IN THE 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
_____/

COMMENTS OF ATTORNEY DAVID GASPARI AND OBJECTIONS TO PROPOSED AMENDMENT

Attorney David Gaspari respectfully submits these comments vehemently opposing the proposed amendment to Rule 4-1.5(f)(4)(B), and states as follows:

A. *The constitutionality of Amendment 3 should not be litigated in the context of a proposed change to the Rules of Professional Conduct, proposed by a group of lawyers representing a single lobbying group:*

The Florida Medical Association (FMA) has cleverly gathered a group of lawyers parading as "rank and file" members of the Florida Bar to propose an amendment to the Rules of Professional Conduct. Mr. Grimes, the Petitioner, has candidly admitted that he was tapped by the FMA to file the amendment. While Rule 1-12.1(f), Rules Regulating the Florida Bar, provides that the amendment process may be initiated by "50 members of the Bar," this procedure contemplated a petition filed by a diverse group of attorneys whose aim is presumably the greater good of the Bar itself.

Holding the Grimes petition up to the light, illuminates the insidiousness of

allowing 50 members -- almost half of which are members of the petitioner's law firm -- working on behalf of a single client to make a broad-based change to a rule that will affect hundreds of thousands of Floridians. Thus, as a preliminary matter, this Court should recognize the reality of what is going on with this petition, and advise attorneys who may be lobbying for their clients, that this procedure will not be tolerated by this Court as a means to subvert the Rule's purpose, when a single interest is hiding behind a rule change for the "common good."

B. *It is also grossly apparent from the Grimes petition, that its sole goal is to flout the normal judicial process to review the constitutionality of recently enacted Amendment 3:*

By portraying this rule to this Honorable Court as some tangential and innocuous minor change to Rule 4-1.5(f)(4)(B), this lobbying group is trying to dupe this Honorable Court into believing that Little Red Riding Hood's grandmother is not really the Big Bad Wolf. It seems both wasteful of judicial resources, as well as constitutionally infirm, for this Court to make a prospective ruling on the constitutionality of this amendment, by simply dispensing with the requisite legal analysis, and just adopting a Bar rule instead. This Court's endorsement of such a procedure will only encourage clever lawyers to make every attempt to bypass the normal judicial process developed over thousands of years of common law, and go for the quick and easy jugular by filing a quick and easy petition to this Honorable Court.

C. *Even if this Court were to determine that Amendment 3 is indeed constitutional, there is absolutely nothing about this amendment that should make it impervious to being waived, like all other constitutional rights:*

It seems rather incongruous that this Court could rule that those charged with crimes can waive their fundamental rights to things like counsel or trial by jury, but that a victim of medical malpractice should not be allowed to waive the right to agree to pay an attorney under the current Bar Rule 4-1.5(f)(4)(B). There is certainly nothing about the "right" seemingly established by Amendment 3 which somehow makes it more sacrosanct, or deserving of different treatment than any other right under our State or Federal Constitutions. Thus, any such distinction cannot be justified.

A defendant in a criminal case may waive just about any right, even though his or her liberty, and life itself, hangs in the balance. *See, Tucker v. State*, 417 So. 2d 1006, 1013 (Fla. 3d DCA 1982)(Court held that a criminal defendant may waive even fundamental rights, such as the right to rely on an expired statute of limitations, so long as the waiver meets appropriate safeguards, stating: "Waiver of any fundamental right must be expressed in certain, not implied or equivocal terms."). It is well known that there are all kinds of waivable fundamental rights that have been upheld: (a) the right to remain silent (*Philmore v. State*, 820 So. 2d 919 (Fla. 2002)); (b) the right to a 12-person jury in a murder case (*Groomes v.*

State, 401 So. 2d 1139 (Fla. 3d DCA 1981)); (c) the right to trial by jury (*Scss Ums v. State*, 404 So. 2d 1074 (Fla. 3d DCA 1981)); and (d) the criminal defendant's right to testify on his or her own behalf (*e.g. Brown v. State*, 894 So. 2d 137 (Fla. 2004)).

How could this constitutional right to cap fees ever compare with the importance of something like speaking to a police officer without having an attorney present? The answer is, that it simply does not. To codify some type of prohibition on this waiver in lieu of a constitutional analysis, would respectfully undermine the important role this Court plays in our State's judicial process.

D. *Conclusion:*

This Court should dismiss this petition because it is an impermissible attempt to abuse a procedure for proposing the Bar's rules. Additionally, to grant this rule change would essentially rule on the constitutionality of Amendment 3 without any consideration of the constitutional arguments. It is both premature and improper, and this Court should deny the petition.

DATED this 8th day of September, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. regular mail this 8TH day of September , 2005 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.

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