

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 ARTHUR B. SKAFIDAS, ATTORNEY,
FLORIDA BAR NO. 0867160 AND PHILLIP W. FARTHING, ATTORNEY,
FLORIDA BAR NO. 0518271, AND OBJECTIONS TO
PROPOSED AMENDMENT**

ARTHUR B. SKAFIDAS, ESQUIRE and PHILLIP W. FARTHING, M.D., J.D.

respectfully submit the following comments and objections to the proposed Amendment to the Rules Regulating the Florida Bar, Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct:

1. As members of The Florida Bar and practicing attorneys, we file this pleading to voice opposition to the Grimes' Petition.
2. This Court should deny the proposed changes to Rule 4-1.5(f)(4)(B) of the Rules Regulating The Florida Bar for three reasons:
 - a) the proposed rule would improperly change the ethical rules at the request of a party that would gain a litigation advantage if the rule change is adopted;
 - b) the proposed rule change would alter the ethical rules governing lawyers before the Court has determined what Amendment 3 actually entails and whether or not Amendment 3 is constitutional within the confines of the United States Constitution; and
 - c) the proposed rule change would forbid a client from waiving his/her constitutional right under Amendment 3 when the United States Supreme

Court and the Florida Supreme Court have ruled that a constitutional right may be waived so long as it is done knowingly, intelligently, and voluntarily.

3. Rule 1-12.1(f) of The Rules Regulating The Florida Bar provides that an amendment to the rules may be initiated by 50 members of the Bar. Any rule or proposed change in a rule should be consistent with the purpose of The Florida Bar:

“. . . to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.”

4. Unfortunately, many of the petitioners who are “sponsoring” this proposed rule are not merely disinterested attorneys that are attempting to improve the administration of justice, but in actuality are employees of a law firm that represents the Florida Medical Association (FMA) or are registered lobbyists for a large medical malpractice insurance company.

5. Both of these entities will gain a tremendous tactical advantage in litigation if plaintiffs cannot hire the attorney of their choice because he/she cannot afford to pay a fee based upon an hourly rate. Further, if the potential plaintiff cannot hire an experienced medical malpractice lawyer to represent them, they must hire an inexperienced lawyer that is willing to gain experience by taking cases with a nominal fee or simply abandon the claim.

6. As this Court is well aware, while Amendment 3 was approved by the voters, its meaning and the constitutionality of this Amendment have not yet been litigated in perspective of not only the Florida Constitution, but also the United States Constitution.

7. If a party in interest would care to bring a claim under this Amendment, the court could rule on the Amendment’s meaning and its constitutionality. Instead, petitioners are

attempting to avoid the open airing and debate surrounding due process, equal protection, access to the courts, and the contracts clause with regard to Amendment 3. The petitioners are asking this Court to circumvent this process and simply have the Court amend the ethical rules to comport with petitioner's clients' hopeful interpretation of the Amendment.

8. If the Court modifies this rule, it is in essence issuing an advisory opinion regarding Amendment 3's meaning and constitutionality without ever having the issue before them. The Rules Regulating The Florida Bar is simply not the appropriate forum to "litigate" these issues.

9. Perhaps the most important reason this Court should deny the FMA's proposed rule change is the petitioners' mistaken position that Amendment 3 somehow created some "super right" that a citizen cannot waive. There is nothing in Amendment 3's language that purports to create a "super right" that cannot be waived.

10. The United States Supreme Court and the Florida Supreme Court have uniformly held that a citizen may waive a constitutional right so long as it is done knowingly, intelligently, and voluntarily.

11. Article 1, Section 21 of the Florida Constitution guarantees its citizens that the courts shall be open to every person for redress of any injury. Further, each individual citizen has the right to contract for legal services with the lawyer of his or her choice.

12. Under current Florida law and Florida Bar Rules, not only does an individual have the right to contract with a lawyer of his or her choice, but also has the right to waive the existing provisions of Rule 4-1.5 with court approval.

13. Specifically, under Rule 4-1.5(f)(4)(B)(ii), a client may petition the court if the client is unable to obtain an attorney of the client's choice because of the limitations set forth in Rule 4-1.5(f)(4)(B)(i). Such authorization shall be given if the court determines the client has a complete understanding of the client's rights and the terms of the proposed contract. (Emphasis added.)

14. Currently, Rule 4-1.5 recognizes the importance of a client's right to enter into a contract with the lawyer of the client's choosing. This Florida Bar Rule is consistent with an individual's right to waive any constitutional provision provided it is done so knowingly, intelligently, and voluntarily.

15. For these three reasons, we respectfully request that this Court deny the Grimes' petition to amend Rule 4-1.5(f)(4)(B) of The Rules Regulating The Florida Bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon **John Harkness, General Counsel**, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300 and **Stephen H. Grimes, Counsel for Petitioners**, Holland and Knight, LLP, Post Office Box 810, Tallahassee, FL 32302-0810, on this __ day of September 2005.

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By: _____
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