IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1150

IN RE: AMENDMENT TO THE RULES
REGULATING THE FLORIDA BAR –
RULE 4-1.5(f)(4)(B) OF THE RULES
OF PROFESSIONAL CONDUCT
_____/

COMMENT ON PROPOSED MALPRACTICE FEE RULE

As an attorney who has been practicing law in this state for the last 30-plus years, and as one who has represented the victims of medical malpractice, I am an "interested person" in this Court's consideration of the proposed amendment to the rules regulating the Florida Bar – Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct. I oppose this amendment for the reasons set forth below:

I. BACKGROUND

Beginning almost a quarter of a century ago, medical providers in this state initiated a legislative campaign to place themselves in a favored position of litigants in our society by having the Florida Legislature enact a series of restrictions on the right of Floridians injured or killed as a result of medical negligence to recover damages from the responsible parties. These enactments have attempted in every way possible to put those who offer medical services to our citizens for a profit in a position not enjoyed by any other persons or entities who are civil defendants in this state.

The alleged impetus for this legislation always seems to be the medical establishment's complaints about increases in the cost of their professional liability insurance initiated by the few insurers who offer that coverage in this market. Rather

than require this regulated industry to justify their increases, the “fix” adopted has been to deny to the victims of their negligence full access to the courts as guaranteed by our constitution.

There is a documented relationship between the nation’s economic cycles and the rates charged by insurers. In good times, with a booming stock market, in a fiercely competitive atmosphere, insurers cut rates to the bone in order to secure funds to invest in the markets. When the inevitable downturn occurs, the insurers seek significant rate increases to make up for their losses in the markets. These requests were inspired not by what was going on with medical malpractice judgments in the state; but rather, to allow the insurers to recoup their losses from imprudent investing strategies.

Faced with higher insurance premiums, the medical community’s unvarying response was to seek legislation which made it more difficult for Florida victims of medical negligence to be compensated. During the 2003 special session of the legislature on the then current “crisis”, Senate President Jim King subpoenaed the medical malpractice insurers’ executives to testify under oath whether the companies were losing money because of “out of control” malpractice litigation in the state. Those executives testified their companies were not losing money.

In 2004, the Florida Medical Association had placed on the ballot a proposed Amendment to the Florida Constitution which purports to provide what a person making a claim for damages against a medical provider is “entitled to”. Nowhere in the amendment is the injured person forbidden from compensating his attorney with funds received from the settlement or judgment. The proposed amendment is the next step in

the medical community's campaign to further insulate itself from responsibility for the results of the negligence of its members.

II. THE PROPOSED AMENDMENT

The proposed amendment which is presently under consideration does not track the language concerning attorney's fees in the constitutional amendment approved by the voters in the 2004 general election. The FMA language gives the constitutional language a "spin" that is not in the actual amendment. The practical effect of the proposed amendment to our Rules, if adopted by this Court, when combined with the other restrictions on damages already present in Ch. 766, Fla. Stat., is to substantially immunize the medical community from financial responsibility to the persons or their survivors who the members of that community maim and kill by their negligent acts.

Attorneys who handle medical malpractice claims would have told you before approval of the constitutional amendment that you should not even consider agreeing to prosecute a claim for medical malpractice unless the damages you could reasonably expect to claim exceeded $500,000. The reason for this caveat is the enormous expense which an attorney representing a plaintiff in this area must bear to get the case to court. Because of this Court's holding in *Fabre v. Marin*, 623 So.2d 182 (Fla. 1993), in a case where several providers have been involved in a patient's care, it is usually necessary for a plaintiff sue numerous individuals or entities to ensure those at fault pay their fair share. The practical effect of this is to increase by a degree of magnitude the expense of this litigation. It is not unusual for a plaintiff's attorney bringing a suit in this environment to spend $100,000 or more, in costs advanced to the client, getting his case to trial. Add a severe reduction in the fees an attorney is allowed to charge his

client for this rigorous litigation; and this court will have provided de facto immunity to medical providers for the vast majority of claims.

