

IN THE FLORIDA 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

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**COMMENTS OF A. CLARK CONE, ESQ. (FLORIDA BAR NO. 326887)**  
**OBJECTING TO PROPOSED AMENDMENT TO THE**  
**RULES REGULATING THE FLORIDA BAR**

A. Clark Cone, an attorney in good standing with The Florida Bar hereby Objects to the above referenced Petition to change Rule of Professional Conduct 4-1.5. There are a multitude of legal procedure, legal principles and Constitutional rights that would be violated by the proposed Rule change. The most glaring of these legal principles is the basic right to have this matter litigated in a judicial proceeding involving an affected litigant. Within such a legal proceeding, the multitude of legal issues would and should be addressed by a Court with appropriate jurisdiction. This Petition improperly attempts to circumvent the entire litigation process. Below is a brief discussion of just some of the multitude of legal issues that must be addressed by a Court with appropriate jurisdiction prior to any administrative rule-making proceeding.

It has not even been determined that the “Claimant’s Right To Fair Compensation” Constitutional Amendment even limits or sets attorney’s fees. The precise wording of the subject Constitutional provision indicates its application is

to medical malpractice claims under contingency fee agreements, but from this point forward attorney's fees are never mentioned. The Constitutional provision simply states that the percentages to the claimant are "exclusive of reasonable and customary cost". If attorney's fees are not a "reasonable and customary cost" of making a recovery, then what are they? The literal reading of the Constitutional Amendment within the four corners of the Constitutional Amendment language determines the interpretation of the Constitutional provision. What the political and special interest supporters of the Constitutional Amendment gave as the reason for the Amendment or gave as their interpretation of the language is not even relevant when interpreting a Constitutional Amendment. Accordingly, the proposed Rule change makes a monumental and incorrect legal interpretation of "Amendment 3" and improperly presents it to this Court in an administrative proceeding to change a Rule of Professional Conduct that would violate the rights of medical malpractice victims throughout the State of Florida.

There are State and Federal Constitutional issues involved in this improper proposed Rule change. The basic Constitutional right of a citizen to contract with an attorney for representation cannot be prohibited. The current Rule provides for percentages that are deemed reasonable, but there is a process by which the client and the attorney can negotiate different and higher percentages to be approved by a Court as reasonable fees. The proposed Rule change prohibits any negotiation of a

contingency fee beyond that stated and thereby improperly takes away a citizen's right to negotiate a contract with an attorney of his choosing. Additionally, even if we make the monumental and incorrect interpretation of "Amendment 3" as affecting contingency attorney's fees, then this type of Constitutional provision is a "personal" Constitutional right that can be waived by the citizen. Again, if we assume the Constitutional Amendment affects contingency fees, the proposed Rule change would improperly take away a citizen's right to waive the Constitutional provision and negotiate a contingency fee contract outside the limitations of the Constitutional provision. There is no other Rule known of by this attorney that limits a citizen's right to waive a personal Constitutional right and it would be improper and unconstitutional to do so.

The above is just the beginning of the multitude of legal issues that must be determined by the Courts of this state before the subject Constitutional provision is interpreted and its meaning and effects even known. It is premature and improper to proceed forward with a Rules-making administrative proceeding that circumvents the entire litigation process and makes monumental and incorrect interpretations of the subject Constitutional provision.

As a "comments" procedure regarding the administrative Rules of Professional Conduct, it is important that we not become blinded by all the legal issues and that we not restrict our "comments" to the technical legal arguments.

When considering a change in a Rule of Professional Conduct, the ultimate reason, purpose, and goal of the Rules of Professional Conduct should be acknowledged and fulfilled, and the use of a moral principled compass is not just helpful but essential.

The Preamble to the Rules of Professional Conduct begins, “A lawyer is a representative of clients, an officer of the legal system, and a public citizen having **special responsibility for the quality of justice.**” (Emphasis added).

Furthermore, the Preamble states, “A lawyer should be mindful of **deficiencies in the administration of justice** and of the fact that the poor, and sometimes person who are not poor, **cannot afford adequate legal assistance**, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself **in the public interest....**” The Preamble goes on to warn that “(T)he **purpose** of the rules can be **subverted** when they are **invoked by opposing parties as procedural weapons.**” (Emphasis added). A frank discussion regarding who filed the Petition, why they filed the Petition, and the detrimental affects of the Petitioned Rule change, will lead to only one logical, honorable, and moral decision; to Deny the Petition.

