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 IN SUPPORT OF PETITION TO AMEND RULE OF PROFESSIONAL CONDUCT 4-1.5(f)(4)(B)

I. Introduction.

This Court has invited "all interested persons" to comment on the amendment to Florida Bar Rule 4-1.5(f)(4)(B) proposed by Stephen H. Grimes, Esq., and fifty-four other members of the Florida Bar concerning contingency fee limitations in medical liability cases (the "Grimes Petition"). These comments supporting the proposed rule change are submitted by First Professionals Insurance Company, Associated Industries of Florida, Florida Insurance Council, Florida Chamber of Commerce, and Florida Justice Reform Institute.

First Professionals Insurance Company. Since 1975, FPIC has been dedicated to protecting professional reputations and personal assets by providing professional liability insurance for physicians, dentists, and other health care professionals. FPIC provides a wide variety of products for health care professionals in the states of Arkansas, Florida and Georgia, and currently serves as the largest writer of medical malpractice insurance for physicians and dentists in the State of Florida.

Associated Industries of Florida. Associated Industries of Florida is a voluntary association of diversified businesses, created for the purpose of pursuing mutual benefit through cooperation in programs designed to create and foster an economic climate in Florida conductive to the growth, development, and welfare of industry and business and the people o f the state.

Florida Insurance Council. As Florida's largest insurance trade association, the Florida Insurance Council is the voice of Florida's insurance community. FIC is committed to providing consumers, the media and public officials with information that is pertinent and real-time.

Florida Chamber of Commerce. The Florida Chamber of Commerce serves as Florida's largest federation of businesses, chambers of commerce and business associations. The Federation's more than 137,000 member businesses represent more than 3,000,000 employees throughout the state. The Federation's mission is to help Florida's business prosper and build commitment to the community of Florida.

Florida Justice Reform Institute. The Florida Justice Reform Institute is a united and

united and dedicated response to the state's dire need for civil justice reform. The Institute's mission is to restore fairness, equality, predictability and personal responsibility to Florida's civil justice system.

II. Background.

Pursuant to Rule 1-12.1, the Grimes Petition requests this Court in its rule-making capacity to amend Rule 4-1.5(f)(4)(B) in light of the recent amendment of the Florida Constitution by initiative procedure, effective November 3, 2004, creating Article I, Section 26 ("Claimant's right to fair compensation"). On July 15, 2004, this Court had issued an advisory opinion approving the amendment ("Amendment 3") and the ballot title and summary for placement on the ballot. *See Advisory Opinion to the Attorney General Re The Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675 (Fla. 2004). After general election on November 2, 2004, the people of the state of Florida adopted an amendment to Article I [Declaration of Rights] which reads in relevant part:

> (a) Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000,00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.
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> * * *

Fla. Const. Art.I, Sec.26.

The Grimes Petition requests this Court to amend the contingent fee provisions of Rule 4-1.5(f)(4)(B) by adding a new subdivision (iii) so as to read as follows:

> (B) The contract for representation of a client in a matter set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:
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> * * *
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> (iii) Notwithstanding the preceding provisions of subdivision (B), in medical liability cases, attorney fees shall not exceed the following percentages of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants:
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> a. Thirty percent (30%) of the first $250,000.00
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> b. Ten percent (10%) of all damages in excess of $250,000.00.

(*See* Grimes Petition at 2-3).

The Grimes Petition further asserts that it would be improper to permit the client to waive these requirements. (*See id*. at 3). The Petition argues that this would not only fly in the face of the constitutional mandate overwhelmingly approved by the voters of Florida, but would put lawyers in the unethical position of negotiating with their clients in order to have the clients give up their constitutional right in order that the lawyer may receive a higher fee. (*Id.*).

Individual attorneys and organizations ("the Objectors") have filed comments opposing the proposed rule change on various procedural, substantive and constitutional grounds. As detailed below, it is respectfully submitted that the legal and factual underpinnings to the Objectors'

underpinnings to the Objectors' arguments are fatally flawed and otherwise unconvincing and that the Grimes Petition should be granted by this Court.

III. Constitutional structure of Florida.

The Objectors' arguments by and large disregard the fundamental constitutional structure of Florida. In Florida, "[a]ll political power is inherent in the people." *See* Fla. Const. Art.I, Sec.1. The Florida Constitution is an expression of the will of the people of Florida and is the highest governing state law. The Florida Constitution has, of course, created three branches of state government: the legislative, the executive and the judicial. *See* Fla. Const. Art. II, Sec.3. As this Court noted in *B.H. V. State*, 645 So. 2d 987 (Fla. 1994), *cert. den.*, 515 U.S. 1132 (1995):

> ... In Florida, the state is entirely a creation of the people, in whom all political powers still inhere--including the ability to create or modify a state Constitution. ... Pursuant to their inherent powers, the people of Florida have established a tripartite separation of powers precisely like that envisioned by Locke and Montesquieu.

