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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RESPONSE TO PETITION BY J. STEELE OLMSTEAD

These comments are submitted to the Court pursuant to this Court's order dated June 29, 2005 regarding the petition to amend the Rules Regulating the Florida Bar - Rule 4-1.5(f)(4)(B) relating to contingency fees in personal injury cases:

I am a practicing trial attorney who has litigated liability cases for twenty years as of October 10, 2005 on behalf of both plaintiffs and defendants in the Federal Circuit, State Circuit and Appellate courts of the state of Florida. I do not accept medical malpractice cases in my practice because I have not had the financial wherewithal or staff necessary to litigate such cases.

The purpose of the tort system is to provide remedy a wrong. The purpose of the Amendment Three is to deny or severely impair the means by which a lay plaintiff obtains his or her remedy. This impairment is not justified in view of the horrific number of death and injury due to medical negligence of which the members of this Court are aware. The findings of one major study found medical errors kill some 44,000 people in U.S. hospitals each year. In 1991, an article in the *New England Journal of Medicine* reported the number much higher, at 98,000. A more recent

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study reports the number well above 100,000 per year. Even using the lowest estimate, the statistics are chilling: more people die from medical mistakes each year than from highway accidents, breast cancer, or AIDS combined. There is a medical malpractice crisis, but it's not with lawsuits or the courts. It is one fashioned by the failure of a profession to improve, police and regulate itself.

The insurance industry started in the 1980s with the "public awareness" publicity campaign to attack the right of redress for torts. Having less than full capitulation by the tort system in the court of public opinion, it swept into the legislatures of the States and the Congress of our Nation and lobbied with some success limiting plaintiffs' tort remedy. After so many years, having failed to achieve their ends fully in 2004 however, the Florida Medical Association (with it's half million dollar budget supplement from the major malpractice carrier, F.P.I.C.) persuaded the citizens of Florida to change our constitution with Amendment Three. In this they persuaded those not medical malpractice victims, to "assure" such a victim to get the majority of the fees generated from a medical malpractice claim. Now, having failed because of the flawed language of Amendment Three, these interests now approach this Court for the death of malpractice

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claims by proposing an "ethics" rule with the subject petition. This Petition is yet another of the continuing attempt to decrease the rights of citizens to redress for injury at the hand of a careless, or uncaring, or over-worked physician. This Petition contains the restrictions of Amendment Three folded into an ethical rule. This Petition would bypass the right to waive such right and instead force a lawyer as an "ethical" rule to adhere to the mandates of Amendment Three.

I have observed from my colleagues that litigation of a medical malpractice case takes over two years of very challenging preparation and research. During that time, the odds facing a medical malpractice plaintiff's attorney are daunting. Much of the time, my colleagues pursue such cases, not for filthy lucre, but an honest desire to correct the wrong done by the health care provider with the knowledge their efforts may be rewarded by the redress of a life changing injury and monetary payment for his or her work.

This is not an idle business they pursue. Most medical malpractice litigators are not doctors, and have much self-education to become familiar with the injury sustained and the wherefore of the injury. They spend hours reading the records, contacting

experts and reviewing medical reference texts and studies to confirm what their client believes. Then, the expenditure of their firm's money begins. The costs to purchase the records, at a dollar a page, from hospitals is a mere sting compared to the bills of the experts who must be consulted. These experts who establish the cause of action are an expensive necessity and are paid when they are consulted, not after a verdict and recovery. The exhibits can also be costly. The depositions are all videotaped, lengthy and expensive. All these costs are advanced by the lawyer or his firm and can easily run $50,000 to $150,000 through trial. These trial lawyers, usually face four or five defense lawyers who, as hourly contractors, lack any economic motivation for settlement or resolution and whose costs and fees are paid each month by an insurance carrier with seemingly limitless resources. Those resources include anti-plaintiff publicity provided by such industry funded "astro-turf" grass groups as Americans Tort Reform Association (funded by among others, the American Tobacco Association and American Insurance Association), which poison the average jury panel with at least one of believers of such propaganda.

