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
_____/

RESPONSE TO PETITION BY MICHAEL K. BAILEY, ESQUIRE

Michael K. Bailey, an attorney in good standing of The Florida Bar, respectfully objects to the Petition filed by former Justice Grimes seeking to employ the provisions of Rule 1-12.1(f), Rules Regulating The Florida Bar, as a vehicle to have this Court exercise its authority to amend Rule 4-1.5(f)(4)(B), Florida Rules of Professional Conduct, and files the following response in support of such objection:

As other Respondents have aptly noted, the Petition should not be viewed as an objective, unbiased attempt to change existing Bar rules for the betterment of the Bar at large, nor a magnanimous effort to further the interests of the citizens of the State of Florida. Instead, as Responses filed by others suggest, virtually all of the signatories have existing or former professional ties to the Florida Medical Association, to FPIC, Florida's largest medical malpractice insurer, or have represented interests aligned with these parties as registered lobbyists. It is respectfully submitted that the

Petition cannot rightfully be considered by this Court without careful scrutiny into the potential conflicts of interest and biased agenda of those that are signatories to it. The integrity of the process of amendment of the rules demands that the Court consider the motivation behind the proposed amendment and the vested interests of the parties with whom the signatories are allied.

The Petition before the Court is predicated upon the adoption of Amendment 3 by the electorate in November, 2004. As Justice Lewis insightfully observed when this Court considered an earlier challenge to placing Amendment 3 on the ballot to begin with:

> Clearly, the proposed amendment as written portrays that it will provide protection for citizens by ensuring that they will actually personally receive a deceptive amount of all money determined as damages in any medical liability action. However, the amendment actually has the singular and only purpose of impeding a citizen's access to the courts and that citizen's right and ability to secure representation for a redress of injuries. Its purpose 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 citizens to seek redress for injuries sustained by medical malpractice. This is truly a wolf in sheep's clothing. *In Re: Advisory Opinion to the Attorney General Re: The Medical Liability Claimant's Compensation Amendment*, 880 So.2d 675, 683 (Fla. 2004)(*dissent*).

The premise of the Petition is that this Court should presumptively validate the supposed intention of the Amendment to limit contingency attorney's fees in medical malpractice cases before there has been opportunity for issues relating to the constitutionality of the Amendment to be resolved through the usual process of litigation where there is a true case and controversy. It is respectfully submitted that this "puts the cart before the horse" by asking the Court to issue what would amount to an inappropriate advisory opinion regarding the interpretation of an ambiguous constitutional amendment before very real and serious challenges can be made to it. Certainly, adopting or rejecting the proposed amendment to Rule 4-1.5(f)(4)(B) "on the merits" would be seen as an indication of this Court's "predisposition" with respect to constitutional challenges to Amendment 3 that might come before it, and would send an unmistakable message to trial and lower appellate courts before which such legal challenges would be pending. Simply deferring consideration of any change in the contingency

fee rule on a procedural basis would allow the issues to be properly resolved through the usual trial and appellate court process, without fear that this Court would unnecessarily color the process. If the Court feels that the proposed amendment to the rule deserves further consideration pending legal rulings by the lower courts, it is submitted that the matter should be referred to an appropriate committee or study panel composed of experienced members of the Bar to report back to the Court, and allowing for further comment, briefing and argument.

Finally, perhaps the most significant reason the Court should reject the proposed amendment to the rule is that it would preclude the citizens of Florida from exercising their right to engage counsel of their choice and have the effect of imposing limitations on their ability to waive vested constitutional rights, even if Amendment 3 is ultimately determined to limit contingency fees. Currently, citizens of Florida have the right to knowingly waive their constitutional rights to counsel when charged with a crime (*Miranda* rights), their constitutional right against self incrimination, their constitutional right to jury trial, and other vested rights granted by the state and federal constitutions. Just as surely, the citizens of this state should have the right to decide for themselves if they want to waive the rights purportedly granted by Amendment 3, in the event it is ultimately upheld by

the courts and is interpreted to limit contingency fees in medical malpractice cases. Adoption of the proposed rule change would, in effect, trump the ability of persons seeking legal representation to exercise their right to waive the "advantages" granted under Amendment 3 and hire counsel of their choosing.

For the foregoing reasons, it is respectfully submitted that the Petition should be denied.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon John Harkness, General Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 and Stephen H. Grimes, Counsel for Petitioners, Holland & Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810, this 30th day of September, 2005.

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