

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SCO5-1150

IN RE: PETITION TO AMEND
 RULE 4-1.5(0(4)(B) OF THE
 RULES OF PROFESSIONAL CONDUCT

RESPONSE TO PETITION BY EDWARD H. ZEBERSKY, ESQ.

This is a Response to the Petition filed by former Justice Grimes seeking to amend the Florida Rules of Professional Conduct Rule 1.15(f)(4)(B). It is with great concern, as will be further discussed, that I write this Response.

I have had an opportunity to review the petition along with the names of all the lawyers that have signed the document. What strikes me right off is that the petition is being filed by a paid lawyer (Former Justice Grimes) and law firm (Holland & Knight) for the Florida Medical Association (FMA) as well as other counsel that are directly employed by the FMA. What is even more troubling is that a majority of the signatures on the Petition are from either other members of the Holland & Knight firm or from paid lobbyists, lawyers and consultants for the FMA or their allies. In short, after scratching the surface of this Petition, it is clear that the document is

nothing more than an attempt by the FMA, through their paid lawyers and allies, to eliminate any real responsibility for acts of medical malpractice. I submit that this attempt creates a conflict of interest.

HISTORY BEHIND AMENDMENT 3

To more fully illustrate this point a brief history behind Amendment 3 is necessary. In, 2003, the FMA and its main insurance carrier FPIC launched an all out assault in the Florida Legislature to effectuate caps on non-economic damages in medical malpractice cases. Some of the lawyers listed on the Petition were either paid lobbyists or volunteers for the position taken by the FMA during the 2003 sessions.

After the regular session and several special sessions, a cap on non-economic damages was eventually passed and signed into law by Governor Bush. The cap was larger than what was advocated by the FMA and there was a huge grumbling amongst the doctors that they should go on the ballot in 2004 to effectuate a hard cap on non-economic damages. The doctors eventually decided that instead of going forward with a non-economic damage cap, it would attempt to cap the amount of attorney's fees that could be paid in a medical malpractice action.

The reason for this change is simple; in 1986 and 1988 the doctors had tried a cap on non-economic damages and lost. As such, rather than

fighting an uphill battle with the public by directly capping damages, they would go forward with a simple notion to cap attorney's fees. By capping fees the hope was that it would become financially infeasible for a qualified malpractice lawyer to accept a complex malpractice case on a contingency fee basis.

The slogan for the Amendment 3 Campaign was "enough is enough" and their campaign was nothing more than an attempt to smear the legal profession and especially trial lawyers. Clearly this worked as Amendment 3 passed by almost a 2/3 majority. However, the goal of the campaign was not to put more money in the client's pocket, but to make it near impossible for a lawyer to accept a medical malpractice case on a contingency basis. This way the doctors would achieve their main goal; limit the ability for a person to seek redress for medical malpractice.

Former Justice Grimes was hired by the FMA as its lawyer throughout the Amendment 3 process. Indeed, he appeared as counsel of record before this court with respect to the constitutionality of the amendment language. Similarly, he was hired as counsel to oppose the constitutionality of two amendments (Amendments 7 and 8) which effected doctors.

Based on the history of Amendment 3 and the forces behind the amendment, I submit that this Court should look at the Petition as little more

than a thinly veiled attempt to effectuate the purpose behind the FMA's main goal; eliminate any meaningful access to courts to redress medical malpractice injuries.

PUBLIC POLICY CONSIDERATIONS

The Florida Bar has an independence that is not shared by many professions in the State of Florida. The Bar polices its own for violations and creates its own rules for professional conduct. There is little dispute that this type of governance has worked very well for a very long time. This Petition, which is being pushed by people that have a conflict of interest based on their or their firm's involvement with Amendment 3, strikes at the very heart of the independence that the Bar has enjoyed over decades. If this petition is granted, the FMA will have succeeded in influencing Bar governance and will surely open the floodgate to future attempts by interested lawyers to undermine the independence of the bar.

Another policy concern is whether this Court wants to restrict a persons' ability to waive their constitutional right to contract with a lawyer of their choosing. Constitutional rights are waived every day. Miranda warnings waive certain constitutional rights. The Right to Access to Courts is waived everyday when arbitration agreements are executed. In fact, outside of life and death circumstances it is difficult to find a constitutional

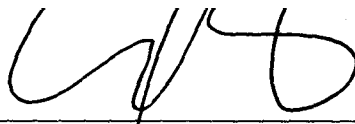
right that cannot be waived voluntarily. Based on the goals of the FMA, which is to eliminate medical malpractice lawsuits, it should come as no surprise that the FMA's lawyers are asking this court to eliminate a persons' right, not only to contract, but to waive their constitutional right.

CONCLUSION

This Petition process is fraught with conflict of interest. Moreover, it is little more than an attempt by the FMA to interject itself into Bar governance to effectuate what it could not in the legislature or through the Amendment process; eliminate medical malpractice lawsuits. This Court should not entertain this request which will serve to limit and not enhance the rights of Florida's citizens and for those reasons and the reasons asserted by numerous other lawyers the Court should deny the petition.

Respectfully submitted,
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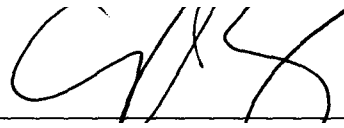
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. regular mail this 23rd day of September, 2005 to: John Harkness, General Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 and Stephen H. Grimes, Counsel for Petitioners, Holland and Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810.

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