May 25, 2005
Via facsimile (850) 223-1991

Gregory Stuart Parker
The Parker Law Firm
315 West Green Street
Perry, FL 32347

Re: Petition to amend Rule 4-1.5(f)(4)(B)

Dear Mr. Parker:

I. Introduction:

This letter addresses the proposed amendment to Rule 4-1.5(f)(4)(B), which seeks to add subsection (iii). We understand it will be discussed by the Disciplinary Procedure Committee at a meeting later this week. We urge the DPC to recommend that The Florida Bar take a strong position urging the Supreme Court to reject the amendment. This letter outlines four main reasons why the DPC should take that position against the amendment.

To begin with, the petition improperly attempts to employ a procedural privilege granted to members of The Florida Bar to seek rule changes concerning matters of professional regulation and ethics in order to effect an unwarranted substantive change in the law. The lawyers who signed as so-called Petitioners in this matter are instead advocates for their undisclosed client at whose behest the petition was filed: The Florida Medical Association ("FMA"), along with their allies.[1] Further, the application and interpretation of Amendment 3 raises substantial legal questions yet to be litigated in the courts of this state. Any consideration of a change to the rule should await the outcome of such litigation.

Second, the proposed amendment to Rule 4-1.5 is premised on the proposition that Amendment 3 to the Florida Constitution approved by the voters last November limits the fees, and only the fees that attorneys representing successful medical malpractice plaintiffs can recover on a contingency basis. That disputed proposition remains to be litigated in the courts of Florida, so a rule approved by the Florida Supreme Court that seems

[1] While not disclosed originally, it is now undisputed that this is the case.

to recognize the validity of that undecided underlying proposition could be misconstrued as authority for the proposition itself, thereby prejudicing the parties to the litigation in which the effects of Amendment 3 are to be decided.[2]

Next, the proposed subsection (iii) of Rule 4-1.5 is premised upon the as-yet untested federal constitutional validity of Amendment 3, if it should be held by a court of law in a binding judgment that Amendment 3 does operate to cap contingency fees. There are numerous serious constitutional challenges likely to be raised against enforcing Amendment 3 as a cap on contingency fees, including impairment of clients' rights to due process, freedom of association, equal protection, access to courts, as well as violations of the Supremacy Clause. Those challenges will require extensive litigation and appellate review that likely cannot be completed until long after consideration of this proposed amendment. It would be unwise for The Bar to approve, and the Florida Supreme Court to adopt, a Rule Regulating The Florida Bar that is hinged exclusively upon such unsettled questions of law. Similarly, a rule that prevents judicial approval of departure fees, if adopted, would amount to an inappropriate advisory opinion prematurely issued to the courts and lawyers of this State impliedly answering those unresolved constitutional questions.

Finally, even assuming for the sake of argument the correctness of both of the FMA's underlying premises concerning the interpretation and application of Amendment 3—that it serves to cap contingency fees and that such caps pass constitutional muster—the FMA-backed petition should be rejected because it tramples upon a very basic right under both the Florida and federal constitutions: the right of citizens to knowingly waive one constitutional right, in order to more fully exercise another such right more valuable to the holder of both those rights.

Each of these reasons why the DPC and the BOG should recommend rejection of the proposed amendment are addressed in more detail below.

II. The Purported "Petitioners" Failed to Disclose in the Petition Itself or in the Submission to the Court and the Bar that They Were Acting on Behalf of and at the Behest of a Non-Lawyer Client, who Would Gain a Litigation Advantage if their Amendment

[2] For the Court's information several of the legal questions regarding the application and interpretation of Amendment 3 are now pending in the Circuit Court in Leon County in a matter styled Graulich v. State of Florida, Case No. 37 2005 CA 001285.

Were Adopted:[3]

Rule 1-12.1(f), Rules Regulating The Florida Bar, provides that the amendment process may be initiated by 50 members of the Bar. Such a petition should have as its aim the achievement of the purpose of The Florida Bar: "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." The purpose of such a petition should not be merely to serve a particular client's interest.

