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VIA REGULAR & ELECTRONIC MAIL

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RE: Case No. SC05-1150

COMMENT ON PETITION TO AMEND  
THE RULES OF PROFESSIONAL CONDUCT  
RULE 4-1.5(f)(4)(B)

This letter addresses the Petition to Amend Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct, and some of my concerns upon review and consideration of it. I would like to briefly comment on three areas: (1) Advisory Opinion To The Attorney General Re: The Medical Liability Claimant's Compensation Amendment, 880 So.2d 675 (Fla. 2004); (2) Amendment 3 as Creating a Right and Power of the People; (3) The Primary Purpose of Contingency Fee Arrangements.

(1) Advisory Opinion To The Attorney General Re: The Medical Liability Claimant's Compensation Amendment, 880 So.2d 675 (Fla. 2004).

The Attorney General requested this Court to review the then proposed Amendment 3 to the Florida Constitution that would limit the contingency fee agreement between injured claimants and their attorneys in

medical liability cases. This Court granted review and gave this Advisory Opinion in July of 2004, approving the proposed Amendment for ballot.

Justice Lewis, in his dissent, was, of course, correct. The proponents of Amendment 3 flew the summary and ballot title under false colors. The Amendment's true purpose and goal was and is to "restrict a citizen's right to retain counsel of his or her choice on terms chosen by the citizen and selected counsel and to thereby negatively impact the right of Florida citizen's to seek redress for injuries sustained by medical malpractice."

The Amendment is a wolf in sheep's clothing, and through the subject Petition the wolf's fangs now begin to show. The subject Petition is simply a further attempt to, as Justice Lewis noted, "impact access to the courts as guaranteed in Article I, Section 21 of the Florida Constitution."

It is important to consider a portion of the majority opinion:

The opponents also argue that the amendment impermissibly affects portions of the Florida Constitution, specifically Article I, Section 2 and 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."). However, we are not persuaded by the argument that the amendment affects portions of the Florida Constitution prohibiting the impairment of citizens' contract rights because it does not propose to transcend similar limitations on attorney-client fee arrangements that are currently in place. See Rule 4-1.5. (emp. supp.)

Thus, in its majority opinion this Court has already established one of the primary logical structures requiring that this Petition be denied. For if the

amendment had proposed to transcend similar limitations on attorney-client fee arrangements that are currently in place, then it would have been deemed to affect those portions of the Florida Constitution prohibiting the impairment of citizens' contract rights. Since, as this Court has decided, the Amendment does not propose such a transcendence, it necessarily follows that any rule change request explicitly or implicitly relying on the proposition that the Amendment does in fact propose or allow such a transcendence must fail. Petitioners' core argument is in fact that Amendment 3 allows or proposes such a transcendence. I need not complete the syllogism.

Petitioners, having now safely secured the Amendment, find themselves postured to do exactly what their ulterior purpose impels them to do, namely, "transcend similar limitations on attorney-client fee arrangements that are currently in place." The current Petition convincingly establishes (and the Court should now be so "persuaded by the argument") that though the Amendment itself may not explicitly propose to transcend current fee arrangements, the proponents of the Amendment, including the Petitioners, have always intended to do so, and they now attempt to do so through a reconstruction of the Rules of Professional Conduct.

This attempt by Petitioners to circumvent constitutional strictures, to detrimentally affect portions of the Florida Constitution prohibiting the

impairment of citizens' contract rights, and to impact access to the courts as guaranteed by our State Constitution, by means of reconstructing the Rules of Professional Conduct, is ground enough to deny their Petition.

Petitioners' ends and means are in derogation of our State Constitution.

Justice Pariente, in concurring opinion, noted, "Although I agree with much of what Justice Lewis says in his dissenting opinion as to the practical effect of this proposed amendment, I conclude that these concerns are beyond the scope of our current review." They are no longer. The numerous, tangible concerns raised by Justice Lewis are now well within the scope of this Court, and so must be considered in their entirety. And these concerns require that the subject Petition be denied.

(2) Amendment 3 As Creating a Right and Power of the People

Amendment 3 creates a right in the People, and so a power too. If Petitioners were truly concerned with protection of the rights of citizens in medical malpractice claims, then they might look to the Statement of Client's Rights For Contingency Fees in order to further empower citizens concerning this new right. It would be quite possible, and possibly prudent, to have a provision in the Statement of Client's Rights for medical malpractice claims which recited the Amendment, or its import, and the client's right to waive (or not to waive) his or her rights under the

Amendment if so desired after a full and complete opportunity to understand his or her rights.

Petitioners, in attempting to trump Rule 4-1.5(f)(4)(B)(ii), evidently want to deny citizens their right and power to exercise their rights as they best see fit. To effect this, perhaps Amendment 3 should have included a phrase along the lines of, “The claimant is not entitled to waive this entitlement, even if waiver would be in the claimant’s best interests, and even if this impermissibility to waive prevents claimant from access to the courts or to competent counsel.”

