

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 FRANK A. ASHTON, THOMAS
S. EDWARDS, JR., ERIC C. RAGATZ, JOEL B.
TOOMEY AND PEEK, COBB, EDWARDS, & ASHTON,
P.A. AND OBJECTIONS TO PROPOSED AMENDMENT**

The undersigned members of The Florida Bar: Frank A. Ashton, Fla. Bar No. 611311, Thomas S. Edwards, Jr., Fla. Bar No. 395821, Eric C. Ragatz, Fla. Bar No. 090253, and Joel B. Toomey, Fla. Bar No. 378976, and Peek, Cobb, Edwards & Ashton, P.A., 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.

The Court should dismiss or deny the Petition for any and all of the following reasons:

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.

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.

Dated this 29th day of September, 2005.

PEEK, COBB, EDWARDS & ASHTON, P.A.

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