In this instance, the DPC has received notice that 55 members intend to petition the Court for a change in the existing rules. The petition itself highlights the context of this proposed amendment to consider the client advocacy positions of the vast majority of the petitioning lawyers: 19 lawyers in one firm (Holland & Knight LLP), acting at the direction of a tort "reform" client, the Florida Medical Association (FMA), 3 employees of FMA, 21 lawyers who are current or former registered Tallahassee lobbyists for tort "reform" principals, 4 employees of FPIC, Florida's largest medical malpractice insurer, and 11 lawyers at the firm of lawyers who are registered lobbyists for FPIC (Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.). Thus, it is clear that this is not a disinterested petition to improve the administration of justice, but a bold attempt to seek a litigation advantage against their opponents in court and interfere with the ability of a victim of medical malpractice to obtain representation by a member of The Florida Bar.[4]

The failure to reveal that the petition reflects advocacy on behalf of a client in the petition itself is a serious problem. Ethics scholars have condemned similar conduct. *See, e.g.*, Richard D. Rotunda and John S. Dzienkowski, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE (Thomson/West 2005), in which the authors/law professors note as follows:

> The lawyer should not purport to represent only a pro bono client's interests, or only her own personal interests, if she is also

[3] "Disclosure" did occur in a *Florida Bar News* article published on April 30, 2005 and now in other contexts as well.

[4] Through this proposed amendment it is now apparent that the sponsors of Amendment 3 chose to hide from the Supreme Court and the voting public that it was their plan to use Amendment 3 to prevent Florida medical malpractice victims from employing, on the terms of their choice, the counsel of their choice. The petition's attempt to prohibit waiver departs from settled rules of constitutional construction on the waivability of personal constitutional rights, which voters last November properly could have assumed applied with full force. Only now do the proponents reveal that Amendment 3 was a Faustian bargain with no escape. If adopted, it will prevent many meritorious malpractice cases from being filed and, for all practical purposes, abolish medical malpractice litigation.

> simultaneously representing a private client on the matter in question. ***If the lawyer is really representing XYZ Corp., she may not pretend to be representing only her own views when advocating changes in the law or engaging in other pro bono activities***. If the lawyer is representing a private client while appearing before a legislative committee and asking for law reform, the lawyer may not mislead the committee as to the true identity of the client."

Id. at 90 (citing Rules 3.9, 4.1(a), 6.4, ABA Model Rules of Professional Conduct and DR 7-106(B))(emphasis added). *See also generally* Rule 4-3.9, Rules Regulating The Florida Bar (entitled "Advocate in Nonadjudicative Proceedings"), which states: "A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding ***shall disclose that the appearance is in a representative capacity*** and shall conform to the provisions of Rules 4-3.3(a) through (c), 4-3.4(a) through (c), and 4-3.5(a), (c), and (d)." (emphasis added). Professor Charles W. Wolfram explains that such a requirement in the ethical rules "prevents lawyer-lobbyists from masquerading in the role of concerned citizen in supporting or opposing legislation or other policy." Charles W. Wolfram, MODERN LEGAL ETHICS 751 (West Group 1986).

Whether petitioners agree with their client or not, the fact that the petition was filed in a representative capacity colors it in ways that are important to this Committee's consideration. In weighing the need for proposed action, the DPC should take into account the fact that the real party in interest is a client with a pecuniary interest in the matter.

That said, three additional, and very substantial, reasons remain why The Florida Bar should recommend that the Court reject the proposed amendment to Rule 4-1.15(f).

III. The Amended Rule Should Be Disapproved Because It is Based on the Disputable Notion That Amendment 3 Caps Contingency Fees, and Just Fees:

Because the proposed rule change would carry with it the implication that The Florida Bar and the Florida Supreme Court agree with FMA's position that Amendment 3 caps contingency fees, and contingency fees alone, in medical malpractice cases, the DPC should recommend disapproval of the proposed amendment. Such a construction would preclude judges—under any

and all circumstances—from ***ever*** being able to consider requests to approve fee agreements for contingency fees in excess of the percentage figures remaining after the plaintiff receives the designated amounts in Amendment 3, regardless of the impact of other claims on the plaintiffs' judgment.

It is obvious that the FMA's proposed amendment to Rule 4-1.5 is premised on that proposition that Amendment 3 limits the fees that attorneys representing successful medical malpractice plaintiffs can recover on a contingency basis. The caps on legal fees imposed under the requested revisions to Rule 4-1.5 are thirty percent (30%) of the first $250,000 and ten percent (10%) of the balance of the recovery. Those are the amounts left over after subtracting the correlative percentages that the plaintiff is "entitled to receive" (seventy percent (70%) of the first $250,000 and ninety percent (90%) of the excess of the recovery, exclusive of reasonable and customary costs) from a malpractice settlement or judgment.