As a result, the juries we face do not recognize the damage and destruction to lives caused by the negligent health care providers: eighty-five percent (85%) of plaintiffs'

medical malpractice cases result in defense verdicts. With this devastating result, the plaintiff's attorney receives nothing for his or her hours, days, weeks, months and years of hard work and must absorb those massive costs. Such results bankrupt most small solo practitioners and likely cause a hard words among partners in a larger firm. In today's reality, before the subject filing of the subject Petition, injured plaintiffs are already hard-pressed to find a lawyer.

The pending Petition to change the rule to restrict plaintiffs' attorneys fees to 30% of the first $250,000 and 10% of all damages in excess of $250,000 is motivated by a desire of the insurance industry and the medical lobby to deny access to courts for victims of medical malpractice by making it impossible for them to hire an attorney. There are multiple problems with the subject Petition and Amendment Three. Amendment Three violates the constitutional rights of the citizens of this State who are the victims of medical malpractice by impairing their right to courts, because they will have no access to counsel. Further it is the impairment of their right to freely contract with an attorney. That same attorney is competing with other attorneys for the same case and must comport his fees as the market dictates; losing clients when he charges to high a fee and garnering more when his charges are similar or the same as his competitors.

Notwithstanding the disingenuous nature of Amendment Three, the citizens of Florida have, for better or worse, incorporated this insurance industry created provision in our constitution. Much has been said of the "constitutionality" of the provision. While I did not "book" Constitutional Law, I did get a 3.5 and I would posit to those still arguing the constitutionality of the amendment thus: If it's in the constitution, it's constitutional. However, there is no arguing with Amendment Three's conflict with the right of access to the Courts and the right to contract.

It is unquestionable the right to access to courts is a fundamental right. The procedural obstacle course imposed by the laws passed in 1986 during the last manufactured tort "crisis" virtually guarantees a lay person cannot proceed to make claim against an injuring health care provider. To deny a medical malpractice victim a lawyer is to deny that plaintiff a remedy. The only way a medical malpractice plaintiff can afford a lawyer is by contingency contract. The only way an attorney can justify to his accountant or partners representing a plaintiff in a medical malpractice case is by charging a reasonable contingent fee according to the percentages authorized by existing Rule of Professional Conduct 4-1.5(f)(4). To permit a wrongfully injured to go without remedy violates the very justice system we as lawyers and judges are sworn to uphold and denies

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them the access to have their grievance heard.

For all the hyperbole and figures cast about during the campaign, Amendment Three is merely a commercial right granted to plaintiffs in medical malpractice cases to receive a certain percentage of any recovery. Constitutionally speaking, the right made available by Amendment Three is not a "fundamental right," under the Fifth or Fourteen Amendment to the United States Constitution, nor any component of the Florida Constitution. This right, as specialized as that right given to pregnant pigs, is not a fundamental one to Florida citizens. A list of such fundamental rights would include right of privacy, right to educate one's children, right of speech, right to practice religion, a right to control procreation.

The porcine rights bestowed by the pregnant pig amendment, cannot be waived, as the sentient creatures who gave those rights are not the ones who now possess such rights. However, other rights by the gifting sentient creatures to themselves, can be waived by those same creatures. Such constitutional rights subject to waiver, can even include some fundamental ones. Privacy for example can be waived by a conscious, knowing decision such as a revealing dance at a "Superbowl" halftime show or posting private pictures on a public internet site. The right in Amendment Three is no different.

It can be waived.

Notwithstanding it is incongruously a part of Florida's constitution, Amendment Three was flawed in its basis and flawed in it reasoning. For reasons all too familiar to this Court's members, the Amendment Three is worded as requested by its proponents. Those proponents, lobbyists and insurance companies "got what they wanted," in the language what they wanted and had it passed by the citizens and incorporated, as they desired into Florida's governing document. Now, it has proven not to have the effect and mandate its proponents desired. As a result of these failures, this Court is now faced with the pending Petition, a point on the continuum on the assault of the right of redress by powerful economic interests.

