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
_____/

To the Supreme Court of the State of Florida:

This letter addresses a proposed amendment to Rule 4-1.5(f)(4)(B), *Rules Regulating the Florida Bar*, which attempts to add an additional subsection (iii) to the rule. I object to this proposed rule change for the reasons outlined below.

First and foremost, this amendment should be rejected because it is nothing more than a thinly veiled attempt by medical providers to limit medical malpractice litigation. The vast majority of the attorneys who signed the petition to amend Rule 4-1.5(f)(4)(B) are attorneys who are either directly representing the Florida Medical Association and/or medical malpractice insurance carriers, or who are members of firms that represent these entities. The petition to change the rule in question was not brought to improve the practice of law in the state of Florida, but rather to advance the agenda of the clients of the lawyers that brought the petition. The Florida Medical Association wants to limit fees in medical malpractice cases not because it is unethical to take fees at the currently allowable

rates, but because they believe that limiting the amount of money that an attorney can make from successfully pursuing a medical malpractice case will discourage such cases from being brought at all. The Florida Medical Association should not be allowed to use the Rules Regulating the Florida Bar to immunize its members from malpractice suits.

Since the passage of Amendment 3, the victims of medical malpractice have frequently chosen to waive their new constitutional rights in order to acquire legal representation in their case. The proposed amendment seeks to cut off the opportunity for a medical malpractice victim to waive that right by preventing the attorney from accepting a fee which is currently allowed within the Rule. In so doing, the proposed amendment would hijack the fundamental right of a citizen to contract with an attorney of their choosing under mutually agreed upon terms. Significantly, this amendment is being brought not by either party to the contract, but by advocates for medical professionals–the party against whom the representation is being sought in the first place.

The citizens of Florida should be able to choose whether or not to exercise their constitutional rights, and in fact choices concerning the exercise of rights are made frequently by ordinary citizens in a variety of circumstances. For instance, criminal defendants charged with serious crimes are allowed to waive their right

against self-incrimination and make statements, confess to crimes, and enter pleas. Criminal defendants have the freedom of choice to remain silent or waive their right to remain silent–even if the consequence of that waiver is the death penalty.

In contrast, the proposed amendment would prevent victims–not defendants–from making a similar waiver, ostensibly preserving rights which are brand new and hardly fundamental. In fact, the new "right" will cease be a right at all under the proposed amendment to the rule; rather, it will constrain the victim's right to contract, which, in the end, was the cynical purpose of Amendment 3.

It is incredible that the purveyors of this proposed amendment would seek to cut off a medical malpractice victim's right to pay what has heretofore been–and in all other cases remains–a reasonable fee to an attorney. After all, while Amendment 3 masqueraded as a benefit to the victim of medical negligence, the unspoken goal of the constitutional amendment was to price attorneys out of the market, leaving that same victim without real access to the courtroom. Indeed, Justice Lewis concluded as much in his dissent to this Court's advisory opinion on Amendment 3, observing that the amendment was "truly a wolf in sheep's clothing." *Advisory Opinion to the Attorney General re the Medical Liability Claimants Compensation Act*, 880 So.2d 675, 683 (Fla. 1994). While the Court may have felt obliged to allow Amendment 3 to go forward under its limited

oversight, it is not required to feed the wolf and sharpen its teeth. Approving this amendment to the Rule would do exactly that. I urge the court to reject the proposed amendment.

COKER, MYERS, SCHICKEL,
SORENSON & GREEN, P.A.

_____

E. AARON SPRAGUE, ESQUIRE
Florida Bar No. 0640786
136 East Bay Street
Post Office Box 1860
Jacksonville, Florida 32202
(904) 356-6071

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to John Harkness, General Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and Stephen H. Grimes, Esquire, Counsel for Petitioner, Holland and Knight, LLP, P. O. Box 810, Tallahassee, Florida 32302-0810, by United States mail this ____ day of September, 2005.

_____

E. AARON SPRAGUE, ESQUIRE