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 FLORIDIANS FOR PATIENT PROTECTION, INC.**

A. Introduction

Pursuant to Rule 1-12.1(g) of the Rules Regulating The Florida Bar (hereinafter referred to as the Rules), Floridians for Patient Protection, Inc. ("FPP") submits these comments and objections to the amendment to Rule 4-1.5(f)(4)(B) proposed by Petitioners. FPP urges this Court to deny the petition for any and all of the following reasons:

1. The proposed amendment to the Rules is an attempt to inappropriately interfere with the relationship between victims of medical negligence and their attorneys. The proposed amendment would place the interests of negligent healthcare providers ahead of the interests of the

individual prospective clients by taking away or limiting their ability to retain counsel of their choice.

2. The proposed amendment to the Rules would effectively limit a claimant's constitutional right of access to the courts under both the Florida and United States Constitutions and is thus unconstitutional; and,

3. The proposed amendment to the Rules seeks to restrict a medical liability claimant's ability to make a knowing, intelligent and voluntary waiver of a personal constitutional right, thus providing an extra-constitutional limitation on the claimant's control over that right.

B. Statement of Interest of Respondent FPP

Floridians for Patient Protection, Inc. ("FPP") is a Florida corporation not-for-profit whose members are primarily victims, or the family of victims, of negligence and medical malpractice. FPP is a proactive organization of members striving for justice and change in Florida's medical care system. FPP has, among other purposes, the goal of providing a medium for cooperation among persons to advocate, support and protect the constitutional rights of disabled persons and generally to preserve the constitutional rights of all Floridians to seek full redress of their grievances in the courts; to gather, analyze and disseminate data and

information relating to issues associated with changes in the healthcare, insurance and tort laws of the State of Florida; and to collect and disseminate information, data and statistics to members of the public with respect to public policy issues affecting the rights of citizens under the Florida legal system.

Through this framework of cooperation and remedies, the members of FPP work to ensure the high quality of medical treatment the citizens of Florida expect, demand and deserve.

C. The Proposed Amendment Makes Negotiation of Legal Fees Unethical

The petition begins with an incorrect premise: that negotiations between a prospective client and an attorney on the amount charged and the method of payment is unethical. Upon that premise the Petitioners base their argument that it would be at least unseemly for lawyers to discuss money with prospective clients and, further, that an attorney's refusal to work for the prospective client for the amounts allowed by the proposed rule would be illegal or at least unethical. When it comes to paying a fee for the services of an attorney, the petition seeks a rule which states, in essence, "Victims of medical negligence have fewer rights."

Contrary to the petition, the contingency fee framework is not an

absolute system allowing for no exigent circumstances, no special cases, and permitting no special needs. Indeed, the framework set forth in the current Rules Regulating the Florida Bar is explicit in its understanding that the financial relationship between an attorney and a prospective client is a contract, subject to negotiation, and is the culmination of compromise. This is evident in two provisions.

First, although the Rules contain a maximum contingency fee schedule (which only sets forth a point, above which any fee charged is presumed to be excessive), the Statement of Client's Rights points out to the prospective client that the schedule should not be interpreted as the proper fee and that the actual fee charged depends on negotiations between the prospective client and the attorney. The Statement of Client's Rights sets forth the following in the very first paragraph:

> There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract

This very clear admonition to prospective clients is directly contrary to the Petitioners' argument that to bargain with a prospective client is somehow "unethical." Lawyers and clients enter into a written contract for services. By the very nature of the vehicle of a contract, it must be

negotiated. It is not unethical for a lawyer to negotiate with a prospective client.

The Petitioners have perhaps intended to mean that the act of negotiating and informing the prospective client that the attorney will not agree to represent the prospective client for the amount set forth in the schedule is somehow unethical. More specifically, perhaps the Petitioners intend to say that it is unethical for an attorney to advise a prospective client that he or she will represent the prospective client only if the prospective client gives up the right to receive 70% or 90% of the damages recovered. That position, too, is contrary to the Rules Regulating the Florida Bar since the Rules already provide for situations when a prospective client has been informed that the attorney of the prospective clients' choice will not agree to accept the case for the scheduled percentage. In that circumstance, the Rules provide:

> (ii) 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 the attorney of the client's choosing.

