IN THE SUPREME COURT OF FLORIDA

Case No. SC05-1150

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 AMERICAN MEDICAL ASSOCIATION AND MISSISSIPPI STATE MEDICAL ASSOCIATION IN SUPPORT OF PETITION

This Court and the Florida Bar have a duty to respect the Florida Constitution and the will of the Florida people. The language of Article I, Section 23 of the Florida Constitution ("Amendment 3") is clear. In a medical malpractice action, the plaintiff is entitled to receive no less than 70% of the first $250,000.00 in damages and 90% of damages in excess of $250,000.00, exclusive of reasonable and customary costs. The present Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct (the "Rule"), which provides a sliding scale for contingency fees exceeding the limitations set by Amendment 3, contradicts the law of Florida governing medical malpractice actions. Therefore, to be consistent with the Florida Constitution this Court should amend the Rule in accordance with the Petition.

STATEMENT OF INTEREST

The American Medical Association ("AMA"), is a private, voluntary, not-for-profit corporation, whose members include approximately 245,000 physicians,

residents, and medical students. Its members practice in all fields of medical specialization and in every state, including Florida, and it is the largest medical society in the United States. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health.

The Mississippi State Medical Association ("MSMA") is a physician organization serving as an advocate for its members, their patients and the public health. The association promotes ethical, educational and clinical standards for the medical profession and the enactment of just medical laws. Founded in 1856, the MSMA provides a way for members of the medical profession to unite and act on matters affecting public health and the practice of medicine. All MSMA members are AMA members.

The AMA and the MSMA support medical liability reform initiatives, such as Amendment 3, which help contain health care costs, provide better access to health care, and promote the quality and safety of health care services. Amendment 3, which protects against oppressive or "windfall" attorney contingency fees, reflects the clear will of the people of Florida. This Court should uphold the law by promulgating rules consistent with Amendment 3 rather than the narrow interests of those to whom the rule applies. Amendment 3 has never been adjudicated to be in violation of the United States Constitution, and it must be deemed valid.

Therefore, the AMA and the MSMA urge this Court to amend the Rules Regulating the Florida Bar insofar as they conflict with Amendment 3.

INTRODUCTION

In the November 2, 2004 election, the State of Florida, by voter initiative, adopted Amendment 3, which reads as follows:

> "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."

Amendment 3 passed with 63 percent of the vote.

The Rules Regulating the Florida Bar ("Rules"), which provide ethical limitations on contingency fees, allow contingency fees in excess of the percentages permitted by Amendment 3. Florida Bar Rule 4-1.5(f)(4)(B)(i) states:

> "Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:
>
> a. Before the filing of an answer…
>
> 1. 33 1/3% of any recovery up to $1 million; plus
> 2. 30% of any portion of the recovery between $1 million and $2 million; plus
> 3. 20% of any portion of the recovery exceeding $2 million.
>
> b. After the filing of an answer…
>
> 1. 40% of any recovery up to $1 million; plus
> 2. 30% of any portion of the recovery between $1

million and $2 million; plus
3. 20% of any portion of the recovery exceeding $2 million.

c. If all defendants admit liability…
1. 33 1/3% of any recovery up to $1 million; plus
2. 20% of any portion of the recovery between $1 million and $2 million; plus
3. 15% of any portion of the recovery exceeding $2 million."

The Petition requests an amendment to Rule 4-1.5(f)(4)(B) to add a subsequent provision, stating:

> "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 (30%) of the first $250,000.00
> b. Ten percent (10%) of all damages in excess of $250,000.00."

Opponents to the Petition argue that this Court should not revise the Rules in response to the restrictions imposed by Amendment 3. They base their argument primarily on the supposition that Amendment 3 "could" be found unconstitutional. They also contend that the restrictions of Amendment 3 can be waived. Finally, they argue that it unfairly impedes the ability of plaintiffs to retain effective counsel. All of these arguments are specious.

I. AMENDMENT 3, BEING A PROPERLY ENACTED LAW, IS PRESUMPTIVELY VALID.

This Court has a duty to uphold the Florida Constitution. Because

Amendment 3 has never been adjudicated invalid, this Court should presume that it is valid.

