit rank-and-file members of The Florida Bar to propose amendments to the rules which have a sufficiently broad base of support among members of the Bar.

- The proposed amendment to Rule 4-1.5 should be denied as is premature and likely to interfere with imminent litigation which will test the underlying assumption

that Amendment 3 to the Florida Constitution limits the contingency fees medical malpractice plaintiffs can agree to pay. That disputed proposition remains to be litigated in the courts of Florida, so a rule which seems to recognize the validity of that proposition could be misconstrued as authority for the proposition and unfairly influence those actual cases and controversies.

- Third, proposed subsection (iii) of Rule 4-1.5(f)(4)(B) is premised upon the as-yet untested federal constitutional validity of interpreting Amendment 3 to cap contingency fees. There are numerous serious constitutional challenges likely to be raised against enforcing Amendment 3 as a cap on contingency fees. It would be unwise for the Court to adopt a Rule Regulating The Florida Bar that is hinged exclusively upon such unsettled questions of law. Such a rule, if adopted, might well be construed as an advisory opinion issued to the courts and lawyers of this State impliedly answering those questions, outside any real case or controversy.

- Finally, and perhaps most fundamentally, even assuming *arguendo* that Amendment 3 ultimately may be found to create an enforceable "right" for those injured by medical negligence to pay no more than the stated percentages for attorneys fees in prosecuting malpractice cases, the FMA-backed amendment should be rejected because it tramples upon a very basic right under the Florida and federal constitutions: the right of citizens to knowingly waive one constitutional right, in order to more fully exercise another right more valued by the holder of both those rights.

B. Statement of Interest of Respondent DCTLA:

The DCTLA is a voluntary Bar association comprised of hundreds of trial attorneys in the Greater Miami area. Our members primarily represent the individuals injured due to the fault of others, including patients harmed by medical errors who seek redress against negligent health care providers. One of the DCTLA's primary objectives set forth in our bylaws is to "improve and enhance the standards of trial practice, the administration of justice and the ethics of the profession." We serve the community and the court system in a variety of ways including volunteering to provide food and shelter to the homeless, working to improve access to courts for the helpless and disadvantaged, and cooperating with the judiciary to enhance efficiency and increase professionalism.

The proposed amendment to Rule 4-1.5 runs counter to the mission and purpose of the DCTLA, in that it threatens to restrict access to courts by those who need access most. The assumed fee caps raise barriers to prevent plaintiffs from litigating—with the assistance of counsel of their choice—meritorious malpractice claims against well-funded defense attorneys whose clients are not capped in the amount they can pay.

C. The Petition Is a Misuse of Rule 1-12.1(f):

The petition should be dismissed because it misuses a procedure for amending the rules. Rule 1-12.1(f), Rules Regulating The Florida Bar, provides that the amendment

process may be initiated by fifty members of the Bar. Such a petition, and any rule change it proposes, should have as its aim the achievement of the overriding purpose of The Florida Bar: Ato inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.@ See *In Re Amendment to Integration Rule of The Florida Bar*, 439 So.2d 213, 213 (Fla. 1983). The procedure for amending the rules in this fashion clearly contemplates a petition filed by a significant enough number of attorneys to demonstrate a broad base of support for a needed rule change. The purpose of such a petition should not be merely to serve a particular client's interest.

The fifty-plus attorneys led by Stephen Grimes who signed the petition purport to be the APetitioners.@ However, as has been reported in *The Florida Bar News* (without contradiction), the real party in interest which directed Mr. Grimes to file the petition is the Florida Medical Association (AFMA@). "The FMA asked Grimes to file the rule amendment with the court."[1] The petition does not reflect the independent professional judgment of a substantial number of licensed attorneys seeking to advance standards of ethics and professionalism, as was implied by the signers= failure to disclose that they were acting as advocates for their client.

[1] Gary Blankenship, "Board Asks Court Not To Adopt Petition To Limit Contingency Fees in Med Mal Actions," 32 *The Florida Bar News* No. 13 at p. 14 (July 1, 2005). *See also* the story by Managing Editor Mark D. Killian entitled "Rule Would Limit Malpractice Fees," *The Florida Bar News* (May 1, 2005)("The Florida Medical Association has directed its attorney to file a petition with the Supreme Court

The putative Petitioners should have revealed that they were acting at the behest of the FMA, and not out of personal and professional conviction. *See* Richard D. Rotunda and John S. Dzienkowski, *Professional Responsibility: A Student=s Guide* (Thomson/West 2005), in which the authors note as follows:

> The lawyer should not purport to represent only a pro bono client's interests, or only her own personal interests, if she is also simultaneously representing a private client on the matter in question. ***If the lawyer is really representing XYZ Corp., she may not pretend to be representing only her own views when advocating changes in the law or engaging in other pro bono activities***.