645 So. 2d at 991.[1]

Under the Florida Constitution, this Court has been delegated the authority and duty to adopt rules for practice and procedure in all courts as well as the exclusive jurisdiction to regulate attorneys engaged in the practice of law in Florida. *See* Fla. Const. Art. V, Secs.2, 15; *see also State v. Raymond*, ___ So. 2d ___, 2005 WL 1529691 *2 (Fla. June 30, 2005).

[1]Unless otherwise noted, all emphasis has been supplied.

Further, with the 1968 revision of the Florida Constitution, the people of Florida created an initiative procedure for amending the state constitution. *See* Fla. Const. Art.XI, Sec. 3; Fla. Stat. '101.161; *see also Advisory Opinion to Attorney Gen.--Limited Marine Net Fishing*, 620 So. 2d 997, 999-1000 (Fla. 1993)(J. McDonald, concurring). The ballot initiative is generally a means of advancing matters which the public believes that the legislature should act upon but has failed to do so. *See Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984), *cert. den.*, 469 U.S. 1229 (1985)("The rights [to place an initiative on the ballot] derive from wholly state-created procedures by which issues that might otherwise be considered by elected representatives may be put to the voting populace.").

Moreover, and significantly, there is no restriction as to an initiative's subject matter. *See Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997)(rejecting claim that a constitutional amendment constituted "special interest legislation"; "`[T]he people can by initiative amend any `portion or portions' of the Constitution *in any way that they see fit*...'"); *see also Advisory Opinion to Attorney General re Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597, 600 (Fla. 2002)(J. Pariente, concurring). While Florida's ballot initiative procedure has been the focus of much debate and some criticism,[2] it has withstood all constitutional challenges and is hardly

and some criticism,[2] it has withstood all constitutional challenges and is hardly subject to collateral attack by the Objectors as pertains to the validity of Art. I, Sec.26. *See Biddulph v. Mortham*, 89 F.3d 1491, 1496-1500 (11th Cir. 1996), *cert. den.*, 519 U.S. 1151 (1997)(Florida's initiative process does not impinge on any federal First Amendment rights).

IV. Court's regulation of attorney fee contracts pursuant to the Florida people's expressed philosophy.

The Objectors' arguments likewise misconceive the proper role of this Court as a rule-making body. As part of its delegated powers under the Florida Constitution, this Court regulates attorney's fee contracts. In *The Florida Bar re Amendment to Code of Professional Responsibility*, 349 So 2d 630 (Fla. 1977), of course, this Court rejected a proposed amendment to the governing Code of Professional Responsibility which would have imposed a maximum contingent fee schedule. *Id.* at 632. The proposal submitted pursuant to a petition by the Florida Bar, however, was not based on any change in the Florida Constitution or Florida Statutes. Accordingly, the Court properly concluded:

> ... Until such time as the people of our State enunciate a different philosophy in their document of fundamental and organic law, we are not disposed to elevate

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[2] *See, e.g.*, Norway, *Judicial Review of Initiative Petitions in Florida*, 5 Fla. Coastal L.J. 15 (2004); Maloney, *Smoking Laws, High-Speed Trains, and Fishing Nets a State Constitution Does Not Make: Florida's Desperate Need for a Statutory Citizens Initiative*, 14 U. Fla. J.L. & Pub. Pol'y 93 (2002); Martin, *Florida's Citizen Constitutional Ballot Initiatives: Fishing to Change the Process and Limit Subject Matter*, 25 Fla. St. U. L. Rev. 57 (1997); Anderson & Ciampa, *Ballot Initiatives: Recommendations for Change*, 71 Fla. B.J. 71 (1997); Turner, *Revising the Role of the Florida Supreme Court in Constitutional Initiatives*, 71 Fla. B.J. 51 (1997).

> disposed to elevate economic considerations above the right of access to the courts of this State.

349 So. 2d at 633.

Nearly a decade later, in *The Florida Bar re Amendment to the Code of Professional Responsibility*, 494 So. 2d 960 (Fla. 1986) --after the Florida legislature had enacted statutory provisions containing a schedule of permissible attorney's fees in medical malpractice actions (*see* '768.595, Fla. Stat. (1985)) -- this Court felt compelled to adopt, with some modification, a rule change proposed by the Florida Bar amending Rule 2-106 of the Code of Professional Responsibility and establishing a maximum contingent fee schedule. *Id*. at 961-962. As explained by Justice Ehrlich in his specially concurring opinion:

> The reasoning advanced by the Court [in *The Florida Bar re Amendment to Code of Professional Responsibility*, 349 So. 2d 630 (Fla. 1977)] for declining to adopt a maximum contingent fee schedule has lost none of its cogency and is as valid today as it was then. We have been given no competent evidence of overall abuse of the contingent fee system which would warrant limiting or curtailing the right of contract between attorney and client.
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> However, one significant event has occurred which causes me to reconsider this question and to take a second look at a proposal for a maximum contingent fee schedule. The Florida legislature enacted the Comprehensive Malpractice Reform Act of 1985 which imposes a schedule on attorneys' contingency fees in medical negligence cases. '768.595, Fla. Stat. (1985). ... I construe this as a request from the legislature that this Court promulgate a contingency fee schedule in medical malpractice actions to assure that contingency fees are not "inadequate or excessive" and that such fees are "fair and reasonable to assure proper representation" of the public in medical malpractice cases. I do not take lightly any request from a coordinate branch of government. For this reason alone ... I am of the opinion, albeit reluctantly, that we should adopt a schedule of maximum contingency fees.

contingency fees.

