

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

**COMMENTS OF ATTORNEY FRANK M. PETOSA
AND OBJECTIONS TO PROPOSED AMENDMENT**

Frank M. Petosa, an attorney in good standing of the Florida Bar, respectfully submits these comments vehemently opposing the proposed amendment to Rule 4-1.5(f)(4)(B), and states as follows:

- A. The constitutionality of Amendment 3 should not be litigated in the context of a proposed change to the Rules of Professional Conduct by a group of lawyers representing a single lobbying group whose intent is to interfere with the ability of a victim of medical malpractice to obtain representation of choice by a member of The Florida Bar:

The Florida Medical Association (FMA) (who cleverly sponsored Amendment 3 through its front group ACitizens for a Fair Share®) has gathered a group of lawyers parading as disinterested rank and file members of the Florida Bar to propose an amendment to the Rules of Professional Conduct. Mr. Grimes, the Petitioner, has candidly admitted that he was hired by the FMA to file the amendment. While Rule 1-12.1(f), Rules Regulating the Florida Bar, provides that the amendment process may be

initiated by 50 members in good standing of the Bar, this procedure contemplates a petition filed by a diverse group of attorneys whose aim is to improve the administration of justice, to advance the science of jurisprudence and to presumably advance the greater good of the Bar itself. A petition filed pursuant to Rule 1-12.1(f) should not be filed if the sole purpose of the petition is to merely serve a particular client's interests.

On its face, the aim of Grimes Petition is not consistent with the purpose of Rule 1-12.1(f) and is clearly filed to only benefit the FMA and its members. In considering the Petition itself, the client advocacy position of the petitioners should be considered. The client advocacy position of the vast majority of the petitioning lawyers is as follows: 19 lawyers in one firm (Holland & Knight, LLP), acting at the direction of a tort "reform" client, the FMA; 3 employees of FMA; 21 lawyers who are current or former registered Tallahassee lobbyists for tort "reform" principals; 4 employees of FPIC, Florida's largest medical malpractice insurer; and 11 lawyers from Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., a firm with lawyers who are registered lobbyists for FPIC, including some of the petitioners. The Grimes Petition is clearly not a disinterested petition to improve the administration of justice, benefit jurisprudence and serve the greater good of

the Bar. Instead, the Petition is a bold attempt to seek a litigation advantage against their opponents in court and interfere with the ability of a victim of medical malpractice to obtain representation of choice by a member of The Florida Bar.

As a preliminary matter, the Court should recognize that this Petition is not disinterested and is inconsistent with the purpose of Rule 1-12.1(f). The Court should reject the Petition on its face and send a clear message to attorneys who may be lobbying for clients with a singular interest under the veil of a petition for the common good, that this procedure will not be tolerated as a means to undermine the purpose and intent of Rule 1-12.1(f) to the detriment of the greater good of The Florida Bar and the citizens of Florida.

B. The goal of the Grimes Petition is to avoid the customary judicial process to review the constitutionality of recently enacted Amendment 3:

The Petitioners seek to avoid the case-by-case interpretation of Amendment 3 through the judicial process by seeking a premature determination by this Court without the essential case or controversy judicial process. A petition to amend the Rules Regulating the Florida Bar is not and should not be an appropriate forum for identifying and litigating the numerous potential applications of Amendment 3 and whether such applications pass constitutional muster. It will be a waste of judicial resources, as well as constitutionally infirm, for this Court to make a prospective ruling on the constitutionality of Amendment 3 by just adopting the Bar rule proposed by the Petitioners and simply dispensing with the judicial process and the requisite legal analysis. The constitutionality of Amendment 3 and its

impact on the citizens of Florida should be determined by the customary judicial process. The Court's endorsement of the Petitioners efforts will only encourage clever lawyers on behalf of interested clients to bypass the judicial process and file a quick and easy petition to this Honorable Court seeking to amend the Rules Regulating the Florida Bar solely for their client's benefit.

C. Even if the Court were to determine that Amendment 3 is constitutional, victims of medical malpractice should be able to waive this constitutional right, like all other constitutional rights:

If an individual can waive the right against self incrimination, freedom from searches, right to jury trial and right to counsel, than the purported right to limit their choice of whom to hire and the amount they choose to pay may also be waived. It seems rather disingenuous of the Petitioners to argue that a victim of medical malpractice should not be allowed to waive the right to hire an attorney of their choice and pay an attorney under the current Bar Rule 4-1.5(f)(4)(B), while those charged with crimes can waive their fundamental rights to things like counsel, self incrimination or trial by jury. In fact, it is absurd to suggest that when faced with incarceration for a crime, a defendant can waive the right to counsel and the right against self incrimination; but a victim of medical malpractice cannot waive an alleged right to limit the fee chosen to pay the counsel of choice.

A defendant in a criminal case may waive just about any right, even though his or her liberty, and life itself, hangs in the balance. *See Tucker v. State*, 417 So.2d 1006, 1013 (Fla. 3d DCA 1982). (Court held that a criminal defendant may waive even fundamental rights, such as the right to rely on an expired statute of limitations, so long as the waiver meets appropriate safeguards, stating: "Waiver of any fundamental right must be express and certain, not implied or equivocal."). There are numerous waivable fundamental rights that have been upheld in Florida: (a) the right to remain silent (*Philmore v. State*, 820 So.2d 919 (Fla. 2002)); (b) the right to a 12-person jury in a murder case (*Groomes v. State*, 401 So.2d 1139 (Fla. 3d DCA 1981)); (c) the right to trial by jury (*Sessums v. State*, 404 So.2d 1074 (Fla. 3d DCA 1981)); and (d) the criminal defendant's right to testify on his or her own behalf (*Brown v. State*, 894 So. 2d 137 (Fla. 2004)).

How could this constitutional right to allegedly limit attorneys' fees ever compare with the importance of speaking to a police officer without having an attorney present or refusing to testify on your own behalf in a capital criminal case? The answer is, that it simply does not. There is certainly nothing about the right allegedly established by Amendment 3 which somehow makes it more sacrosanct, or deserving of preferential

treatment, than any other right under our State or Federal Constitutions.

Thus, the interpretation of Amendment 3 sought by the Petitioners cannot be justified.

D. Conclusion:

Based on the foregoing reasons, the Court should respectfully deny the Petition. The Petition is an impermissible attempt to abuse a procedure for proposing a change to the Rules Regulating the Florida Bar. Further, should the Court grant the Petition, the rule change would essentially rule on the constitutionality of Amendment 3 without any consideration of the constitutional arguments to be asserted in the customary judicial process by individuals to be impacted by Amendment 3. The relief sought by the Petition is both premature and improper and the judicial process should not be side-stepped by the Petitioners.

DATED this 13th day of September, 2005.

Respectfully submitted,

FRANK M. PETOSA, ESQ.
Petosa & Associates, P.L.
7251 West Palmetto Park Road
Suite 206
Boca Raton, FL 33433
Telephone: (561) 416-4848
Facsimile: (561) 416-9770

By: _____
Florida Bar No. 972754

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. regular mail this 13th day of September, 2005 to: John Harkness,

General Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 and Stephen H. Grimes, Counsel for Petitioners, Holland and Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810.

FRANK M. PETOSA, ESQ.
Petosa & Associates, P.L.
7251 West Palmetto Park Road
Suite 206
Boca Raton, FL 33433
Telephone: (561) 416-4848
Facsimile: (561) 416-9770

By: _____
Florida Bar No. 972754