Opponents argue that the Petition should be rejected, because the proposed rule change "hinges on still more untested legal arguments that…such an interpretation would be valid under the federal constitution" (Comments of Dade County Trial Lawyers Association ("DCTLA") at 7.) In addition, they contend that enforcement of Amendment 3 should be delayed, because the Petition is based on the "assumption that the constitutional amendment is valid." (Resp. of Florida Bar at 2.) These arguments, however, ignore clear precedent. A law cannot be deemed invalid until proven unconstitutional in a proper legal proceeding. *See Florida Dept. of Educ. v. Glasser*, 622 So. 2d 944, 946 (Fla. 1993), *Holley v. Adams*, 238 So. 2d 401, 404 (Fla. 1970), and *Larson v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958).

Moreover, legal restrictions on contingency fees in medical malpractice cases are commonplace. Seventeen states, not including Florida, currently have a statute or court rule that establishes a specific limit or sliding scale on contingency fees attorneys may charge clients who file a medical malpractice claim.[1] The

[1] California (Cal. Bus. & Prof. Code § 6146 (2005)); Connecticut (Conn. Gen. Stat. § 52-251c (2004)); Delaware (Del. Code Ann. tit. 18, § 6865 (2005)); Illinois (735 Ill. Comp. Stat. 5/2-1114 (2005)); Indiana (Ind. Code Ann. § 34-18-18-1 (2004)); Maine (Me. Rev. Stat. Ann. tit. 24, § 2961 (2005)); Massachusetts (Mass. Gen. Laws Ann. ch. 231, § 60I (2005)); Michigan (Mich. Ct. R. 8.121 (2005)); Nevada

supreme courts of several states have affirmed the constitutionality of these restrictions. *Roa v. Lodi Med. Group*, 695 P.2d 164 (Ca. 1985); *DiFilippo v. Beck*, 520 F. Supp. 1009 (D. Del. 1981); *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980); *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994), *cert. denied*, 513 U.S. 869 (1994).

Opponents cite *In re BellSouth Corp.*, 334 F.3d 941, 955-56 (11th Cir. 2003) and *Cole v. U.S. Dist. Court*, 366 F.3d 813, 817 (9th Cir. 2004), arguing that Amendment 3 may violate the right to retain counsel under the Federal Due Process Clause. *BellSouth* and *Cole*, however, involved *orders* disqualifying the attorneys retained by a party, and in both cases, the petitions for a writ of mandamus to reverse the orders of disqualification were denied. Moreover, *BellSouth* states that although there is a constitutionally based right to counsel of choice, "it is also well established that the right is not absolute." *BellSouth*, 334 F.3d at 955. The present situation is clearly distinguishable, because Amendment 3 does not disqualify any attorneys. It simply compels attorneys to absorb more of the risks involved with filing non-meritorious lawsuits and provides an injured patient a greater share of damages awarded in meritorious cases.

(2004 Bill Text NV V. 4); New Jersey (N.J. Court Rules, 1969 R. 1:21-7 (2005)); New York (N.Y. Jud. Law § 474-a (2005)); Oklahoma (Okla. Stat. tit. 5, § 7 (2004)); Oregon (Or. Rev. Stat. § 31.735 (2003)); Tennessee (Tenn. Code Ann. § 29-26-120 (2005)); Utah (Utah Code Ann. § 78-14-7.5 (2005)); Wisconsin (Wis. Stat. § 655.013 (2005)); Wyoming (Wyo. Contingent Fees Rule 5 (2001)).

Opponents also cite *Kusch v. Ballard*, 645 So.2d 1035, 1036 (Fla. 4th D.C.A. 1994), for the proposition that Amendment 3 may violate the First Amendment's right to "associate freely with others of our choosing." Like *BellSouth* and *Cole*, *Kusch* also involved a judge's order disqualifying a party's attorney. In addition, the opinion does not invoke the First Amendment.

Finally, Opponents argue that as a result of Amendment 3's restrictions, a medical malpractice plaintiff would be "forced to represent himself or herself." (Comments of DCTLA at 9.) This is unlikely. There is no evidence that plaintiffs in states which limit contingency fees in medical malpractice actions have had difficulty obtaining counsel. Furthermore, the amendment specifically does not impact the reasonable and customary costs of a lawsuit. Whether such a possibility is likely or unlikely and what weight should be given to such a circumstance are matters the voters considered when they passed Amendment 3.

II. PLAINTIFFS MAY NOT WAIVE THEIR RIGHTS UNDER AMENDMENT 3, BECAUSE ALLOWING SUCH WAIVER WOULD UNDERMINE THE AMENDMENT'S INTENT.