Id. at 90 (citing Rules 3.9, 4.1(a), 6.4, ABA Model Rules of Professional Conduct and DR 7-106(B))(emphasis added). *See also generally* Rule 4-3.9, Rules Regulating The Florida Bar (AAdvocate in Nonadjudicative Proceedings@), which states: AA lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding ***shall disclose that the appearance is in a representative capacity*** . . . . @ (Emphasis added). The petition was misused and should be dismissed.

D. The Proposed Amendment Will Interfere With Litigation:

This Court should deny the petition for a rule change because such a change would carry with it the implication that the Court agrees with FMA=s position that Amendment 3 to the Florida Constitution caps contingency fees in medical malpractice cases.

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to conform the Rules of Professional Conduct to the provisions set forth in Amendment 3 . . . .").

Amendment 3 makes no mention of attorney=s fees at all, and instead is couched in terms of the correlative percentages that the plaintiff is Aentitled to receive@ (70% of the first $250,000 and 90% of the excess of the recovery, exclusive of reasonable and customary costs).

Amendment 3 can be read to place a cap on third-party claims against the verdict or settlement amounts, such as subrogation claims, Medicare liens, hospital liens, and other claims. If the 30% and 10% figures reflect intended caps on such claims, and other deductions from a plaintiff's recovery, instead of being the maximum percentage fee which can be charged, the assumption underlying the pending petition is unsound.

The impact of Amendment 3 on these various claims is working its way through the court system, but remains unresolved at this time. Were the Court to adopt the proposed rule change, the rule would doubtless be cited as impliedly recognizing the effect of Amendment 3 which the FMA advances. The purpose of the Rules Regulating The Florida Bar is not to serve as legal advice or authority on contested questions of law, and the amendment to Rule 4-1.5 would inappropriately be cited as an advisory opinion on such an unsettled legal issue. The proposed amendment of the rule on contingency fees should be denied.

E. Rule Change Hinges on Untested Constitutional Arguments:

The next reason why the proposal should be rejected is that this rule change hinges on still more untested legal arguments that—should the courts interpret Amendment 3 as

capping fees in malpractice cases—such an interpretation would be valid under the federal constitution. Should the Florida Supreme Court approve a rule change which is hinged solely on the untested constitutional validity of such an interpretation of Amendment 3, that rule would be held up by the FMA as an advisory ruling for the lower courts to heed that this Court finds no constitutional infirmity in Amendment 3. However, that implicit advisory opinion will have been rendered without any real party in interest actually litigating the constitutional claims within an actual case or controversy. Thus, unless and until the likely constitutional challenges to Amendment 3 are resolved in favor of the FMA-backed petitioners, a rule change which implies agreement with the FMA=s legal arguments should not be adopted.

Because this is not the forum to litigate the federal constitutional claims (either those for or against enforcement of Amendment 3 as the FMA proposes), these comments will simply touch on some of the most obvious of those issues, in order to demonstrate the potential viability of a constitutional challenge to the FMA=s reading of Amendment 3. If Amendment 3 caps contingency fees in the percentages the FMA-sponsored petition contends[2], that makes it much less likely that a typical client will be able to engage his or her choice of legal counsel in a medical negligence case. Many

[2] Assuming that the FMA's position is correct, applying the 30% and 10% figures as caps on fees, on a hypothetical malpractice verdict of $800,000, the successful plaintiff's attorney would be limited to a 16.25% contingency fee overall.

clients with meritorious malpractice claims will be effectively precluded from retaining competent lawyers.

