

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

**COMMENTS AND OBJECTIONS OF ROSSMAN, BAUMBERGER,
REBOSO & SPIER, P.A., STEPHEN F. ROSSMAN, CHARLES H.
BAUMBERGER, MANUEL A. REBOSO, HOWARD A. SPIER,
LINCOLN J. CONNOLLY, AND PETER S. BAUMBERGER
TO THE GRIMES PETITION**

NOW COME Rossman, Baumberger, Reboso & Spier, P.A., Stephen F. Rossman, Charles H. Baumberger, Manuel A. Reboso, Howard A. Spier, Lincoln J. Connolly, and Peter S. Baumberger (hereinafter, collectively, “Rossman, Baumberger, Reboso & Spier, P.A.”) and file their comments and objections to the Petition to Amend Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct filed by Attorney Stephen H. Grimes (hereinafter “the Grimes Petition”), stating as follows:

INTRODUCTION

Pursuant to Rule 1-12.1(g) of the Rules Regulating the Florida Bar, Rossman, Baumberger, Reboso & Spier, P.A. submits the following comments and objections to the Grimes Petition. The Court should dismiss or deny same and reject the proposed rule amendment.

STATEMENT OF INTEREST

Rossman, Baumberger, Reboso & Spier, P.A. is a law firm formed in 1974 located in Miami, Florida. All of its members are admitted to practice in the State of Florida and are in good standing with the Florida Bar. Over the past 30 years, the firm and its attorneys have represented victims of medical negligence in claims and lawsuits in the State of Florida under contingency fee contracts which serve as the keys to the courthouse for most, if not all, such clients.

COMMENTS AND OBJECTIONS

1. The Grimes Petition was obviously filed in an attempt to circumvent the standard manner of interpreting and examining a new constitutional or statutory enactment. As the Court is likely well aware from the other comments filed, from its prior consideration of the subject amendment (hereinafter “Amendment 3”) as a proposed ballot initiative, and from the media and public attention the amendment received leading up to the 2004 election, there is a real and present dispute about the purpose, intent, and effect of Amendment 3. Its proponents claimed the amendment would merely guarantee greater recoveries to victims of medical malpractice; those opposed argue that it actually sought to lower the rate permitted to be charged under a contingency fee in a medical malpractice

case to such a level that competent, experienced counsel could not afford to accept cases under such terms and thereby eliminate most if not all meritorious medical malpractice actions. Rossman, Baumberger, Reboso & Spier, P.A. joins in such arguments in opposition and affirmatively states that due to the complexity and cost of medical malpractice litigation, and the well-funded and experienced defense counsel usually present in such cases, they would be unable to accept and pursue medical negligence claims and cases under such a significantly and severely reduced contingent fee.

2. Because in our experience none of our clients could afford to retain our (or any other comparatively competent and experienced firm's) services under an hourly non-contingent fee, approval of the Grimes Petition will result in Rossman, Baumberger, Reboso & Spier, P.A. being removed from the pool of available and experienced counsel for victims of medical negligence in Florida.

3. In actual practice, in order to represent a victim of medical negligence, the facts of the case must be meritorious on liability and, due to the expense involved, significant in damages. This almost always means that the victim must have suffered a severe, permanent injury or death in order to result in a recovery for the victim or his or her survivors. This is so because, in our almost universal experience, negligent healthcare providers

and their insurers do not offer a reasonable amount in settlement of meritorious and significant claims until after years of litigation. Such entails the expenditure of substantial sums for expert witness fees, treating physician conference and deposition fees, court reporter deposition transcript fees, thousands of dollars for obtaining copies of relevant medical records, and other related costs. Typically these approach or exceed six figures in amount. Thus, in accepting a case, we must evaluate both the factual merits and (knowing the defense will require us to prove our mettle and willingness to do everything necessary to prove our client's case), whether the ultimate settlement or verdict value will support such necessary expenditures and result in a net recovery to the client after reasonable attorneys' fees that will leave the client satisfied that justice was done and that he or she has been fairly and adequately compensated for his or her damages.