Perhaps Petitioners do not feel as if citizens of this State are competent enough to exercise their rights. Were the citizens competent enough to understand the true import of Amendment 3? If so, and Petitioners cannot deny so without destabilizing their entire cause, then surely they are competent enough to freely exercise their newly created rights, including waiver if they see such is in their best interest.

Simply put, if any change is required to the Rules of Professional Conduct because of the new Amendment, then the change is best placed in the Statement of Client’s Rights for Contingency Fees. This would give citizens the opportunity to consider and then exercise the rights that the citizens alone voted to create via the Amendment, as they best see fit.

Why should Petitioners fight so avidly in the first instance for the rights of the citizens, if Petitioners do not want the citizens to have them? Put a different way, what is the point of a right without the concomitant power to exercise it? Do Petitioners contend that this Court must force the people to be free, by requiring the people to exercise their newly created rights in a very restricted way? The current Petition proposes just that – an amendment to the Rules of Professional Conduct which would strip the citizens of their power to exercise their rights as they best see fit, a power which is indeed the core power that the people in a free society must have.

(3) The Primary Purpose of Contingency Fee Arrangements

This Court has stated,

The Court observes that the benefit of the contingency fee system is to provide a party with increased access to the court system and the services of attorneys. The availability of attorney's fees would have the effect of encouraging plaintiffs to bring meritorious claims that would not otherwise be economically feasible to bring on a non-contingent fee basis. These goals are consistent with the Florida Constitution. Bell v. U.S.B. Acquisition Co., 734 So.2d 403 (Fla. 1999).

This “contingency fee system” includes as an integral part subsection (ii) of Rule 4-1.5(f)(4)(B). And subsection (ii)'s goals are consistent with the Florida Constitution – increased court access for citizens with meritorious claims; access to competent counsel for citizens who would not otherwise have access to such. Just as Justice Lewis saw in his dissent (discussed

above) regarding the goals of the proponents of Amendment 3, so Petitioners' goals in petitioning to bypass subsection (ii) are inconsistent with the Florida Constitution. Petitioners' Petition for amendment of the Rules of Professional Conduct seeks to further disable the benefit of the contingency fee system already significantly debilitated by Amendment 3.

### Conclusion

In their Petition, Petitioners state:

Some lawyers have suggested that because the amendment is a constitutional provision, the client may waive its requirement and agree to higher contingent fees than permitted by the amendment. Such a suggestion would have the lawyer negotiating with the client in order to have the client agree to give up his constitutional right in order that the lawyer may receive a higher fee. To permit such a practice would not only put the lawyer in an unethical position but fly in the face of the constitutional mandate overwhelmingly approved by the voters of Florida. (emp. supp.)

It is somewhat humorous (perhaps tragically so), how this is put. Plaintiff's attorneys apparently have no concern for the rights of their clients. Plaintiff's attorneys will apparently immediately go to behind-the-door "negotiating" with the client to get "the client to agree" to "give up" his constitutional right so that the attorney can "receive a higher fee." Of course, we are all officers of the court, obliged to abide by our oaths and respect the rights of all citizens, clients included. Access to courts, and access to competent counsel in medical liability cases, are real, concrete concerns

affecting everyday people, everyday. They are not fears being drummed up by ‘the plaintiffs bar’ in order to try and make another buck. Perhaps we could tactfully rephrase the above paragraph to read more accurately:

Some lawyers have suggested that because the amendment is a constitutional provision, the client may waive its requirement and agree to higher contingent fees than permitted by the amendment. Such a suggestion would have the lawyer consulting with the client to fully and fairly inform the client of his or her constitutional right in order to facilitate the client in exercising that right as best the client sees fit, in order that the client may have access to the courts and competent counsel to seek redress for his or her injuries. To permit such a practice would not only put the lawyer in an ethical position but support and reinforce the constitutional mandate overwhelmingly approved by the voters of Florida.

It strikes me that this more positive and promising view of our profession is the correct one. It is my experience.

The critical issue is now, or soon will be, that of waiver. To be sure, a number of lawyers and organizations are taking the position that it is premature to consider such a procedural change to the rules concerning waiver before substantive analysis of the Amendment can be had. But there is no need to wait. No matter at what stage of the analysis we may be, it will be impossible to ignore or escape the basic truth of Petitioners’ real motives for the rule change request – motives repugnant to our Constitutions and harmful to the People.

In my humble opinion, Petitioners have made this a question of money. I believe it is a question of the rights of citizens in a free society, and in such a society it is the citizens who must keep the power to exercise their rights, no one else.

Respectfully Submitted,

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