SUPREME COURT OF FLORIDA

Case No. SC05-1150

In Re: Petition to Amend Rule
Rule 4-1.5(f)(4)(B) of the
Rules of Professional Conduct
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RESPONSE OF CHRISTIAN D. SEARCY ON BEHALF OF THE 21 MEMBERS IN GOOD STANDING OF THE FLORIDA BAR WHICH CONSTITUTE THE LAW FIRM OF SEARCY DENNEY SCAROLA BARNHART AND SHIPLEY, P.A.

CHRISTIAN D. SEARCY, ESQUIRE, on behalf of the 21 lawyers in the firm of Searcy Denney Scarola Barnhart and Shipley, P.A., responds in opposition to the Petition as set forth below. The comments are joined in by 21 members in good standing of The Florida Bar whose names and Florida Bar Numbers are attached, who practice in the Law Firm of Searcy Denney Scarola Barnhart and Shipley, P.A.

1. No Florida citizen ever voted to impair his or her freedom to contract for representation by an attorney of his or her choice. The voters were never told a vote for Amendment 3 would be a vote to impair their right to freely contract for the lawyer of their choice on terms mutually agreeable to both parties.

2. If the Court enacts the petitioned for rule change, it will severely impair the right of a victim of medical malpractice to freely contract for representation by an attorney of choice.

3. Christian D. Searcy, Esquire has handled plaintiffs' medical malpractice cases in Florida for over 25 years. The collective experience in the medical malpractice field of the Bar members joining in these comments is over 300 years. We cannot conceive of any contested liability medical malpractice case that would be economically feasible to handle, or our firm would be willing to handle, for a fee of 30% of the first $250,000 of recovery and 10% of the remainder of recovery (hereinafter, 30/10%).

4. We do not know of any competent, experienced law firm in Florida that could conduct a practice representing medical negligence victims in contested liability medical malpractice cases for a 30/10% fee.[1]

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[1] Representing the victim of medical malpractice in a civil action in which liability is contested is one of the most difficult forms of civil litigation. Our firm reviews and rejects perhaps a dozen cases for every one we accept, but even rejected cases may require extensive time and effort plus the expenditure of tens of thousands of dollars in investigative costs and expert consultation fees. Accepted cases must not only carry the economic burden of their own prosecution, but they must also help to defray the costs both of reviewing rejected cases and defraying the unrecoverable expense of any contingency fee cases that are not successfully prosecuted to enable a firm to make its services available to injured victims. Accepted cases commonly require thousands of hours of attorney time, as well as thousands of hours of staff time. A medical negligence case that goes through a jury trial will probably require the plaintiff's attorney to advance between $100,000 and $600,000 in costs. Healthcare providers by statute and common law are offered more protection than virtually any other civil defendant. See Chapter 766 Florida Statutes. That protection compounds the cost and complexity of prosecuting medical malpractice claims. A malpractice victim may not sue a

5. Under the proposed Rule change, what happens to a victim of medical malpractice when no lawyer will accept his or her representation, because no lawyer is willing to undertake such a complex, time consuming, costly, risk-laden case for 30/10%? The answer is simple. Victims of medical malpractice in Florida will be unable to obtain quality representation (or perhaps any representation at all) and they will lose any meaningful access to the Court for redress of their grievances.

6. The Petition attempts to involve the Court in a "bait and switch" scheme of monumental proportion to dupe the Florida voter. Floridians purportedly voted for a measure which would enhance their position as injured victims (by obtaining a larger percentage of a medical malpractice recovery). If enacted, however, the proposed Rule change will put them in a much worse position (unable to obtain a lawyer; therefore, unable to make any recovery at all). They will be left with an unwaivable constitutional right to a larger percentage of zero. Make no mistake about it, if injured malpractice victims

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healthcare provider unless, and until, the victim has satisfied the requirements of a 90 day presuit process. The 90 day presuit process cannot be commenced until the victim has obtained expert review and provided verified opinion(s) of expert witness(es). If the plaintiff's attorney loses this most difficult form of civil litigation, he loses the hundreds of thousands of dollars he has advanced in costs and gets paid nothing for the thousands of hours of time advanced by attorneys and staff. We cannot conceive of a well qualified and experienced attorney providing the kind of representation necessary to win a meritorious but contested liability medical malpractice suit for a 30/10% fee.

are not allowed to waive their rights under Amendment 3, they will be unable to hire competent, experienced lawyers and will have no meaningful access to the Courts.

7. Floridians can and should be allowed to knowingly waive their right to 70/90% of their medical malpractice recovery if it is necessary for them to do so to retain the lawyer of their choice. Accordingly, the Court should reject the Petitioned Rule change.

8. The Florida Bar has long advocated, and this Court has staunchly upheld, the right of the client to select the lawyer of his or her choice. The proposed Rule change would impair the client's freedom to contract for the lawyer or his or her choice.

