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./

COMMENTS OF LEE D. GUNN IV, ESQUIRE
AND OBJECTIONS TO PROPOSED AMENDMENT

Pursuant to Rule 1-12.1(g) of the Rules Regulating The Florida Bar, the undersigned submits these comments and objections to the proposed amendment to Rule 4-15(f)(4)(B). The Court should dismiss or deny the Petition for each and any of the following reasons:

1. The Petition currently before the Court prematurely seeks the adoption of a rule change that would implicitly validate the legal force and effect of Amendment 3. This Court should not implement any rule before determining the scope and constitutionality of Amendment 3, issues that will undoubtedly be addressed in substantive litigation. Parties in such litigation will certainly raise Florida and federal constitutional issues including, but not necessarily limited to, procedural and substantive due process, equal protection, and conflicts with Article 1, Section 21, Florida Constitution, rights to access to courts and redress for any injury.
2. To the extend that the Petition is viewed as properly bringing the issue before the Court at this time, the Court should deny the Petition because it effectively precludes clients from waiving their rights under Article 1, Section 26, of the Florida Constitution (Claimant's Right to Fair Compensation). As the title of this

section indicates, the constitutionally vested right is held by the claimant. It is axiomatic that individually held rights are waiveable.

3. If the proposed rule change is adopted, then attorneys could not charge fees currently permissible, thereby effectively negating a client's waiver. There is no overriding public policy, nor other valid basis, for The Florida Bar to effectively deny persons injured by the negligence of a medical provider the right to select counsel of his or her choice. If the desired counsel will only accept the case under the terms of the current Rule 4-1.5, then the amendment proposed by the Petitioner would deny medical malpractice victims the right to selected counsel. Again, this denial occurs even where counsel is willing to undertake the representation for an amount currently deemed reasonable.
4. I have practiced in this state since 1983. I am Board Certified in Civil Trial Law by The Florida Bar and have held this certification since 1990. I am Board Certified in Civil Trial Law by The National Board of Trial Advocates and a member of the American Board of Trial Advocates. I have held a "av" rating by Martindale-Hubbell since 1990. For seventeen years, I defended health care providers and insurance companies. Since 2000, I have represented many persons injured by medical negligence.
5. It is well-accepted, in my opinion, that medical malpractice cases are much more difficult, demanding and expensive to prosecute than most other types of personal injury cases. In my experience, it is not economically viable for an attorney to accept representation of the victim of a medical negligence case under the limitations provided for by Article 1, Section 26 of the Florida Constitution.

Beyond the additional time and expense created by pre-suit compliance under Chapter 766, Florida Statutes (2005), there is also the extreme expense associated with the prosecution of medical negligence cases that are inevitably "a battle of expert witnesses." Manhardt v. Tamton, 832 So. 2d 129 (Fla. 2nd DCA 2002). Prospective jurors have been exposed to propaganda campaigns designed to create the appearance of a "medical malpractice crisis." Thus, jurors are extremely skeptical of medical malpractice cases and are often prepared to reject even valid cases unless the evidence is overwhelming. Examples of voir dire exchanges exemplifying this bias are discussed by the Fifth District Court of Appeal in its recent opinion of Somerville v. Ahuja, 902 So. 2d 930 (Fla. 5th DCA 2005). Furthermore, the 2003 amendment to Chapter 766, that limited a medical malpractice insurance company's liability for breach of its duties of good faith and fair dealing will undoubtedly lead to more protracted and expensive litigation processes being thrust upon medical malpractice victims and their counsel. See Section 766.1185, Fla. Stat. (2003). These exacerbating effects are just beginning to be seen in the litigation process. It is simply not reasonable to expect that the victims of medical negligence will be able to obtain competent counsel experienced in complicated medical negligence cases if the Petition is granted and the proposed rule amendment is adopted.

6. The Draconian effect of the proposed rule amendment fails to respect the rights of the victims of medical negligence to select counsel of their choice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon John F. Harkness, Jr., Executive Director of The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 and Stephen H. Grimes, Esquire, Counsel for Petitioners, Holland and Knight, LLP, P.O. Box 810, Tallahassee, Florida 32302-0810 on this _____ day of September, 2005.

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