To be sure, Amendment 3 makes no mention of attorneys' fees at all. No plain reading supports the notion that Amendment 3 limits those fees to the percentages sought as absolute caps in the proposed modification to Rule 4-1.5. Amendment 3 arguably places a cap on the amounts by which awards can be reduced for things other than attorneys' fees: third-party claims against the verdict or settlement amounts, such as subrogation claims, Medicare liens, hospital liens, and other claims. If the 30% and 10% figures cap such claims, and not on attorneys' fees, the assumption underlying the fee cap percentages in the pending petition is unsound. Even if it embraces all of the above, the petition insensibly applies the percentages to attorneys' fees alone. The impact of Amendment 3 on these various claims is sure to be litigated soon, but remains unresolved at this time. A rule based on the Amendment makes no sense before the courts confront these complex legal issues.

Were The Florida Bar to approve, and the Supreme Court to adopt, the proposed rule change, the rule would doubtless be cited as impliedly recognizing the effect of Amendment 3 which the FMA advances. The purpose of the Rules Regulating The Florida Bar is not to serve as legal advice or authority on contested questions of law, and the amendment to Rule 4-1.5 would inappropriately be cited as an advisory opinion on such an unsettled legal issue. The proposed amendment of the rule on contingency fees is premature and should be disapproved.

The portions of these comments which indulge the Petitioners' underlying assumption—that Amendment 3 purports to set the maximum contingency fee percentages in medical malpractice cases—should not be construed as conceding the accuracy of that assumption. While we believe that Amendment 3 does not cap contingency fees, this is not the time or place to address the substance of those arguments.

IV. The Proposed Rule Change Should Be Disapproved Because It Is Hinged on Untested Legal Arguments That Amendment 3 is Federally Constitutionally Valid:

The next reason why the proposal should be disapproved is because that proposed rule change is hinged on still more untested legal arguments that–should the courts interpret amendment 3 as capping fees in malpractice cases–such an interpretation would be valid under the U.S. Constitution. Should The Florida Bar and the Florida Supreme Court approve a rule change that necessarily assumes the constitutional validity of such an interpretation of Amendment 3, that rule would stand (or at least be held up) like an advisory opinion for the lower courts that our Supreme Court finds no constitutional infirmity in Amendment 3. However, that implicit advisory opinion will have been rendered without any real party in interest actually litigating the constitutional claims which—even assuming that the effect of Amendment 3 is to cap contingency fees—could well spell the demise of Amendment 3 *in toto*. Whether or not a rule change is required must await final adjudication of these issues by the courts of this state.

Because this is not the forum to litigate the federal constitutional claims (either those for or against enforcement of Amendment 3), this comment will simply touch on some of the most obvious of those legal issues, in order to demonstrate the potential viability of a challenge to the FMA's reading of Amendment 3. If Amendment 3 caps contingency fees, it is less likely that a typical client will be able to engage his or her choice of legal counsel in a medical negligence case. Some clients with meritorious malpractice claims will be effectively precluded from retaining competent, experienced lawyers. To impair or negate a civil litigant's right to retain chosen counsel offends several very fundamental constitutional rights we hold dear.

One of the sources of the right of civil litigants in state courts to engage counsel is the Due Process Clause of the Fourteenth Amendment. The Eleventh Circuit Court of Appeals and the United States Supreme Court recognize a due process right to counsel in civil cases, so long as the client can afford to engage a lawyer:

> While case law in the area is scarce, ***the right of a civil litigant to be represented by retained counsel, if desired, is now clearly recognized***. See *Goldberg v. Kelly*, 397 U.S. 254, 270-71, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (welfare recipient must

> be allowed to retain an attorney at welfare termination hearing if recipient so desires); *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 256-57 (1st Cir. 1986); *Indiana Planned Parenthood Affiliates Assoc. v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117-19 (5th Cir.), *cert. denied*, 449 U.S. 820, 66 L. Ed. 2d 22, 101 S. Ct. 78 (1980). Recognition of this right can be traced back to the Supreme Court's holding in *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932), where the Court held that "if in any case, ***civil or criminal***, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that ***such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense***." *Id.* at 69 (emphasis supplied). . . . "***A civil litigant's right to retain counsel is rooted in fifth amendment notions of due process*** . . . . In both [civil and criminal] cases the litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceedings against him." *Potashnick*, 609 F.2d at 1118. Finally, "in each instance, ***the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement***." *Id.*

In Re Bellsouth Corp., 334 F.3d 941, 955-56 (11th Cir. 2003) (emphasis added). Other courts have similarly recognized such a right to counsel of choice in civil cases. "Parties normally have the right to counsel of their choice, so long as the counsel satisfy required bar admissions . . ." *Cole v. U.S. Dist. Court*, 366 F.3d 813, 817 (9th Cir. 2004).

