

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1150

IN RE: PETITION TO AMEND
RULE 4-1.5(f)(4)(B) OF THE RULES
OF PROFESSIONAL CONDUCT

**OPPOSITION OF GREG MAXWELL, ATTORNEY,
TO PETITION TO AMEND RULE 4-1.5 (f) (4) (B)
OF THE RULES OF PROFESSIONAL CONDUCT**

Attorney Greg Maxwell respectfully files this opposition to the Petition to Amend Rule 4-1.5 (f) (4) (B) of the Rules of Professional Conduct and states:

1. The relief sought is premature. The Petition seeks the amendment of Rule 1-1.5 purportedly to reflect changes to Article 1 of the Florida Constitution effected during the 2004 election by the creation of Article 1, Section 26. However, the constitutionality of Article I, Section 26 of the Florida Constitution (commonly named "Amendment 3") has not yet been determined by either this Court or by the Supreme Court of the United States. Until the constitutionality of Amendment 3 has been properly determined, no similar amendment should be made to the Rules of Professional Conduct. Should this Court approve the rule change sought by the Petition, which rule change would implicitly recognize the validity of the changes sought to be implemented by Amendment 3, the opponents of such changes would be prejudiced in any litigation in which the effects of Amendment 3 are to be decided.

2. The petition is an inappropriate attempt to circumvent the litigative process in an adjudicative forum. The constitutionality of Amendment 3 cannot be mandated by a rulemaking process. The Petition constitutes an abuse of the procedural privilege afforded members of The Florida Bar to petition for changes in Bar Rules because it does not represent a legitimate effort

to further the profession. Rather, the Petition constitutes a transparent attempt by attorneys representing special interests to effect a change in the Rule which would benefit those special interests.

3. The Rules of Professional Conduct are not the proper vehicle for changing substantive law. The Petition seeks to have the Court violate the concept of separation of powers by usurping the legislature's authority. To the extent that the proposed Rule would effect a sweeping change of the existing frame work for permissible contingency fee contracts in civil actions, this Court should refrain from approving such changes through the mechanism sought to be employed by Petitioners. Any such change should be effected only through valid legislative action or appropriate court decision.

4. The Petition unconstitutionally seeks to interfere with citizens' rights by hindering freedom of association, freedom to contract, access to courts, equal protection of the law and due process. The proposed rule change would inevitably prevent injured parties from seeking redress in court by restricting their ability to enter into contingency fee contracts to pursue medical negligence claims. In the event that the caps on contingency fees sought by Petitioners were to be approved, the effect would be to essentially eliminate injured citizens from pursuing their legal rights. By reducing the contingency fees available to attorneys in pursuing such claims, the proposed change would severely restrict, if not, completely eliminate, the number of attorneys willing to take high risk, expensive medical malpractice claims. This result appears to be the exact result sought by Petitioners and the driving force behind the Petition as well as Amendment 3.

5. The proposed rule change would improperly restrict a citizens' right to contract with his or her attorney. While Amendment 3 provides that a successful medical malpractice

plaintiff is entitled to certain portions of any damages recovered, Petitioners recognize that this constitutional entitlement may be waived by contract. Petitioners seek to eliminate a citizen's constitutional right to contract with counsel to waive the entitlement established by Amendment 3 and to provide for a greater contingency fee to the attorney. Petitioner's motivation in proposing this rule change has nothing to do with the best interests of medical malpractice litigants but everything to do with insulating special interests groups with whom the Petitioners are associated. The impetus behind the Petition is the special interest medical industry, not the legal community. The Response of The Florida Bar to Petition, filed July 11, 2005, highlights this fact. The response of the Florida Bar is incorporated herein by reference.

6. The proposed rule change undermines longstanding principles of American jurisprudence by seeking to bar financially less fortunate citizens from seeking justice in the courts. To the extent that a citizen is unable to pay significant hourly fees to an attorney in order to pursue a medical malpractice claim, such citizen is left with little option other than to enter into a contingency fee agreement with counsel, which contingency fee agreement is premised upon the basic tenet that the attorney only is compensated if the case is successful. If the case is not successful, the attorney is not compensated and typically is also out of pocket any costs incurred in prosecuting the claim. By significantly reducing the maximum contingency, the changes sought by Petitioners will have a significant detrimental impact on these citizens' ability to obtain counsel to pursue their legal rights.

7. Allowing this rule change would send a message that the legal community, of which every lawyer and judge is a part, is weak and easily manipulated by outside interests. The medical industry has not effectively regulated itself, but now, ironically, seeks to regulate the legal profession by attempting to insulate itself from legal malpractice claims.

8. The rule change would do nothing to reduce inferior medical care. The medical and insurance industries hope to create a further discrepancy in the relative abilities of plaintiffs and defendants to obtain quality legal representation. If the rewards of successfully prosecuting a claim decrease while the risk remains the same, simple economic theory proves that access to courts will be inhibited. Put simply, victims of medical negligence will receive no restitution because lawyers will be less willing to accept the risk of losing.

9. For the reasons set forth above, the undersigned opposes the Petition as a transparent attempt by special interest lawyers backed by special interest groups to restrict citizens' rights to pursue medical malpractice claims by severely restricting the compensation available to counsel who would pursue such rights on their behalf. Such action improperly restricts litigants' access to the courts and should not be condoned by this Court. Accordingly, the Petition should be rejected.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail this 29th day of September, 2005, to John F. Harkness, Jr., Esquire, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and Stephen H. Grimes, Holland & Knight LLP, Post Office Drawer 810, Tallahassee, Florida, 32302.

Respectfully Submitted,

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