To impair or negate a civil litigant=s right to retain counsel of his or her choice offends several very fundamental constitutional rights we hold dear. One source of such rights is the Due Process Clause of the United States Constitution, made applicable to states by the Fourteenth Amendment. The federal courts recognize a due process right to retained (as opposed to appointed) counsel in civil cases:

> While case law in the area is scarce, ***the right of a civil litigant to be represented by retained counsel, if desired, is now clearly recognized***. See *Goldberg v. Kelly*, 397 U.S. 254, 270-71, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970)(welfare recipient must be allowed to retain an attorney at welfare termination hearing if recipient so desires); *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 256-57 (1st Cir. 1986); *Indiana Planned Parenthood Affiliates Assoc. v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117-19 (5th Cir.), *cert. denied*, 449 U.S. 820, 66 L. Ed. 2d 22, 101 S. Ct. 78 (1980). Recognition of this right can be traced back to the Supreme Court's holding in *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932), where the Court held that "if in any case, ***civil or criminal***, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that ***such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense***." *Id*. at 69 (emphasis supplied). . . ."A ***civil litigant's right to retain counsel is rooted in fifth amendment notions of due process*** . . . . In both [civil and criminal] cases the litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceedings against him." *Potashnick*, 609 F.2d at 1118. Finally, "in each instance, ***the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement***." *Id*.

In Re Bellsouth Corp., 334 F.3d 941, 955-56 (11th Cir. 2003)(emphasis added). *Accord, e.g., Cole v. U.S. Dist. Court*, 366 F.3d 813, 817 (9th Cir. 2004)("Parties normally have the right to counsel of their choice . . . .")

Another constitutional right which might well be asserted in a constitutional challenge by a prospective client unable to retain counsel due to such an interpretation of Amendment 3 is found in the First Amendment=s right to associate freely with others of our choosing. A[O]ne of the most important associational freedoms that a person may have [is] the right to choose one's own lawyer.@ *Kusch v. Ballard*, 645 So. 2d 1035, 1036 (Fla. 4th DCA 1994)(Farmer, J., concurring). The Fifth Circuit has held that government action which interferes with the client=s right to be represented by counsel of their choosing violates Athe affected parties' First Amendment freedom of association,@ and noted that Athese ***rights are important ones and will yield only to*** an ***overriding public interest***.@ *United States v. Gopman*, 531 F.2d 262, 268 (5th Cir. 1976)(emphasis added)(disqualification order).

In the event that the fee caps purportedly imposed by Amendment 3 can be shown to prevent a prospective client from being able to retain counsel to assist her in obtaining meaningful access to courts, that deprivation could be found to constitute a denial of additional rights under either the First Amendment or the Fifth Amendment, as incorporated by the Fourteenth Amendment. A malpractice plaintiff forced to represent himself or herself in a complicated malpractice case may well be denied the right of

effective access to courts under federal law. *Compare Walters v. National Ass'n. of Radiation Survivors*, 473 U.S. 305 (1985)(finding no constitutional violation established due to lack of evidence of need for counsel in simple administrative matter and lack of showing that counsel actually could not be retained).

Medical negligence cases under Florida law are much more complex than was the simple proceeding in *Walter*, and it would be impossible for the vast majority of clients to navigate the hazards of the malpractice statutes. APursuant to Florida law, medical negligence actions are currently highly regulated, and, unquestionably, ***Florida's citizens require the assistance of knowledgeable and experienced attorneys*** to navigate through the extensive and complicated process.@ *Advisory Opinion to the Attorney General Re: The Medical Liability Claimant=s Compensation Amendment*, 880 So. 2d 675, 683 (Fla. 2004)(Lewis, J., dissenting)(emphasis added). The appellate courts Ahave recognized that while the procedures were not designed to function as traps for the litigants, they have nonetheless become just thatCa trap. . . . *Zacker v. Croft*, 609 So. 2d 140, 141-42 (Fla. 4th DCA 1992). Unquestionably, ***without competent counsel, the process is impossible***.@ 880 So. 2d at 683 (emphasis added).

The proposed amendment to Rule 4-1.5 is at least premature because it presupposes the judicial rejection of all the foregoing constitutional arguments and others like them. The petition should be denied.

F. The Purported Right Created By Amendment 3 Can Be Waived:

The final, and perhaps most fundamental, area in which the FMA-instigated amendment to Rule 4-1.5 runs counter to Florida law and public policy is that it precludes without any basis a medical malpractice plaintiff from waiving whatever Aright@ may be found to be bestowed thereunder.[3] Florida and federal cases uniformly hold that rights bestowed under the state and federal constitutions can be waived, including rights which are much more basic to our system of justice. There is no support for the proposition inherent in the proposed rule change that a plaintiff=s rights under Amendment 3, if any (if they can be characterized as Arights@ in the first place) cannot (or should not) be waived.