The provision above does not apply only to situations where the prospective client cannot retain any attorney. It applies to situations in which the prospective client's preferred attorney will not work on the case

unless the fee contract provides for a percentage in excess of the scheduled amount. This section presupposes that the attorney has already informed the prospective client that he or she will not represent the prospective client unless the prospective client gives up his or her right to receive the scheduled amount. Since the Rules already anticipate this situation, it cannot possibly be unethical for the situation to exist. It is absolutely proper for an attorney to inform the prospective client what the fee for services will be. It is then up to the prospective client to decide if that particular attorney is worth the price quoted.

Still, it is possible that the Petitioners intended to convey the argument that because the medical negligence recovery schedule is contained in a constitutional amendment, it is sacrosanct and cannot be circumvented by the prospective clients who desire the services of a "preferred attorney." That particular reading of the amendment would mean that every personal injury/wrongful death plaintiff in the state is permitted to negotiate with his or her preferred attorney and come to an agreement on the fee to be charged, even if it means giving the attorney a greater percentage of the recovery. That is, every plaintiff except victims of medical negligence. In the case of victims of medical negligence, the injured person or the personal representative of the estate of the person killed because of medical

negligence is limited to retaining whatever attorney is willing to work for the scheduled amount.

The victims of medical negligence would be forced to have their cases handled perhaps by an attorney they do not trust, or one whose office is 500 miles away, or who just graduated from law school. This special class of victims would be forced to bring their case to whomever will take it, like beggars in the street. When simpler cases yield higher fees with less risk, and when other cases do not require a large expenditure of time and money, very few qualified lawyers will be willing to take on a medical negligence case. While the numbers are subject to debate, the total number of qualified attorneys who are willing to work on medical negligence cases on a restricted fee basis will be smaller than the number who practice that area of the law now.

The Rules Regulating the Florida Bar prohibit attorneys from entering into contracts which restrict the lawyer's right to practice, Rule 4-5.6, because it is of paramount importance that prospective clients be able to retain the lawyer of their choice. Comment to Rule 4-5.6, Rules Regulating the Florida Bar. The inability to pay an attorney has the same effect. A prospective client who is prohibited by law from paying enough to retain a preferred attorney is in the same position as a prospective client who cannot

retain his or her preferred attorney because the attorney is prohibited by contract to work for that prospective client. Either way, the prospective client loses.

D. The Proposed Rule Is an Inappropriate Intrusion into the Patient/Attorney Relationship Which Limits the Patient's Access to Court

As set forth above, the proposed amendment is notable for the fact that it is contrary to several provisions in the Rules Regulating the Florida Bar. The proposed amendment is also notable in that it runs afoul of a provision of the Florida Constitution.

In addition, Article I, section 21, Access to Courts, provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Financial burdens have long been considered an impermissible hurdle when the effect is to restrict access to the courts. Don's Sod Co., Inc. v. Department of Revenue, State of Fla., 661 So.2d 896 (5th DCA 1995); Bell v. State, 281 So.2d 361 (2d DCA 1973). The financial burden in this circumstance is not a charge which prevents access, but a prohibition to pay an attorney to guide the client through the litigation process. The denial of access is just as effective when it prevents the prospective client from retaining an attorney, as when it prevents the prospective client from filing a

lawsuit.

If a prospective client finds that he or she cannot retain the attorney of choice because of the limitations of the 70/90 contract, the proposed amendment to the Rules does not allow for the prospective client to agree to pay more. In fact, the purpose of the proposed amendment is to prevent a waiver of the 70/90 contract and the prospective clients' agreement to pay more. Without a waiver provision, the net effect of the amendment is to deny medical negligence victims access to the courts, a point made by Justice Lewis in his dissent in In re Advisory Opinion to the Atty. Gen. re Medical Liability Claimant's Compensation Amendment, 880 So.2d 675, 683 (Fla. 2004).

E. Victims of Medical Negligence Have the Right to Waive the 70/90 Schedule.

The Petitioners' basic proposition is that the 70/90 schedule cannot be waived. It is, of course, a long standing rule that an individual may waive a constitutional right. In Re Estate of Shampow v. Shampow, 15 So.2d 837 (Fla. 1943). However, a constitutional right which protects a substantial public interest cannot be waived unilaterally by the most affected individual. Singer v. United States, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965); Hartwell v. Blasingame, 564 So.2d 543, 545 (Fla. 2d DCA 1990).

