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 LAKE LYTAL, JR., ESQUIRE
AND OBJECTIONS
TO PROPOSED AMENDMENT

A. Introduction:

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

1. The Petition should be dismissed because Rule 1-12.1(g) was never intended to be utilized by lawyers furthering the interests of their clients such as the Florida Medical Association.

2. Amendment 3 of the Florida Constitution creates numerous potential legal issues that will have to be litigated before Florida courts. Included among those issues are whether or not the Amendment limits contingent attorneys' fees and whether or not litigants have the right to waive any alleged rights available to them under the Amendment. It would be premature for this Court to amend the rules regulating The Florida Bar prior to those

issues being properly presented and ruled upon by the trial and appellate courts of this State.

3. If Amendment 3 is construed to limit contingency fees, that will raise a number of Federal constitutional questions that will need to be properly presented and ruled upon by the courts of this State. This Court should not consider adopting any rule regulating Florida lawyers prior to the resolution of those issues.

4. Adopting the Petition would be contrary to the Florida Constitution, the Federal Constitution, decisions of this Court recognizing the right and value of representation by competent counsel as well as public policy.

B. Statement of Interest:

The undersigned is a member of The Florida Bar and is engaged in the active practice of civil trial law including representing victims of medical malpractice. In that capacity, the undersigned has represented few individuals during the past 39 years who had the financial capability to hire a lawyer to pursue a medical malpractice claim other than through the benefit of a contingency fee contract. Furthermore, the undersigned cannot economically justify representing victims of medical malpractice on a contingency fee basis based upon the limited fees alleged to be provided by Amendment 3. As a lawyer, I feel it is my duty to do everything within my power to protect the rights of my clients and those who may become my clients in the future. It is no secret that the Florida Medical Association promoted Amendment 3 for the purpose of eliminating the rights of the average person to pursue medical malpractice litigation. As a result, I believe it is my responsibility to strongly object to the proposed amendment and urge the Court to dismiss or deny the Petition.

C. Comments:

It seems impossible to reconcile the inherent unfairness of allowing members of the health care profession to select attorneys of their choice on terms they deem fair and reasonable, while potential claimants are hamstrung from finding competent attorneys to represent them due to the ethical limitations the proposed rule embodies. Under the rule, one whose constitutionality remains very much in question, attorneys representing victims of malpractice could easily be investing thousands of dollars and hours of work with no hope of recovering a "reasonable" fee for their time. If the victim is willing to waive those limitations, why should such an arm's length decision be in any way considered unethical? How can the Petitioner justify adoption of a rule that would nullify the rights of a class of litigants otherwise entitled to access of court by Article 1 Section 21 of the Florida Constitution? Why can't Amendment 3 be waived? These are legitimate, serious legal issues that should be resolved before this Court considers adopting the rule proposed by the Petition.

In considering the legal issues raised by the Petition, this Court must apply its common sense and practical knowledge to resolving the issue as well as principles of law. Current Rule 4-1.5(f)(4)(B) sets forth contingent fees that may be charged by lawyers handling civil litigation on a contingent fee basis. Over the past 39 years, I have handled a significant sampling of different types of legal cases involved in civil litigation and have been a member of two relatively large law firms that have specialized in this area of the law. Without question, accepting representation of a plaintiff in a medical malpractice case involves more knowledge, skill and significantly more costs and time than any other form of civil trial litigation I have handled.

Frankly, it would make no sense for this Court to adopt a rule that would, in effect, make it

unethical for a lawyer to handle a medical malpractice claim unless the lawyer agreed to accept a fee that would be significantly less than this Court allows the lawyer to earn to handle other, less complex, less costly and less time consuming forms of litigation and certainly less than if the lawyer agreed to be paid by the hour.

In approving the ballot title and summary of this constitutional amendment for placement on the ballot, this Court emphasized the narrow legal issues it was permitted to examine in determining whether to grant approval or not. Advisory Opinion To The Attorney General Re The Medical Liability Claimant's Compensation Amendment, 880 So.2d 675 (Fla. 2004). Although contained in the dissent by Justice Lewis, surely no member of this Court can dispute the following observations that he made in his dissenting opinion:

> "Pursuant to Florida law, medical negligence actions are currently highly regulated, and, unquestionably, Florida's citizens require the assistance of knowledgeable and experienced attorneys to navigate through the extensive and complicated process. Those attorneys who have worked years to gain expertise in this highly specialized field are certainly entitled to reasonable compensation. If enacted, the proposed amendment will not eliminate the process an injured citizen must follow, but is designed and will undoubtedly eliminate the willingness of counselors to accept the responsibility for such mattes with the economic restrictions imposed."

