

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC05-1150

IN RE: PETITION TO AMEND  
RULE 4-1.5(f)(4)(B) OF THE  
RULES OF PROFESSIONAL CONDUCT

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COMMENTS OF STEVEN B. LESSER, ATTORNEY

I am Steven B. Lesser, a member of the Florida Bar and the Chair of the American Bar Association Tort Trial & Insurance Practice Section Task Force on Contingent Fees.

In the fall of 2003, the Tort Trial & Insurance Practice Section of the American Bar Association (TIPS) empanelled a national Task Force on Contingent Fees, including practicing attorneys, corporate in-house counsel, insurance company representatives and academics. As a construction lawyer with no significant ties to contingent fee practice, TIPS appointed me as Chair of the Task Force. The Task Force conducted a number of meetings across the country, with invited guests making presentations and answering members questions on the subject of contingent fees in medical malpractice actions. The end product is the Task Force September 20, 2004 Report on Contingent Fees in Medical Malpractice Litigation. A copy of the Report and Exhibits is appended.

The Report is germane to the propriety of limiting contingent fees in medical malpractice cases generally, and should be of assistance to this Court in dealing specifically with any proposed amendments to the Rules Regulating the Florida Bar. In particular, the Task Force Conclusions A through E suggest the proposed amendment to Rule 4-

1.5(f)(4)(B) is ill advised. The Task Force Conclusions are listed at page 11 of 66 of the attached Report and are duplicated here.

## **II. Conclusions**

A. Limitations on fees by the formulae recently proposed in Florida and elsewhere risk compromising access to justice by medical malpractice victims. Without the prospect of reasonable fees, competent counsel would be unwilling to assume the high cost burden associated with typically complex medical malpractice actions.

B. The right of people who have suffered injury as a result of medical malpractice to seek redress for their injuries in the courts must be ensured. A fair and reasonable contingent fee is essential to preserve that right.

C. A small percentage of true medical malpractice events in the United States ever becomes the subject of a claim. Practically speaking, most physicians have only marginal exposure to medical malpractice claims.

D. Limiting fees by the formulae recently proposed in Florida and elsewhere by physicians' associations would reduce the incidence of meritorious medical malpractice actions and further reduce legal exposure for those who commit medical malpractice.

E. Contingent fees rates in medical malpractice actions are not fixed but often cluster around traditional percentages. To prevent unreasonable fee agreements and to foster more efficient claim resolution, clients would be well served by additional measures, some of which are already in practice in states such as Florida, to educate and protect them and to promote bargaining symmetry in lawyer-client fee agreements.

The Florida Rules Regulating the Florida Bar were seen by the Task Force as a positive example. The Rules provide for client education with a Statement of Client's Rights, protect clients from "clearly excessive" fees, provide a presumptively reasonable fee schedule, and empower clients to petition the courts when necessary to obtain quali-

fied counsel. Rule 4-1.5(f)(4)(B)(ii) provides, “If any client is unable to obtain an attorney of the client’s choice because of the limitations set forth in subdivision (f)(4)(B)(i), the client may petition the court . . . for approval of any fee contract between the client and an attorney of the client’s choosing.” The Grimes’ amendment overrides the client’s ability to petition for court approval of a contract with an attorney of the client’s choosing. The Grimes’ amendment should be rejected if for no other reason than this. The present rules both protect and empower the client, which should be the primary concern of this Court and the Florida Bar it regulates.

Respectfully Submitted,

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Steven B. Lesser  
Florida Bar No. 280038

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy was served upon John F. Harkness, Jr., Executive Director of the Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and Stephen H. Grimes, Post Office Drawer 810, Tallahassee, Florida 32302, this \_\_\_\_ day of July, 2005.

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