In The 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 AND OBJECTIONS
TO PROPOSED AMENDMENT TO
RULES OF PROFESSIONAL CONDUCT
BY THE FLORIDA CONSUMER ACTION NETWORK , INC.

A. Introduction

Pursuant to Rule 1-12.1(g) of the Rules Regulating The Florida Bar, the Florida Consumer Action Network, Inc. ("FCAN") submits these comments and objections to the amendment to Rule 4-1.5(f)(4)(B) proposed by Petitioners. FCAN urges this Court to deny the petition for the following reasons:

1. The proposed rule change would limit a consumer's right to contract with an attorney of his or her choice, thus depriving the consumer of the right to freely associate and the right of access to the courts under both the Florida and United States Constitutions.

2. The proposed rule change would eliminate a consumer's ability to make a knowing, intelligent and voluntary waiver of a constitutional right,

as permitted by Article I, Section 26, Florida Constitution, when the consumer believes that such a waiver is in his best interests.

B. Statement of Interest of FCAN

The Florida Consumer Action Network, Inc. (FCAN) is a statewide not-for-profit corporation--a non-partisan grassroots organization which empowers citizens to influence public policy by organizing and educating in those areas in which consumers' interests are implicated and their voices are underrepresented. FCAN values a positive, inclusive approach to issues. FCAN helps build networks of local grassroots organizations and individuals united statewide in a structure based on coordinated autonomy on issues and empowerment of local groups to address their own local issues; to develop low- and moderate-income leadership strategies; to influence public policy; and to present a challenge to social, political, economic and environmental injustice throughout the state.

C. Adoption of Others' Arguments

FCAN agrees with many others who have argued that it would be inappropriate for this Court to address the question of attorney's fees in medical malpractice cases through the adoption of Rules of Professional Conduct, which serve to "provide a framework for the ethical practice of law." Preamble (Scope), Fla. R. Prof. Conduct. Specifically:

1. Even if the proposed amendment accurately reflected the language and intention of Article I, Section 26, §26 does not reflect a moral evaluation of attorney's fees in medical malpractice cases, and this Court already has determined that attorney's fees of greater proportions are not unethical. Therefore, the proposed amendment purports to make policy, not to define rules of ethics.

2. Although this Court hitherto has had exclusive authority to regulate attorneys' fees in Florida, that authority has been pre-empted in part by the adoption of Article I, §26, which was explicitly self-executing. Even assuming *arguendo* that the Court may by rule facilitate the implementation of §26, its interpretation and enforcement present an issue of judicial interpretation in the context of a case or controversy—not a rule of professional conduct.[1] Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), questions of constitutional interpretation are for the courts in a judicial context—not a rulemaking context. One case is already currently pending in the Second Judicial Circuit.

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[1] As the Court is aware: "A statute or a rule may be consistent and compatible with, and may implicate, emulate or expound upon, a constitutional right but should never be confused with the constitutional right and . . . neither the original enactment of a statute, nor adoption of the rule, nor any amendment or repeal thereof, can in any manner reduce or defeat or adversely affect a constitutional right nor detract from it one dot, jot or tittle." *Foster v. State*, 596 So. 2d 1099, 1112 (Fla. 5th DCA 1992), *approved*, 613 So. 2d 454 (Fla. 1993).

3. Numerous complex questions of interpretation also render rulemaking on this question inappropriate, including the supremacy of Medicare liens, the effect of other liens, and the application of §21 to "medical liability cases."

D. Arguments of Importance to Consumers

If the Court decides to undertake an interpretation of Article I, §26 in the course of rulemaking rather than adjudication, FCAN respectfully submits that the proposed amendment would significantly infringe upon consumers' rights. As others have argued, Article I, §26 by its terms creates a personal right in a medical malpractice client; it does not by its terms create any constraints on the client's right to negotiate a contract with the lawyer of his choice. As the Court is aware, "[i]t is fundamental that constitutional rights which are personal may be waived." *In Re Shambow's Estate*, 15 So. 2d 837 (Fla. 1943). This right of consumers to make their own decisions, by contract or otherwise, free of governmental intrusion, is critical to consumers' rights. Absent constitutional prohibition (there is none) or ethical transgression (there is none), United States citizens have the right to waive the most fundamental constitutional guarantees, such as the rights to counsel, to confront witnesses, and to jury trials in criminal cases. At the very least, before undertaking such an intrusive and draconian step,

the Court should await interpretation of Article I, §26 in the context of a case or controversy beginning in the lower courts.

Moreover, the proposed amendment raises significant questions concerning consumers' constitutional rights of access to courts under the due process clause of the federal constitution. As the proponents of §26 intended, the limitations prescribed by §26 would literally put an end to medical malpractice cases in Florida, whether meritorious or not. The best lawyers will find it inappropriate to carry the cost of such a case in light of the recoveries provided, and less skilled lawyers in large measure will be unable to carry such costs, and/or will be less effective in prosecuting such lawsuits. They will certainly not be the counsel of choice of Floridians who are victimized by medical malpractice. Unlike the language of Article I, §26, the proposed amendment would codify these intrusions as a matter of policy—very bad policy.

The proposed amendment's presumed interpretation of §26 raises significant questions of due process and equal protection under the federal constitution, which implicate the rationality of both its objectives and its ability to achieve them—questions which cannot be answered without examination of the legislative record in an adversary proceeding.

These are all fundamental constitutional rights of Florida's citizens.

Impinging on those rights, when no constitutional provision or ethical consideration requires such infringement, is objectionable. FCAN strongly urges the Court not to consider the proposed amendment, or if it does so, to reject it.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of September, 2005, to: JOHN F. HARKNESS, JR., ESQ., Executive Director of Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and STEPHEN H. GRIMES, ESQ., P.O. Drawer 810, Tallahassee, Florida 32302.

Respectfully submitted,

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