In his dissent, Justice Lewis briefly summarized several of the obstacles and hurdles a medical malpractice claimant must clear to present a claim and observed:

> "Florida citizens need, and are entitled to, assistance to guide them through this process."
>
> . . . "Unquestionably, without competent counsel, the process is impossible."

> . . . "Without knowledgeable and experienced attorneys to provide representation, the citizens of Florida will have no meaningful access to the courts, and the end result will be that the courthouse door will be open to only those wealthy enough to afford to compensate an attorney on some non-contingency fee basis."

In conclusion, Judge Justice Lewis observed:

> . . . "The chief purpose of the proposed amendment is to render it economically impossible for claimants and their legal representatives to proceed with actions to redress legitimate injuries. With the artificial percentages of recovery mandated by the proposed amendment, unquestionably, legal counselors will be unable to accept responsibility for processing medical actions."
>
> . . . "Every citizen of Florida needs and is entitled to assistance of counsel in all legal matters, particularly in connection with medical negligence actions, and to be free to engage counsel on terms the citizen deems appropriate. . ."

While the majority of this Court obviously disagreed with Justice Lewis under the context of the limited review that was before the Court at the time those comments are certainly pertinent to and right on the money with respect to the issues raised by the Petition now before the Court.

In considering awards for attorneys representing indigents in criminal matters, this Court has recognized the obvious need for attorneys to be fairly compensated for their efforts. In Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), this Court observed:

> ". . . The adage that you 'get what you pay for' applies not infrequently. In our pecuniary culture, the caliber of personal services rendered usually has a corresponding relationship to the compensation provided."
> . . .

This Court in White v. Board of County Commissioners of Pinellas County, 537 So.2d 1376 (Fla. 1989) stated:

> ". . . The relationship between an attorney's compensation and the

> quality of his or her representation cannot be ignored. It may be difficult for an attorney to disregard that he or she may not be reasonably compensated for the legal services provided due to the statutory fee limit. As a result, there is a risk that the attorney may spend fewer hours than required representing the defendant or may prematurely accept a negotiated plea that is not in the best interests of the defendant. A specter is then raised that the defendant received less than the adequate, effective representation to which he or she is entitled, the very injustice appointed counsel was intended to remedy."

The Petitioner must concede the right and the value of litigants receiving the benefit of representation. It would be completely contrary to the above observations of this Court for this Court to enact a rule that would have the effect of eliminating the ability of so many to obtain proper representation for the benefit of a special interest group that has no allegiance to anyone other than its members. It would be impossible for this Court to reconcile adoption of the proposed Rule with the precedent set by these earlier comments.

Certainly, lawyers who represent civil clients are no different than the lawyers that were the subject of this Court's concern regarding the right to competent, diligent compensation in criminal matters. These concerns should be magnified by considering that the proposed amendment has absolutely no effect on the ability of the health care provision to retain and compensate lawyers of their choice.

When Amendment 3 was passed, my firm decided that it could no longer handle medical malpractice claims. Upon further reflection, it became obvious that this was unfair to the many prospective clients who consulted our firm with potential medical malpractice claims. As a result, our firm decided to carefully and accurately inform all prospective clients of their constitutional rights established by Amendment 3 but to also provide those individuals with an option of waiving those rights

and retaining our firm based upon the requirements of Rule 4-1.5(f)(4)(B) of the rules regulating The Florida Bar. To date, every one of those prospective clients has signed the waiver and acknowledged that it would be unreasonable to request a lawyer to handle this type of case under the potential restrictions imposed by Amendment 3.

This Court should play no role in supporting or validating the motives of the Florida Medical Association in depriving the people of Florida the right to bring a medical malpractice action that is justified by the facts and circumstances surrounding their medical care.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via regular U.S. mail this _____ day of July, 2005, to: John Harkness, General Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, and Stephen H. Grimes, Counsel for Petitioners, Holland + Knight, LLP, P. O. Box 810, Tallahassee, FL 32302-0810.

Lake Lytal, Jr.,
Lytal, Reiter, Clark, Fountain & Williams, LLP
515 N. Flagler Drive, Suite 1000
West Palm Beach, FL 33401
(561) 655-1990 Fax: (561) 832-2932
Florida Bar No. 094843