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.
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OBJECTIONS AND COMMENTS OF WILLIAM C. GENTRY, ATTORNEY, FLORIDA BAR NO. 137134, TO PROPOSED AMENDMENT TO THE RULES REGULATING THE FLORIDA BAR

William C. Gentry, an attorney in good standing of The Florida Bar, objects to the petition filed purportedly in behalf of some 55 attorneys who, in violation of at least the clear spirit of Rule 4-3.9, Rules Regulating The Florida Bar, seek to improperly use their offices as members of The Florida Bar to further the interest of their clients.[1] Undersigned counsel comes to this issue from a different perspective than many who have appeared to oppose the Petition. I have strenuously opposed the Academy of Florida Trial Lawyers' decision to use the Constitution to "punish" doctors (Amendments 7 and 8) and have refused to participate in the internecine doctor-lawyer squabble which has abused the petition process and the State Constitution. However, Petitioner's attempt to extend this destructive political struggle into professional rule making is, in my view, contrary to the public interest and the proper and orderly regulation of the Bar. Although

[1] We will not belabor the representative capacity of Mr. Grimes and the signatories to the Petition. Their interest and relationship to the medical and other special interest tort-reform groups have been previously brought to the attention of this Court by other commentators.

not wishing to belabor comments already made, I would respectfully submit the following:

1. Having previously crafted an exceptionally deceptive and seductive constitutional amendment that promised Florida citizens they would personally receive a guaranteed amount of all money awarded as damages in any medical malpractice claim – while the proponents were really seeking to limit the claimants' ability to employ counsel – the proponents now seek to use the Rules Regulating The Florida Bar to hijack the customary adjudicatory process and impose their self-serving construction of the Amendment.

2. The conventional wisdom in Tallahassee as to what Amendment 3 was "intended" to do and the characterizations by the proponents or opponents are irrelevant to the issue of what Amendment 3 meant to the citizens who voted for it.[2] It is through the average voter's eyes, as ascertained through established principles of statutory and constitutional construction, that the Amendment should now be interpreted and applied. The Circuit Court for Leon County recently recognized such and made the following cogent observations in rejecting the attempt of the Trial Lawyer's front group to offer evidence of their "intent" in drafting Amendment 7:

[2] For example, Florida courts have long held that legislators' intent in passing legislation is not admissible and irrelevant to the court's interpretation of a law. *McLellan v. State Farm Mut. Auto. Ins. Co.*, 366 So.2d 811 (Fla. 4th DCA 1979) citing *Security Feed and Seed Co. v. Lee*, 138 Fla. 592, 189 So. 869 (1939).

> "It seems especially imperative that the words proposed to be enacted by any initiative petition be given a practical, common, familiar meaning. This, of course, the first (and often last) canon of construction – what words say is the polestar of what they mean. *Florida Soc. Of Ophthalmology v. Florida Optometric Ass'n*, 489 So.2d 1118 (Fla. 1986) … But it is even more appropriate considering constitutional amendments submitted to the direct democratic processes of an initiative petition and a referendum of the voters. Fla. Const. Art. XI. …
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> FPPI argues for protection of what it contends to be the "will of the people." But the people do not cede their will to the proposer of an amendment. … Accepting testimony purporting to supply unwritten, unadopted constitutional intent would create a means of establishing constitutional law that could not be anticipated by the electorate that is the only body with power to create the constitution. And, of course, if the provision is not ambiguous, resort to aids for construction is unnecessary."

Likewise, the intent of Mr. Grimes and the people he represented and apparently still represents in drafting and advocating the passage of Amendment 3 is irrelevant.

3. It should now be for the courts **in appropriate controverted cases** to determine the application of this new constitutional right of a claimant "to receive no less than 70% of the first $250,000.00 of all damages received by the claimant … whether received by judgment, settlement, or otherwise … [and] 90% of all damages in excess of $250,000.00 …". Who wouldn't vote for such a thing?[3]

[3] Given the nature of these proceedings, I presume it is not inappropriate to share a somewhat humorous anecdote that probably best makes the point. My oldest daughter is a lawyer and called my youngest daughter to tell her to vote against Amendment 3 because it was an effort to limit attorneys' fees. My youngest daughter, who is no dummy – having received a Masters Degree in the incomprehensible area (at least to me) of entomology and soon to be a doctor of veterinary medicine – called me on the Tuesday night of the vote to find out if she had done the right thing. She told me when she got in the polling booth, she couldn't figure out which amendment she was supposed to

