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 OF PROFESSIONAL CONDUCT
_____/

COMMENTS IN SUPPORT OF PETITION

Petitioners file their comments in support of their Petition to Amend Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct.[1]

In the election held November 2, 2004, by a vote almost 70 percent, the people of the state of Florida approved an Amendment to the Florida Constitution which reads as follows:

> Section 1.
> Article 1, Section 26 is created to read "Claimant's right to fair compensation."
>
> 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.
>
> Section 2.
> This Amendment shall take effect on the day following approval by the voters.

[1] Petitioners wish to advise the Court that their undersigned attorneys are being paid for their legal services in this matter by the Florida Medical Association.

> By its terms the Amendment does not contemplate legislative implementation and reflects the intent to control contingency fee contracts in medical liability cases. With respect to medical liability cases, Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct contained in the Rules Regulating The Florida Bar presently authorizes contingent fees in excess of the percentages permitted by the Amendment.

Now that the Amendment has passed, the purpose of this Petition is to request the Court to amend Rule 4-1.5 to comply to the Amendment.

In view of the fact that the adoption of the amended rule would have the effect of limiting attorney's fees, many lawyers have filed comments in opposition to the Petition. Petitioner will endeavor to respond to the various objections raised by these comments.[2]

WAIT FOR SUBSEQUENT ADJUDICATION

The Florida Bar suggests that rather than addressing the Petition now, the Court should wait until the issues of "validity and interpretation" of Amendment 3 reach the Court in an "adjudicatory proceeding." Yet, the Bar can hardly question validity because Amendment 3 is a part of the Constitution, and the amendment clearly demonstrates its intent to limit attorney's fees in medical liability claims. If the "issues" are not addressed in a straightforward manner at this time, it is doubtful that they will later come before the Court because medical malpractice lawyers will simply refuse to represent prospective clients unless they agree to

[2] Many of the comments are overlapping or raise the same objections. At least 37 of the comments are identically worded.

waive their rights to the lower fees. It is unlikely that a client who does so would later sue for a higher percentage of the recovery but should this occur, the claim would surely be met by the defense of lack of standing to complain. The Bar seeks only to maintain the status quo and to avoid deciding the issue.

In fact, this Court has already recognized that Rule 4-1.5 would be impacted if Amendment 3 passed. When the amendment was before the Court prior to its placement on the ballot, the Court stated:

> We agree that the amendment does relate to the Judicial Branch because at the very least, the amendment would functionally override or interfere with the Rules of Professional Conduct as they relate to fee contracts between attorneys and their clients. *See*, R. Regulating Fla. Bar 4-1.5.

Adv. Op. to the Att'y Gen. re: Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 565-66 (Fla. 1998).

Now is the time for the Court to set the matter at rest.

CLAIMANTS CANNOT OBTAIN COMPETENT COUNSEL

Opponents make the speculative assertion that the proposed rule change will prevent some persons with meritorious medical liability claims from obtaining competent counsel to represent them. This argument is purely speculative, but it is also essentially irrelevant. The people of Florida have concluded that $150,000 is a sufficient attorney's fee when obtaining a $1,000,000 medical malpractice recovery. This Court cannot second guess the wisdom of this policy choice made by the people.

Caps on medical malpractice fees are not unique.[3] In *Roa v. Lodi Medical Group, Inc.*, 37 Cal. 3d 920, 211 Cal. Rptr. 77, 695 P.2d 164, (1985), the court considered a provision of the Medical Injury Compensation Reform Act of 1975 which placed limits on the amounts of contingent fees that an attorney could obtain in a medical malpractice action. The Legislature limited the fees to 40% of recovery of the first $50,000 and 33? % on the next $50,000 and 25% on the next $100,000 and 10% on any amount in excess of $200,000. Addressing the constitutionality of the law, the California Supreme Court first observed:

