

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
RULE OF PROFESSIONAL CONDUCT,

**COMMENTS OF ANDREW ELLENBERG, ATTORNEY, FLORIDA BAR
NO. 0770868 AND OBJECTIONS TO PROPOSED AMENDMENT**

Andrew Ellenberg respectfully submits the following comments and objections to the proposed Amendment to the Rules Regulating the Florida Bar- Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct:

1. I am a member of the Florida Bar since 1988 and have been practicing since that time as a civil trial attorney. I file this pleading to voice my opposition to the “Grimes Petition” now pending before the court.
2. The Grimes petition has been signed by a cabal of lobbyists for the insurance and health care industries (all of whom stand to directly benefit from the draconian request). It is also signed by an assortment of lawyers from Holland and Knight, former Justice Grimes’ law firm. The petition is an abuse of the procedural privilege extended to each member of the Florida bar to seek changes in the rules regulating our profession to advance our professionalism and profession.
3. As is known, former Justice Grimes engineered Amendment 3. It is clear that **the amendment was carefully worded not to limit attorneys fees**. For Grimes, et. al. to have written an amendment to limit attorneys fees in this type of case would have been simple - the amendment would have stated, without need for an

oracular divining of its meaning - 'lawyers for victims of health care neglect cannot charge a fee of more than %XX of the gross recovery'. That was not done.

4. One must reasonably assume, given the money spent by Justice Grimes' client to put forth Amendment 3, that those who crafted the language could have plainly written an amendment which limited fees - *if they wanted to do so*. Rather, the clear intent was to be unclear - to fly under the radar an effort to limit fees via an amendment which guarantees certain amounts of 'recovery'. The instant Grimes Petition is an attempt to advance the interests of the Florida Medical Association and other like situated potential defendants in health care neglect cases. The Grimes Petition is an effort to gain additional unfair advantage over health care consumers who have been victimized by negligent care. **To be sure, there is no limitation on any health care provider, in any way, shape or form, as to the amount which may be paid to have the lawyer(s) of their choice defend such lawsuits.**

- 5.

Grimes' interpretation of Amendment 3, and any of its applications, is a substantive legal matter to be addressed through appropriate litigation in the courts. The Grimes Petition is a blatant attempt to change substantive law through rules regulating professional conduct. That is inappropriate.

6. Florida citizens have rights, under current Florida Bar rules, by which they contract with, and pay for, legal services in all manner of cases including, but not limited to, health care negligence cases. Clearly, the Rules provide the legal services consumer the right to waive provisions of Rule 4-1.5. These consumer rights should not be changed or eliminated so that a narrow class of potential litigants can load the dice in their favor.
7. The rights and benefits to contract for legal services, as conveyed on Florida citizens by current Rules, must remain inviolate. The Grimes Petition is an attempt to compound the injury suffered by victims of sub-standard health care. These people are once victimized by the receipt of sub-standard health care and, if the Grimes Petition carries the day, will endure a second rights deprivation by the inability to retain experienced, capable lawyers to handle these challenging and expensive cases. Again, and this bears repeating, these are cases fought tooth and nail, with health care providers defended by deep-pocketed insurers, and without limitation on the amount which can be paid by health care providers in defense of their care. It would be a travesty to institutionalize such a proposed inequity by changing the Florida Bar Rules as requested in the Grimes Petition.
8. The Grimes Petition, like the Amendment 3 campaign itself, is a misguided attempt to make lopsided the playing field, to shut the courthouse door to victims

of health care neglect, by unfairly and arbitrarily limiting their freedom to contract with an attorney. Such a consumer's contract with a lawyer is based upon market conditions subject to the existing constraints of Rule 4-1.5.

9. The existing rights to contract with a lawyer in such cases should not be changed. To change the Rules impairs a victim's rights under the state and federal constitutions. This Court should be allowed to consider the substantive issues before addressing regulation. It is respectfully suggested, to say the least, that it is premature for the Court to be considering a Rule change based upon the Grimes Petition.
10. Accordingly, I oppose the Petition and request that this Honorable Court deny it.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was served by U.S. mail upon John Harkness, Executive Director, The Florida Bar, 651 East 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 ____ day of July, 2005.

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