Another constitutional right which might very well be asserted in a constitutional challenge by a prospective client unable to retain counsel due to such an interpretation of Amendment 3 is found in the First Amendment's right to associate freely with others of our choosing. "[O]ne of the most important associational freedoms that a person may have [is] the right to choose one's own lawyer." *Kusch v. Ballard*, 645 So. 2d 1035, 1036 (Fla. 4th DCA 1994) (Farmer, J., concurring). The Fifth Circuit has held that government action that interferes with the client's right to be represented by counsel of their choosing violates "the affected parties' First Amendment freedom of association," and noted that "these ***rights are important ones and***

will yield only to an ***overriding public interest***." *United States v. Gopman*, 531 F.2d 262, 268 (5th Cir. 1976)(emphasis added)(disqualification order).

In the event that the fee caps assumedly imposed by Amendment 3 can be shown to prevent a prospective client from being able to retain counsel to assist her in obtaining meaningful access to courts, that deprivation could be found to constitute a denial of additional rights under either the First or Fourteenth Amendment. *Compare Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985)(describing applicable law).

Medical negligence cases under Florida law are much more complex than the simple proceeding reviewed in *Walters*, where the Court found no violation occurred because of a failure of proof and because the proceedings at issue did not require a lawyer's representation. On the other hand, it would be impossible for the vast majority of clients to navigate the hazards of the medical malpractice statutes. "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." *Advisory Opinion to the Attorney General Re: The Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675, 683 (Fla. 2004)(Lewis, J., dissenting)(emphasis added). The appellate courts "have recognized that while the procedures were not designed to function as traps for the litigants, they have nonetheless become just that—a trap. . . . *Zacker v. Croft*, 609 So. 2d 140, 141-42 (Fla. 4th DCA 1992). Unquestionably, ***without competent counsel, the process is impossible***." *Id.* (emphasis added).

There are a variety of other constitutional challenges which are likely to be litigated in cases involving the purported fee caps under Amendment 3. By way of illustration, and not of exclusion, one of those federal constitutional provisions which the courts could find to have been violated includes the Supremacy Clause. U.S. Const. Art. VI, cl. 2. (while Amendment 3 purports to guarantee claimants 70 percent of the first $250,000 awarded in their claim and 90 percent of any amount above $250,000, it cannot do so, at least to the extent that such guarantees conflict with claims that the federal government may have under Medicare Secondary Payor statute, 42 USC § 1395y(b)(2)).

Other likely constitutional challenges which consideration of any rule amendment should await include those under the Equal Protection Clause:

U.S. Const. amend. XIV, § 1 (no State shall "deny to any person within its jurisdiction the equal protection of the laws"). Those with potential claims are likely to argue that Amendment 3 unconstitutionally treats clients subject to federal liens on any recovery differently than it treats clients fortuitous enough to have liens held by non-federal hospitals or others, with a concomitant impact on the plaintiff's attorney's compensation for the representation.

Others who may argue that they have been denied equal protection include the funding providers themselves, as the federal government's guarantee of full repayment of any Medicare liens will leave hospital and other lienholders in an inferior position in seeking recompense from a final judgment. Still others are almost certain to argue that Amendment 3 unconstitutionally treats plaintiffs' counsel differently on the basis of whether they charge a contingency fee or charge on an hourly or flat-fee basis, and places plaintiffs at a disadvantage to their defendants across the courtroom, who are paying their lawyers by the hour.

Adoption of the proposed amendment to Rule 4-1.5 presupposes the judicial rejection of all the foregoing constitutional arguments and others like them. The proposal should be disapproved.

V. The Proposed Amendment Should Be Disapproved Because It Would Interfere With Florida Citizens' Right to Waive Whatever Right to Capped Fees As May Be Found To Have Been Created By Amendment 3, and To Exercise Other, More Valued Rights Instead:

The final area in which the FMA-sponsored amendment to Rule 4-1.5 runs counter to Florida and federal law and public policy is that it presumes without any basis that a medical malpractice plaintiff cannot waive any rights which he or she may have acquired with the passage of Amendment 3. Florida and federal cases uniformly hold that rights bestowed under the state and federal constitutions can be waived, including rights more basic to our system of justice. There is no support for the proposition inherent in the proposed rule change that whatever a plaintiff's rights may be under Amendment 3 they cannot be waived.

