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.
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COMMENTS AND OBJECTIONS TO PROPOSED AMENDMENT TO RULES OF PROFESSIONAL CONDUCT BY THE ACADEMY OF FLORIDA TRIAL LAWYERS, INC.

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A. Introduction

Pursuant to Rule 1-12.1(g) of the Rules Regulating The Florida Bar, the Academy of Florida Trial Lawyers, Inc. ("AFTL") submits these comments and objections to the amendment to Rule 4-1.5(f)(4)(B) proposed by Petitioners. The AFTL urges this Court to deny the petition for any and all of the following four reasons:

1. The proposed amendment to Rule 4-1.5(f)(4)(B) would inappropriately effect a substantive change in the law – one that subverts, rather than advances, the quest for justice – through an improper device: amending the rules governing ethical conduct by Florida lawyers;

2. The proposed rules change has no basis in the text of the constitutional amendment, Article I, Section 26, Fla. Const., that it purportedly

seeks to implement and is otherwise without compelling justification;

3. The proposed rules change seeks to restrict a medical liability claimant's ability to make a knowing, intelligent and voluntary waiver of a personal constitutional right, thus providing an extra-constitutional limitation on the claimant's control over that right; and,

4. The proposed rules change would effectively limit a claimant's constitutional rights of access to the courts under both the Florida and United States Constitutions and is thus unconstitutional, an issue now being litigated in a forum capable of compiling a full evidentiary record upon which to determine constitutionality.

B. Statement of Interest of Respondent AFTL

Respondent The Academy of Florida Trial Lawyers, Inc. (AFTL) is a statewide not-for-profit trade association of trial lawyers who primarily represent plaintiffs in personal injury actions, including medical malpractice lawsuits. AFTL has approximately 4,000 members, dedicated to strengthening and preserving the laws that protect Florida's families and make Florida a safer and better place to live.

AFTL's objectives and goals, as established in its charter, are: "to uphold and defend the principles of the Constitutions of the United States and the State of

Florida; to advance the science of jurisprudence; to train in all fields and phases of advocacy; to promote the administration of justice for the public good; to uphold the honor and dignity of the profession of law; to encourage mutual support and cooperation among members of the bar; to diligently work to promote public safety and welfare while protecting individual liberties; to encourage the public awareness and understanding of the adversary system and to uphold and improve the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of any injury and that the right to trial by jury shall be secure to all and remain inviolate."

As members of the Florida Bar, AFTL's members are representatives of clients, officers of the legal system, and public citizens "having special responsibility for the quality of justice." Fla. R. of Prof. Conduct, *Preamble* (R. Regulating Fla. Bar 4). Consistent with the Rules of Professional Conduct, AFTL's members must provide clients "with an informed understanding of the client's legal rights and obligations and explain[] their practical implications." *Id*.

The Petition at issue here creates difficulties and impracticalities that make the discharge of the foregoing obligations difficult, if not impossible. Further, the proposed amendment is inconsistent with the most basic tenets of the fair administration of justice that Floridians enshrined in their Constitution and that members of the Florida Bar are obligated to defend and uphold.

C. The Proposed Rule Is an Improper Subject for an Amendment to the Rules of Professional Conduct

The Rules of Professional Conduct serve to "define a lawyer's professional role" and "provide a framework for the ethical practice of law." Fla. R. of Prof. Conduct, *Preamble* (Scope). It is not their function to "reform" the law of medical malpractice litigation or any other substantive legal field. The Rules instead "presuppose a larger legal context" that includes substantive and procedural law in general, and they do not assume any authority to change principles of substantive law external to the Rules. *Id. See also Miller v. Jacobs & Goodman, P.A.,* 699 So.2d 729, 732 (Fla. 5th DCA 1997), *rev. denied*, 717 So.2d 533 (Fla. 1998); *Kaufman v. Davis & Meadows, P.A.,* 600 So.2d 1208, 1211 (Fla. 1st DCA 1992). In fact, changing the law is "manifestly beyond the stated scope of the Rules and their intended legal effect." *Id*. (quoting *Lee v. Florida Dep't of Ins. & Treasurer,* 586 So.2d 1185, 1188 (Fla. 1st DCA 1991)).

Petitioners' proposal flies in the face of the Rules' purposes and attempts to change substantive law. Under the false guise of "implementing" the newly adopted "Claimant's Right to Compensation," the proposed rule seeks to limit a claimant's control over that right by assuming that the right may only be exercised against attorneys[1] to whom it allocates the entire reserved percentage of the

[1] Plaintiff's counsel, hired on a contingency fee basis, would not be the only potential lienholder with a claim against the recovery. Medicare and hospitals, for

recovery and further assumes that the claimant's right to the designated percentages cannot be waived. Neither basis for the proposal is mandated by this self-executing constitutional provision's own terms. Nor does experience indicate abusive behavior by counsel that might suggest a need for rule-making intervention.