Other states, for example, do not permit contractual subrogation claims. *See e.g.,* Conn. Gen. Stats. §52-225c (2005). By the unambiguous language of this constitutional amendment, the people of Florida have swept away or greatly limited devices that previously reduced a claimant's right to receive the compensation which he or she is awarded through verdict or settlement. Indeed, the Amendment is entitled and provides for "Claimant's Right to Fair Compensation", not "Defendant's Right to Limit Claimant's Choice of an Attorney".

4. Nowhere does Amendment 3 purport to limit attorneys' fees. Its only passing reference to fees is to identify the specie of claims universally involving claimants by making its guarantee apply to "medical liability claims involving a contingency fee". Faithful application of Amendment 3 would eliminate a plethora of contractual and statutory limitations on the right of a claimant to receive the full damages guaranteed by Amendment 3. Among other things, Amendment 3 may eliminate or greatly reduce subrogation claims of insurance companies, liens, various statutory "caps" on damages, and any other provision of law or contract that would preclude the personal injury claimant from receiving "70% of the first $250,000.00 in all damages received … and 90% of damages in excess of

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vote against. She said Amendment 3 sounded really good to her and she didn't see where it had anything to do with attorneys' fees. However, since that was the only one that involved claims, she voted against it with the hope she was doing as her sister requested. Fearful of calling her older sister, she called her dad to see if she had done the right thing.

$250,000.00." Indeed, to the extent a voter thought to view the Amendment as applying to attorneys' fees, it can just as readily be read as a fee shifting provision to require a losing defendant to pay claimant's fees so as to guarantee the net recovery. Of course, some applications may implicate federal preemption or impair preexisting contracts. However, many applications would not. That, of course, is why these matters need to be fully adjudicated in the lower courts of this state before this Court attempts to fashion some rule.

5. Accepting Petitioners' premise that the Amendment solely creates a "right" to limit claimant's attorney's fees would run contrary to canons of constitutional and statutory construction that, to the extent possible, the Amendment should be read in conformity with other existing constitutional provisions. (*See* Fla.Jur.2d §60, *Con. Law.)* Such Florida Constitutional provisions include Access to Courts, Article I, §21, Due Process, Article I, §9 and Equal Protection, Article I, §2. Such an interpretation would also have to be tested in a proper case or controversy against federal constitutional guarantees and protections. When properly viewed we would submit that the least likely legal interpretation of Amendment 3 is that it limits the fee that may be charged or which a claimant may agree to pay to prosecute a medical liability claim.[4]

[4] The Amendment clearly contemplates the claimant should receive the stated percentages of the gross award or settlement. Any other interpretation would be strained at best. However, if subrogation claims and liens were allowed to be deducted and the Amendment only limited plaintiffs' attorney fee, then in order for the client to

6. A petition to amend the Rules Regulating The Florida Bar is not an appropriate forum for identifying and litigating the myriad potential applications of Amendment 3 and whether such applications pass constitutional muster. In its Advisory Opinion, this Court noted the various arguments made by opponents as to potential ramifications of the proposed amendment, but found there was no "discrepancy between the amendment and summary because those terms are used consistently between the summary and the amendment". As to the opponents' argument that certain terms, and in particular "medical liability", were vague, the Court noted that resolution of such issues was "better left to subsequent litigation, should the amendment pass." 880 So. 2d at 679 (Emphasis added). Of course, the proponents of Amendment 3 now seek to avoid the case-by-case interpretation of Amendment 3 through "subsequent litigation" by seeking a premature determination by this Court without the essential case or controversy process. It is respectfully submitted that a multitude of issues **must** be resolved before this Court amends the Rules in a manner that necessarily adopts an interpretation.

