IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SCO5-1150

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 ATTORNEY JAMES READ HOLLAND II, FLORIDA BAR NUMBER 0007390 AND OBJECTIONS TO THE PROPOSED AMENDMENT

Attorney James Read Holland, II respectfully submits these comments opposing the proposed amendment to Rule 4-1.5(f)(4)(B), on grounds of fundamental fairness and states as follows:

The Fourteenth Amendment to the Constitution of the United States, Section 1 states in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A well recognized privilege under the Fourteenth Amendment is the right to counsel for both the criminal and civil litigant. *Powell v Alabama,* 287 U.S. 45 (1937) Denial of the right to counsel to the indigent standing before a state criminal court has repeatedly been held to violate the Fourteenth Amendment and by implication the Fifth and Sixth Amendments. *Gideon v Wainwright*, 372 U.S. 335 (1963)(denial of appointed counsel in a felony proceeding); *Powell v Alabama,* 287 U.S. 45 (1937)(denial of appointed counsel in a capital case).

The essential nature of counsel was recognized by Justice Sutherland in *Powell v Alabama*, when he eloquently stated: "'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent

and educated layman has small and sometimes no skill in the science of law." *Powell v Alabama,* 287 U.S. 68.

The Florida Bar has already established a fair schedule of contingency fees which may be charged by lawyers handling civil cases which is set forth in Rule 4-1.5(f)(4)(B). Recently, by Amendment Three to the Florida Constitution, the Florida Medical Association and its associated front organizations, successfully introduced an impediment to counsel. The present intent of the F.M.A. petition is clear. By lowering the financial threshold of the experienced attorney's contingency fee below the threshold of economic viability, the barrier to the courthouse is raised. In order to turn the impediment into a virtual bar, the F.M.A's petition now seeks to deprive victims of the right to choose the counsel of their choice by imposing unreasonable and unwaivable financial restraints on the contingency fees which may be charged.

The present circumstances are little different from the issues of fundamental fairness and the right to counsel presented before this court over forty years ago in *Gideon v. Wainwright.* Like criminal cases, medical negligence cases are fraught with procedural pitfalls which are traps for the inexperienced and unwary. Medical negligence cases are also among the most expensive civil actions to pursue with pre-suit requirements which require expert testimony. Given these hazards, pursuing a medical negligence claim is an expensive, time consuming toil for even the most experienced practitioner.

Citizens of the State of Florida can now waive the most fundamental constitutional rights such as the Fifth Amendment right not to incriminate oneself or the custodial rights to a child. *See eg. Tucker v State,* 417 So2d 1006, 1013 (Fla 3rd D.C.A. 1982). The F.M.A. petition before this court seeks to prohibit a waiver of Amendment 3. Such a position offends the very fundamentals of fairness. Under the F.M.A. petition, an injured party who chooses his counsel must either fund the litigation himself against the medical

wrongdoer by an hourly fee or forgo the claim[1]. Like the circumstances facing Mr. Gideon, as he stood before this court forty years ago, justice should not be reserved for those who can afford it.

The wolf beneath the sheep's clothing of the present petition is nothing more than an invitation for the Florida Supreme Court to add its stamp of approval on a perversion of fundamental fairness. The court The underlying issues of constitutionality are better reserved for the traditional progression through the courts by scholars more ably equipped than the F.M.A. and the undersigned. This Court should dismiss the present petition as it impermissible seeks to short circuit the judicial process. The pretext under petition proceeds is as offensive to the "common good" as the underlying amendment is offensive to a "fair share." Both offend constitutional notions of fairness and waivable rights.

[1] This is under the safe assumption that the contingency fees desired by the F.M.A.'s interpretation of Amendment 3 are below the threshold of economic viability in the marketplace of the experienced medical negligence practitioner.

Dated this ___ day of September, 2005.

Respectfully submitted,
JAMES R. HOLLAND II, ESQ.
WETTERMARK HOLLAND & KEITH, LLC

One Independent Drive, Suite 3100
Jacksonville, Florida 32202-5025
Attorneys for Plaintiffs
Telephone: 904-633-9300
Facsimile: 904-633-9200

By:
JAMES R. HOLLAND, II, ESQUIRE
Florida Bar No.: 0007390

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been provided to John Harkness, General Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300and Stephen H. Grimes, Counsel for Petitioners, Holland and Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810, by U. S. Mail this day of September, 2005.

WETTERMARK HOLLAND & KEITH, LLC

One Independent Drive, Suite 3100
Jacksonville, Florida 32202-5025
Attorneys for Plaintiffs
Telephone: 904-633-9300
Facsimile: 904-633-9200

By:
JAMES R. HOLLAND, II, ESQUIRE
Florida Bar No.: 0007390