

**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

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**COMMENTS OF THE JACKSONVILLE  
TRIAL LAWYERS ASSOCIATION AND  
OBJECTIONS TO PROPOSED AMENDMENT**

**A. INTRODUCTION.**

Pursuant to Rule 1-12.1(g) of the Rules Regulating The Florida Bar, the Jacksonville Trial Lawyers Association (“JTLA”) submits these comments objecting to the proposed Amendment to Rule 4-1.5(f)(4)(B). The Court should dismiss or deny the Petition for any and all of the following reasons:

1. The JTLA adopts the comments and objections of the Dade County Trial Lawyers Association.
2. The JTLA also points out that if the Constitutional Amendment stands for the proposition advanced by the Grimes/FMA Petition, and citizens of the State of Florida may not waive this Constitutional right in order to advance other Constitutional rights, then the legal system and the Courts of this State will only be available to the most wealthy segment of our society for redress of wrongs and injuries created through medical malpractice. This is inconsistent with the tenets of fundamental fairness and access to Courts as well as the right of citizens to make knowing choices about which

Constitutional rights are most important or advantageous to them in a given set of circumstances.

**B. STATEMENT OF INTEREST OF RESPONDENT JTILA.**

1. The JTILA is a voluntary Bar Association comprised of more than one hundred trial attorneys in the northeast Florida area. Our members primarily represent consumers and individuals injured by others. Included among the clients represented by the members of the JTILA are plaintiffs pursuing medical malpractice claims against negligent healthcare providers.

2. The objectives of the JTILA set forth in our By-Laws include the following:

To uphold and defend the principles of the Constitutions of the United States and the State of Florida; ... to promote the administration of justice for the public good; ... to diligently work to promote public safety and welfare while protecting individual liberties; ... to uphold and improve the adversary system; ... [and to] assure that the Courts shall be kept open and accessible to every person for redress of any injury and that the right to trial by jury shall be secure to all and remain inviolate.

3. Members of our organization serve the community, the Bar and the Court system in a variety of ways.

4. The proposed Amendment to Rule 4-1.5 runs counter to the mission and purpose of the JTILA in that it threatens to restrict access to Courts by those who need access the most. The claim advanced in the Grimes/FMA Petition, that the fee cap is non-waiveable, creates barriers which prevent needy plaintiffs from litigating, with the assistance of counsel of their own choice, meritorious malpractice claims against

healthcare practitioners. By contrast the healthcare practitioners typically face no barriers in their choice of counsel. Typically, they employ well-funded insurance defense attorneys who face no limitations upon their ability to fund either the costs or the number of attorneys defending the case.

C. **THE GRIMES/FMA PETITION IS ADVANCED BEFORE THIS COURT UNDER THE GUISE OF SEEKING TO PROTECT RECOVERIES FOR CITIZENS FROM ABUSES BY THEIR OWN ATTORNEYS – THIS IS A “WOLF IN SHEEP’S CLOTHING”.**

The citizens of this great state will have no right to recover anything if they are unable to obtain legal representation in medical malpractice cases. In reality, the Grimes/FMA Petition is in furtherance of a political effort to close the courthouse doors to medical malpractice claims. Currently, medical malpractice claims are extraordinarily expensive to prosecute and typically require costs of prosecution in the range of six figures (over \$100,000.00) to properly handle a claim. Attorneys prosecuting these claims also often expend time which is several times the value of these costs. Thus, medical malpractice cases are extraordinarily expensive to prosecute, fraught with risk, and procedurally difficult. A quick review of Chapter 766 will reveal the numerous procedural hurdles and the reasons behind much of the expense incurred in these cases.

If the Grimes/FMA Petition is successful in obtaining a mandate from the Supreme Court of the State of Florida that attorneys may never ask a client to waive the purported terms of this Amendment, then the Grimes/FMA Petition will be successful in taking away the rights of many injured consumers, who have no say or

voice in the process currently before the Court. Ultimately, a fair reading of the Grimes/FMA Petition makes clear that it is their position that the Constitutional “right” is really a prohibition and not a right. Far from protecting consumer’s rights, the Grimes/FMA Petition advances the “right” of a healthcare practitioner not to be sued and serves as a potential prior prohibition of a citizen’s right to choose how to fully advance their rights in the most advantageous way. The relief sought in the Petition is inconsistent with the whole concept of protecting a citizen’s “right”.

If, in all circumstances, a lawyer is absolutely foreclosed from asking for a knowing waiver of this Constitutional “right” so that a client might gain access to the Courts when they otherwise may not, then this Constitutional Amendment is truly what was predicted in Justice Lewis’ dissenting opinion, “a wolf in sheep’s clothing”. See *Advisory Opinion to the Attorney General Re: The Medical Liability Claimant’s Compensation Amendment*, 880 So.2d 675, 683 (Fla. 2004, Lewis, J., dissenting). Given the extraordinary technical complexity of medical malpractice cases as mandated by Chapter 766, Florida Statutes, as well as the extraordinary expense and work associated with these cases, it is clear that the Grimes/FMA Petition is an attempt to close the courthouse doors to many injured citizens.

The people of this state have always had the right to make knowing choices about the manner in which they may most fully advance and protect their own Constitutional rights. The Petition asks that this Court make these choices regarding the priority and importance of Constitutional Rights for citizens injured by healthcare practitioners, in advance and without knowing the individual circumstances that might

cause a citizen to make a knowing choice to waive or modify the right discussed. If a citizen makes knowing choices in weighing and then advancing their rights in a way that the citizen believes is most advantageous, then it impairs individual freedoms for this Court to make those selections, in advance, with no factual knowledge of the circumstances. In sum, the Grimes/FMA Petition asks that this Court engage in a “big brother” role and make choices for citizens about which rights are most important and how those rights should be managed. That is inconsistent with the way in which the Court system treats citizens’ rights in other circumstances. See generally *Bowles v. Singletary*, 698 So.2d 1201 (Fla. 1997), *Larson v. State*, 572 So.2d 1368, 1371 (Fla. 1991), *Harris v. State*, 438 So.2d 787 (Fla. 1983), *cert. denied*, 466 U.S. 963 (1984).

We all know of numerous instances of citizens making the knowing choice to waive rights. Those instances range from a waiver of Miranda rights to the waiver of access to Courts through the selection of arbitration. The Grimes/FMA Petition fails to suggest any reason why this Court should treat this Constitutional “right” differently than other rights. In truth, the Grimes/FMA Petition seeks to disadvantage the citizens of this state and to restrict their rights because it is politically advantageous to those whom the Petitioners’ represent.

Standards already exist for Court oversight of fee contracts. Standards also already exist in the law for dealing with circumstances where rights are waived without full knowledge and understanding of the right. Likewise, there is a body of case law and existing Bar Rules to deal with a fiduciary who takes advantage of a client without ensuring that they are properly informed of their rights. The Grimes/FMA Petition does

not seek to advance the interests of the public or the Bar. It seeks to advance the political interests of a particular political interest group and is an inappropriate abuse of this process which was designed to protect and advance the integrity of our system of Justice.

The JTTLA respectfully urges the Court to dismiss the Petition and in further response and commentary supplies the Resolution attached hereto as Exhibit A.

Dated: September 29, 2005.

JACKSONVILLE TRIAL LAWYERS ASSOCIATION

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Christopher G. Burns, President

