

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

COMMENTS OF JOSEPH M. TARASKA
PETITION TO AMEND RULE 4-1.5(f) (4) (B) OF THE RULES OF
PROFESSIONAL CONDUCT

Please accept this in response to the Petition to Amend Rule 4-1.5(f) (4) (B) of the Rules of Professional Conduct.

I am opposed to this amendment. My position is based primarily on my training and experience, as well as my interpretation of the law of the state of Florida, which leads me to believe that such an amendment would be in contravention of a Florida citizen's right to contract freely, to select the attorney of their choice and to have access to the courts.

I have had the privilege of being a member of the bar of the state of Florida since 1977. I became a Board Certified Civil Trial Lawyer in 1984 and have been re-certified at each interval since then to the present. Between 1977 and 1999, my practice consisted almost entirely of the defense of physicians, hospitals, nursing homes, other health care providers and their insurers, in medical malpractice and other health care matters. I have also had the opportunity, during that time of acting as outside counsel to a number of hospitals, providing them with medical

legal advice on matters ranging from medical malpractice to contracts. In the year 2000, my practice changed. Rather than defending medical malpractice actions, I began representing the citizens of the state of Florida as plaintiffs in medical malpractice and other health care related matters. I have continued in that role, almost exclusively to the present time. I believe that my experience leaves me in a fairly unique position of understanding the impact that this proposed Rule change would have on the citizens of the state of Florida who may seek redress when they believe they have been injured through medical negligence. I also understand the effect that such a change would have on healthcare providers.

This response assumes for the purpose of argument (although it is not admitted and is in fact controverted) that Amendment 3 to the Florida Constitution is constitutional and does cap attorney's fees. I believe that other briefs have addressed these issues. This response is focused, rather on the right of the citizens of Florida to contract freely, select counsel of their choice and be able to access the courts of Florida, as is their constitutional right.

The prosecution of medical malpractice actions differs from many other forms of litigation, in two primary respects. The first is the expertise and extraordinary number of hours required to perfect these cases and the second the expenses incurred. With regard to the first, attorneys who represent plaintiffs must first insure that the cases they select have merit. This requires that the attorney

understand the medicine and conduct an in-depth evaluation with medical experts. If he is convinced of the merits, he must then obtain affidavits in order to comply with the notice of intent requirements of Florida Chapter 766. There are few forms of litigation that require this extensive pretrial process. Once the litigation is filed it requires counsel to depose not only the defendants, but all relevant treating physicians. In most instances, these are detailed depositions requiring extraordinary preparation. Finally, experts are selected throughout the United States who can bring their particular expertise to bear on each specific matter relevant to the cause. As a defense attorney, I found it fairly easy to obtain such experts throughout the state of Florida. Unfortunately, as counsel for the plaintiff I have encountered significant difficulty in this regard and therefore find it necessary to spend time and money obtaining appropriate reviews and testimony from medical experts throughout the country. Each of these individuals must also be deposed. These efforts increase, as more than one defendant healthcare provider is added to the cause and therefore multiple attorneys and experts are encountered. With regard to the second it is not unusual to expend \$100,000.00 to \$300,000.00 per case. It leaves an attorney such as myself in a difficult position of having to abandon this form of litigation. This is particularly unfortunate considering the nearly three decades of experience that I bring to bear on these cases. In conversations with my peers, it is my understanding that they are of a similar mind.

The obvious difficulty that this presents is that the citizens of Florida will be deprived of the services of counsel, like myself, with considerable experience in this field.

Finally, it should be noted that such a rule change would lead to an imbalance that would deprive the citizens of the state of Florida of their Constitutional rights to a fair consideration of their case. This will occur, if the proposed rule change, in conjunction with the amendment, places no restriction on the amount of money that an insurance carrier on behalf of the healthcare provider or healthcare provider may pay its own defense counsel and the amount of money they may use to reimburse costs. The proposed rule change, would however, severely restrict the compensation and reimbursement of costs provided to plaintiff's counsel. In essence, a circumstance would quickly develop whereby defendants were represented by better compensated counsel. A shift in market resources would obviously move to the defense. Although this may occur naturally in some circumstances, amending the Rules would create this imbalance by edict in the state of Florida. This would further deprive Plaintiffs of the opportunity to select counsel of their choice and access to the courts when aggrieved.

My own training and experience in this field, representing both sides of the conflict leads me to strongly urge you to deny this Petition.

CONCLUSION

WHEREFORE, the undersigned respectfully submits that this Court should reject the proposed Rule 4-1.5 Amendment.

Dated this 30th day of September, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 30th day of September, 2005 to John F. Harkness, Jr., Executive Director of The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300 and Stephen H. Grimes, Post Office Drawer 810, Tallahassee, Florida 32302.

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