Although an ethical rule cannot change substantive law, let alone limit a constitutional right, it may guide counsel in determining morally appropriate conduct, or it may advance the cause of justice. The proposed rule, however, does neither. There is nothing immoral or inappropriate about counsel negotiating a fee with a prospective client – and doing so creates no conflict of interest between the two.

Rather than further legitimate purposes, the Petition improperly attempts to use the Rules to tilt the litigation playing field against of one set of litigants, medical malpractice plaintiffs, to the benefit of their adversaries. It places potentially insurmountable obstacles to the retention of counsel of plaintiff's choice. The Rules themselves warn against such a tactic: "the purpose of the Rules

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example, may also have substantial claims, as would insurers holding subrogation rights. While Petitioner's rule would appear to make counsel the preferred lienholder, potentially displacing all others, Medicare, through a federal statute preemptive of the Florida constitutional provision, actually occupies that position. *See* Medicare Secondary Payor Act, 42 U.S.C. § 1395y(b)(2). Nonetheless, a rule of professional responsibility is ill-equipped to sort through the various claims that could and will be made on a plaintiff's recovery, an issue that separately raises profound questions about the taking of property under the U.S. Constitution.

can be subverted when they are invoked by opposing parties as procedural weapons." *Id.*

Petitioners, representing the primarily the Florida Medical Association and other medical and insurance industry clients, have sought to advance their clients' position in medical malpractice litigation by making it extremely difficult for most plaintiffs, and impossible for some, to obtain representation, an objective completely foreign to the purpose of the Rules. This Court should not countenance this ploy by permitting the Rules to be subverted as if it were the spoils of a political war.

The proposed rule magnifies difficulties already present in medical malpractice litigation past the breaking point. Compounding the difficulties and complexities of this field, plaintiffs' medical malpractice litigation expenses, usually borne by plaintiff's counsel, run much higher than expenses in most other areas of legal practice. *See* James S. Kakalik & Nicholas M. Pace, COSTS AND COMPENSATION PAID IN TORT LITIGATION 54-55 (RAND Inst. for Civil Justice 1986). The combination of financial burden and procedural complexity then combines with statutory limits on noneconomic damages, delays in satisfaction of the judgment, as well as the likelihood that the amount of the recovery not constitutionally guaranteed to the claimant must be split among plaintiff's counsel and other lienholders *after Medicare's lien is satisfied*, to render medical

malpractice representation sufficiently undesirable that only the most irrefutable instances of medical malpractice with the largest claims have the economic wherewithal to be logically pursued.

Under the proposed rule, because subrogated claims and liens will be exacted from the same reserved amount of the recovery that is available for attorneys' fees, potential counsel for the plaintiff will be uncertain whether successful representation will result in any fee at all. Even in those cases that are taken, defense counsel, paid on an unlimited hourly basis, will enjoy a substantial tactical advantage that can be used to coerce a low settlement from a plaintiff or will be encouraged to engage in dilatory tactics intended to persuade a plaintiff to give up his or her cause. Without the availability of waiver, access to justice will be severely curtailed for most medical malpractice plaintiffs.

Instead of advantaging medical malpractice defendants by adopting the proposed rule, this Court has an obligation to treat adversaries similarly. Our system of justice anticipates that truth and justice are best served through an adversarial system in which the parties and their counsel operate on an equal playing field, unburdened by artificial constraints. The late Judge Marvin Frankel noted that this adversarial approach is "cherished as an ideal of constitutional proportions" precisely because it advances "the fundamental right to be heard." Marvin E. Frankel, PARTISAN JUSTICE 12 (1980). *See also* Geoffrey C. Hazard, Jr.,

ETHICS IN THE PRACTICE OF LAW 123 (1978)(the adversary system "stands . . . as a pillar of our constitutional system."). Unquestionably, the Petition would have the rules intervene in this equipoise by permitting one side in a dispute to spend without limitation on counsel of choice, while the other side cannot make a rational and voluntary decision to waive any limit and negotiate a different one in order to obtain well-qualified and experienced representation. Such a tilt in favor of defendants has no place in rules of professional responsibility.