As with the federal constitutional claims, even if it should be decided that Amendment 3 caps attorneys fees, it is almost a certainty that plaintiffs in medical malpractice cases will seek declaratory judgments that they, and

others similarly situated, may validly waive the right to insist upon those attorneys' fee caps and choose to pay a higher percentage to counsel of their choosing, provided that any such waiver be knowingly and voluntarily given, after full disclosure of the client's right to decline such a waiver. Their right and ability to waive any protections which may be found to have been created by Amendment 3 should be no less available than their right to waive protections afforded by other constitutional provisions affecting medical liability claimants, such as their option to waive their "inviolate" right to a jury trial under Art. I, Sec. 22.

There is nothing about the "right" assumedly established by Amendment 3 that is deserving of different treatment than any other right under the state or federal constitutions. A defendant in a criminal case may waive just about any right, even though his or her liberty, and life itself, hangs in the balance. See *Tucker v. State*, 417 So. 2d 1006 (Fla. 3d DCA 1982), in which the court held that a criminal defendant may waive even fundamental rights, such as the right to rely on an expired statute of limitations, so long as the waiver meets appropriate safeguards: "Waiver of any fundamental right must be express and certain, not implied or equivocal." *Id.* at 1013.

Such waivable fundamental rights include the right to remain silent. *E.g. Philmore v. State,* 820 So. 2d 919 (Fla. 2002); *Groomes v. State*, 401 So.2d 1139 (Fla. 3d DCA 1981)(waiver of right to twelve person jury in murder case); *Sessums v. State*, 404 So.2d 1074 (Fla. 3d DCA 1981) (waiver of jury trial). Other seemingly fundamental rights may be waived by counsel, or without the waiver being made on the record. *E.g. Brown v. State,* 894 So. 2d 137 (Fla. 2004)(waiver of defendant's right to testify on his own behalf).

There is nothing in Amendment 3 to indicate that it purports to vest some sort of "super right" which cannot be waived. Even if it were to contain such a provision, that would conflict with a more fundamental right to select which rights are more important to a given client: the right to retain counsel of choice at a reasonable fee or the "right" to be represented by less experienced counsel who can afford to take cases at a fraction of a fair fee in order to obtain experience. Clients should not be forced to be guinea pigs for legal experiments, which is what the FMA version of Amendment 3 would do. The faulty premise that assumed fee caps cannot–or should not–be waived is yet another reason why The Florida Bar should not adopt the FMA amendment to

Rule 4-1.5.[5]

[5] It is plainly clear that in the "political" effort to pass Amendment 3 the FMA and the lawyers who drafted the language either forgot that constitutional rights can be waived or, worse, simply did not care. Had the Amendment actually said what the proposed rule would accomplish it may very well have been that the voters would have rejected the amendment. It is not for the Florida Bar or the Supreme Court to fix this error by the proponents of Amendment 3. Again, the legal interpretation of Amendment 3 must be litigated and judicially determined.

VI. Conclusion:

The Florida Bar should disapprove the proposed amendment to Rule 4-1.5 for four reasons. First, the rule would improperly put a substantive legal change into the ethical rules at the behest of a party that stands to gain a litigation advantage from the change. Second, the change would inappropriately serve as an advisory opinion on a contested legal issue concerning whether Amendment 3 can be read to cap fees. Third, the proposal is premised on the dubious presumption of the federal constitutionality of Amendment 3, an issue that remains to be litigated by parties with real cases before the courts. Fourth, the proposal goes far beyond any possible reading of the effect of Amendment 3 itself, by precluding knowing waivers of rights less fundamental than those waived in courtrooms across the state on a daily basis. The proposed rule change is ill-conceived and should be soundly rejected.

Respectfully submitted,

COKER, MYERS, SCHICKEL,
SORENSON & GREEN, P.A.
136 East Bay Street
Jacksonville, Florida 32201
(904) 356-6071

By_____
Howard C. Coker

GROSSMAN AND ROTH, P.A.
2665 South Bayshore Drive
Penthouse One
Miami, Florida 33133
(305) 442-8666

By_____
Neal A. Roth