Amendment 3 was passed in order to make certain contracts illegal. A waiver of the rights guaranteed under Amendment 3 would eviscerate this purpose.

Amendment 3 also has important public welfare benefits, such as protecting consumers against overreaching attorneys, providing additional compensation to injured patients, and reducing the costs of health care. It benefits physicians by

curbing the costs of medical malpractice insurance and reducing the number of frivolous lawsuits. If an individual plaintiff is allowed to waive his or her rights to lower contingency fees, market forces may compel other plaintiffs to do the same, and waiver provisions could become an industry standard. Such a result would directly undermine the intent of the Florida people to prevent attorneys from charging excessive contingency fees in medical malpractice cases.

A. There is no legal basis for assuming that a plaintiff's rights under Amendment 3 can be waived.

Opponents cite numerous cases involving the right to waive certain criminal procedures. *Philmore v. State*, 820 So. 2d 919 (Fla. 2002); *Groomes v. State*, 401 So. 2d 1139 (Fla. 3d D.C.A. 1981); *Sessums v. State*, 404 So. 2d 1074 (Fla. 3d D.C.A. 1981); *Brown v. State*, 894 So. 2d 137 (Fla. 2004). These rights include the right to remain silent, the right to a twelve person jury, the right to a jury, and the right of a defendant to testify on his or her own behalf. (Comments of DCTLA at 13.)

These cases are readily distinguishable. They pertain to constitutional rights that can be waived without negating the underlying purpose of the constitutional provisions that gave rise to those rights. Amendment 3, however, was passed in order to prohibit certain contingency fee arrangements. The creation of an option of either entering or not entering into such forbidden fee arrangements would simply defeat this purpose. The people of Florida would not have passed

Amendment 3 if they had intended to allow contracts, whether through waiver or otherwise, of the type they had intended to forbid. Laws should not be construed in such light as to render them meaningless. *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004).

The mere raising of the waiver argument highlights the need to grant the Petition. Amendment 3 should not be evaded, by waiver or otherwise.

B. Amendment 3 has social ramifications beyond the protection of plaintiffs from oppressive fees.

Although individual medical malpractice plaintiffs are the primary beneficiaries of Amendment 3, restrictions on contingency fees also have other public purposes. Amendment 3 will make attorneys more selective about the lawsuits they file. A diminution in the filing of non-meritorious lawsuits will reduce medical malpractice insurance premium costs. Such reduction in premiums will ensure the continued delivery of quality health care to the citizens of Florida.

A reduction in non-meritorious medical malpractice lawsuits will also be felt indirectly, by alleviating the practice of "defensive medicine" or a distorted choice of career options among medical students, residents, and practicing physicians. While it is difficult to measure the cost of medical malpractice litigation for the country as a whole, the cost of increased federal government payments alone is approximately $47.5 billion per year. Office of the Assistant Secretary for Planning and Evaluation, United States Department of Health and Human

Services, “Confronting the New Health Care Crisis, Improving Health Care Quality & Lowering Costs by Fixing our Medical Liability System.” (2002). The average defense cost of medical malpractice suits brought to trial is over $90,000. Even in cases where the claim was dropped or dismissed, the defense costs averaged $17,408. Physician Insurers Association of America, “Claim Trend Analysis” (2004).

Compared to the enormous costs, the benefits to injured patients of medical malpractice litigation is modest. Overall, more than 70% of medical liability claims in 2003 were closed without payment to the plaintiff. Of the 5.8% of claims that went to a jury verdict, the defendants won 86.2% of the time. Physician Insurers Association of America, “Claim Trend Analysis” (2004).

The total costs, however, go beyond the monetary expenditures in litigation. Physicians, like all individuals, adapt to their situation. Those adaptations are not always positive for public health. The economy has limited resources available for health care, and some of that is spent on tests and treatments intended primarily to avoid lawsuits. The cost of this defensive medicine is estimated at $70 to $126 billion per year. Office of the Assistant Secretary for Planning and Evaluation, United States Department of Health and Human Services, “Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care” (2003).

Defensive medicine can take other forms as well, such as physicians' referring patients to safety net hospitals or academic health centers or declining to take call in the emergency department. R. Berenson, et al., Center for Studying Health System Change, Medical Malpractice Liability Crisis Meets Markets: Stress in Unexpected Places (2003). Forty-five percent of hospitals have reported that professional liability concerns have resulted in the loss of physicians and/or reduced coverage in emergency departments. American Hospital Association, "Professional Liability Insurance Survey" (2003).