It is worth noting that this Court has recognized that contingent fees are the "'poor man's keys to the courthouse.'" *The Florida Bar re Amendment to Code of Professional Responsibility (Contingent Fees),* 494 So.2d 960, 961 (Fla. 1986). It is through this device that most medical malpractice plaintiffs are able to hire experienced counsel capable of financing and navigating their case through the dangerous and complex shoals that are peculiar to that category of litigation. The Rules should not impose an absolute limitation that prevents them from securing the counsel they choose to represent them.

D. Article I, Section 26 of the Florida Constitution Provides No Basis for Petitioners' Proposed Rule

Contrary to their assertion, Petitioners have not proposed a rule that is either mandated or suggested by the language of Article I, Section 26. By initiative, the

Florida Constitution was amended to include a new provision in its Declaration of Rights entitled, "Claimant's right to fair compensation." It provides:

> 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 $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

FLA. CONST. art. I, § 26.

The provision plainly creates, in the successful claimant who has hired a lawyer on a contingency-fee basis, a right to receive a certain percentage of any medical malpractice judgment rendered or settlement executed. It does not purport to limit attorney fees directly, nor does it single out attorney fees alone for treatment different from other claims that might be made against the judgment or settlement.[2]

The *ipse dixit* by which Petitioners attempt to transform the claimant's right to compensation into an attorney-fee limitation conflicts with traditional canons of construction. The starting point to construe a constitutional provision is the provision's plain language. *Florida Society of Ophthalmology v. Florida*

[2] It does, however, create this compensatory right only in medical malpractice plaintiffs who hire counsel on a contingency-fee basis, raising serious federal constitutional concerns about its fundamental fairness and equal treatment of similarly situated plaintiffs.

Optometric Ass'n, 489 So.2d 1118, 1119 (Fla.1986). It must be assumed that the drafters of a constitutional provision had "a clear conception of the principles they intended to express, that they knew the English language and that they knew how to use it, that they gave careful consideration to the practical application of the Constitution and arranged its provisions in the order that would most accurately express their intention." *Ervin v. Collins*, 85 So.2d 852, 855 (1956). Given that constitutional provisions are interpreted under the same canons of construction as statutes, *Coastal Fla. Police Benev. Ass'n v. Williams*, 838 So.2d 543, 548 (Fla.2003), Section 26's unambiguous plain language governs. This Court cannot provide correction, even when it is convinced that the drafters meant something different from what they wrote. *See St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071, 1073 (Fla.1982) ("even where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.") (quoting *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918)).

Section 26 makes plain that it provides a medical malpractice claimant with guaranteed percentages of the recovery against any impositions on the claimant's receipt of that full amount. Necessarily, that amount cannot be reduced either by attorney fee liens or by other liens or subrogation claims.

Thus, while the constitutional provision addresses any claim that might prevent the successful plaintiff from obtaining the designated percentages, the Petition treats the amendment solely as an attorney-fee limitation. Specifically, the Petition's proposed rule states:

> Notwithstanding the preceding provisions of subdivision (B), in medical liability cases, attorney fees shall not exceed the following percentages 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.

As explained by Petitioners, the proposed rule would not permit a client to waive the rule's fee limitation, even with judicial approval.

The proposed rule clearly goes beyond the contents of Section 26, which is explicitly self-executing and thus requires no implementing legislation or, for that matter, ethical rule. By going beyond the amendment, the proposed rule mirrors the issue that caused the Supreme Court to invalidate congressional action in the seminal case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)(invalidating an expansion of the Supreme Court's jurisdiction beyond what the Constitution itself provided).

The proposed rule goes beyond Section 26 in three fundamental ways. First, it imposes a nonwaivable fee limitation on counsel without regard to the constitutional provision's status as a self-executing, personal constitutional right

and without regard to the provision's broad reach beyond attorneys' fees.[3] Second, the proposed rule would have an unknown impact on others who might claim a percentage of the recovery, such as those holding subrogated claims or liens. Third, the proposed rule also fails to distinguish – even though the amendment does – between those claimants represented on a contingency-fee basis and those represented on an hourly or fixed-fee basis, for whom the amendment has no application.

Thus, at its most basic level, the proposed rule attempts to perform a type of alchemy that transforms a claimant's new constitutional right to compensation into a fee limitation on attorneys generally. At a minimum, experience under the constitutional provision and interpretation through the crucible of litigation is needed before the amendment's import for attorney's fees, if any, can be established.

[3] On its face, the constitutional provision, quite obviously, encompasses only the claimant's right to compensation. To the extent that it operates to constrain claimants in their ability to hire and compensate counsel of their choice or pursue the case through its resolution, including possible appeals and retrials, while imposing no such constraints on defense counsel, the amendment raises substantial federal due process and equal protection concerns.