> Some states have adopted maximum fee schedules which apply to *all* personal-injury contingency fee arrangements (see, e.g., *American Trial Lawyers v. New Jersey Supreme Ct.* (1974) 66 N.J. 258 [330 A.2d 350]; *Gair v. Peck* (1959) 6 N.Y. 2d 97 [188 N.Y.S. 2d 491, 160 N.E. 2d 43, 77 A.L.R. 2d 390], app. dismissed (1960) 361 U.S. 374 [4 L. Ed. 2d 380, 80 S. Ct. 401]); others have enacted limits which, like section 6146, apply only in a specific area, such as medical malpractice. (See, e.g., *Johnson v. St. Vincent Hospital, Inc.* (1980) 273 Ind. 374 [404 N.E. 2d 585, 602-603]; *Prendergast v. Nelson* (1977) 199 Neb. 97 [256 N.W. 2d 657, 669-670]; *DiFilippo v. Beck* (D.Del. 1981) 520 F. Supp. 1009, 1016). Congress has passed numerous statutes limiting the fees that an attorney may obtain in representing claimants in a variety of settings. (See, e.g., 28 U.S.C. § 2678 [limit on attorney fee in actions under the Federal Tort Claims Act]; 42 U.S.C. § 406(b)(1) [limit on attorney fee in actions under the Social Security Act]; 38 U.S.C. § 3404 [limit on fee for claims under the Veterans Benefit Act].)

Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920 at 925.

[3] As noted in the comments of the American Medical Association, seventeen states have placed some limitations on contingent fees in medical malpractice cases.

The California court went on to reject all of the constitutional challenges. With respect to the argument that the law would operate to drive most competent attorneys out of medical malpractice litigation and the result of unconstitutional infringement of a malpractice victim's right to counsel, the court stated:

> . . . plaintiffs have failed to make any showing to support the factual premise of their contention. In addition, a similar claim could, of course, be raised with respect to every statutory provision which creates legislative limits on attorney fees in a particular field. As we have seen, such statutes are commonplace. Suffice it to say that we know of no authority which suggests that due process requires a single, uniform attorney fee schedule for all areas of practice.

Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920 at 929.

Moreover, the contention that claimants will not be able to obtain "good" lawyers to prosecute their cases is mere speculation. There is no reason to believe that persons with legitimate claims cannot obtain the services of a competent lawyer among the thousands of lawyers practicing personal injury law in Florida. Furthermore, the recent enactment of Amendment 8 (Three Strikes and You're Out) will make it easier for plaintiffs' medical malpractice lawyers to force doctors to settle their claims in order to avoid the effect of an adverse judgment on their ability to practice.

The objecting lawyers accuse the Florida Medical Association (FMA) of plotting to deprive those with legitimate malpractice claims from obtaining lawyers to prosecute those claims. It is not the legitimate claims which the FMA seeks to curb. It is the marginal or dubious claims which cost so much to defend despite

their ultimate lack of merit. This is borne out by the objectors' acknowledgement that the claimants lose the majority of cases which actually go to trial. As it now stands, there is an incentive to bring such claims whenever a doctor has failed to cure a patient, because the damage potential is usually so high. Thus, medical malpractice cases tend to have a high settlement value. The adverse effect on the practice of medicine and on patient care in Florida is well known. The point is well illustrated in *DiFilippo v. Beck*, 520 F. Supp 1009 (1981), when the court rejected a constitutional challenge to a Delaware law which limited attorney's fees in medical malpractice actions to 35% of the first $100,000 in damages, 25% of the next $100,000, and 10% of the balance.[4] The court stated:

> . . . it is rational to limit attorney's fees which may be collected in malpractice suits and not in other actions because the limitation is also related to reducing malpractice insurance costs and, consequently, medical costs. For example, the attorney's fee limitation is likely to deter attorneys from instituting frivolous suits and to encourage the settlement of such suits, thus saving litigation expenses and ultimately reducing medical costs to the consumer.

DiFilippo v. Beck, 520 F. Supp 1009 at 1016.

In upholding a legislative limitation on medical malpractice attorney's fees against a constitutional attack, the Illinois Supreme Court stated:

> The goals of the legislation, we have said, were to reduce the burdens existing in the health professions as a result of the perceived malpractice crisis. The legislature may have reasonably believed that the limits on fees would expedite the resolution of disputes, act as a

[4] The authorized attorney's fee in Delaware for a $1,000,000 recovery would be $10,000 less than that permitted under Amendment 3.

> disincentive for filing frivolous suits, and preserve to a plaintiff a greater part of his recovery, and in those ways help reduce the malpractice crisis.

Bernier v. Burris, 113 Ill. 2d 219, 497 N.E. 2d 763, 778, 100 Ill. Dec. 585 (1986). *See Pendergrass v. Nelson*, 256 N.W. 2d 657, 669 (Neb. 1977) ("Much of the literature on the malpractice crisis attacks the contingent fee as the root of the evil.")

