

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

**COMMENTS OF BARBARA GREEN TO PROPOSED AMENDMENT
TO THE RULES REGULATING THE FLORIDA BAR -
RULE 4-1.5(f)(4)(B) OF THE RULES OF PROFESSIONAL CONDUCT**

Barbara W. Green, Fla. Bar No. 264628, respectfully submits the following comments in opposition to the proposed Amendment to the Rules Regulating the Florida Bar – Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct:

I have been a member of the Florida Bar since 1978. For most of that time, I have worked primarily in appeals and litigation support in civil actions.

The Petition asks this Court to enact a rule that would interpret the recent amendment creating Article I, §26 of the Florida Constitution as creating an absolute cap on plaintiffs’ attorneys fees in medical malpractice cases. Under the proposal, the cap could not be waived. Many of the reasons for rejection of the proposed

amendment are thoroughly discussed in the comments of other attorneys, and I will not reiterate them here. I write to point out an additional issue.

It is not at all clear that the people of the State of Florida intended that a limit on the amount of attorneys fees should be the only way to achieve the recovery percentages described in the statute. For example, the required recovery could be achieved through a court award of fees against the opposing party. However, even if a limit on fees were intended, there are many good reasons why an injured plaintiff should be permitted to waive such a limit, the same way a party may make a knowing and intelligent waiver of any other constitutional right.

A plaintiff might wish to waive such a limit at the outset of a case in order to be able to hire the attorneys of their choice, or to make sure that they will have resources comparable to the resources of the defendants in order to ensure a fair fight. Medical malpractice cases are usually extremely complex. Due in part at least to §768.81, Florida Statutes and Fabre v. Marin, 623 So.2d 18 (Fla. 1993), medical malpractice cases almost always involve multiple defendants from the beginning. A plaintiff might well want to retain more than one attorney in order to effectively litigate against multiple defense attorneys.

In addition, circumstances can arise during the course of litigation that would justify a decision to waive such a fee limit. Before trial, presuit investigation and discovery are required. But those proceedings do not create a freeze frame limiting

the scope of the litigation. As this Court pointed out in Cohen v. Dauphinee, 739 So.2d 68, 73 (Fla. 1999), the medical and legal issues are likely to change during discovery.

As the case evolves, the need to associate additional counsel may become manifest. A plaintiff may wish to bring in additional counsel with expertise in a particular area of medicine, or with knowledge about a particular expert retained by a defendant, or with legal or medical expertise in an area raised by one of the defendants. The proposed rule leaves no room for a plaintiff to bring in additional counsel when needed.

Finally, this Court has long recognized that an additional fee is appropriate in the event of an appeal, and has recognized that five percent is a reasonable appellate fee. The proposed rule makes no allowance for any appellate fee.

The proposed amendment is nothing more than a brazen attempt to close the courthouse doors to plaintiffs with meritorious but difficult cases. Respectfully, the Court should reject it.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to: Executive Director of the Florida Bar, John F. Harkness, Jr., 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and Stephan H. Grimes, Post Office Drawer 810 Tallahassee, Florida 32302 this _____ day of August, 2005.

Respectfully submitted,

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BY: _____
BARBARA GREEN, ESQUIRE
Florida Bar No. 264628

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

BARBARA GREEN
Florida Bar No. 264628