

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 JOSEPH D. MCFARLAND, ESQUIRE, TO
PROPOSED AMENDMENT TO RULE 4-1.5(f)(4)(B)**

Please accept the following comments to the proposed amendment to the Rules Regulating the Florida Bar as set forth in the Petition filed by former Justice Stephen H. Grimes, Esq.

For the following reasons, the Petition to Amend Rule 4-1.5(f)(4)(B) should be dismissed with prejudice or denied in its entirety.

First, the Petition is an attempt by special interests, namely the Florida Medical Association, lobbyists and the healthcare industry, to utilize Rule 1-12.1(f) to further their particular clients' interests rather than to promote the administration of justice and advance the principles of duty and honor to the public at large. As a practicing attorney representing Florida citizens for over 22 years on a contingent fee basis, there is no question that a client's ability to enter into a contingent fee contract with the attorney of his or her own choice continues to be, ...@the keys to the courthouse door@. It cannot be

seriously asserted that the healthcare industry's legal counsel would feel that a reduction in their ability to charge their hourly rate from \$330 per hour to \$100 per hour would be an acceptable and appropriate use of Rule 1-12.1(f). Further, if the healthcare industry was so concerned about the total amount that the malpractice victims would ultimately receive, they would not have worked so feverishly with the legislators of the state to limit awards to the most catastrophically injured victims only months before they began the Amendment 3 campaign.

Second, the petition, in and of itself, is a broad and overreaching attempt to prevent Florida citizens from obtaining the counsel of their choice. Practically speaking, no malpractice case can be successfully prosecuted on a 10% contingent fee basis. The question then is not how much more a victim of malpractice will receive but whether they will find competent counsel to accept their case in the first place. Substantial economic disparity that will undoubtedly be created by this petition when the healthcare providers will have unlimited resources to fight a plaintiff's counsel who will receive a 10% contingency fee. The practical effect of this petition will be to leave unprotected the most injured and vulnerable citizens of this state with virtually no ability to contract with an attorney of their choosing.

Third, the current Rule 4-1.5(f)(4)(B) already provides the prospective client, the bar and the courts with numerous guidelines and protections which address and govern the enforceability of contingent fee contracts. Rule 4-1.5 has served the bar and the

citizens of the state of Florida well since its adoption and the Court will now be placed in a position to explain why the previously acceptable and presumptively reasonable sliding fee schedule is now suddenly unreasonable.

Fourth, by granting the petition, this Court will also create conflict by ruling that some, but not other, constitutional rights may be waived by Florida citizens. Certainly, if, after full disclosure, a criminal defendant can waive his or her right to a jury trial, his or her right to remain silent, or the right to testify on his or her behalf, it would seem highly inconsistent to refuse allow a victim of medical malpractice to engage competent counsel for a fee he or she deems to be reasonable and in his or her best interests. Once again, the short sighted and special interest driven petition is merely an attempt to further a private vs. public interest and to mend the hold in their efforts to eliminate as many medical malpractice lawsuits as possible.

Finally, from recent events it has become increasingly obvious that the victims, the downtrodden, and the displaced of our society cannot depend upon the legislative or executive branches of their government to protect their interests. The only possible way to right these wrongs and achieve justice is to allow every courtroom in this country to be open to every person for redress of any injury and where justice shall be administered without sale, denial or delay as mandated by Article I Section 21 of the Florida Constitution. The Grimes petition will not further this constitutional right.

Wherefore, it is respectfully suggested that this Court deny in its entirety or dismiss

with prejudice, the Petition to Amend Rule 4-1.5(f)(4)(B).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and nine copies were served upon and sent by email to the Clerk of the Supreme Court and true and correct copies of the foregoing were served by US Mail upon John Harkness, General Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 and Stephen H. Grimes, Counsel for Petitioners, Holland + Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810 this 27th day of September, 2005.

By: _____
JOSEPH D. MCFARLAND, ESQ.

