

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 DAWN M. VALLEJOS-NICHOLS, ATTORNEY,
FLORIDA BAR NO. 0009891, AND OBJECTIONS
TO PROPOSED AMENDMENT**

DAWN M. VALLEJOS-NICHOLS respectfully submits the following comments in opposition to the proposed Amendment to the Rules Regulating the Florida Bar – Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct relating to contingency fees in personal injury cases:

1. The so-called Grimes’ Petition is nothing but a sham proposal cooked up by the Florida Medical Association (FMA) to further protect its own members from lawsuits brought by Florida citizens victimized by medical negligence. To attempt to circumvent the judicial process of reviewing the constitutionality of Amendment 3 (Art. I, s. 26 Fl. Const.) by hoodwinking the Court into adopting a Bar rule is both deceitful and shameful. This is not an attempt to advance our profession. It is nothing

more than a poorly veiled attempt by a special interest group to gain an advantage in litigation.

2. Amendment 3 was sponsored by Citizens For a Fair Share, Inc., the political action committee (PAC) of the FMA. Its goal was not to put more money into the hands of the victims of medical negligence, but instead to prevent these victims from finding competent representation. Medical malpractice litigation is expensive and time-consuming. Attorneys for victims must front all of the costs of the litigation, which can reach tens if not hundreds of thousands of dollars before the conclusion of a complex case. Defense lawyers, on the other hand, are usually funded by insurance carriers with unlimited resources. When the defendant doctor or other medical provider loses a medical negligence case, defense counsel is still paid a fee and reimbursed his or her costs. When a victim loses his or her case, plaintiff's counsel receives no fee or reimbursement of costs expended.

3. Amendment 3 is an unconstitutional denial of access to courts. Article 1, Section 21 of the Florida Constitution states: *"The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."* But the courthouse door will be closed and locked against victims of medical negligence if they are unable to find the highly specialized and trained attorneys to take their cases against

counsel with unlimited resources. Although the language of Amendment 3 never mentions attorney's fees, the intent of the Amendment was at all times clear to the plaintiff's Bar – to constitutionally reduce and limit the amount of money an injured plaintiff can pay an attorney for representation against the lucrative medical profession and its insurers. In cases that often take years to bring to trial, that are defended vigorously, and that require the retention of costly experts, what attorneys will be financially able to represent such victims in light of the significant reduction in potential fees?

4. The Petitioners herein, by filing the Grimes Petition, are asking the Florida Supreme Court to skip the constitutional analysis of Amendment 3, and instead amend the Rules Regulating the Florida Bar, specifically Rule 4-1.5(f)(4)(B). The intent of the FMA with Amendment 3 to only limit fees to the attorneys of the victims of medical negligence and not the defenders of it has clearly been placed in black and white by virtue of the Grimes Petition, which forbids the victims of medical negligence to contract a higher fee with their attorneys upon successful completion of a malpractice claim than what the FMA has decided should be sufficient.

5. This tactical maneuver by the FMA is being pursued because, even if Amendment 3 is able to somehow withstand a constitutional challenge, the history of our state and federal case law is replete with

instances of people waiving their constitutional rights. Surely an injured victim of medical negligence could waive his or her constitutional right to receive a greater percentage of collectible damages in favor of hiring an attorney at the rate this Supreme Court has previously asserted was proper in all personal injury cases. After all, criminal defendants are permitted to waive their right to counsel, their right to remain silent, and to be tried by a jury of their peers. An alleged criminal is deemed competent to make those decisions; the proposed amendment to Rule 4-1.5(f)(4)(B) would determine that an alleged victim of medical negligence *is* incompetent to contract a fee with his or her own counsel.

6. The audacity of the FMA to attempt to make such a determination is stunning. The passage of the proposed Amendment to Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct would constitute an even greater denial of those rights already guaranteed by Art. I, Section 21 of the Florida Constitution than the passage of Amendment 3 itself. Not only would innocent victims of medical negligence lose the ability to waive a fundamental constitutional right, but all citizens of this state would not receive the appropriate constitutional consideration of the Amendment itself.

7. The right to have access to our courts for the redress of any grievance is our most fundamental right – one that has been guaranteed since

the birth of this nation and accepted with equal importance by the citizens of this State. To consider stripping that precious right from the victims of medical negligence is unconscionable. Who among us will be next?

8. For the reasons stated above, I oppose the Grimes Petition and urge this Honorable Court to dismiss it summarily.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to John F. Harkness, Jr., Esq., Ex. Dir. of the Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300; and Stephen H. Grimes, Esq., P.O. Drawer 810, Tallahassee, FL 32302 this _____ day of September, 2005.

DAWN M. VALLEJOS-NICHOLS
Florida Bar No. 0009891