IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SCO5-1150

IN RE: PETITION TO AMEND RULES REGULATING THE FLORIDA BAR, RULE 4-1.5(f)(4)(B) OF THE RULES OF PROFESSIONAL CONDUCT

_____/

COMMENTS OF ATTORNEY ROBERT RAY UNDERWOOD II, FLORIDA BAR NUMBER 684971 AND OBJECTIONS TO THE PROPOSED AMENDMENT

Attorney Robert Ray Underwood, II respectfully submits these comments opposing the proposed amendment to Rule 4-1.5(f)(4)(B), on grounds of fundamental fairness and states as follows:

It is a fundamental tenet of American ideals that all citizens of the United States of America should be treated equally in the administration of justice. From the very infancy of this Country, our forefathers believed that everyone was equal. *See* The Declaration of Independence. Later, the Thirty-Ninth Congress of the United States of America proposed what would later become known as the Fourteenth Amendment to the legislatures of the several states on June 16, 1866, further promulgating this fundamental belief. The State of Florida voiced its agreement with this very fundamental belief when, on June 9, 1868, the legislature of the State of Florida became one of twenty-five states (representing a three-fourths majority of the then existing several States of the Union) to ratify the Fourteenth Amendment to the United States Constitution. Thus, the belief that all Floridians are entitled to equal protection is well established in this state.

The Fourteenth Amendment to the Constitution of the United States, Section 1, states in

relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

There is no doubt that the Fourteenth Amendment is applicable to the State of Florida. Accordingly, the State of Florida, through any of its species of government, cannot constitutionally treat one Floridian differently than another under the law. The United States Supreme Court recognized this principle of American justice with respect to racial classifications in the landmark decision of *Brown v. Board of Education*, 347 U.S. 483 (1954). Likewise, the United States Supreme Court recognized that citizens cannot be treated differently based upon their individual economic status as it relates to access to the courts. *See Boddie v. Connecticut*, 401 U.S. 371 (1971).

Justice Harlan, speaking for the *Boddie* Court noted that "'[d]ue process' requires, at minimum, . . . persons forced to settle their claims of right and duty through the judicial process must be given meaningful opportunity to be heard." *Boddie*, 401 U.S. at 377. Moreover, Justice Harlan reaffirmed the fundamental principle of equal protection under the law when he stated Athe right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals.@ *Id* at 379-80.

Contingency fee arrangements have been a mainstay of affording equal protection to litigants for many years. More importantly, one fact cannot be ignored: without contingency

fee arrangements (or a significant restriction upon them) the courthouse doors would effectively be slammed in the face of many litigants seeking justice for the wrongs committed against them. As Justice Douglas stated in *Boddie*, Athere can be no equal justice where the kind of a trial a man gets depends on the amount of money he has.@ *Boddie*, 401 U.S. at 383, concurring opinion of Justice Douglas, citing, *Griffin v. Illinois*, 351 U.S. 12 (1956).

Recently, by Amendment Three to the Florida Constitution, the Florida Medical Association (F.M.A.) and its associated front organizations, successfully introduced an impediment to access to the courts and equal protection. The present intent of the F.M.A. petition is clear. By lowering the financial threshold of the experienced attorney=s contingency fee below the threshold of economic viability, the barrier to the courthouse is raised. In order to turn the impediment into a virtual bar, the F.M.A=s petition now seeks to deprive victims of the right to access to the courts and equal protection under the law by imposing unreasonable and unwaivable financial restraints on the contingency fees which may be charged. Thus, in effect, treating individuals differently because of the type of claim they have and their financial ability to fund the prosecution of it.[1]

The present circumstances are little different from the issues of equal protection and due process presented before this court over forty years ago in *Gideon v. Wainwright.* Like criminal cases, medical negligence cases are fraught with procedural pitfalls which are traps for the inexperienced and unwary. Medical negligence cases are also among the most

[1] As an aside, the petition currently before this Court applies strictly to medical negligence cases. Thus, the petition seeks to discriminate against litigants based upon the particular defendant in their claim. As such, this petition completely ignores the fact that the wrong sought to be redressed is no different from any other tort case brought under Florida law.

expensive civil actions to pursue with pre-suit requirements which require expert testimony. Given these hazards, pursuing a medical negligence claim is an expensive, time consuming toil for even the most experienced practitioner.

Citizens of the State of Florida can now waive the most fundamental constitutional rights, such as the Fifth Amendment right not to incriminate oneself or the custodial rights to a child. *See eg. Tucker v. State,* 417 So.2d 1006, 1013 (Fla 3rd D.C.A. 1982). The F.M.A. petition before this court seeks to prohibit a waiver of Amendment 3. Such a position offends the very fundamentals of fairness, due process, access to the courts and equal protection. Under the F.M.A. petition, an injured party who chooses his counsel must either fund the litigation himself against the medical wrongdoer by an hourly fee or forgo the claim[2]. Thus, making access to the courts and, the ability of litigants to avail themselves to the applicable law dependent upon their financial ability to pay for it. Like the circumstances facing the litigants in *Boddie* and Mr. Gideon, as he stood before this court forty years ago, justice should not be reserved for those who can afford it.

Dated this 29th day of September, 2005.

Respectfully submitted,

[2] This is under the safe assumption that the contingency fees desired by the F.M.A.'s interpretation of Amendment 3 are below the threshold of economic viability in the marketplace of the experienced medical negligence practitioner.

ROBERT R. UNDERWOOD II, ESQ.
WETTERMARK HOLLAND & KEITH, LLC
One Independent Drive, Suite 3100
Jacksonville, Florida 32202-5025
Attorneys for Plaintiffs
Telephone: 904-633-9300
Facsimile: 904-633-9200

By: s/ Robert R. Underwood II
ROBERT R. UNDERWOOD II, ESQUIRE
Florida Bar No.: 684971

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been provided to John Harkness, General Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 and Stephen H. Grimes, Counsel for Petitioners, Holland and Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810, by U. S. Mail this 29th day of September, 2005.

WETTERMARK HOLLAND & KEITH, LLC
One Independent Drive, Suite 3100
Jacksonville, Florida 32202-5025
Attorneys for Plaintiffs
Telephone: 904-633-9300
Facsimile: 904-633-9200

By: s/ Robert R. Underwood II
ROBERT R. UNDERWOOD II, ESQUIRE
Florida Bar No.: 684971