494 So. 2d at 966.

V. Court's task in passing on current proposed rule amendment.

Contrary to the Objectors' arguments, if this Court was compelled to amend the bar rules in 1986 to reflect the legislature's statutory limitation of contingency fees in medical malpractice cases, the Court is *doubly* compelled to amend the current rules in light of the Florida people's amendment of the Florida Constitution so as to guarantee their "fair share" rights.

Unlike the legislature, the constitution is not a co-equal branch of government which the judiciary scrutinizes for potential separation-of-powers violations. The state constitution, enacted by the people of Florida, created the judiciary and delegated its powers and duties, and along with the federal constitution, stands supreme. *See Gibson v. Florida Legislative Investigation Committee*, 108 So. 2d 729, 740 (Fla. 1958), *cert. disch.*, 360 U.S. 919 (1959)("This court has no power to tamper with either [constitutional] document. If a change is made the people will have to make it."); *see also Advisory Opinion to the Attorney General re Limiting Cruel and Inhumane Confinement of Pigs during Pregnancy*, 815 So. 2d 597, 600 (Fla. 2002)(J. Pariente, concurring)("`The legal principles in the state constitution inherently command a higher status than any other legal rules in our society.'").

As discussed below, the Objectors' arguments against adoption of the rule change are meritless. Indeed, courts in other jurisdictions have approved similar contingency fee contract

contract limitations in medical liability actions and rejected virtually identical arguments (including the "waiver" argument) raised by the Objectors herein.[3] Further, this Court can take comfort knowing that the sky has not fallen in those states adopting similar "10% fee limitations" in medical liability cases. Highly competent and effective Plaintiff's counsel continue to vigorously accept medical liability cases in those states. There has been no discernible adverse impact. More importantly, there are enormous public benefits and policy concerns being furthered by non-waivable contingent fee contract limitations in medical liability cases.

VI. Proposed rule amendment without a "waiver" provision effectuates intent of Florida people in creating Art.I Sec.26.

In determining the propriety of the proposed rule change, this Court must obviously construe the language of Fla. Const. Art I, Sec. 26 so as to "give effect to the intent of the drafters and those who voted on the amendment." *Department of Environmental Protection v. Millender*, 666 So. 2d 882, 885 (Fla. 1996). "The spirit of the constitution is as obligatory as the written word." *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979). In discerning intent, this Court examines the purpose

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[3] *See, e.g., Roa v. Lodi Medical Group, Inc.*, 211 Cal.Rptr. 77, 78-85 (Cal.), *app. dism.*, 474 U.S. 990 (1985)(upholding constitutionality of California Business and Professions Code '6146 which establishes contingency fee limitations including "10 percent of any amount exceeding $200,000" in medical malpractice actions); *DiFilippo v. Beck*, 520 F. Supp. 1009, 1015-1016 (D. Del. 1981)(upholding constitutionality of Delaware statute limiting attorney's fees to 10% of damages over $200,000 in medical liability actions); *Schultz v. Harney*, 33 Cal.Rptr.2d 276, 279 (Ct.App. 1994)("[T]he client in such an action cannot validly waive the statutory fee limitation"); *Fineberg v. Harney & Moore*, 207 Cal.App.3d 1049, 1050, 255 Cal.Rptr. 299 (Ct. App. 1989)("We determine the statute was intended to further a significant public policy and that its protection cannot be waived").

933, 936 (Fla. 1979). In discerning intent, this Court examines the purpose the provision was intended to accomplish and the evils sought to be prevented. *See Millender*, 666 So. 2d at 885. The Court also discerns intent "`from historical precedent, from the present facts and from common sense.'" *Id.* Further, the Court "`may look to the explanatory materials available to the people as a predicate for their decision as persuasive of their intent.'" *Id.; see also, e.g., City of Jacksonville v. Continental Can Co.*, 151 So. 488, 489-490 (Fla. 1933); *Sullivan v. City of Tampa*, 134 So. 211, 216-217 (Fla. 1931). This Court also looks to the decisions of other state and federal courts regarding similar constitutional or statutory provisions. *See State ex. rel. West v. Gray*, 74 So. 2d 114, 116 (Fla. 1954).