E. The Proposed Rule Creates an Improper Extra-Constitutional Limitation on a Personal Constitutional Right

Article I, Section 26 indisputably creates a personal constitutional right in a medical malpractice claimant who hires counsel on a contingency-fee basis and creates a property interest in the guaranteed recovery. The proposed rule would limit the claimant's control over that right by extra-constitutional means, specifically prohibiting an attorney from accepting a waiver of that right. Such extra-constitutional limitations on a constitutional provision cannot be valid. *See Foster v. State,* 596 So.2d 1099, 1112 (Fla. 5th DCA 1992)("A statute or rule may be consistent and compatible with, and may implement, emulate or expound upon, a constitutional right but should never be confused with the constitutional right and . . . neither the original enactment of a statute, nor adoption of the rule, nor any amendment or repeal thereof, can in any manner reduce or defeat or adversely affect a constitutional right nor detract from it one dot, jot or tittle.").

Contrary to the proposed rule, a personal constitutional right may be waived. *In Re Shampow's Estate v. Shampow,* 15 So.2d 837, 837 (Fla. 1943)("It is fundamental that constitutional rights which are personal may be waived."). *See also City of Treasure Island v. Strong,* 215 So.2d 473, 479 (Fla. 1968)("it is firmly established that such constitutional rights designed solely for the protection of the individual concerned may be lost through waiver"); *Bellaire Securities Corp. v.*

Brown, 168 So. 625, 639 (Fla. 1936) ("a party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution"); *S.J. Business Enter., Inc. v. Colorall Technologies, Inc.*, 755 So.2d 769, 771 (Fla. 4th DCA 2000) ("the law has long recognized an individual's right to waive statutory protections as well as constitutional or contractual rights"). Thus, for example, Florida courts have recognized that various personal constitutional rights are subject to waiver, including the right to trial by jury, the right to access to the courts, and the right to due process of law. *See Seifert v. U.S. Home Corp.*, 750 So.2d 633, 642 (Fla. 1999)(recognizing that an agreement to arbitrate waives constitutional rights to trial by jury, due process, and access to the courts). Moreover, in *Hartwell v. Blasingame*, 564 So.2d 543, 545 (Fla. 2d DCA 1990)(citation omitted), the court recognized:

> Although the constitution and the statute do not expressly recognize a person's right to waive their [homestead] protection, it has long been recognized that an individual is free to knowingly and intelligently forego a right which is intended to protect only the property rights of the individual who chooses to make the waiver.

Clearly, Article I, Section 26 creates a property right for the claimant in a percentage of the recovery. The proposed rule, however, makes such a personal property right inalienable without warrant in the constitutional text. Whatever public purpose the proposed rule is intended to accomplish is already realized by the existing law governing waiver. To be valid, the waiver of a constitutional right

must be voluntary, knowing and intelligent. *See, e.g., Sliney v. State,* 699 So.2d 662, 668 (Fla. 1997), *cert. denied,* 522 U.S. 1129 (1998)(articulating a two-part test). *See also Jean-Louis v. Forfeiture of $203,595.00 in U.S. Currency,* 767 So.2d 595 (Fla. 4th DCA 2000).

That such a waiver should not pose ethical dilemmas was established by Connecticut courts in circumstances analogous to this one. In *In Re Estate of Salerno,* 630 A.2d 1386 (Conn. Superior Ct. 1993), a conservator sought to bring a tort action based on her husband's disability, and sought leave to waive the statutory attorney's fee cap that had been enacted as part of Connecticut's tort reform legislation. The conservator raised various constitutional challenges to the statutory cap, but the court decided the case solely on the basis that it could be waived. The court concluded that the statutory right at issue was merely a private right subject to waiver, stating:

> By limiting the attorney's fees of plaintiffs, the statute was intended to increase the portion of the judgment or settlement that was actually received by the plaintiffs. The statute does not protect the general rights of the public. It confers a private right only on those who file tort actions. The fee cap statute therefore satisfies the general rule regarding when statutes can be waived.

Id. at 1390.

It is clear that the Florida Constitution confers a personal property right in Section 26. The rules of professional conduct cannot, and should not, operate to constrain the owner of that right's ability to make a voluntary, knowingly, and intelligent waiver.

