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.
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OBJECTIONS AND COMMENTS OF KENNETH J. MCKENNA, ATTORNEY, FLORIDA BAR NO. 0021024, TO PROPOSED AMENDMENT TO THE RULES REGULATING THE FLORIDA BAR

Kenneth J. McKenna, an attorney in good standing of The Florida Bar, objects to the petition and as grounds therefore states:

1. The undersigned is certainly coming at this issue with a vested interest, as I am a Plaintiff's medical malpractice attorney. I freely disclose my interest at least part because the Petitioner and his signatories make no such disclosure. The most salient argument in opposition to the petition was already articulated by Justice Lewis of this Honorable Court. Justice Lewis accurately observed that Amendment 3 "as written portrays that it will provide protection for citizens by insuring that they will actually personally receive a deceptive amount of all money determined as damages in any medical liability action. However, the Amendment actually has a singular and only purpose of impeding a citizen's access to the courts and that citizen's right and ability to secure representation for a redress of injuries. . .This is truly a wolf in sheep's clothing." *Advisory Op. 2 Atty. Gen. re Comp. Amd.*, 880 So.2d 675 at 683.

2. The Petitioner in essence asks this Court to go far beyond the stated language of the Amendment to correct what the petitioner (read…the Florida Medical Association) perceives to be a loophole in the Amendment. That is, the drafters of the amendment petition apparently failed to consider that victims of medical malpractice could (and would) knowingly waive their constitutional right in order to retain the medical malpractice counsel of their choosing. It is patently disingenuous for the Petitioner to purportedly seeks a right on behalf of a class of people (victims of medical malpractice) and then attempt to control the individual's use of secured right. If in fact a constitutional right exists, then it is the property of the individual and it is wholly inappropriate, if not unethical, for the Petitioner and the Florida Medical Association to attempt to enforce their will on the people.

3. What the Petitioner is really presenting is a one-sided attack on contingency fee agreements in medical malpractice claims. The Petitioner, and the 55 attorneys who signed the petition, are largely serving as the pawns of their clients or benefactors in the medical community. The contingent fee system levels the playing field and allows victims of medical malpractice to retain qualified counsel with the resources necessary to engage in medical malpractice litigation. The fact of the matter is that medical malpractice litigation is so expensive, and so risky, that the vast majority of cases are turned down and the vast majority of those

that proceed to trial result in defense verdicts. These realities, combined with the fee schedule the Petitioner seeks to impose on all medical malpractice attorney-client relationships in the State of Florida will have a chilling effect and essentially bring an end to the pursuit of medical malpractice claims in this State.

4. Furthermore, the Petitioner's position is all the more ridiculous when one considers that the amendment, and this subsequent petition, put no limitations on the resources that can be utilized to defend a medical malpractice claim. So, in a multi-party medical malpractice case the defendants can (and will) spend hundreds of thousands of dollars to defend the claim, yet the victim's team can only spend a comparatively small amount in attorney's fees and costs to get the claim to verdict? Is that fair? Is that protecting the rights of the victim? NO!

5. The simple truth is the litigation of medical malpractice claims is an extremely risky undertaking. As such, there are very few lawyers in this State with the resources and training to pursue medical malpractice claims. Of these lawyers, I have not encountered or spoken to one who believes they can pursue a medical malpractice claim under the "terms" of Amendment 3. My firm simply cannot and will not take cases on Amendment 3 terms. Assuming this to be true, what the Petitioner seeks is for this Court to enter an Order signaling the death of medical malpractice claims in the State of Florida. For, if the victims cannot get lawyers, they cannot bring their claims. And with that, the Petitioner's clients, the doctors

and hospitals of the State, will be free to engage in medical negligence with no fear of accountability or reprisal.

For the foregoing reasons, it is respectfully submitted that the Petition should be denied. If this Court should determine to consider the matter further, it is submitted that the Court should refer this matter to an appropriate committee or panel of experienced appellate and trial counsel to report back to the Court as to the potential issues, interpretations, applications and constitutional implications of the Amendment for further comment, briefing and argument.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and nine (9) copies hereof have been forwarded to the Clerk for filing, along with an electronic copy filed with the Clerk at e-file@flcourts.org; and that a copy has been furnished by U.S. Mail to John F. Harkness, Jr., General Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300, and to Stephen H. Grimes, Counsel for Petitioners, Holland & Knight, LLP, Post Office Drawer 810, Tallahassee, FL 32302-0810, this _____ of September, 2005.

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Kenneth J. McKenna