The Petition was not pragmatically filed by 55 concerned members of The Florida Bar identifying a Professional Conduct Rule needing changes to promote

the goals of the Rules of Professional Conduct. The Petition was filed by Stephen H. Grimes, an attorney known to represent special interest groups that include health care providers, medical associations, and other tort-reform (tort-deform) organizations whose stated goals include; obtaining immunity from legal responsibility in medical malpractice events and preventing the citizens of Florida from gaining access to the Courts for redress of injuries caused by medical malpractice events. For all practical purposes, the Petition was filed by Mr. Grimes on behalf of Mr. Grimes' special interest clients; health care provider client(s), medical association(s), and other tort-reform (tort-deform) organization(s). An analysis of the 55 attorneys who signed onto the Petition provides confirmation that this Petition is driven by special interest clients and has absolutely nothing to do with any desire by members of The Florida Bar to change a Rule to attain any of the lofty goals of the Rules of Professional Conduct. In fact, quite the opposite is true. The 55 attorneys are made up of major defense law firm's attorneys representing the Florida Medical Association along with attorneys working in-house with the Florida Medical Association, registered lobbyists for tort-reform (tort-deform) organizations and lawyers representing the largest health care provider insurer in the state of Florida, FPIC, along with in-house FPIC attorneys. As stated above, knowing who is really behind the filing of the Petition is important when considering the arguments made to the Court in, what should be,

an administrative proceeding by members of The Florida Bar who should only be requesting an amendment to the Rules of Professional Conduct to meet the lofty goals set forth by this Court for the administration of justice to all; not to meet the special interest goals of some of The Florida Bar members' clients. Some could even argue that the filing of the Petition itself was improperly silent regarding the individuals, organizations, and business entities having a specific special interest in the filing of the Petition, particularly in light of the Rules of Professional Conduct, Rule 4-3.9, that requires an attorney under these circumstances to reveal that their "appearance is in a representative capacity." In this way, the ruling authority fully understands the underlying motivation of the real party in interest. This Court should have known, from the Petitioner, the real party in interest. It can be legitimately argued that such a blatant omission of failing to indicate the real client with an interest in a Petition to change a Rule of Professional Conduct will from this day forward taints all their arguments for a change in the Rule. Absent disclosure of the real clients in interest, it incorrectly appears the filing was just a concerned member of The Florida Bar wanting to change a rule to further the goals expressed in the Preamble to the Rules of Professional Conduct.

Moving on to why the Petition was filed, it is clear that the Petition is an improper attempt to use the Rules of Professional Conduct to take away a citizen's ability to waive a personal Constitutional right (even if we assume Amendment 3

granted a Constitutional right regarding fees), and to take away a citizens right to negotiate a contract with an attorney of their choosing, and to prevent a citizen's access to the courthouse to redress an injury caused by a medical malpractice event; all for the benefit of special interest clients and having nothing to with meeting the goals of the Rules of Professional Conduct. The true intent and purpose of Constitutional "Amendment 3" and now the Petition for the Rule change before this Court were clearly espoused in Justice Lewis' Dissent in *In Re Advisory Opinion To The Attorney General Re Medical Liability Claimant's Compensation Amendment*, 880 So.2d 675 (Fla. 2004):

The chief purpose of the proposed amendment is to render it economically impossible for claimants and their legal representatives to proceed with actions to redress legitimate injuries. With the artificial percentages of recovery mandated by the proposed amendment, unquestionably, legal counselors will be unable to accept responsibility for processing medical actions.... Every citizen of Florida needs and is entitled to assistance of counsel in all legal matters, particularly in connection with medical negligence actions, and to be free to engage counsel on terms the citizen deems appropriate...."

Accordingly, the clear intent of the Constitutional "Amendment 3" and now the clear and improper purpose of the Petition for a Rule change is to fulfill the stated goals of Mr. Grimes' clients; to obtain immunity from legal responsibility for medical malpractice events and to prevent any citizen's right to access the court for the redress of an injury caused by a medical malpractice event. Again, and most

importantly, the goals of the Petition have absolutely nothing to do with the goals stated in the Preamble to the Rules of Professional Conduct.

