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 Regulating The Florida Bar

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DAVID L. DEEHL's COMMENT CONCERNING THE PETITION TO HAVE THE FLORIDA SUPREME COURT AMEND RULE 4-1.5

David L. Deehl serves and files his comment with the Florida Supreme Court in opposition to the Petition to amend the Rules Regulating The Florida Bar, which amendment would make it impossible for most victims of medical negligence to be able to retain competent counsel, and states as follows:

1. Powerful insurance interests have had their lawyers petition The Supreme Court of Florida to change the Rules Regulating The Florida Bar in a way that will make it virtually impossible for most victims of medical negligence in Florida to be able to obtain compensation for the losses, injuries and damages they have suffered due to medical negligence.

2. Since I became a member of The Florida Bar in 1982, I have represented injured victims of negligence, including medical negligence. My practice began at the Floyd Pearson Stewart Richman Greer & Weil law firm, where I reviewed numerous medical negligence cases. We examined medical research and consulted with experts to determine if we should invest in such cases. Throughout my practice I have reviewed cases, and have seen the entire files of the

attorneys on many medical negligence cases where I have served as a court appointed Guardian Ad Litem for minors and legal incompetents, where I had to make recommendations to courts on whether proposed settlements were in the best interest of those wards, including fee and cost agreements and closing statements showing distributions. I have also represented defendants in medical negligence cases, including serving as personal counsel.

3. The proposal set forth in the Petition would not allow the customary percentages of total recovery in medical negligence cases that have permitted some of the worst injured victims of medical negligence to obtain some measure of justice through partial compensation for their injuries.

4. The suggested language would restrict contingency fees in such a way as to make it totally uneconomic to bring the vast majority of the few cases that merit legal action under our current system, with all of its restrictions on bringing medical negligence actions.

5. No restriction is suggested on the amount that defendants may contract or spend for their legal representation – perhaps the clearest indication that justice is not the purpose of this proposed amendment. This Court should view with great skepticism, and not consider, any changes to the Rules of Professional Conduct designed to close the very courthouse doors this Court must keep open to permit Floridians to be able to seek justice.

6. The proposed rule change, combined with insurer tactics that have increased greatly the cost and risk of bringing medical negligence cases, will end the ability of lawyers who have represented victims of medical negligence to even screen, much less bring, medical negligence actions in the courts of Florida. It would be contrary to Florida law and public policy allowing waiver of rights, including the right to jury trial and to remain silent. See research supplied in attorney Lauri Waldman Ross' Comment to this Court, served on August 10, 2005.

7. Mr. Grimes' petition is signed by lawyers who, to my knowledge, do not represent claimants in medical negligence claims and will not be directly affected by the proposed amendment. His suggestion about the ethics of a lawyer explaining to a client about the possible waiver of these rights is not valid. Defense lawyers who get paid to prolong litigation or to serve insurers' interests over those of their clients should consider their Oaths of Attorney and The Rules Regulating The Florida Bar. Perhaps the Petition's signors could disclose exactly why they signed the Petition, and which clients promoted it?

8. It is well known among trial lawyers that medical negligence cases are the most complicated and difficult cases to bring, as well as the most expensive.

9. Florida laws have become so restrictive, by statutory changes designed to close the courthouse doors that have somehow been upheld despite unconstitutionally restricting the right of access to the courts, that most meritorious cases of negligence cannot be brought, because the recoverable damages are not

sufficient to reimburse the lawyer for the costs advanced and to compensate the lawyer for the time needed to bring a case to fruition.

10. My experience has been that I have rejected 95% of the medical negligence cases brought to me for consideration – even those with clear negligence – because they are economically impractical to bring. Widows, widowers and the unmarried elderly are "fair game" in Florida to become uncompensated victims of medical negligence, because there are no large economic damages, and when they die, no claimant possesses the right to damages adequate to bring the case. I have turned down cases for potential clients (even successful, prominent, and personable ones) injured by medical negligence because the damages were not great enough, even when the injury was loss of life or a shortened life

11. Why are the obstacles to bringing cases of medical negligence to juries for resolution so great? The conspiracy of silence among many doctors shelters those who are negligent. Who wants to have to see someone at the country club, or in the community, when one has signed a pre-suit affidavit against a fellow professional? Referrals could dry up, and the doctor could be ostracized. Many doctors I know are more interested in not making waves, than in maintaining professional standards that would protect the public.

12. Right now, it costs thousands of dollars to even consider bringing a case. When you reject the vast majority of inquiries, those cost dollars, and the

lawyer and staff time to obtain the records, experts and to consider the cases, are totally uncompensated. Only when major claims are won or settled in a cost-effective fashion can revenue be generated that makes up for the wasted time getting to that point.

13. The presuit period is an expensive and time-consuming statutory obstacle that has served as a minefield for the injured victim. It has never, in my personal experience, resulted in an early settlement. In fact, the defense has never even made a serious offer or properly reviewed the claims I have brought, in the presuit period. When the defense fails to live up to presuit obligations, though, virtually nothing happens to the defendants. When the Plaintiff makes any error, the hope of justice is instantly gone.

