

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1150

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

COMMENTS OF RAQUEL A. RODRIGUEZ, GENERAL COUNSEL TO
GOVERNOR JEB BUSH, IN SUPPORT OF PETITION TO AMEND
RULE 4-1.5(f)(4)(B)

Pursuant to Rules 1-12.1(e) and (g), the undersigned submits
comments in support of the Petition to Amend the Rules of Professional
Conduct (“The Grimes Petition”).

A. Statement of Interest

As a member of the Florida Bar in good standing and a practitioner in
this State for twenty years, with diverse private practice and governmental
experience, I respectfully submit the following comments, supporting the
amendment of the Rules Regulating the Florida Bar, Rule 4-1.5(f)(4)(B), to
conform to Amendment 3.

B. Introduction

During my interviews of judicial nominees, I learned that it is a
widespread practice among lawyers to ask their clients to waive Amendment

3 rights. Amendment 3 affords the injured party in a medical malpractice case a greater percentage of the recovery. The waiver of this right is highly troubling, because of the inherent conflict of interest created by the lawyer's pecuniary interest that is adverse to the client. *See* R. Regulating Fla. Bar 4-1.8 and comments thereto ("As a general principle, all transactions between client and lawyer should be fair and reasonable to the client."). The potential for abuse is great, as is the economic loss to the client.

Waiving rights under Amendment 3 also circumvents the will of Florida voters. Specious federal constitutional arguments should not thwart Florida Constitutional rights afforded to her citizenry; enactment of rules conforming to the people's will should not be delayed.

C. Comments

The Supreme Court of Florida should amend the Rules of Professional Conduct to comport with Amendment 3, as proposed by Petitioners, to reflect the will of the People of this State, for the following reasons:

1. It is unethical for a lawyer to advise a client to contract away a right from which the lawyer derives a financial benefit, especially in the absence of the advice of independent counsel. Any contract between an attorney and his or her client for waiver of the right created by Amendment 3 should be unenforceable, because it violates public policy as an inherent

conflict of interest. *See generally Chandris v. Yanakakis*, 668 So. 2d 180 (Fla. 1995).

2. Amendment 3 allows an injured plaintiff to place more money in his or her pocket as redress for injuries resulting from medical malpractice. The citizens of the State of Florida exercised their constitutional right to amend their Constitution, affording medical malpractice claimants greater financial recovery. *See Art. XI, § 3, Fla. Const.* This political power is inherent in the people. *See Art. I, § 1, Fla. Const.; see also Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)(discussing that Floridians live in a constitutional democracy in which sovereignty resides in the people). The people of this State have a right to change, abrogate, or modify their constitution in any manner they see fit, as long as they do not violate the Federal Constitution. *Id.*

3. Limits on attorney's fees in tort actions are common throughout the nation at both a federal and state level. *See Roa v. Lodi Medical Group, Inc.*, 695 P. 2d 164, 166 (Ca. 1985). Amendment 3 governs the contingency fee contractual relationship between the lawyer and the client, an aspect of the attorney-client relationship which has been historically restricted by the Florida Rules of Professional Conduct and this Court. *See R. Regulating Fla. Bar 4-1.5.* For instance, contingent fee agreements are expressly

prohibited in domestic relations and criminal cases. *See* R. Regulating Fla. Bar 4-1.5(f)(3)(A) and (B). Moreover, Rule 4-1.5(f) provides a fee schedule for contingent fee contracts. The freedom to contract is not absolute; it is subject to reasonable restraint in the interest of public welfare. *See The Florida Bar*, 349 So. 2d 630 (Fla. 1977)(citing *State v. Ives*, 167 So. 394 (Fla. 1936)).

4. The practical effect of amending the Rule is that Florida practitioners will exercise greater caution with regard to cases filed, thereby carefully evaluating claims, assessing issues of liability, reducing the number of frivolous lawsuits, and promoting early settlements. *See Roa*, 695 P.2d at 171.

5. Amendment 3 is constitutional. Challenges to attorney fee restrictions in medical malpractice cases have been rejected by the courts. *See Roa v. Lodi Medical Group*, 695 P. 2d 164; *DiFilippo v. Beck*, 520 F. Supp. 1009 (Del. 1981); *Pendergast v. Nelson*, 256 N.W. 2d 6547 (Neb. 1977). The rational basis test generally has been applied in assessing the constitutionality of medical malpractice attorney's fees legislation under the due process and equal protection clauses, *see Bernier v. Burriss*, 497 N.E. 2d 763, 767 (Ill. 1986), because the limitation of medical malpractice attorney's fees does not involve a fundamental right or a suspect class. *See also*

DiFilippo 520 F. Supp. at 1016. It is rational to limit such fee recoveries because of the relationship to insurance and medical costs. *See id.* (“[T]here is no dispute that the Act’s objectives, i.e., reducing the cost of healthcare by reducing the cost of insurance, assuring prompt settlement of malpractice claims, and assuring fair and reasonable recoveries on malpractice claims are legitimate.”); *see also Roa*, 695 P. 2d at 170 (“A plaintiff quite naturally concerned with what a proposed settlement will yield to him personally, and because [the provision] permits an attorney to take only a smaller bite of a settlement, a plaintiff will be more likely to agree to lower a 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.”).

Amendment 3 does not limit or restrict access to courts; it simply guarantees the client a higher percentage of the ultimate recovery. To find that Amendment 3 limits access to the courts would support the proposition that all other Rules of Professional Conduct which limit attorney’s fee recovery are also unconstitutional. “It is a fundamental rule of construction of our constitution that a construction of the constitution which renders superfluous, meaningless or inoperative any of its provisions should not be

adopted by the courts.” See *Broward County v. City of Ft. Lauderdale*, 480 So.2d 631, 633 (Fla. 1985).

Two constitutional provisions have equal weight; and the people of the State of Florida are presumed to know the law, including the Florida Constitution. See *American Home Assur. Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 375 (Fla. 2005). The People may vote to limit the scope of a law or amend the constitution. Art. XI, § 3, Fla. Const. This Court has stated that it “endeavors to construe a constitutional provision with the intent of the framers and the voters.” *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm’n*, 838 So. 2d 492 (Fla. 2003). “The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such a manner as to fulfill the intent of the people, **never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.**” *Id.* at 501 (emphasis added). In this instance, Amendment 3, affording the injured party in a medical malpractice case a greater percentage of the recovery, is a specific constitutional guarantee which governs over other general constitutional provisions.

D. Conclusion

The undersigned respectfully submits that this Court should grant the Grimes Petition and Amend the Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail and facsimile upon John Harkness, General Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, and Stephen H. Grimes, Counsel for Petitioners, Holland & Knight, LLP, Post Office Drawer 810, Tallahassee, Florida 32302, facsimile (850) 224-8832, on this _____ day of September 2005.

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