III. THE SANCTITY OF CONTRACT

When I was in law school, I was taught that, in a free society, two parties can agree on a contract to do anything as long as the matter in question was not either illegal or immoral. This Court and other courts in this country have regularly held citizens of this country are able to waive a wide range of rights guaranteed by the federal or state constitutions, or by federal or state law. An accused murderer may waive his right to a jury trial or his right to assistance of counsel. Consumers are regularly confronted with arbitration agreements when they purchase goods or services ranging from automobiles to residence in a nursing home, which contract away their right to jury trial. This Court has consistently upheld the right of persons to enter into contracts which waive their access to the court system, as long as it is demonstrated the consumer made an informed, uncoerced choice. In this case, the medical community wishes to enlist this court's regulatory power to make it more, not less difficult for a citizen of this state to obtain competent counsel in these types of cases.

With reference to the issue before this Court, attorneys in this state are bargaining with potential clients about the waiver of the restrictions on attorney's fees, which to proponents of the proposed Rule claim, is contained in the onerous constitutional amendment. Most, if not all of these attorneys make full, good faith disclosure to the potential client of the factors which dictate their seeking a waiver; i.e. the client who determines to waive this right is fully advised of the rights he is being asked to waive and the sound reasons which dictate that waiver. That process is the

essence of our free markets, the bedrock of which is the right to freely bargain. If sanctity of contract is nullified, a free society can not exist.

Let me put it bluntly, what this proposed rule is, in reality, is simply another strategy of the medical community to further insulate itself from legal responsibility for its acts of negligence. If that community can persuade this court to adopt this rule, the doors to Florida's courts will be closed even further to the victims of medical negligence.

IV. THE RULES REGULATING THE FLORIDA BAR

These Rules have been developed by this Court with the overwhelming purpose of protecting the rights of our citizens who avail themselves of the services of an attorney. They regulate every aspect of the interface between the attorney and his client, with the clear goal being to insure that, in his dealings with an attorney, the client is fully advised as to his rights and the attorney's responsibilities to him.

In the first part of the Rule for which amendment is sought, this Court has adopted a reasonable fee schedule to be used in all contingent fee arrangements in this state [Rule 4-1.5(f)(4)(B)(i)]. But even here, this Court has left an "out" that allows an attorney, with his client's consent, to seek court approval for a different arrangement [Rule 4-1.5(f)(B)(ii)]. This rule protects both the parties to a contract, allowing the attorney to seek court approval for fair compensation and the client to receive the representation he needs.

This Rule also requires the attorney have the client execute a "Statement of Client's Rights", detailing the attorney's responsibilities under the contingency fee contract. Again, this insures the client is fully informed as to his options before entering into a contractual relationship with an attorney. Both of these rules, in effect, "level the

playing field" between the attorney and his client under the aegis of this Court's supervision.

What the petition in this matter seeks to do is have this proposed measure aid persons who are neither attorneys nor their clients. Unlike any other application in this Court's history, rather than seeking a measure which will improve the public's ability to partake of legal services, this proposal will make it more difficult for our citizens to enlist the aid of an attorney in a narrow range of cases. To adopt this measure would be a complete departure from this Court's historic mission to ensure delivery of competent legal services.

V. WHAT NEEDS TO BE DONE

Rather than adopting a measure which nullifies the constitutional rights of citizens of this republic to freely contract, this Court needs to amend the Rule in question in a manner which will ensure that, if a client consents to give up rights conferred by the Florida Constitution, that person has made a fully informed choice on the question. I would suggest the Statement of Client's Rights be modified to inform the client of the existence and application of the new constitutional amendment before waiving his constitutional right to insist on legal representation subject to that compensation scheme.

If this Court feels that proposal is not adequate, this Court could modify the Rule to allow the parties to seek court approval for the waiver of the application of the constitutional provision, just as in the existing procedure for modifying the mandated contingency fee schedule.

VI. CONCLUSION

The right of a citizen of this state to freely contract is one enshrined in the warp and woof of the fabric of our society. To allow a narrow special interest to intrude into that sacred relationship between an attorney and his client to serve that group's – not the client's – interest is inimical to a society which recognizes the rule of law. The proposed rule should be rejected.

CERTIFICATE OF SERVICE

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

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