9. The present Bar Rule provides safeguards to ensure the client's freedom to contract for the lawyer of his or her choice in Rule 4-1.5(d)(B)(ii),

> If any client is unable to obtain an attorney of the client's choice, because of the limitation set forth in subdivision (f)(4)(B)(i), the client may petition the Court in which the matter would be filed, if litigation is necessary, or if such Court would not accept jurisdiction for the fee division, the Circuit Court wherein the cause of action arose, for approval of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the Court determines the client has a complete understanding of the client's rights and the terms of the proposed contract…

10. There appears to be no doubt in Florida that individual constitutional property rights can be waived in certain circumstances. As this Court has held, "It is fundamental that constitutional rights which are personal may be waived." In Re: Shampow's Estate v. Shampow, 15 So.2d 837 (Fla. 1943)(right to jury trial). In City of Treasure Island v. Strong, 215 So.2d 473, 479 (Fla. 1968), the issue was a property holder's constitutional right not to be subject to a special assessment lien in excess of the benefits accruing to the property. In concluding that the property owner had waived those rights, the Court stated (215 So.2d at 479):

> It is firmly established that such constitutional rights designed solely for the protection of the individual concerned may be lost through waiver, estoppel or laches, if not timely asserted.

See also Bellaire Securities Corp. v. Brown, 168 So.2d 625, 639 (Fla. 1936)("a party may waive any right to which he is entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution"); S.J. Business Enter., Inc. v. Colorall Technologies, Inc., 755 So.2d 769, 771 (Fla. 4th DCA 2000)("the law has long recognized an individual's right to waive statutory protections, as well as constitutional or contractual rights").

11. The most common means by which members of the public waive constitutional rights is when they execute a contract containing an arbitration provision. The Florida Supreme Court has noted that by submitting to arbitration, the party waives its constitutional rights to trial by jury, due process, and access to the Courts. Seifert v. US Home Corp., 750 So.2d 633, 642 (Fla. 1999).

12. The conclusion that contingent attorney fee caps can be waived by the client is supported by the decision, In Re: Estate of Salerno, 630 A.2d 1386 (Conn. Superior Ct. 1993). In that case, a conservator sought to bring a tort action based on her husband's disability, and sought leave to waive the statutory attorney's fee cap that had been enacted as part of Connecticut's tort reform legislation. The conservator raised various constitutional challenges to the statutory cap, but the Court decided the case solely on the basis that it could be waived. The Court noted the general rule that "rights granted by statute may be waived, unless the statute is intended to protect the general rights of the public, rather than private rights." (630 A.2d at 1389-90). The Court concluded that the statutory right at issue was merely a private right, stating,

> The fee cap statute, enacted as part of the tort reform legislation adopted in 1986, clearly confers a private

> right on plaintiff's bringing tort actions. By limiting the attorney's fees of plaintiffs, the statute was intended to increase the portion of the judgment or settlement that was actually received by the plaintiffs. 29 S.Proc., Pt. 10, 1986 Sess., pp. 3465-66. The statute does not protect the general rights of the public. It confers a private right only on those who file tort actions. The fee cap statute therefore satisfies the general rule regarding when statutes can be waived.

630 A.2d at 1390.

The Court determined the conservator had the right to waive the statutory fee cap, and that she had a full understanding of those rights sufficient to permit waiver:

> It is clear from her testimony before this Court, as well as from her testimony before Judge Nevas in the Federal Court, that she understands her rights under the fee cap statute and that she has freely and voluntarily waived her rights under that statute. The Court finds further that the proposed fee agreement is reasonable.

(Id).

13. For the above reasons, the Court should Deny the Petition to Amend Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct.

WHEREFORE, CHRISTIAN D. SEARCY, ESQUIRE, on behalf of the 21 Florida Bar Members in SEARCY DENNEY SCAROLA BARNHART &

SHIPLEY, P.A., respectfully requests the Honorable Court to Deny the Petition.

I HEREBY CERTIFY that the original, as well as eight copies were furnished by Federal Express to the Clerk of The Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399-1927 and was electronically filed (e-file@flcourts.org), as well as a copy being Federal Expressed to the Executive Director/General Counsel of The Florida Bar, John F. Harkness, Jr., 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, and Counsel for Petitioner, Stephen H. Grimes, Holland and Knight, LLP, Post Office Drawer 810, Tallahassee, Florida 32302-0810, this 27th day of September, 2005.

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The undersigned members in good standing with The Florida Bar hereby join in Christian D. Searcy, Esquire's Response in Opposition to Petition to Amend Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct:

	Name	**Attorney Florida Bar Number**
1.	Earl L. Denney, Jr.	106834
2.	John Scarola	169440
3.	F. Gregory Barnhart	217220
4.	John A. Shipley	215351
5.	C. Calvin Warriner	374131
6.	David K. Kelley, Jr.	213039
7.	Christopher K. Speed	961991
8.	Karen E. Terry	045780
9.	Rosalyn Sia Baker-Barnes	0327920
10.	Jack P. Hill	0547808
11.	Sean Domnick	843679
12.	Lawrence J. Block, Jr.	449237
13.	James W. Gustafson, Jr.	0008664
14.	William A. Norton	243361
15	David J. Sales	794732
16.	Darryl L. Lewis	818021
17.	William B. King	181773
18.	Todd R. Falzone	975184
19.	Harry A. Shevin	0984450
20.	David J. White	171420