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 KURT E. LEE (FLORIDA BAR NO. 0983276) AND OBJECTION TO PROPOSED AMENDMENT

Kurt E. Lee respectfully submits the following comments and objections to the Petition filed by Stephen H. Grimes, Esq., and the request to amend Rule of Professional Conduct 4-1.5(f)(4)(B):

I am a Board Certified Business Litigation Lawyer and, thus, do not have significant ties to contingent fee practice. I do, however, have a profound interest in insuring that Florida has the best possible judicial system. Accordingly, I am writing to oppose the petition to amend Rule Regulating the Florida Bar 4-1.5(f)(4)(B) because it will, if granted, harm our judicial system and detrimentally impact the people of Florida.

A recent study by Alexander Tabarrok, an associate professor of economics at George Mason University, and Eric Helland, an associate professor of economics at Claremont McKenna College, has demonstrated, through empirical evidence, that limitations on contingency fees adversely impact our judicial system whereas unrestricted contingency fees benefit our judicial system. Alexander

Tabarrok and Eric Helland, Two Cheers for Contingent Fees: Why Limits on Contingency Fees May Not Be Good For Tort Reform, AEI Press (August 22, 2005).

Economists Alexander Tabarrok and Eric Helland found that contingent fees benefit plaintiffs and do not cause higher awards, improve access to the courts for low-income plaintiffs, and provide contingent-fee lawyers with an incentive to screen cases and to reject those cases that are unlikely to be won.

Tabarrok and Helland found that when contingent fees are restricted, plaintiffs begin many cases that they later find to be of little value and subsequently drop. In states that limit contingency fees in medical malpractice cases, 18.3 percent of these cases were eventually dropped, but in states without limits only 4.9 percent were abandoned. The drop rate for medical malpractice cases increased in Florida by 15 percent when Florida limited contingency fees in 1985.

Tabarrok and Helland also found that lawyers paid by the hour are likely to take longer to settle cases than lawyers paid by contingent fees. The time to settle a case is 22 percent longer in states that restrict contingent fees. "In Florida, in the 300 days after contingent fees were restricted in 1985, settlement time increased by 13 %." Alexander Tabarrok, "Give the Lawyer His Cut: Despite The Cry Of Tort

Reformers, Contingency Fees Are Good For The Legal System," Forbes (October 3, 2005)(a copy of this article is attached).

While tort reform is a laudable goal, the fact of the matter is that limiting the contractual rights of plaintiffs and their lawyers is a flawed and ineffective means for reaching such goal. Accordingly, I respectfully request that this Honorable Court deny the Petition and not make any changes to Rule of Professional Conduct 4-1.5(f)(4)(B).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 23, 2005, a copy of the foregoing was furnished to the following by first class United States mail:

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Respectfully submitted,

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By:_____
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On My Mind

By Alexander Tabarrok, ASSOCIATE PROFESSOR OF ECONOMICS AT GEORGE MASON UNIVERSITY

Give the Lawyer His Cut

Despite the cry of tort reformers, contingency fees are good for the legal system. They weed out bad cases.

IF AMERICA IS, IN THE IMAGERY OF TORT REFORMERS, LAWSUIT hell, then contingent-fee lawyers are its devils. Most injury cases are handled on contingency, meaning the lawyers get paid only if they settle or win in court. Tort reform proponents have long demanded restrictions on these contingent fees, which typically give the lawyer a third of any award. They argue that fat contingent fees encourage frivolous litigation and give attorneys the wrong incentives, especially on settlement decisions.

State legislatures have listened. Sixteen states, including California, New Jersey and Florida, limit contingent fees in medical malpractice or personal injury cases. In Florida, which since 2004 has had the strictest limits in the nation, fees in medical malpractice cases are capped at 30% of the first $250,000 and just 10% of the balance.

But there is a glaring absence of empirical evidence to support the attack on contingent fees. Together with my colleague Eric Helland, associate professor of economics at Claremont McKenna College, I conducted a recent study (*Two Cheers for Contingent Fees*, AEI Press) that compares states that restrict contingent fees in medical malpractice cases with states that don't.

The contingent-fee reformers assume that curbing fees will shorten settlement negotiations (if the lawyer is going to get a smaller fee, then he's motivated to settle more quickly, goes the reasoning) and reduce the number of frivolous suits (the lawyer won't take the suit if he can't be assured of a big payday). Surprise: The opposite is true.

Here's how 33%-contingent-fee lawyers really work: They screen cases carefully at the door. Why take a case if you can't make a reasonable bet that it will yield a high fee, either in a settlement or at trial? Pursuing litigation is costly for lawyers. They won't lay out a bet unless they think they'll win. When states restrict fees to less than 33%, lawyers have less of an economic incentive to spend hours doing careful screening. One possible outcome is that they take on lots of cases, file them and let the chaff fall where it will. Or they might simply charge by the hour. When clients pay whether their lawyers win or lose, lawyers have little motivation to screen.

In states that restrict contingent fees, plaintiffs dropped 18% of cases before trial without getting a settlement. In states where lawyers were free to take their usual 33% cut, they dropped only 5% of cases. This tells us that lawyers had already screened out the junk suits and were pursuing those with merit.

Our study also shows that the time to settlement in medical malpractice cases is 22% longer in states that restrict contingent fees. In Florida, in the 300 days after contingent fees were restricted in 1985, settlement time increased by 13%. Why? When lawyers are paid by the hour, they have little incentive to settle quickly.

"When states restrict fees, lawyers have less of an economic incentive to spend hours doing careful screening."

Critics assume that big contingent fees prompt lawyers to push awards sky-high. The data show the opposite. The average medical malpractice award is twice as high in states that restrict contingent fees ($501,000 versus $225,000). Although this does not mean that contingent fees decrease awards, it does call into question the idea that contingent fees increase them.

Mandated limits are wrong in principle because they curb the rights of plaintiffs to choose how to reward their agents, the lawyers. Since the market for lawyers is competitive, I see no reason to violate the rights of both plaintiffs and their lawyers to freedom of contract.

Outrage with the court system should continue to be aimed at out-of-control class actions. Here, there are no contracts between client and lawyer. In fact, class action plaintiffs often find out that they are parties to the suit only after a settlement has been reached. So we shouldn't be surprised to see settlements that yield millions in attorneys' fees and nothing but valueless coupons for the purported clients. To solve the class action crisis, we should look at elected judges, jury demographics and bad law. But contingency fees aren't the problem. F

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