IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC05-1150

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

RESPONSE TO PETITION BY BILL WAGNER

Respondent, Bill Wagner, a member of The Florida Bar in good standing, responds to the Petition above referenced by urging the Court to deny such petition.

FACTUAL BACKGROUND

The Florida Constitution was recently amended to provide:

> In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

This Respondent in an earlier petition to this Court, pointed out to the Court that the Amendment was "silent on its intended affect upon a contingent fee contract existing between clients and their attorney for investigation and prosecution of medical liability claims prior to the date the Amendment becomes

effective. This silence produces uncertainty". Several responses which were filed to that petition suggested a number of additional "uncertainties", although in some cases those "uncertainties" were phrased as an affirmative arguments for specific interpretations of the effect of the Amendment.

This Court subsequently determined that it had no jurisdiction and this Respondent's earlier petition was denied. *See: IN RE: EMERGENCY PETITION REGARDING THE RULES OF PROFESSIONAL CONDUCT AND RULES OF COURT, Case No. SC04-2164* (Fla. 2005).

This Court now has before it a Petition to Amend the Rules of Professional Responsibility Rule 4-1.5(f)(4)(B) by adding the following:

> (iii) Notwithstanding the preceding provisions of subdivision (B), in medical liability cases, attorney fees shall not exceed the following percentages of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants:
>
> a. Thirty percent (30%) of the first $250,000.00.
> b. Ten percent (10%) of all damages in excess of $250,000.00

ARGUMENT - THE UNCERTAINTIES

The uncertainties previously stated by this Petitioner and the several respondents still exist.

The principle overriding uncertainty is that the Amendment only provides that the claimant "is entitled to receive no less than" a certain percentage of "all damages received by the claimant exclusive of reasonable and customary costs".

There is no reference to attorneys fees. There is no indication as to what is to occur if there are insufficient funds to fulfill the client's other obligations. There is no clear expression of what was intended by the term "damages" or "entitled to receive".

Although the Amendment as drafted and approved suggests that the Amendment is "self-executing and does not require implementing legislation", without such legislation this Court is hampered in any effort to resolve the uncertainties that arise in a variety of factual situations. Those varied circumstances will arise through ordinary litigation regarding the manner in which the Amendment must be applied.

As an example, the Court will undoubtedly be called upon to interpret whether "all damages received" are those damages awarded by a jury or damage awarded by the court before or after reductions for set-offs, before or after the application of federally mandated liens, before or after the application of state liens, before or after the application of attorneys liens, or before or after the application of other statutory and common law recognized deductions which might otherwise be applied to the damages which the jury believed the claimant was to "receive".

The Court will likely have to determine whether and to what extent those reduction and the claimed protection of the Constitution will apply to consortium

and derivative claims in ordinary injury litigation and whether those reductions and protections will apply to the recoveries of all of the various survivors who may be making claims under the wrongful death statutes.

In addition, the Court will necessarily have to determine in some cases whether the law of damages applied by a local court based upon the law of a foreign jurisdiction or even the statutory law of the United States can be affected by Florida's Constitution. For example, in cases arising under the admiralty jurisdiction of the United States or the Federal Tort Claims Act or under similar federal statutes, would this above constitutional provision apply if the case involved a medical liability claim?

This Court might well be called upon to determine whether or not the effect of the Amendment to the Constitution is to abolish those statutes purporting to apportion damages between individual defendants and non-party tortfeasors or partially or completely immune tortfeasors if the effect of such apportionment statutes was to reduce the damages otherwise having been determined by a jury as "damages received by the claimant".

Although early efforts to adopt legislation clarifying these points were not successful in the immediate preceding term of our legislature, the Court may well be called upon to determine the constitutionality of legislation attempting to

interpret a constitutional amendment which, by its terms, provided that it was "self-executing and does not require implementing legislation."

ARGUMENT - UNCERTAINTY OF PROPOSED RULE

Regardless of these many uncertainties, the Petitioners suggest that the Rules of Professional Responsibility should be amended to accomplish the following:

a. Change the current rule setting a "presumed excessive" standard for fees collected in all contingent fee cases by substituting an absolute limit on contingent fees in cases involving medical liability;

b. Eliminate any capability of a court, for whatever reason, to determine that a client's wishes should be considered in authorizing a fee to be paid to an attorney;

c. Without any rational basis the proposal attempts to provide an ethical barrier to a client's substantive right to an attorney in only one specialized type of case when such a fee limitation has not been called for by the legislature or even by the terms of the new amendment to the Constitution provision above.

ARGUMENT - "UNCERTAINTY" COMPOUNDED

If the proposed rule were adopted as framed, it would eliminate none of the potential confusion already created by the above provision of the Constitution but

would instead create additional "uncertainty" by reason of the variance in the wording between the court's existing rules allowing a fee computation against the amount "recovered" by the plaintiff and the proposed computation based on the amount "received by the claimant".

If the rule were adopted, without substantial explanation by the Court, the Court would be giving special recognition to the claims for attorneys fee against the damages "received" by the claimant regardless of the amount which the claimant may have actually "recovered". This would leave substantial uncertainty with regard to allocation of competing financial claims that were made by others against the client's "recovery" under common law or statutory principles.

CONCLUSION

The uncertainties created by the constitutional provision cannot be eliminated by the adoption of the proposed amendment to the rules. Adoption of the proposed amendment to the rules would in fact create substantial additional uncertainties. It would raise serious questions as to the constitutionality of the proposed rule under our federal Constitution because of its attempt to deprive persons of the freedom to contract for legal representation only in certain civil suits, all without a rational basis.

For these reasons, unfortunately, the legal issues as they might apply in any particular case in which the constitutional amendment might have an impact, must

be considered in the specific factual circumstances of each case at the time such issues arise. There cannot be a blanket solution provided by framing a limitation of substantive rights as somehow an "ethical" concern of the Court.

The Petition should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this _____ day of September, 2005 by U.S. mail to the Clerk of the Florida Supreme Court, 500 S. Duval St., Tallahassee, FL 32399-1927 and by US Mail to John Harkness, General Counsel, Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-2300, Stephen H. Grimes, Counsel for Petitioner, Holland & Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810.

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