Medical students and residents, being acutely aware of the burden created by medical malpractice litigation, may determine their careers based on risk-avoidance. Medical residents' growing concerns about liability issues cause them to avoid choosing high-risk specialties or practicing in states with reputations for litigious climates. Sixty-two percent of medical residents reported that liability issues were their top professional concern in 2003. Merit, Hawkins & Assoc. Summary Report: 2003 Survey of Final Year Medical Residents. Forty-eight percent of students in their third or fourth year of medical school indicated that the liability situation was a factor in their specialty choice, and 39% said the medical liability environment was a factor in their decision about a state in which they would like to complete residency training. American Medical Association Survey: Medical Students' Opinions of the Current Medical Liability Environment (2003),

available at http://www.ama-assn.org/ama1/pub/upload/mm/31/ms-mlrhighlights.pdf. A recent New England Journal of Medicine report stated, "in spite of the mission of malpractice law to improve the quality of care through deterrence—indeed, perhaps because of it—the fear of litigation obstructs progress in ensuring patient safety." D. Studdert, et al., 350 New Eng. J. Med. 283, 287 (2004).

Therefore, the limitation of contingency fees, one of the key initiatives taken by states to reduce medical malpractice litigation and the rising costs of health care in general, has public purposes beyond those of ordinary consumer protection laws. Allowing individual plaintiffs to waive this right would undermine the larger goal of Amendment 3 to benefit the public and physicians.

A law established for a public purpose should not be circumvented by private parties, because an individual's right to waive a law should only be granted with respect to a law intended solely for that individual's benefit. *See Fineberg v Harney & Moore,* 207 Cal. App. 3d 1049, 255 Cal. Rptr. 299 (Cal. Ct. App. 1989), *cert. denied,* 493 US 852 (1989). The intent of the People of Florida to establish an effective restriction on contingency fees should not be circumvented.

III. THE PUBLIC POLICY ISSUE OF WHETHER PLAINTIFFS WILL BE DISADVANTAGED IS NOT FOR THIS COURT TO DETERMINE.

Opponents argue that medical malpractice plaintiffs will be disadvantaged through an inability to retain good attorneys. (Comments of DCTLA at 8.) The

purpose of contingency fee arrangements, they argue, is to provide a party with increased access to the court system. (Resp. of Florida Bar at 2; Comments of Dade County Bar Ass'n at 2; Comments of Palm Beach County Bar Ass'n at 2.)

Opponents provide *no* evidence to support their contention that Amendment 3 would "impair or negate" a plaintiff's right to retain a counsel of choice or right to effective access to courts. Rather, they rely entirely on the mere belief that Amendment 3 "could" or "may well" have such an effect. (Comments of DCTLA at 10.) Amendment 3 will not eliminate the contingency fee system. This system will continue to provide effective legal counsel to medical malpractice plaintiffs. Amendment 3 will merely change the levels of attorneys' fees that can be charged in medical malpractice actions, must as the existing rule changed the levels of contingency fees when it was adopted in 1987.

Opponents' arguments would ask this Court to make a legislative determination already made by the people themselves. Who is to say that a contingency fee restriction of 30% of damages, excluding reasonable and customary costs, would disadvantage plaintiffs, while a restriction of 33 1/3% would not? Who is to know how many malpractice victims will compensate their attorneys on an hourly basis, rather than through a contingent fee?

Whatever the actual effect of these restrictions may be, the question of whether they will or should disadvantage plaintiffs has already been decided. It is

not the role of the judiciary to question the wisdom of the voters or the words of the constitution. *See Humana Med. Plan, Inc. v. State*, 898 So. 2d 1040, 1044 (Fla. 1st DCA 2005) and *Cilento v. State*, 377 So. 2d 663, 665 (Fla. 1979). The opponents to the current petition had their opportunity to plead their position to the public, and they lost the argument. The people have made their decision, and it is now the duty of this Court to enforce it.

Respectfully submitted,

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Linda McMullen, General Counsel
Mississippi State Medical Association
Florida Bar No. 252603
P.O. Box 2548
Ridgeland, MS 39158-2548
(601) 853-6733

Jon N. Ekdahl, General Counsel
American Medical Association
515 North State Street
Chicago, Illinois 60611
(312) 464-4600
Of Counsel

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