14. Defendants rarely look at cases on a case-by-case basis. Most defense offers are far less than even the cost to defend the claims. In other words, settlements, while sometimes substantial, are often less than the cost of defense, or less than a purported "nuisance" settlement. All cases should be considered as a combination of the costs of defense, plus the likelihood of success multiplied by the likely mean verdict range. Offering less than that shows the agenda of the insurer and/or defense lawyer is not to act in the best interests of the insured doctor or the claimant. The defense insurers and their adjusters are often hell-bent on ruining the system for plaintiffs, so that even when plaintiffs win, they lose. Putting so much time and money into cases, and often not having judges award all

costs that could be reimbursed under the statute, makes many "victories" pyrrhic ones.

15. The insurers' agenda is to deprive medical negligence plaintiffs' lawyers of the economic resources to bring their next case. That same agenda is the driving force behind the instant Petition for a rule change.

16. Time records on my cases have shown that where (as is often the case) defendants delay, raise difficult defenses to overcome on standard of care, causation, damages and third party liability, and with many responsible parties judgment-proof, the net result even in a large settlement is less than what lawyers can make by the hour with little risk. All of the files I have reviewed as a Court Appointed GAL have shown that Plaintiffs' lawyers have expended huge sums of time and costs to get some compensation for their claimants. In some of those cases, trial judges exercised their discretion and approved fees in an amount less than the contract fee. I have never seen a trial judge increase a fee over what was sought or allowed by contract, or had one consider the number of uncompensated cases lawyers have to work on to get one that is actually profitable. All of this combines to create a chilling effect against counsel taking such cases for incompetent claimants, where court approval is required for recovery, in addition to a proposed settlement.

17. The current Rule already (improperly in my opinion) restricts the ability of the client to have a straight percentage recovery to seek maximum

compensation. In larger, more difficult cases for the most severely injured patients, the incremental millions get harder to recover, with set-offs for collateral sources and empty-pocket, judgment-proof or bankrupt defendants being dumped on by remaining parties. Recovery against those who pull the strings on the economics of medicine – the HMOs and insurers, who have every incentive to deny expensive but needed care – has been blocked by statutes and judges who interpret restrictive laws to prevent justice for claimants. Defendants already list numerous experts, in the same specialty, purposely spread all over the country, to make it onerously expensive for a plaintiff's attorney to even get discovery of them. Paying for travel, court reporters, your own experts to assist in preparing for depositions and trial, transcripts and videos can be a huge expense.

18. The requisite Plaintiffs' experts are expensive, in their charges and in the time needed to get them the documents they need, meeting with them initially, to prepare for depositions and trial. Defense lawyers will stall during a slow and repetitive cross examination so the cross will go on to the next day, or perhaps over a weekend, greatly increasing the expense for the expert testifying and for the other experts flown in to testify, and waiting outside the courtroom. Each hour of trial can cost thousands of dollars that Plaintiffs' lawyers have to expend regardless of the outcome, especially when multiple experts come to town and get delayed by defense tactics.

19. In Florida, and around the country, the majority of cases tried to juries result in defense verdicts. There is little public debate about the fact that only a tiny percentage of the many victims of medical negligence get any justice. Much misinformation has been propagated in support of efforts to restrict access to courts for medical negligence victims, including President George W. Bush's speech in Collinsville, Illinois in January 2005 which restated myths as if they were facts, "As the research demonstrates, not one of these factual predicates is true. Not frivolous lawsuits. Not excessive jury awards. Not driving many doctors out of communities, not overly defensive medicine. Not reducing access to medically necessary services. And not raising the costs of health care for all". Baker, Tom (to be published November, 2005), *The Medical Malpractice Myth*. Chicago, University of Chicago Press. The United States General Accounting Office examined and researched claims about doctors not being available in certain specialties and supposedly leaving the state of Florida, and found those claims to be incorrect. U.S. General Accounting Office, Pub. No. GAO-03-836, *Medical Malpractice and Access to Health Care* 17-18 (August 2003). Mammograms, a type of X-ray designed to detect breast cancer, were purportedly unavailable on a timely basis in Florida due to medical liability insurance problems, but the GAO found no evidence to support that claim either. U.S. General Accounting Office, Pub. No. GAO-03-836, *Medical Malpractice and Access to Health Care* 21

(August 2003). See also U.S. General Accounting Office, Mammography, Pub. No. GAO-02-532, *Capacity Generally Exists to Deliver Services* (April 19, 2002).

20. Tom Baker, University of Connecticut Connecticut Mutual Professor of Law, and Director of the Insurance Law Center, has analyzed the oft-cited myths used to promote restrictions of the rights of patients who are victims of medical negligence. Among his findings are the following:

> · "There is a high rate of medical malpractice" and a low rate of malpractice suits.
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> · Juries do not favor people claiming malpractice; they more likely favor the defendants.
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> · Juries find liability based on negligence, not on a defendant's deep pockets or the severity of the victim's injuries.
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> · Juries award damages consistent with the evaluations of independent medical experts and of the judges who preside over the trials.
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> · Doctors' premiums have shot up recently because insurers' investments went bad, not because of an increase in either malpractice litigation or malpractice itself.
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> · Damage caps don't reduce the cost of malpractice; they simply shift costs from insurers to victims.
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> · Damage caps also don't reduce malpractice premiums, but they *do* "harm the most seriously injured victims."