7. It is beyond cavil for the Petitioners to suggest their interpretation of this new constitutional right cannot be waived. Indeed, there should be little doubt these same lawyers who signed this Petition would sing a different tune if Amendment 3 were applied to limit subrogation clauses in insurance contracts – to

"receive" the guaranteed amount, in many instances the amount "received" after liens would be less than the guaranteed amount; thus, leaving no amount payable for attorneys' fees.

which these advocates for insurance would surely argue that by agreeing to the contract of insurance, the insured has "waived" this right. *See e.g., Global Travel Mrktng, Inc. v. Shea*, ____ So. 2d. ___, 2005 WL 1576244 (Fla. 2005). Certainly, if a party may waive the right against self incrimination, freedom from searches, right to jury trial and right to counsel[5], they can waive a purported right to limit their choice of whom to hire and the amount they choose to pay.

8. Justice Lewis was eminently correct in his observation that Amendment 3 "as written portrays that it will provide protection for citizens by insuring they will actually personally receive a deceptive amount of all money determined as damages in any medical liability action. However, the Amendment actually has a 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. … This is truly a wolf in sheep's clothing." *Advisory Op. 2 Atty. Gen. re Comp. Amd.*, 880 So. 2d 675 at 683. Unfortunately, in reviewing a proposed amendment to determine whether it may be placed on the ballot, the Court is constrained to determining (a) whether the amendment complies with the single subject rule and (b) whether the title and summary provide fair notice of the content. In its opinion, this Court noted "the summary in this amendment comes very close to reiterating the briefly worded amendment." 880 So. 2d at 679. Thus,

[5] Is it not preposterous to suggest that when faced with incarceration for a crime, an indigent defendant can waive his right to counsel; but a civil litigant cannot waive a "right" to limit the fee he chooses to pay to have the counsel of his choice?

when this Court takes a restricted view of its jurisdiction, if the summary and text are equally misleading, they pass constitutional muster.[6]

9. Finally, we would note that Petitioners' purported "concern" that it is unethical for an attorney to be in a position of "negotiating" with the client to cause them to agree to a higher fee is demagoguery at its best (or, more appropriately stated, at its worst). Every client has a constitutional right to contract. Was Mr. Grimes unethical if he "negotiated" with the Florida Medical Association in regard to the amount of fee he would charge for carrying their water? The Statement of Clients' Rights required by the Rules of Professional Conduct [(*See* Rule 4-1.5(f)(C)] must be thoroughly discussed, signed and kept with every contingency fee contract. It expressly provides,

> "You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with 1 lawyer you may talk with other lawyers. (Statement, Para. 1) … If at any time you, the client, believe that your lawyer has charged an excessive or illegal fee, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida." (Statement, Para. 11).

Having told a client he or she has a right backed by The Florida Bar to "negotiate" for a lesser fee, is it "unethical" and a "conflict" for the attorney to then "negotiate" with his client and (heaven forbid) seek a larger fee than the client

[6] Just as the proponents intent is now irrelevant, this Court's earlier assessment of Amendment 3 was in the context of the proponents' and opponents' frenzied struggle wherein the battle-lines were about limiting contingency fees. Respectfully, any review now should be guided, as the Circuit Court of Leon County observed, by the "practical, common, familiar meaning "of the words of Amendment 3. That's what the people read and voted upon.

requests? Petitioners' disingenuous concern about protecting plaintiffs' lawyers from having to engage in the unseemly practice of negotiating with their clients is but another deception to try to gain an advantage for the health care profession against its victims who already face a stacked deck.[7]

For the foregoing reasons, it is respectfully submitted that the Petition should be denied. If this Court should determine to consider the matter further, it is submitted that the Court should refer this matter to an appropriate committee or panel of experienced appellate and trial counsel to report back to the Court as to the potential issues, interpretations, applications and constitutional implications of the Amendment for further comment, briefing and argument.

William C. Gentry
Florida Bar No. 137134
Law Office of W. C. Gentry, P.A.
One Independent Drive, Suite 1701
Jacksonville, FL 32202
(904) 356-4100
(904) 358-1895 – Facsimile

[7] Clearly, to the extent Amendment 3 may ultimately be found to apply in any respect to attorneys' fees, any right so bestowed may be knowingly waived by the person having the right; and if an attorney were to overreach or fail to disclose a right or fail to obtain an informed and competent waiver, the client would have an adequate remedy at law (*See, e.g., Global Travel,* supra, at *4) and the present Rules Regulating the Bar adequately constrain and prohibit such conduct. *See, e.g.,* Rule 4-1.5(a)(d)(e).

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; 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 32302-0810, this 29th day of August, 2005.

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W. C. Gentry