

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

To the Supreme Court of the State of Florida:

This letter addresses a proposed amendment to Rule 4-1.5(f)(4)(B), *Rules Regulating the Florida Bar*, which attempts to add an additional subsection (iii) to the rule. While there will be other comments regarding additional legal grounds to reject the proposed amendment, this letter will outline my personal objections to the amendment.

The amendment seeks to expand the reach of controversial Amendment 3, passed by the voters in November 2004, into the governing provisions of attorney conduct and ethics. Since the passage of Amendment 3, the victims of medical malpractice have frequently chosen to waive their new constitutional rights in order to acquire legal representation in their case. The proposed amendment seeks to cut off the opportunity for a medical malpractice victim to waive that right by preventing the attorney from accepting a fee which is currently allowed within the Rule. In so doing, the proposed amendment would hijack the fundamental right of a citizen to contract with an attorney of their choosing under mutually agreed upon

terms. Significantly, this amendment is being brought not by either party to the contract, but by advocates for medical professionals—the party against whom the representation is being sought in the first place.

As a former prosecutor, I find this proposed amendment particularly offensive. There are few rights in the United States held more dear than the right of an individual to remain silent and not incriminate oneself. Nevertheless, criminal defendants charged with the most serious crimes are allowed to waive their right against self-incrimination and make statements, confess to crimes, and enter pleas. In my three and a half years as a prosecutor, I prosecuted hundreds of defendants who made statements or confessions. Presumably, these statements, when made after the proper Miranda warning, were made by these individuals because they believed they were acting in their own best interest. Criminal defendants have the freedom of choice to remain silent or waive their right to remain silent—even if the consequence of that waiver is the death penalty.

In contrast, the proposed amendment would prevent victims—not defendants—from making a similar waiver, ostensibly preserving rights which are brand new and hardly fundamental. In fact, the new “right” will cease to be a right at all under the proposed amendment to the rule; rather, it will constrain the victim’s right to contract, which, in the end, was the cynical purpose of Amendment 3.

It is incredible that the purveyors of this proposed amendment would seek to cut off a medical malpractice victim's right to pay what has heretofore been—and in all other cases remains—a reasonable fee to an attorney. After all, while Amendment 3 masqueraded as a benefit to the victim of medical negligence, the unspoken goal of the constitutional amendment was to price attorneys out of the market, leaving that same victim without real access to the courtroom. Indeed, Justice Lewis concluded as much in his dissent to this Court's advisory opinion on Amendment 3, observing that the amendment was "truly a wolf in sheep's clothing." *Advisory Opinion to the Attorney General re the Medical Liability Claimants Compensation Act*, 880 So.2d 675, 683 (Fla. 1994). While the Court may have felt obliged to allow Amendment 3 to go forward under its limited oversight, it is not required to feed the wolf and sharpen its teeth. Approving this amendment to the Rule would do exactly that. I urge the court to reject the proposed amendment.

COKER, MYERS, SCHICKEL,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to John Harkness, General Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and Stephen H. Grimes, Esquire, Counsel for Petitioner, Holland and Knight, LLP, P. O. Box 810, Tallahassee, Florida 32302-0810, by United States mail this ____ day of September, 2005.

RICHARD R. ALEXANDER, ESQUIRE