To be perfectly candid, every legal scholar and every political professional fully comprehend that special interest groups successfully mislead the public into falsely believing that the “Claimant’s Right To Fair Compensation”, would actually provide protection, benefits, and an increased share of a medical malpractice recovery to a medical malpractice victim, while the real intent and covert purpose of the “Claimant’s Right To Fair Compensation” was to prevent the payment of any medical malpractice compensation to any victim by preventing them access to qualified representation. Now these same special interest groups, emboldened by the misleading passage of “Amendment 3”, are improperly enlisting the assistance and representation of members of The Florida Bar to improperly use an administrative Rule changing procedure as a weapon to take away a Florida citizen’s last remaining chance to obtain justice for Florida medical malpractice events, by attempting to change a Professional Conduct Rule to remove a citizen’s ability to obtain legal counsel in a medical malpractice claim and to remove a citizen’s right to that ever more elusive key of justice to the courthouse door. The Petitioned Rule change would virtually eliminate (but for the very wealthy) any citizen’s ability to pursue a medical malpractice claim.

The Petitioned Rule change, on its face, would not pursue any of the stated objectives of the Rules of Professional Conduct to regulate itself for the public interest and the Petitioned Rule change is seeking a new Professional Conduct Rule specifically designed and calculated to be “subverted” and “used as a procedural weapon” (as warned about in the Preamble to the Rules of Professional Conduct) against every citizen harmed by a medical malpractice event.

The Petition should have been filed because members of The Florida Bar were fulfilling their “special responsibility for the quality of justice”, and that they were addressing “deficiencies in the administration of justice”, and they were taking into consideration that many citizens “cannot afford adequate legal assistance”, and it was “in the public interest”, and was filed without any interest or intent to change a Rule so it could be “subverted” and “invoked by opposing parties as procedural weapons”; all stated goals and warnings in the Preamble of the Rules of Professional Conduct. Most unfortunately, it is blatantly obvious that the Petition was filed by member of The Florida Bar for all the wrong reasons. To be blunt and to the point, as a fellow member of The Florida Bar, I find the filing of a Petition to change one of our Rules of Professional Conduct under these circumstances and for these purposes very disappointing and detrimental to the professional integrity of our Professional Conduct rule-making process.

It is clear that this Petition should be Dismissed as an improper Petition filed for improper reasons on behalf of special interest clients, and/or the Petition should be Denied as contrary to every stated goal in the Rules of Professional Conduct, and as contrary to the spirit and fundamental purpose and goals of the Rules of Professional Conduct. As stated above, the use of a moral principled compass is not just helpful but essential in this process. Can there be any doubt what direction a moral principled compass would point on this issue? It would clearly point to a Dismissal and/or a Denial of the Petition.

It should not be forgotten that all members of The Florida Bar took an oath to protect and preserve all citizens' and families' Constitutional rights, and pledged not to make attempts to destroy Constitutional rights. In my general research, I came across the attorney's oath which includes, "I will support the Constitution of the United States and the Constitution of the State of Florida..." and "I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land..." I also ran across Rules Regulating The Florida Bar, Rule 3.4.7, which states, "Violation of the oath taken by an attorney to support the constitutions of the United States and the State of Florida is ground for disciplinary action..." Let me be abundantly clear, I am not suggesting there are grounds for disciplinary actions. While I would strongly disagree with the legal arguments, I'm sure there

are legal scholars who could argue that moving forward in this Rule change process is not “unjust” to citizens and who could find the issues, “honestly debatable under the law of the land...”, and who could argue that the Rule change is not intended to destroy Constitutional rights. I mention these provisions to show that the oath and these Rules demonstrate how strongly The Florida Bar and the Courts deem it is our professional duty to ensure the process used is fundamentally “just”, and deem it is our duty to protect and support Constitutional rights. In my opinion, the Petition, if granted, would improperly employ a procedure never intended to adjudicate outstanding legal issues affecting the Constitutional rights of our citizens and such a process would not be fundamentally “just” because the very citizens affected are not even involved in the process; and the Petition, if granted, would destroy Constitutional rights we have pledged to protect and defend.

I thank the Court for giving me this opportunity to express my “comments” on this very important issue that could potentially, if such a Petition was granted, destroy so many citizens’ and families’ Constitutional rights in this great State of Florida. I respectfully request that this Court Dismiss and/or Deny the Petition.

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## **CERTIFICATE OF SERVICE**

I hereby certify that the original and nine (9) copies hereof have been forwarded to the Clerk for filing, along with an electronic copy filed with the Clerk at [e-file@flcourts.org](mailto:e-file@flcourts.org); and that a copy has been furnished by U.S. Mail to John F. Harkness, Jr., General Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300, and to Stephen H. Grimes, Counsel for Petitioners, Holland & Knight, LLP, Post Office Drawer 810, Tallahassee, FL 32302-0910, this 14<sup>th</sup> day of September, 2005.

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