Carole Bass, *Diagnosis: Too Much Malpractice - What the medical lobby doesn't want you to know*, Fairfield County Weekly, January 30, 2003. Citations to Professor Baker's work can be found at: http://www.law.uconn.edu/faculty/tbaker/pubs.html. See also William M. Sage,

Medical Malpractice Insurance and The Emperor's Clothes, 54 DePaul L. Rev. 463 (2005). Sloan, Frank A., et al, 1991. *Insuring medical malpractice*. New York: Oxford University Press. Sloan, Frank A., et al, 1993. *Suing for medical malpractice*. Chicago: University of Chicago Press. Sloan, Frank A. and Chee Ruey Hsieh. 1990. Variability in medical malpractice payments: Is the compensation fair? *Law and Society Review* 24:997-1040.

21. The campaign resulting in the creation of Article 1, Section 26 "Claimant's Right To Fair Compensation"[1] of the Florida Constitution, and resulting in the instant Petition, was deceptive and unfair, as the public (unable to have the information to understand the real workings of a plaintiffs' medical negligence practice) was misled to think they would be obtaining more adequate compensation with a tiny percentage fee in the wording of Amendment 3. Ten percent of the recovery means no recovery if no qualified lawyer will take the case. No client can afford the risk of paying for litigation costing more than the possible recovery. If the proponents of the Petition truly wanted to increase the amounts in the pockets of victims, the clever lawyers behind this Petition could have sought a constitutional amendment against the statutory abrogation of the common law collateral source rule (which permitted full recovery against tortfeasors when an

[1] Judicial enforcement of the literal wording of the title would supersede decades of statutes which prevent claimants from obtaining fair compensation by altering common law. Its text, however, limits itself to medical negligence claimants.

injured person had the foresight to purchase insurance coverage), or against statutory limits on the common law responsibility of joint tortfeasors. These proponents could care less about assisting victims of medical negligence in obtaining full and fair compensation.

22. This Court knows what the instant Petition is all about: it is just another in a series of mean-spirited attempts to take away the rights of victims of medical negligence, so the medical/insurance/HMO industry can continue to kill and injure patients with impunity. Research has shown that medical carelessness is causing 100,000 or more deaths a year in hospitals. Doctors are causing many more in other settings. There are more medical negligence deaths than those that occur on our highways. But how many are getting to trial? Very few. The tiny percentage of those who have a chance of obtaining some compensation will be greatly reduced if the Florida Supreme Court allows these motivated petitioners to slam more courthouse doors shut.

23. This Court should be dedicated to allowing Florida courts and juries to correct injustice to patients killed or injured by medical negligence. If all victims of hospital-based negligence were allowed compensation, the industry would have made patient safety a higher priority. There is an epidemic of medical negligence. And, most of the medical negligence victims are uncompensated. As it is, the percentage of costs of medical negligence compensation is insignificant compared to overall health care expenditures. Even adding on the costs of defense,

overhead and profits for medical malpractice insurers, the total premiums paid for medical and hospital malpractice coverage (11 billion dollars) are four billion less than one percent of total heath care spending (1,500 billion dollars) Baker, Tom (to be published November, 2005), *The Medical Malpractice Myth*. Chicago, University of Chicago Press, at page 9.

24. Finding statutory changes that limit access to the courts (like presuit screening, collateral source and joint tortfeasor common law changes) unconstitutional and unjust would allow juries and judges to correct injustices. Creating higher prejudgment interest by rule of court, and encouraging full reimbursement for costs of prevailing parties, would reduce insurers' incentives to drag out cases and make them more expensive, and might limit the current "heads - defendants win, tails – plaintiffs' lawyers lose" approach to litigation.

25. The Florida Supreme Court should decline to make any changes to Rule 4-1.5 that would make access to the courts more unobtainable for the few, worst injured victims of medical negligence now allowed it. The excessive fee language in the current Rules Regulating The Florida Bar[2] is adequate to handle any egregious situations (of which I have seen none, including numerous cases where I served as Guardian and Attorney *ad litem* for minors and incompetents),

[2] Rule 4-1.5, "FEES AND COSTS FOR LEGAL SERVICES," provides as follows: (a) Illegal, Prohibited, or Clearly Excessive Fees and Costs. An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost.

and the proposed Constitutional Amendment does not make a waiver of its provisions illegal or prohibited. Instead, the current, stepped contingency fee percentage limitations of Rule 4-1.5 should be abolished as an improper limitation and impediment to negligence victims' ability to obtain counsel.

WHEREFORE, David L. Deehl respectfully comments to the Florida Supreme Court to deny the Petition, which was sought for the true purpose of limiting access to the courts for victims of medical negligence, contrary to the Constitutional rights of the citizens of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U. S. Mail on _____ to John F. Harkness, Jr., General Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300 and to Stephen Grimes, Holland and Knight, LLP, P.O. Drawer 801, Tallahassee, FL 32302-810.

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