In *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994), the Tennessee Supreme Court addressed equal protection and due process challenges to a statute which limited the amount of contingent fees in medical malpractice cases. In spite of the lack of legislative history, the court applied the rational basis test to uphold the statute. The court explained:

> The proper analysis is whether the legislature could conceive of a relationship between the statute and the purpose of the Act. It is conceivable that the General Assembly concluded that the contingency fee cap of Tenn. Code Ann. § 29-26-120 would further the purposes of the Medical Malpractice Act by reducing malpractice insurances costs and, therefore, reduce the cost of health care to the public.

The opponents' unproven assertions cannot trump the constitutional mandate.

THE CLIENT MAY WAIVE THE LOWER FEE

Some lawyers have publicly stated that the Amendment creates nothing more than a right which may be waived as certain other constitutional rights may be waived. Thus, they assert that the client may waive its requirement and agree to

higher contingent fees than permitted by the Amendment. This rationale would have the lawyer negotiating with the client in order to have the client agree to give up his or her constitutional right in order that the lawyer may receive a higher fee. To permit such a practice, would appear to put the lawyer in an unethical position and fly in the face of the constitutional mandate overwhelmingly approved by the Florida voters.

The constitutional rights to which persons are permitted to waive are mostly those specifically enumerated "rights" set forth in the United States and Florida Constitutions. Often such rights may only be waived upon the advice of counsel. Clearly, none of these constitutional rights are ones which may be waived upon the advice of the counsel which stands to directly benefit from the waiver.

In *Fineberg v. Harney & Moore*, 207 Cal. App. 3d 1049, 255 Cal. Rptr. 299 (Cal. App. 2d Dist. 1989), the court addressed the validity of a contingent fee contract which stated that the client had been advised of the California limitations on attorney's fees in medical malpractice cases and that the client waived these limitations and agreed to paid a higher fee percentage. The court held that there was nothing in the statutory scheme or its legislative history to indicate that the Legislature intended to permit a waiver of fee limitations and rejected the attorney's claim for the excess fee. In responding to the attorney's argument that fee limitations would preclude retention by injured persons of adequate counsel, the court stated:

> Implicit in the testimony of both David Harney and his expert is their assumption either that no lawyer would undertake representation of medical malpractice plaintiffs under the statutory fee limitation, or that lawyers engaged in that practice would lower the standard of representation afforded medical malpractice clients because of the fee limitation. The first of these assumptions is purely speculative; the second assumes a willingness on the part of medical malpractice lawyers, as a group, to violate their duty to their clients. We reject both assumptions, and find no deprivation of the right to counsel by reason of the statutory provision in question.

Fineberg v. Harney & Moore, 207 Cal. App. 3d 1049 at 1054.

As recognized in the cases upholding similar limitations, in addition to giving the plaintiff a larger portion of the recovery, the amendment also provides the public benefits of discouraging frivolous suits, saving litigation expenses and reducing the cost of health care. To permit a plaintiff to sign a waiver would undercut the purposes of the amendment. The Opponents' complaints about the wisdom of the amendment are beside the point.

The suggestion that the problem could be solved by adding a summary of the amendment to the Statement of Client's Rights is specious. Unlike other information already contained in such statements, the limitation on attorney's fees in medical liability claims is a constitutional mandate. Is it reasonable to believe that when the citizens of Florida voted to reduce medical malpractice attorney's fees that they only intended to *suggest* a lower percentage that could be waived?

The Medical Liability Claimants' Amendment does not create a right which may be waived but rather establishes a mandate that the medical liability claimant

shall receive a specified percentage of the damages that are recovered. The amount is intended to assist all citizens by reducing medical malpractice defense costs, not just to benefit malpractice plaintiffs.

AMENDMENT 3 DOES NOT RELATE TO FEES IN MEDICAL LIABILITY CASES

The suggestion that the Medical Liability Claimants' Compensation Amendment does not set the maximum contingency fee percentages in medical malpractice cases is absurd. As this Court recognized in *Advisory Opinion to the Attorney General re: Medical Liability Claimants' Compensation Amendment*:

> The proposed amendment has a limited scope because it involves contractual fee arrangements between attorneys and clients. . . .

AMENDMENT 3 VIOLATES THE UNITED STATES CONSTITUTION

Some Opponents assert that the proposed rule change should not be adopted because to do so would assume that Amendment 3 does not violate the United States Constitution. They argue that an approval of the rule change would be equivalent to an advisory opinion which finds no constitutional infirmity in the Amendment. This argument stands constitutional law on its head. It presumes the unconstitutionality of a provision in the Florida Constitution.