Contrary to the Objectors' suggestion, the proposed amendment to Rule 4-1.5(f)(4)(B) stated in the Grimes Petition is entirely consistent with and gives effect to the 70/90 percent "entitlement" to damages guaranteed to medical liability claimants by newly enacted Art.I, Sec.26. The 30/10 percent attorney's fee limitations set forth in proposed subsection (iii) are a necessary correlation to the substantive damage rights and ensure their enforcement.

Significantly, while many Objectors agree that a rule change is needed to reflect the constitutional "fair share" rights created by Art.I, Sec.26, they argue that the Court should incorporate 30/10 percent fee provisions into subsection (i) of Rule 4-1.5(f)(4)(B) thereby preserving the ability of a client to effect a "waiver" by petitioning the court under subsection (ii) for judicial authorization of a contract exceeding the fee limitations. Paraphrasing from Justice Lewis' dissenting

Paraphrasing from Justice Lewis' dissenting analysis in *Advisory Opinion*, 880 So. 2d at 681-686, the Objectors argue that medical malpractice is a highly specialized field and that the new fee limitations are so unreasonably low that either no attorneys, or only unskilled attorneys, will be willing to take on such cases. The Objectors argue that a waiver is necessary to permit plaintiffs to have the ability to freely contract with knowledgeable and financially capable attorneys who can afford to advance the expensive litigation costs associated with medical liability cases. The Objectors assert that other important constitutional rights may be waived -- such as the right to a jury trial; the right to remain silent; the right to a twelve-person jury in a murder case; and the criminal defendant's right to testify on his own behalf.

Respectfully, the Objectors' "waiver" arguments miss the mark. Art.I, Sec. 26 on its face does not permit any waiver or contain any "opt-out" or "relaxation" provision and this Court should decline to create one. The Court has long recognized that it is not authorized to add language to the constitution. *See Sullivan*, 134 So. at 217 ("It is the function of this court to construe and interpret constitutional amendments and not to make them."). Moreover, as other courts have reasoned in rejecting similar waiver arguments, it would emasculate the constitutional "fair share" amendment and contravene the intent of the voters and drafters were lawyers able to negotiate with the client to give up his or her constitutional right to a fixed percentage of damages. *See Waters v. Bourhis*, 40 Cal.App.3d 424, 439 n.15, 220 Cal. Rptr. 666 (Cal. 1985)("Of course, even if plaintiff had knowingly agreed to the attorney's stated condition with respect to the fee that he would charge ..

that he would charge ... section 6146 would limit the attorney fee notwithstanding plaintiff's consent to a higher fee."); *Schultz v. Harney*, 33 Cal.Rptr.2d 276, 279-280 (Ct.App. 1994)("[T]he client in such an action cannot validly waive the statutory fee limitation[.]"); *Fineberg v. Harney & Moore*, 207 Cal.App.3d 1049, 1055, 255 Cal.Rptr. 299 (Ct. App. 1989)("We conclude there is nothing in the statutory scheme, or its legislative history, indicating that the Legislature intended to permit waiver of the provisions of Business and Professions Code section 6146 by parties to a contingency fee agreement in a medical malpractice case").

A claimant would hardly have any constitutional "entitlement" to fair compensation under Art I, Sec.26 if attorneys were able to essentially coerce clients into paying a higher percentage. Other courts have wisely rejected any waiver on public policy grounds. *See Fineberg*, 207 Cal.App.3d at 1050 ("We determine the statute was intended to further a significant public policy and that its protection cannot be waived"). The "waivable" constitutional rights discussed by the Objectors (e.g., right to a jury trial) are fundamentally different in that litigants otherwise clearly have such essential rights. Here, in contrast, if the damage "entitlements" stated under Art.I, Sec.26 are subject to negotiation, then there is no right in the first instance to waive. Stated differently, the voters and drafters never intended that a fee contract contravening Art.I, Sec.26 would be voidable by the injured claimant as opposed to void. *See Fineberg*, 207 Cal.App.3d at 1055.

VII. Proposed rule amendment does not impermissibly interfere with any state or federal

federal constitutional rights.

This Court should likewise reject the Objectors' other main argument that the proposed rule amendment impermissibly conflicts with state and federal constitutional rights -- namely, the right to freely contract with others and retain counsel of one's choice; the right to access to court; and the right to equal protection and due process.

In approving the Art.I, Sec. 26 initiative, this Court rejected the ballot opponents' argument that the amendment impermissibly affected portions of the Florida Constitution on the basis that the initiative in itself did "not propose to transcend similar limitations on attorney-client fee arrangements that are currently in place." *See Advisory Opinion*, 880 So. 2d at 678. While the amendment to Rule 4-1.5(f)(4)(B) proposed by the Grimes Petition (as well as many Objectors under subsection (i)) obviously does place further limitations on contingency fee arrangements, such limitations are not unconstitutional because legitimate public interests are being furthered and hence there is a "rational basis" for such governmental restriction via ballot initiative. *See Lane*, 698 So. 2d at 262-265 (rational basis test applies to review constitutionality of amendment adopted through initiative petition); *State v. Kirvin*, 718 So. 2d 893, 896 (Fla. 1st DCA 1998), *rev. den.*, 729 So. 2d 918 (Fla.

