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
_____/

These comments are submitted to the Court pursuant to this Court's order dated June 29, 2005 regarding the petition to amend the Rules Regulating the Florida Bar – Rule 4-1.5(f)(4)(B) relating to contingency fees in personal injury cases.

I am a practicing trial attorney who has litigated a wide variety of personal injury claims, including medical malpractice claims, on behalf of plaintiffs for over thirty years. It has been my experience that the litigation of medical malpractice claims is one of the most difficult, complex, risky, and expensive areas in civil litigation.

The pending petition purports to implement by rule the recently adopted Article 1, Section 26 of the Constitution of Florida. However, close analysis of the petition reveals that it actually goes far beyond, and directly contradicts, the Constitutional amendment. If the proposed amendment to the Rules were adopted, it would prohibit a medical liability claimant who could not obtain competent counsel to represent him or her for the fee specified in the Constitutional amendment from entering into an agreement, with or without court approval, to

pay a higher percentage of any potential recovery as a legal fee. This would operate to unlawfully discriminate against persons with medical liability claims and against lawyers who desire to represent them, and virtually guarantee that many persons injured as the result of medical malpractice will be unable to prosecute their claims because their cases are so complex and expensive to prosecute that they will be unable to obtain competent representation. Indeed, one would be entitled to conclude that it is the intent and purpose of the proposed amendment to make it as difficult as possible for a person injured as a result of medical malpractice to obtain representation.

Rule 4-1.5(f)(4)(B)(i) of the Rules Regulating the Florida Bar, as presently structured, sets out a schedule of percentage fees for contingent representation and provides that a fee in excess of that set forth in the schedule is presumptively unreasonable. However, Rule 4-1.5(f)(4)(B)(ii) allows a potential litigant who is unable to obtain counsel of his choosing at a fee level within the schedule to waive his rights under that schedule and to petition the court for an order approving a higher fee. In substance, the present Rule 4-1.5(f)(4)(B) recognizes that it is ultimately the right of the client that is protected by the maximum fee schedule,

and that the client is entitled to waive his right in an appropriate case, subject to court approval of the waiver.

In this respect, Article 1, Section 26 of the Constitution of Florida, as amended November 2, 2004, does not differ from the present Rule 4-1.5(f)(4)(B)(i) of the Rules Regulating the Florida Bar. The Constitutional amendment is unambiguously framed in terms of the claimant's right to receive the specified percentage of any recovery. The petitioners' proposed amendment to Rule 4-1.5(f)(4)(B) would prevent a medical malpractice claimant from waiving the right to receive the minimum recovery specified in the Constitutional amendment, even though the claimant may wish to waive his or her right, and even though the claimant in any other kind of contingency case is allowed to waive his or her right under the current rule.

The fact that a client may voluntarily and intelligently waive his or her rights under the maximum fee schedule set out in Rule 4-1.5(f)(4)(B)(i), subject to court approval as provided by Rule 4-1.5(f)(4)(B)(ii), in and of itself refutes the petitioners' claim (Petition, paragraph 8) that to allow a client to waive his or her right with respect to a specified maximum fee would place lawyers in an unethical

position. There is nothing about medical malpractice claims that is ethically different from other claims for whose prosecution a contingency fee may lawfully be charged. Yet petitioners do not seek to preclude claimants in non-medical malpractice cases from waiving their rights subject to court approval. Instead, petitioners seek to carve out medical malpractice claimants as a special category of claimants who, unlike all other claimants, cannot waive their rights, even with court approval.

Likewise, petitioners misstate the case in arguing that to allow a medical malpractice claimant to waive the right to receive 70% of the first $250,000 recovered and 90% of any excess recovery would "fly in the fact of the constitutional mandate overwhelmingly approved by the voters of Florida." (Petition, page 3) The voters approved an amendment that, by its terms, granted a specific right to medical malpractice claimants. Nothing in the language of the Constitutional amendment purports to preclude a claimant from waiving that right, in circumstances where the claimant considers it in his or her best interests to do so. The present petition, far from seeking to give effect to the amendment, seeks

instead to make it impossible for medical malpractice claimants to make informed decisions about how their interests will be best served.

The Court should therefore reject the proposed amendment to Rule 4-1.5(f)(4)(B) and allow the rule to stand as written.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing and an electronic copy as well as nine copies were sent to the Clerk of the Supreme Court of Florida by U.S. Mail, and that copies have been served on John F. Harkness, Jr., Executive Director of

The Florida Bar, 651 E. Jefferson St., Tallahassee, Florida 32399-2300 and Stephen H. Grimes, Post Office Drawer 810, Tallahassee, Florida 32302 on September 20, 2005 pursuant to the Court's Administrative Order: In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84 dated September 13, 2004.

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