As with the federal constitutional claims, it is almost a certainty that prospective plaintiffs in medical malpractice cases will seek declaratory judgments that they may validly waive the right to insist upon those attorneys fee caps and choose to pay a higher percentage to counsel of their choosing, provided that any such waiver be knowingly and voluntarily given, after full disclosure of the client=s right to decline such a waiver. Their right and ability to waive any protections which may be found to have been created by Amendment 3 should be no less available than their right to waive rights afforded by other

[3] It is difficult to conceive that a constitutional provision which eliminates a client's ability to engage competent counsel at a reasonable fee, and relegates that client to retaining an unskilled lawyer desperate enough to take such a case at a tiny fraction of a reasonable fee, can be characterized as a "right" of any sort. Instead of being just an empty right ("a right without a remedy"), it is worse. It is a "right" which removes a remedy.

constitutional provisions affecting medical liability claimants, such as their option to waive their Ainviolate@ right to a jury trial under Art. I, Sec. 22.

There is nothing about the Aright@ assumedly established by Amendment 3 which is deserving of different treatment than any other right under the state or federal constitutions. A defendant in a criminal case may waive just about any right, even though his or her liberty, and life itself, hangs in the balance. See *Tucker v. State*, 417 So. 2d 1006 (Fla. 3d DCA 1982), in which the court held that a criminal defendant may waive even fundamental rights, such as the right to rely on an expired statute of limitations, so long as the waiver meets appropriate safeguards: AWaiver of any fundamental right must be express and certain, not implied or equivocal.@ *Id.* at 1013.

Such waivable fundamental rights include the right to remain silent (*e.g. Philmore v. State,* 820 So. 2d 919 (Fla. 2002)); the right to a twelve-person jury in a murder case (*Groomes v. State*, 401 So.2d 1139 (Fla. 3d DCA 1981)); the right to trial by jury (*Sessums v. State*, 404 So.2d 1074 (Fla. 3d DCA 1981)); and the criminal defendant=s right to testify on his own behalf. *E.g. Brown v. State,* 894 So. 2d 137 (Fla. 2004).

There is nothing in Amendment 3 to indicate that it purports to vest some sort of Asuper-right@ that cannot be waived. Even if it were to contain such a provision, that would conflict with a more fundamental right to select which rights are more important to a given client: the right to retain counsel of choice at a reasonable fee or the Aright@ to be represented by less competent counsel who will be out-gunned by the defense because he

or she has taken on a complex malpractice case at a fraction of a fair fee. The faulty premise that assumed fee caps cannot—or should not—be waived is yet another reason why the Court should not adopt the FMA's proposed amendment to Rule 4-1.5.

G. Conclusion:

This Court should dismiss the petition because it impermissibly attempts to misuse a procedure intended to permit broad-based, attorney-initiated amendments to the Rules Regulating the Florida Bar, at the behest of the Petitioners' client, the Florida Medical Association. The rule change would inappropriately be used as an advisory opinion on the contested issue of whether Amendment 3 can be read to cap fees. The proposal is faultily premised on the federal constitutionality of Amendment 3, which issues remain to be litigated by parties with real cases before the courts. The proposal goes far beyond any possible reading of the effect of Amendment 3 itself, by precluding knowing waivers of assumed rights which are far less fundamental than those waived in courtrooms across the state on a daily basis. The proposed rule change is ill-conceived and should be soundly rejected.

Respectfully submitted,

ROY D. WASSON
Florida Bar No. 0332070
Wasson & Associates, Chartered
Gables One Tower – Suite 450
1320 South Dixie Highway
Miami, FL 33146
(305) 666-5053 Telephone
(305) 666-0010 Facsimile

JONATHAN FRIEDLAND
Florida Bar No. 0008486
President, Dade County
Trial Lawyers Association
Jonathan R. Friedland, P.A.
9130 S. Dadeland Blvd., Suite 1609
Miami, FL 33156-7851
(305) 670-0660 Telephone
(305) 670-6834 Facsimile

Counsel for Dade County Trial Lawyers Association

By: _____
ROY D. WASSON
Florida Bar No. 0332070

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon John Harkness, General Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 and Stephen H. Grimes, Counsel for Petitioners, Holland + Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810 on this the 6th day of July, 2005.

By: _____
ROY D. WASSON
Florida Bar No. 0332070