729 So. 2d 918 (Fla. 1999)(same).[4]

Significantly, the exact same constitutional arguments raised by the Objectors herein have been squarely rejected by other courts in upholding the constitutionality of contingency fee limitations including similar "10 percent" provisions in medical liability cases. *See Roa v. Lodi Medical Group, Inc.*, 211 Cal.Rptr. 77, 78-85 (Cal.), *app.dism.*, 474 U.S. 990 (1985); *see also DiFilippo v. Beck*, 520 F. Supp. 1009, 1015-1016 (D. Del. 1981)(upholding constitutionality of Delaware statute limiting contingency fees in medical malpractice actions including 10% limit on amounts over $200,000); *Newton v. Cox*, 878 S.W.2d 105, 107-112 (Tenn.), *cert. den.*, 513 U.S 869 (1994)(upholding constitutionality of Tennessee statute imposing contingency fee limitations in medical liability actions); *Buckley Powder Co. v. State*, 70 P.3d 547, 561-563 (Colo. App.), *cert. den.*, 2003 WL 21222805 (Colo. 2003)(upholding constitutionality of Colorado statute's attorney's fee limitations and $250,000 cap governing class actions against public entities); *Mieras v. Dyncorp*, 925 P.2d 518, 523-527 (N.M. App.) & 530 (J. Hartz, specially concurring), *cert. den.*, 923 P.2d 1164 (N.M. 1996)(upholding cap on attorney's fees in workers' compensation cases); *see generally* Bearman, *The Rationality of Tennessee's Medical Malpractice Contingency Fee Statute*, 25 U.

[4]*See generally North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612, 645-646 (Fla. 2003)(J. Pariente, specially concurring)("`[Rational basis] inquiry employs a relatively relaxed standard' ... Further, consistent with this deferential standard, courts apply to rational basis review the rule of statutory construction that accords legislation a presumption of validity. ... If there is `any reasonable conceivable state of facts that would provide a rational basis for the classification,' the courts must defer to the Legislature.").

Medical Malpractice Contingency Fee Statute, 25 U. Mem. L. Rev. 1555 (1995); Birnholz, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. Rev. 949 (1990).

In the seminal decision of *Roa v. Lodi Medical Group, Inc.*, the California Supreme Court held that a state statute placing limits on the amount of contingency fees an attorney may obtain in a medical malpractice action -- including a limitation of 10% of any amount of recovery exceeding $200,000 -- was not unconstitutional as a denial of due process, equal protection, or separation of powers. *See* 211 Cal.Rptr. at 78-85 & n.1.

Regarding plaintiff's due process argument that the "statute impermissibly infringes on the right of medical malpractice victims to retain counsel," the court in *Roa* ruled that the statute did not in any way abrogate that right but merely limited the amount of compensation the attorney may obtain and that legislative regulation in such matters is well established. *Id.* at 79-80. Regarding the argument that the fee limitations were "so low that in practice the statute will make it impossible for injured persons to retain an attorney to represent them," the court held that plaintiffs made no conclusive empirical showing to support such a factual claim and thus the statute could hardly be deemed unconstitutional on its face. *Id.* at 81. The court also rebuffed the suggestion that the fee limitation "will operate to drive the most competent attorneys out of medical malpractice litigation" so as to work "an unconstitutional infringement of a malpractice victim's right to counsel." *Id.* at 82-83.

Roa likewise rejected plaintiff's equal protection arguments including the contention that

that malpractice defense attorneys were not being limited in the same way as plaintiff's attorneys. *Id*. at 83. Significantly, the court concluded there was a rational basis to the legislative action and that important public policies would be furthered by placing caps on medical malpractice fees:

> ... In the first place, it is unrealistic to suggest that such limits will not reduce the costs to malpractice defendants and their insurers in the large number of malpractice cases that are being resolved through settlement. A plaintiff is quite naturally concerned with what a proposed settlement will yield to him personally, and because [the statute] permits an attorney to take a smaller bite of a settlement, a plaintiff will be more likely to agree to a lower settlement since he will obtain the same net recovery from the lower settlement. Accordingly, the Legislature could reasonably have determined that the provision would serve to reduce malpractice insurance costs.
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> Second, the Legislature may also have imposed limits on contingency fees in this area as a means of deterring attorneys from either instituting frivolous suits or encouraging their clients to hold out for unrealistically high settlements. Although plaintiff's contend there is no evidence to suggest that unregulated contingency fee agreements pose special problems in the medical malpractice field, plaintiffs themselves stress--in another context--that an unusually high percentage of medical malpractice cases that go to trial result in defense verdicts. While there may be many explanations for this phenomenon, the Legislature could rationally have believed that unregulated contingency fee contracts--calling from potentially huge attorney fee awards if cases are won--play at least some part in leading so many plaintiffs to pursue malpractice claims that ultimately prove unsuccessful. ...
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> Finally, the [contingency fee] limits are rationally related to the [statutory] scheme in yet another respect. In order to reduce malpractice insurance costs, [the statutes] incorporated a number of provisions that place special limits on, or at least may tend to reduce, a malpractice plaintiff's recovery, provisions that are not applicable to other personal injury plaintiffs. ... The Legislature may reasonably have concluded that a limitation on contingency fees in this field was an "appropriate means of protecting the already diminished compensation" of such plaintiffs from further reduction of high contingency fees. ...