As a lawyer who doesn't try medical malpractice cases, but as a contingency lawyer, it appears Amendment Three as embodied in this petition, violates the constitutional rights of practicing trial attorneys by interfering with their rights to contract with clients for a fair and reasonable fee and by denying them due process and equal protection of the law when retained in a medical malpractice case. As a practitioner who makes referrals to medical malpractice attorneys, I am hobbled by the language of the Amendments Three's effects on such practitioners: No one would take my referral of the

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less than catastrophic case. The net result, for the wrongfully injured plaintiff: no lawyer, no access to courts, and no remedy. This is a direct violation of the principal of tort remedy in the justice system and the fundamental right of access to the courts.

The same can be said of this amendment's effect on the right of an injured person's ability to contract with a lawyer in terms on which they can agree. I see no equal rule for the defense bar. There is no statute, rule or regulation which cuts the hourly fee, cuts down on the hours which the insurance company must pay, reduces the photocopying charges, or other costs. Under such circumstances, I believe Mr. Grimes will be able to bill what the insurance company will tolerate. Were that the case in plaintiffs case and a lawyer could earn a living at 30%, or 10% wouldn't this Court see the billboards on the drive in on Appalachee Parkway? In fact we don't. In the defense lawyer's case, the insurance companies pay what the market bears. So, too should the injured malpractice plaintiff. If his or her case is meritorious enough and assured of victory, they would have the whole of the plaintiffs' bar from which to choose at the percentages outlined in Amendment Three. Yet the market will not bear this as lawyers cannot offer services at the rates in Amendment Three as forced on them by the subject Petition. The petitioner, the insurance companies and the lobbyists know this.

Amendment Three also violates the Florida Supreme Court's judicial authority to regulate the legal profession and by imposing unreasonable and unconstitutional discriminatory restrictions on the rights of clients and attorneys in medical malpractice cases as opposed to other personal injury cases.

The pending Petition to amend the rules of professional conduct to reinforce the sloppy language of Amendment Three is simply a "second bite at the apple" for the insurance industry and anti-consumer critics. What those interests were unable to force on the public with Amendment Three, they now seek to have this Court force on the lawyers of this State. To quote the publicity campaign of the insurance industry and physicians' groups during the Amendment three publicity campaign: "Enough is Enough."

Let the injured plaintiff, the personal representative of the comatose former patient, the pained victim, unable to obtain counsel, decide whether to agree to the Draconian terms of the opprobrious Amendment Three. To force this as an "ethical" rule is as specious as the language of and campaign for Amendment Three itself.

The Florida Supreme Court should not allow the rules governing the Florida Bar to be used as an vehicle to destroy the tort system, constitutional rights of a minority of

citizens of this State in order to serve the strong, yet unfair desires of a well organized and very lucrative business interest. (The insurance industry had its most profitable year in 2004, some 41 billion dollars in profit).

The solution to the medical malpractice problem is not to deprive medical malpractice victims of their ability to hire an attorney. The solution to the sloppy language of Amendment Three should not be turning it into an ethical rule. It has nothing to do with ethics and everything to do with the profit margins of an insurance industry which, like the Florida Medical Association and Florida Board of Medicine has failed to stem the deaths from medical mistakes in Florida.

The Court should flatly reject the proposed amendments to Rule 4-1.5(f)(4)(B) and not give the insurance industry another "bite at the apple" further tailoring laws and the constitution and even the Rules promulgated by this Court for the Florida Bar to deprive injured Floridians the right to waive a non-fundamental constitutional right given by the Amendment Three. The rule should stand as written.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing original and an electronic copy as well as eight copies were sent to the Clerk of the Supreme Court of Florida by mail October 3, 2005 pursuant to the Court's Administrative Order: In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84 dated September 13, 2004.

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