The Opponents point to no case law that remotely suggests that the Amendment would violate the United States Constitution. As previously noted, other courts have rejected constitutional arguments directed toward limitations on

attorney's fees.[5] Cases which hold that civil litigants have the right to be represented by retained counsel have no relationship to this issue. In any event, this Court's enactment of a rule implementing Amendment 3 would not preclude a lawsuit asserting that the amendment violated the United States Constitution, and if the Amendment were ever declared unconstitutional, the new rule necessarily would also be invalid.

AMENDMENT 3 AFFECTS FEDERAL MEDICAID CLAIMS

The argument that the Amendment impermissibly affects federal Medicaid liens is likewise illusory. This Amendment simply reduces the amount of attorney's fees which may be charged for prosecuting medical liability claims. There would be no change from the way Medicaid liens are applied under the present practice.

AMENDMENT 3 VIOLATES ACCESS TO COURT'S PROVISION

Others argue that an amendment to the rule would violate the access to courts provision set forth in Article I, section 21 of the Florida Constitution. The argument is based on the untested and speculative assumption that no lawyers will prosecute medical liability claims for the lower fees. As noted above, this argument has been considered and rejected by courts in other states. This argument also came up before Amendment 3 was placed on ballot when the Court

[5] The United States Supreme Court has upheld a $10 limit on attorney's fees for assisting veterans in making disability claims. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 105 S. Ct 3180, 87 L. Ed. 2d 220 (1985).

was considering whether or not Amendment 3 contained more than one subject. In their initial briefs in opposition to allowing the Amendment to be placed on the ballot, Floridians for Patient Protection argued that the initiative violated the single-subject requirement because it had a substantial and undisclosed impact on the access to several provisions of the Constitution including the access to courts provision. In its Opinion authorizing the Amendment to be placed on the ballot, the Court addressed the basis for this contention by quoting from *Advisory Opinion to the Attorney General re: Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 565-66 (Fla. 1998), for the proposition that:

> It is imperative that an initiative identify the provisions of the Constitution substantially affected by the proposed amendment in order for the public to fully comprehend the contemplated changes and to ensure that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations.

However, the Court went on to hold that Amendment 3 did "not appear to have a wide-reaching impact on other amendments." Thus, it is clear that amending Rule 4-1.5(f)(4)(B) in order to conform to Amendment 3 would not create a conflict with the access to courts provision. By voting for Amendment 3, the people of Florida decided that the fees which lawyers were charging in medical liability claims were too high. Obviously, a given lawyer always has the right to decline a representation for the prescribed fees. However, even if this Amendment has the effect of limiting some marginal claims, how can it be said that the voters

could not make this choice in order to ensure that those with the meritorious claims would not see their recoveries diluted by the higher fees?

CONCLUSION

Like other provisions of our Constitution, Amendment 3 is the law of Florida. Petitioners merely ask that the Court conform its rule to the constitutional mandate.

Respectfully submitted this _____ day of September, 2005.

HOLLAND & KNIGHT LLP

_____
Stephen H. Grimes (FBN 0032005)
Jerome W. Hoffman (FBN 258830)
P.O. Drawer 810
Tallahassee, FL 32302
Ph. (850) 224-7000
Fax (850) 224-8832

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States mail, this _____ day of September, 2005, to John F. Harkness, Jr., The Florida Bar, 651 East Jefferson St., Tallahassee, FL 32399-2300, and to the following persons who have requested oral argument:

Barry Richard
Greenberg Traurig, PA
P. O. Drawer 1838
Tallahassee, FL 32302
Attorney for The Florida Bar

Gary Susser
3294 N.W. 63rd Street
Boca Raton, FL 334933

Arthur I. Jacobs
Jacobs & Associates, P.A.
961687 Gateway Blvd., Suite 2011
Fernandina Beach, FL 32034
Attorney for Trial Lawyers Section
of The Florida Bar

Roy D. Wasson
Wasson & Associates, Chartered
Gables One Tower – Suite 450
1320 South Dixie Highwy
Miami, FL 33146
Attorney for Dade County Bar Assoc. and
Dade County Trial Lawyers Assoc.

Michael B. Feiler
Feiler, Leach & McCarron, P.L.
Penthouse Suite
901 Ponce de Leon Blvd.
Coral Gables, FL 33134

_____
Attorney

CERTIFICATE OF FONT

I HEREBY CERTIFY that this document was prepared using Times New Roman 14 point type, a font that is proportionately spaced.

_____
Attorney

2976149_v1