> Plaintiffs alternatively contend that the statute violates equal protection because it places limits on the fees that *plaintiffs'* attorneys may charge but imposes no limits on *defense* counsel's fees. As we have already seen, there are a host of statutes--both in California and other jurisdictions--that place similar limits on contingency fees without limiting attorney's fees that are earned on some other basis. Here, as in those other instances, the Legislature could have determined that there was a special need (1) to protect plaintiffs from having their recoveries diminished by high contingency fees, and (2) "to reduce temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage." ...
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> Finally, plaintiffs argue that the decreasing-sliding-scale component of [the statute] unconstitutionally discriminates against more seriously injured malpractice victims. They suggest that in light of the lower percentage fee which the statute authorizes for higher recoveries, the provision makes it more difficult to obtain an attorney who will be willing to undertake the additional effort required to obtain such awards. As we have already noted, however, the Legislature could reasonably have concluded that the sliding-scale approach in fact produces more equitable fees than the traditional flat contingency fee, helping to ensure that an attorney does not obtain a "windfall" simply because his client is very seriously injured and guaranteeing that the most seriously injured plaintiffs will retain the lion's share of any recovery secured on their behalf.

211 Cal. Rptr. at 83-85 (footnotes omitted).

In the same way that *Roa* found that a state legislature had a rational basis for enacting a statute containing 10% contingency fee limitations in medical malpractice actions, this Court should find that the people of Florida had a rational basis for approving a similar "fair share" constitutional amendment which requires the adoption of the ethical bar rule proposed in the Grimes Petition. The fact the Court must promulgate a rule change pursuant to an initiative-based constitutional amendment as opposed to statutory amendment by the legislature is of no moment. As this Court stated in *Lane*:

> The plaintiffs argue that this case should be subject to a higher standard of scrutiny because the restriction in question was adopted as a result of a constitutional initiative and not as part of the deliberative process of enacting laws in the Florida legislature. There is no precedent for this argument and the court concludes that it does not pass the test of common sense. It is illogical to conclude that the people of Florida have greater protection in the legislative process where they participate indirectly through their representatives, than they do in the constitutional initiative process where they can participate directly by their casting their own votes. Moreover, the Florida Constitution is the supreme law of Florida .... If a constitutional amendment is a higher authority than a state statute, it stands to reason that it is entitled to an even greater deference from the courts.

698 So. 2d at 262-263.

Here, the Florida voters clearly had a rational basis for approving Art.I, Sec.26. There are numerous substantial benefits to the public with lower fixed attorney's fees limitations in medical liability cases.[5]

First and foremost, under the constitutional amendment and proposed Rule 4-1.5(f)(4)(B)(iii) the injured party receives a higher share of the ultimate recovery. The voters could have rationally concluded that this is inherently more fair and equitable and especially in medical actions where substantive damage caps curtailing recovery rights are already in place. *See Roa*, 211 Cal.Rptr. at 83-85. Respectfully, far from supporting Justice Lewis' dissenting analysis regarding Art.I, Sec.26 such existing damage caps supported the need for revised fee limitations. *See Advisory Opinion*, 880 So. 2d at 684 (discussing "766.118, 766.207, 766.209, Fla. Stat. (2003)).[6]

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[5]*See* Birnholz, 37 UCLA L. Rev. at 976 (outlining "ample grounds upon which to rest a finding that limiting [contingent] fees will rationally serve a valid governmental interest").

(discussing "766.118, 766.207, 766.209, Fla. Stat. (2003)).[6]

Second, the Florida public could have rationally determined the fee limitations would make it easier for medical malpractice plaintiffs to reach a settlement. A far lower settlement amount gives plaintiffs the same or a better yield and accordingly assures or promotes prompt settlement of malpractice claims, as well as mediation without costly trial *See Roa*, 211 Cal.Rptr. at 83-85; *DiFilippo*, 520 F. Supp. at 1016; *see also Mieras*, 925 P.2d at 530 ("The interest in obtaining the best possible legal counsel is a sufficiently uncompelling one that it can be overcome by the simple public interest in reducing costs. ... [O]bjections to limitations on attorney's fees have met with little success; all that is required is that the limitation be rational.").