4. Because such cases by definition involve death or a significant and permanent injury, the victims or their survivors have almost always lost the ability to be productive, self-sufficient members of society. Their medical bills mount, they lose their jobs (or in a wrongful death case, often a significant wage-earner for the family), and they are left to scrape by in their every-day lives to pay their rent or mortgage, to feed and clothe themselves and their families, and to otherwise meet the day-to-day economic

requirements of survival in our society. Regardless of their financial circumstances before becoming victims of medical malpractice, such clients do not have the financial ability to pay hundreds of dollars per hour in attorneys fees to retain competent, experienced attorneys to represent them, let alone possess a spare hundred thousand dollars or more to finance the litigation costs of a medical negligence lawsuit. By seeking to void the ability of counsel to accept such cases under a reasonable contingency fee, the Grimes Petition and its proponents seek to eliminate the ability of victims of medical negligence to obtain access to courts for redress of their grievances and to seek justice for the wrongs committed against them. In this sense, the Grimes Petition in application—if adopted—would be economic discrimination in the purest form against those who are least able to afford and finance the assertion and preservation of their rights.

5. As explained above, the Grimes Petition would undo the fairness that has developed in our legal system which allows the middle class, lower economic classes, and the poor to obtain equal justice. Yet even ignoring this compelling reason that it should be rejected, the Grimes Petition simply puts the cart of the rules of professional conduct before the horses of judicial interpretation and constitutional supremacy.

6. Amendment 3, upon which the Grimes Petition relies, itself says nothing about limiting contingent fees in medical malpractice actions¹ and says nothing about currently approved fees being *un*reasonable or excessive, but instead simply guarantees claimants a certain percentage of recovery. This guarantee does not place prohibitions upon how claimants may utilize their net recoveries generally and certainly does not specifically outlaw the expenditure of such funds for attorneys' fees. The Grimes Petition nonetheless asks this Court to preordain such an outcome. Although Amendment 3's proponents may have desired to artificially reduce the permissible contingency fees in medical negligence cases, its author simply failed to write it so as to achieve or even require this dubious result.

7. Victims of medical negligence will no doubt bring court challenges contending that Amendment 3, if applied as the Grimes Petition seeks to prohibit them from freely retaining counsel of their choice under reasonable terms of their informed choosing, violates their federal constitutional rights of, for example, access to courts, due process, and equal protection, while leaving tortfeasors unbridled to finance strident and

¹The Grimes Petition does not claim otherwise. Without acknowledging the lack of textual support for its argument, the Grimes Petition instead merely offers the supposition that the amendment “*reflects the intent to control contingent fee contracts in medical liability cases.*” Grimes Petition, at 2 ¶ 5 (emphasis added).

monetarily unlimited defenses to even the most meritorious of medical malpractice claims. In short, Amendment 3 presents much grist for the constitutional mill, and it would be unwise and premature for this Court to bestow the imprimatur of validity upon it via adoption of the Grimes Petition, which would freeze victims of medical negligence out from obtaining counsel to pursue their claims (which involve complex presuit requirements and a relatively short two-year statute of limitations) while these substantial issues regarding Amendment 3 are considered by the courts in actual cases presenting real controversies.

8. In the meantime, victims of medical negligence will continue to be protected by the current and longstanding requirement of the Rules of Professional Conduct requiring contingent fees to not clearly exceed a “reasonable” amount, Fla. R. Prof. Conduct 4-1.5(a)(1), and affording a presumption that contingent fees higher than those set forth in Rule 4-1.5(f)(4)(B)(i) are clearly excessive. Moreover, clients will remain able and allowed to negotiate the contingent rates charged for professional services amongst competing counsel in the marketplace. There simply is no pressing need or emergency worthy of adopting the Grimes Petition to the detriment of victims of medical negligence when so much remains unsettled about the validity and effect of Amendment 3, and where the aforementioned

protections of such victims under the Rules of Professional Conduct are in place.

CONCLUSION

WHEREFORE, Rossman, Baumberger, Reboso & Spier, P.A., Stephen F. Rossman, Charles H. Baumberger, Manuel A. Reboso, Howard A. Spier, Lincoln J. Connolly, and Peter S. Baumberger respectfully request that this Court reject the proposed amendment to Rule 4-1.5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that an original and 9 copies of the foregoing have been sent to the Florida Supreme Court, attention Clerk's Office, 500 South Duval Street, Tallahassee, FL 32399, via Federal Express, with an electronic format copy to the Court at e-file@flcourts.org, and

with copies served by Federal Express to John Harkness, General Counsel,
The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 and
Stephen H. Grimes, Counsel for Petitioners, Holland and Knight, LLP, P.O.
Box 810, Tallahassee, FL 32302-0810, this 29th day of September, 2005.

ROSSMAN, BAUMBERGER, REBOSO & SPIER, PA.,
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