On this point, the Petitioners are skewered by the tactic they used to get the approval of this Court to have the amendment on the ballot. In re Advisory Opinion to the Atty. Gen. re Medical Liability Claimant's Compensation Amendment, 880 So.2d 675, 683 (Fla. 2004). In that decision, this Court approved the initiative because the wording applied to a very simple concept of the rights of an individual, stating (Id. at 677):

> While we find the proposed amendment at bar to be extremely brief, we also find its language to be straightforward as to who it affects or who is involved in its implementation.

The proponents of the constitutional amendment portrayed the purpose as an attempt to benefit only plaintiffs in medical negligence cases. As was pointed out by Justice Lewis in his dissent (880 So.2d 675, 682-83 (Fla. 2004):

> The sponsors of the proposed amendment assert that the chief purpose of the amendment is to guarantee that a claimant for medical liability with a contingency fee agreement will receive no less than seventy percent of the first $250,000 in damages and ninety percent of damages in excess of $250,000, exclusive of reasonable and customary costs and regardless of the number of defendants. Clearly, the proposed amendment as written portrays that it will provide protection for citizens by ensuring that they will actually personally receive a deceptive amount of all money determined as damages in any medical liability action.

Since the purpose of the constitutional amendment was described to this Court as only benefiting the individual plaintiff, and to ensure that the

individual plaintiff gets a greater share of the recovery, there is no public interest in whether the plaintiff actually gets more of the recovery. The individual who was given the right should be able to waive that same property right. It affects only that one person.

The fact that the right to limit a contingency fee is an individual right subject to waiver is bolstered by the provision in the current rules which allow a prospective client to petition the court to allow the prospective client to enter into a contract for more than the scheduled percentage. The fact that such a petition is allowed indicates that it is an individual right, the waiver of which is of no interest to anyone else. Regardless of whether the right is contained in the Rules or in a constitutional amendment, the nature of the right to negotiate with the attorney is obviously personal to the prospective client.

Finally, it should be pointed out that when this Court considered the ballot initiative, the proponents never discussed whether the right created could or could not be waived by the victim of medical negligence. This Court approved the wording of the summary, writing that

> …the title and summary must be accurate and informative. See Advisory Opinion to the Attorney Gen. re Term Limits Pledge, 718 So.2d 798, 803 (Fla.1998). These requirements make certain that the "electorate is advised of the true meaning, and ramifications, of an amendment." Advisory Opinion to the Attorney Gen. re Tax Limitation, 644 So.2d 486, 490

(Fla.1994) (quoting Askew v. Firestone, 421 So.2d 151, 156 (Fla.1982)).

In re Advisory Opinion to the Atty. Gen. re Medical Liability Claimant's Compensation Amendment, 880 So.2d 675, 678-679 (Fla. 2004). This Court concluded that it could find no "material or misleading discrepancies between the summary and the amendment." Id. At 679.

However, now that the proponents of that constitutional amendment have come forward again and argued that the right created by the amendment cannot be waived, it is clear that the summary of the amendment and the wording of the amendment did, in fact, contain misleading discrepancies. If the text of the amendment had been accurately written, at least in accordance what the proponents now claim was the intent, the text would have included a statement that the right could not be waived. The summary of the ballot initiative was similarly misleading, since it did not point out that the right created could not be waived. If that critical piece of information had been included, it is doubtful that the electorate would have been as eager to approve the constitutional amendment. At the very least, the knowledge that the amendment was going to irrevocably take away the rights of other people would have caused the voters to consider the matter more carefully before casting their vote. Since all constitutional personal

rights may be waived, a finding by this Court that the right discussed herein cannot be waived amounts to a re-writing of the amendment after the election.

Conclusion

This Court should not approve the proposed amendment to the Rules Regulating The Florida Bar. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to JOHN F. HARKNESS, JR., ESQ., Executive Director of The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-2300; and STEPHEN H. GRIMES, ESQ., P.O. Drawer 810, Tallahassee, FL 32302, by mail, this 29th day of September, 2005.

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