Third, Florida voters may have reasonably considered that capping fees keeps overly zealous counsel at bay by keeping them from unrealistically encouraging their clients to hold out for unrealistically high settlement amounts. *See Roa*, 211 Cal.Rptr. at 83-85.

Fourth, the Florida public may have envisioned further legislative efforts to cap recovery of non-economic or other damages in medical malpractice. Thus, the voters may have rationally

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[6]Even if the existence of such medical negligence damage caps somehow mitigated the need for attorney's fee limitations (which is denied), contrary to Justice Lewis' observation, there was clearly no guarantee these statutory caps would "continue to remain in effect should the proposed [constitutional] amendment be adopted." *See Advisory Opinion*, 880 So. 2d at 684. Other courts have recently struck down similar legislatively imposed damage caps as unconstitutional. *See, e.g., Ferdon v. Wisconsin Patients Compensation Fund*, ___ N.W.2d ___, 2005 WL 1639450 (Wis. July 14, 2005).

may have rationally decided that the public needed greater protection in the advent of legislative action limiting damages. *See Roa*, 211 Cal.Rptr. at 83-85; *see also Mieras*, 925 P.2d at 526-527.

And fifth, looking at the big picture, Florida voters could have reasonably concluded that lesser exposure by the medical profession makes health care rates and insurance more affordable and leads to the retention of affordable and quality health care in Florida. *See DiFilippo*, 520 F. Supp at 1016 ("[I]t is rational to limit attorney's fees which may be collected in malpractice suits and not in other actions because the limitation is also related to reducing malpractice insurance costs and, consequently, medical costs."); *see also Newton*, 878 S.W.2d at 108.

Clearly, therefore, just as this Court rejected similar constitutionality objections in 1986 and found itself duty-bound to amend the bar rules in light of the Florida legislative's enactment of a schedule of permissible attorney's fees in medical malpractice actions, *see Florida Bar*, 494 So. 2d at 960-962, the Court should do the same in light of an even higher constitutional mandate. *See Lane*, 698 So. 2d at 262-263. The Florida public was well aware of the conflicting debate surrounding the Art.I, Sec.26 ballot initiative and the pro's and con's of contingency fee limitation.

Indeed, and most respectfully, the Florida voters' approval of the amendment on November 2, 2004, was a repudiation of Justice Lewis' thought-provoking but ultimately unpersuasive dissenting analysis in *Advisory Opinion*, 880 So. 2d at 681-685, disseminated for public scrutiny some three and half months earlier. Florida voters did not accept the notion that the sole purpose of

not accept the notion that the sole purpose of the amendment was to make it less likely for malpractice victims to find representation. The politically astute and knowledgeable people of Florida saw through the initiative-opponents' rhetoric and hyperbole and rationally concluded that the amendment was not "a wolf in sheep's clothing." 880 So. 2d at 683.

Further, the Objectors to the Grimes Petition cannot contend that Florida voters were inadequately advised of the consequences of the "fair share" amendment. As Chief Justice Pariente noted in this regard:

> [T]he task of informing the public as to the possible motivations behind the proposed amendment and its potential practical effects must fall on the proponents and opponents of the measure. ... `...Under our system of free elections, the voter must acquaint himself with the details of a proposed ordinance on a referendum together with the pros and cons thereon before he enters the voting booth. If he does not, it is no function of the ballot question to provide him with that needed education. ...'"

880 So. 2d at 680-681.

In truth, both sides of the fence got the word out.[7] Florida voters simply rejected the initiative-opponents' arguments. The arguments by the present Objectors against the Grimes Petition

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[7]For example, a few weeks prior to the election, one editorial in a leading Florida newspaper criticized the proposed constitutional amendment as follows:

> The doctors, of course, aren't really fighting to make sure that victims of medical malpractice are well-compensated. Rather, they want to cut lawyers' contingency fees in hopes that the lawyers will be dissuaded from ever trying such cases of malpractice. Note that their amendment does not restrict the amount that can be paid to lawyers who defend doctors.

St. Petersburg Times, Editorial, Oct. 17, 2004. *See generally* "Report on Voter Education Programs During the 2004 Election Cycle," published by Florida Department of State, Division of Elections, available at *http://election.dos.state.fl.us*.

Grimes Petition are "untimely and without merit" -- and essentially "sour grapes." *See Lane*, 698 So 2d at 264. Neither Art.I, Sec.26 nor the proposed amendment to Rule 4-1.5(f)(4)(B) impermissibly conflict with any other state or federal constitutional rights.[8]

VIII. The Grimes Petition is entirely proper under Rule 1-12.1.

Remarkably, some Objectors have also asserted that the proposed ethical rule change is a misuse of the Rule 1-12.1 procedure which allegedly only permits rank-and-file members of the Florida Bar to propose amendments with a sufficiently broad base of support. These Objectors contend the Grimes Petition has been improperly filed on behalf of an undisclosed client - the Florida Medical Association -in order to further its special interest and contrary to the interests of a majority of Florida Bar members.

