

# IN THE SUPREME COURT OF FLORIDA

## IN RE: AMENDMENT TO THE RULES REGULATING THE FLORIDA BAR- RULE 4-1.5(f)(4)(B) OF THE RULES OF PROFESSIONAL CONDUCT

Case No. SC05-1150

### RESPONSE TO THE FLORIDA BAR'S PROPOSED AMENDMENT TO 4- 1.5, RULES REGULATING THE FLORIDA BAR

Respondent Joseph W. Little respectfully submits that this Court should DENY the proposed amendment to Rule 4-1.5 served by the Florida Bar on February 23, 2006 and enter an order revising Rule 4-1.5 to incorporate Article I §26 *verbatim*.

Respondent is a member of The Florida Bar in good standing, and filed a response in support of the petition to this Court to adopt a rule to implement Article I §26 Florida Constitution *verbatim*. Respondent is also a faculty member at the University of Florida College of Law and regularly teaches Florida Constitutional Law. Respondent reiterates that he does not personally agree with the policy expressed in Article I §26 and opposed it when it was being debated prior to adoption by the people, but also submits that this Court should DENY the amendment proposed by the Bar for reasons stated herein.

Respondent observes that Article I §26 purports to be self executing.

Accordingly, under the settled law of this State that provision, by operation of law, becomes a part of every lawyer-client contract entered into after its effective date. As this Court stated in *The Board of Public Instruction of Dade County v. Town of Bay Harbor Islands*, 81 So.2d 637 (Fla. 1955), “The constitution and laws are a part of every contract.” Accordingly, the provision needs no rule to be legally binding as a part of all lawyer-client contracts notwithstanding any provisions to the contrary that might be stated within those contracts. Indeed, any rule that might be issued by this Court would merely regulate the matter of attorney discipline and would have no direct effect on the substance of any lawyer-client contract of which Article I §26 is an inherent term.

Parties to a lawyer-client contract may not excise Article I §26 as an inherent term by a waiver provision such as the Bar has proposed. Various news sources have reported this statement was made during oral arguments on the petition that engendered this proposed rule: “All constitutional rights may be waived. Article I §26, too, is a constitutional right, and may be waived.” This syllogism is fallacious. *Not every constitutional right is waiveable.* The right not to be held as a slave is not waivable; the right not to be denied the equal protection of the laws on invidious grounds is not waiveable; the right not to be deprived of life, liberty or property without due process of law is not waiveable; and the right not to be

subjected by the State to cruel and unusual punishment is not waiveable. In sum, no court would enforce a purported voluntary waiver of a constitutional protection that embraces public policies that are broader than the interests of contracting parties. The same can be said of provisions enacted by many laws. The courts would not enforce a borrower's apparent voluntary waiver of the usury laws of the State. Neither would an employee's voluntary agreement to waive the laws prohibiting discrimination on the basis of race, religion or gender be enforced. Nor would the courts enforce a worker's voluntary agreement to forgo the compensation for injuries required by the State's workers' compensation law. Similarly, a person cannot waive the crime of murder by agreeing to be killed by another. In these instances and others like them, the Constitution and laws have embodied broad public policies that cannot be circumvented by supposed voluntary agreements of private parties. Non-waivability in part acknowledges that systematic disparities in bargaining power would expose the intended beneficiaries of the constitutional and statutory protections to subtle (or not so subtle) pressures for waiver that could not be resisted.

Article I §26 is a provision of exactly this character. The non-waivability character of Article I §26 is enhanced by the fact that it was instigated and approved directly by the people themselves through the initiative and referendum

provisions found in Article XI Florida Constitution. In short, the people themselves deemed it necessary to adopt this provision because the Florida public perceived that medical malpractice plaintiffs in general were powerless to negotiate contingent fee agreements more favorable to victims of medical injuries than those permitted by Rule 4-1.5. The Bar's proposed amendment to Rule 4-1.5 is a complete ruse to avoid the application of Article I §26. Under the Bar's proposal every lawyer in the State might modify the standard contingency fee contract to include the proposed language and consistently refuse to represent any person who should decline to sign it. In effect, the Bar's proposal would permit the legal profession to aggrandize to itself the authority to render Article I §26 entirely nugatory by collectively refusing to accept clients who decline to waive. This, of course, would be a direct affront to the citizens who sponsored and voted for Article I §26.

Article I §26 may be a poor policy choice by the people of Florida as Respondent believes and as predicted by the dissenting justices in *Advisory Opinion to the Attorney General Re: The Medical Liability Claimant's Compensation Amendment*, 880 So.2d 675, 683-686 (Fla. 2004). Indeed, even the majority acknowledged that the proposed Article I §26 "would functionally override or interfere with the Rules of Professional Conduct as they relate to fee

contracts between attorneys and their clients.“ *Id.*, at 677. If this Court had thought that the voters were being deceived about the probable dire operational effects of the measure they were asked to adopt, its authority to remedy the matter was to endorse the dissenting justices’ argument and send the measure back to its sponsors to provide the voters a clearer statement of its consequences. This the Court did not do. Hence, this Court must now acknowledge that the voters adopted Article I §26 with *knowledge and approval* of the consequences it would have on medical malpractice actions in this State. It may not now claim the power to adopt a rule to nullify the measure merely because it does not approve of the probable effects that have always been evident.

In sum, this Court cannot be part of a ruse to thumb the legal profession’s nose at the Constitution and the people of the State. In regard to attempts by the Legislature to nullify constitutional prescriptions this Court has said, “A statute enacted by the Legislature may not constrict a right granted under the ultimate authority of the Constitution.” *Austin v. State ex re. Christian*, 310 So.2d 289, 293 (Fla. 1975). This Court’s Article V Section 15 rule-making powers are no greater than the Legislature’s Article III law-making powers: the Constitution trumps both.

Nothing less than this Court’s reputation and the meaning of constitutional

governance in our State are at stake. Accordingly, Respondent respectfully submits that his Court DENY The Florida Bar's proposed amendment and enter an order incorporating Article I §26 *verbatim* into the Rules Regulating The Florida Bar. To do otherwise would make a mockery of the Constitution and hold this Court up to ridicule in the eyes of the people. Those consequences, this Court cannot permit.

#### Certificate of Service

I certify that a copy of this motion with comments has been served by mail on April 7, 2006 on John F. Harkness, Jr., Esq., Executive Director, The Florida Bar, 651E. Jefferson Street, Tallahassee, Fl. 32399-2300, 850-561-5600 and Stephen H. Grimes, P.O. Drawer 810, Tallahassee, Fl. 32302 and by email to the Clerk at [e-file@fcourts.org](mailto:e-file@fcourts.org).

Respectfully submitted,

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