F. The Proposed Rules Change Would Violate Constitutional Guarantees

Because of the complexity, intensity, difficulty, and costliness of medical malpractice litigation, any additional imposition on the ability of counsel to pursue a client's case is likely to be fatal to a plaintiff's access to justice, a right that is explicitly guaranteed in the Florida Constitution, Article I, Section 21, and implicit in the U.S. Constitution. *See Christopher v. Harbury,* 536 U.S. 403 (2002). The proposed rule tramples upon that right of access by foreclosing a potential plaintiff from waiving the rule's attorney fee limitations when that is the only means to obtain experienced representation.[4] To the extent that the rule could be considered an implementation of Article I, Section 26, the constitutional provision itself then runs afoul of the U.S. Constitution.

The complexities of constitutional adjudication over the validity of Article I,

[4] The existing rule does not make this fatal constitutional error because it has a procedure by which prospective clients can depart from relevant fee limitations. Rule 4-1.5(f)(4)(B)(ii) permits a client who cannot obtain the attorney of the client's choice because of the fee limitation to seek judicial authorization to depart from that fee regime.

Section 26 and due consideration of the appropriate evidentiary predicates to considering the constitutional question cannot be performed in the type of proceeding engendered by this rules proposal, but must instead proceed through the normal litigation process. Such a case – one that underscores the impact of the amendment – is currently pending in the Circuit Court for the Second Judicial Circuit. *Graulich v. State of Florida*, Case No. 37 2005 CA 001285. The *Graulich* Complaint alleges that the plaintiff had extraordinary difficulty obtaining counsel because of large pending Medicare liens against any recovery that, under Article I, Section 26, would have precluded any remuneration to counsel absent a waiver of the constitutional right established. It then contends that either the claimant's right to compensation is subject to a voluntary, knowing and intelligent waiver or it violates multiple provisions of the U.S. Constitution.

Among those provisions is the Supremacy Clause, U.S. Const. Art. VI, cl. 2, which gives federal law preemptive effect and thus nullifies such portions of the amendment that conflict with Medicare's lien rights under 42 USC §1395y(b)(2). As a result of the preemptive priority of satisfying Medicare's lien, the state constitutional right to compensation could be interpreted to limit attorney fees to an amount unknowable until the rights of any and all other lien holders are resolved and thus conflicts irreconcilably with the federal constitutional guarantee of access to the courts.

One aspect of that federal guarantee is a due process guarantee that attorneys' fees will be sufficient to provide a plaintiff with necessary representation. *See Walters v. National Assn. of Radiation Survivors,* 473 U.S. 305 (1985). To prove a violation of such due process rights, a constitutional challenge must produce empirical evidence tying the fee regime to the unavailability of lawyers for a substantial number of legitimate claimants. *U. S. Dep't of Labor v. Triplett*, 494 U.S. 715, 723-24 (1990). Of significance to this matter is the fact that *Triplett* involved disciplinary proceedings begun in the West Virginia Supreme Court of Appeals, where there was no record of the type that might be developed at trial. Because of the U.S. Supreme Court's injunction that such challenges must develop a record that includes expert evidence, *Triplett* establishes compelling reasons why the petition procedure before this Court is an inappropriate vehicle to sort through the constitutional issues raised both by Section 26 and the proposed rule.

Depending on the construction of Petitioners' proposal, serious equal protection issues may be raised as well. If the proposed rule only applies to plaintiffs represented on a contingency-fee basis, it is difficult to imagine the rationality, let alone compelling nature, of the limit imposed on contingency fees but left unregulated when the fee charged on an hourly or flat-fee basis can surmount that total. After all, the essence of the Equal Protection guarantee is that

government must treat similarly situated plaintiffs alike. *Plyler v. Doe,* 457 U.S. 202, 216 (1982). The rule has no rational basis for treating medical malpractice plaintiffs differently on the basis of how they intend to pay their attorney.

The constitutional issues outlined above are significant and require careful consideration on the basis of a full trial record. They are inappropriate for resolution in the context of this Petition and strongly suggest that the Petition should be denied and dismissed.

G. Conclusion

The pendency of a case seeking construction and a constitutional determination of Article I, Section 26's application, along with the many open questions about its meaning, the substantive departures that the proposed rule has from the plain language of Section 26, and the lack of experience, either laudatory or abusive, unmasks the radical nature of Petitioners' endeavor. The proposed rule's apparent use as a procedural weapon and as a substantive legal declaration renders it inappropriate for inclusion in rules of professional conduct. Respondent AFTL respectfully prays that the petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to JOHN F. HARKNESS, JR., ESQ., Executive Director of The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-2300; and STEPHEN H. GRIMES, ESQ., P.O. Drawer 810, Tallahassee, FL 32302, by mail, on September 30, 2005.

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