Such nefarious allegations must be soundly rejected. The Grimes Petition is signed by fifty-five Florida attorneys and is entirely proper under Rule 1-12.1. *See Amendment to Rules Regulating the Florida Bar--Rule 5-1.1(e)--IOTA*, 797 So. 2d 551, 552 (Fla. 2001). No procedural or ethical impropriety has been demonstrated.

Moreover, regarding an alleged need for a broad base of support among bar members, not only is this not a requirement but attorneys most assuredly do not voluntarily petition this Court to limit their own fees. The Court only enacts rule changes lowering attorney's fees where the public

[8]While the issue is moot, it is theoretically impossible for Art.I, Sec.26 to be deemed unconstitutional under the Florida Constitution itself. Once it has been determined that the ballot initiative process was not defective under the governing constitutional and statutory provisions, Art. I, Sec.26 could only be scrutinized under federal constitutional standards.

lowering attorney's fees where the public mandates change in the interest of the client and society as a whole. For that reason, this Court considers comments from not only Florida Bar members but the public and other groups as well.[9] The Objectors are disingenuous to suggest they oppose the rule change out of a noble concern for the client and "ethics and professionalism" instead of their own financial self-interest. Respectfully, it is the Objectors who constitute a highly partisan "special interest group." Significantly, the same kinds of objections being made now were made back in 1986 in opposition to the current fee limitations which this Court deemed "necessary to protect the public interest" -- and not the limited self-interest of certain members of the Bar. *See Chandris*, 668 So. 2d at 186; *Florida Bar*, 494 So. 2d at 966.

IX. The relief sought by the Grimes Petition is not "premature."

Finally, while some Objectors expressly and correctly agree that this Court not only has the power but the duty to immediately modify Rule 4-1.5 in light of Art.I, Sec. 26's constitutional mandate (but mistaken believe subsection (i) should be amended to afford "waiver" rights), other Objectors -- including the Florida Bar -- contend the matter is "premature." They contend that questions regarding the scope and constitutionality of Art.I, Sec.26 must first be litigated to conclusion in the courts in an actual case and controversy. Respectfully, these arguments are flawed and unpersuasive.

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[9] *See Florida Bar*, 494 So. 2d at 961 ("We have reviewed numerous comments and suggestions regarding the proposed amendment. Individual lawyers and members of the public, as well as groups such as the Academy of Florida Trial Lawyers, the Florida Medical Association, and Associated Industries of Florida, have responded.").

As previously noted, the people of Florida through the Florida Constitution have delegated to this Court the exclusive jurisdiction over rule-making and regulation of attorneys. *See* Fla. Const Art.V, Secs.2,15. The constitutional "fair share" amendment at issue is presumptively valid until declared otherwise and this Court's task is to interpret and give effect to its provisions. *See North Florida*, 866 So. 2d at 645-646. As is evident from the Court's prior amendment to the attorney's fee rules in 1986 in the face of a similar attack on the constitutionality of an underlying Florida statute limiting attorney's fees in medical malpractice actions, the relief sought by the Grimes Petition is hardly premature. *See Florida Bar*, 494 So. 2d at 961.

To be sure, other courts have expressly rejected the notion that the judiciary should exercise control over the attorney-client contract only in specific adjudicatory proceedings. *See Gair v. Peck*, 188 N.Y.S.2d 491, 501 (1959), *cert. den.*, 361 U.S. 374 (1960)("The [court's] rule-making power is not limited to prescribing only for the specific case after the event."); *see also American Trial Lawyers Association v. New Jersey Supreme Court*, 330 A.2d 350 (N.J. 1974)(rejecting challenge to authority of Supreme Court to establish maximum contingent fee schedule including 10% limitation on amounts over $100,000).

Further, as some Objectors have properly noted, lawyers are entitled to immediate guidance from this Court regarding the applicable bar rules. Since the November 3, 2004 effective date of the constitutional "fair share" amendment, any contingency fee agreement between an attorney and client which exceeds the limits set forth in Art.I, Sec. 26 is void as against public policy. This Court

26 is void as against public policy. This Court should accordingly immediately amend the Florida Bar Rules to reflect the will of the people of Florida and protect the public interest. *See Chandris*, 668 So. 2d at 185-186 ["[T]he requirements for contingent fee contracts are necessary to protect the public interest. Thus, a contract that fails to adhere to these requirements is against public policy and is not enforceable by the member of The Florida Bar who has violated the rule."). The issue is not premature.

X. Conclusion.

WHEREFORE, the undersigned respectfully request this Court to grant the Grimes Petition and adopt and promulgate the proposed amendment to Rule 4-1.5(f)(4)(B) of the Florida Rules of Professional Conduct.

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