

**SUPREME COURT OF FLORIDA
CASE NO. SC05-1150**

**IN RE: AMENDMENT TO THE RULES REGULATING THE FLORIDA BAR
RULE 4-1-5(f)(4)(B) OF THE RULES OF PROFESSIONAL CONDUCT**

ONE TRIAL ATTORNEY'S COMMENTS

PREFACE

Having reviewed the submissions in opposition to this proposed Amendment, I perceive no useful purpose would be served by recasting, restating, or recharacterizing those arguments. I oppose the proposed Amendment.

However, while I unequivocally oppose the Amendment for the sundry reasons and rationale already made known to this Honorable Court, I do offer the following comments which I believe would be appropriately considered by this Court in light of Amendment 3.

CONCLUSION

The Supreme Court of Florida should, in light of Amendment 3, Florida Constitution, consider an amendment to Florida Bar Rule 4-1.5, Rules of Professional Conduct, revising the presumption as to when a contingent fee is considered "clearly excessive" with respect to medical malpractice actions; providing for a presumption of a knowing and intelligent waiver by the client if certain bold faced language in the retainer contract is complied with; together, with a modification of the Statement of Client's Rights for contingency fees,

clearly setting forth the prospective client's rights, under Amendment 3, either to insist upon the "fee limitations" or to waive the same.

Modifying existing Rule 4-1.5, as recommended, is certainly within this Court's jurisdiction, furthers the purposes of the Rules of Professional Conduct, assures judicial independence and responsibility, provides attorneys a framework for the ethical practice of law, promotes the client/lawyer relationship and may avoid judicial diseconomies which require petitions to the courts of this State due to the attendant uncertainties which may be engendered by an individual lawyer's attempt to comply.

COMMENTS

The Preamble to Chapter 4, Rules of Professional Conduct, provides, in pertinent part:

As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession.

* * *

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the Bar regulate itself in the public interest.

* * *

Self-regulation helps maintain the legal profession's independence from undue government domination.

The citizens of the State of Florida have passed Amendment 3, perceiving that it is in the public interest.¹ As a separate branch of government, this Court is charged with the obligation to assure the Rules of Professional Conduct do, indeed, serve the public interest.

Since it is provided in the Preamble that “[t]he Rules of Professional Conduct are rules of reason,” and provide for “... a framework for the ethical practice of law,” is it not appropriate for this Court to amend Rule 4-5 so that the historical contingent fee key to the courthouse is preserved – even in medical malpractice claims while the fundamental constitutional right of contract is also recognized? The question answers itself, or should. This lawyer could not afford to pay the hourly fees and costs of an experienced medical malpractice attorney. Nor, could the undersigned, an experienced medical malpractice attorney, afford to represent a client based upon the so-called fee limitations of Amendment 3.² Since a lawyer is to abide by clients’ decisions subject to certain exceptions and limitations, Rule 4-1.2, and a lawyer is obligated to explain matters to the client reasonably necessary to permit the client to make informed decisions, Rule 4-1.4(b), the following comments and recommendations are made.

COMMENTS AND RECOMMENDATIONS

¹That perception may be flawed by the appreciated and expressed “wolf in sheep’s clothing” ascribed to the propriety of Amendment 3 at the time it was reviewed by this Court prior to being placed on the ballot.

²Indeed, the proposed Amendment to Rule 4-5 is itself a subversion as it is being invoked by opposing parties as a procedural weapon which, if adopted by this Court, will

The undersigned humbly suggests that the Supreme Court of Florida deny the proposed Amendment but undertake to revise Rule 4-1.5 as follows:

Rule 4-1.5(f)(4)(B)(i), new paragraph e. reading as follows:

- e. In medical malpractice claims, Amendment 3 of the Florida Constitution imposes the following limits which you may either insist upon, or knowingly and intelligently decide not to:
 - a. You are entitled to 70% of the first \$250,000.00 received, not including costs; and
 - 5. You are entitled to 90% of all damages in excess of \$250,000.00, not including costs.

Since you, as the client, have the constitutional right to insist upon these percentages of recovery in medical malpractice actions, you need not sign a contingency fee agreement providing otherwise. You may elect to waive or give up your right to these limitations on recovery but need not do so. If you elect to waive or give up this recovery limitation, you will need to date and sign a separate provision in this contract expressly waiving your rights which reads as follows:

**Waiver of Constitutional Right to Insist Upon Recovery
Limitations in Medical Malpractice Matters**

I ACKNOWLEDGE AND UNDERSTAND that I have a constitutional right by virtue of Amendment 3 of the Florida Constitution to insist that my attorney assure that I receive 70% of the first \$250,000.00, not including costs and 90% of any recovery in excess of \$250,000.00, not including costs but having been afforded a full and complete opportunity to understand these rights and having read and signed the Statement of Client's Rights for contingency fees accompanying this contract, I elect to waive this right and rely

just as surely and undoubtedly deprive citizens of *effective* access to the courts to which they are also entitled under the Florida Constitution.

upon the percentages of recovery otherwise stated in this contract for representation.

Dated: _____

Witness

Client

In the Statement of Client's Rights for contingency fees, it is recommended that a new paragraph 2 be adopted which provides:³

2. In all medical malpractice claims, Amendment 3 of the Florida Constitution assures you of your constitutional right to recover no less than 70% of the first \$250,000.00, not including costs, and 90% of all damages recovered in excess of \$250,000.00, not including costs. You have the right to insist upon this and your lawyer has the right to either agree or not agree in representing you given these constitutional limitations on recoveries in medical malpractice actions. If you do not reach an agreement with one lawyer you may talk with other lawyers. Indeed, as explained in other provisions of the Statement of Client's Rights, you do have three (3) business days to reconsider the contract should you decide to sign it with this lawyer. If you have not already done so, you are encouraged to talk with other lawyers who may agree to represent you based upon the recovery limitations in medical malpractice cases as provided for in Amendment 3 to the Florida Constitution. You should not sign this contract and the separate Constitutional Waiver Provision unless you feel that you are knowingly, intelligently, and comfortably doing so. In the event you do sign the Constitutional Waiver Provision it will be presumed, unless rebutted, that you have done so knowingly and intelligently. If you have any doubt, whatsoever, you should seek the consultation of other lawyers before signing the contract or the Constitutional Waiver.

³It should be noted that paragraph 1 clearly and undisputedly recognizes the client's right to talk with the attorney about the proposed fee and to bargain about the rate or percentage as in any other contract.

WHEREFORE, the undersigned respectfully requests that the Supreme of Florida deny the proposed Amendment to Rule 4-1.5 but adopt the foregoing or substantially similar language modifying Rule 4-1.5 to facilitate prospective clients making informed decisions regarding their representation and providing a framework for the ethical practice of law in medical malpractice matters.

Respectfully submitted,

LAW OFFICES OF ROY L. GLASS, P.A.

Roy L. Glass
FBN: 0210781
5501 Central Avenue
St. Petersburg, FL 33710
(727) 384-8888; (727) 345-3008 fax

cc: Alan B. Bookman, President, The Florida Bar
John F. Harkness, Jr., Esquire
Stephen H. Grimes, Esquire