

# 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 SCOTT R. MCMILLEN  
TO PROPOSED AMENDMENT**

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Please accept for consideration my comments on the Petition to Amend Rule 4-1.5(f)(4)(B).

The recent Ballot Amendment 3, now Article I, Section 23 of the Florida Constitution, is in conflict with the access to courts provision in Article I, Section 21 of the Florida Constitution, which reads:

"SECTION 21. Access to courts.--The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

The only way to find Section 23 compatible with Section 21 is to construe Section 23 as creating a right which can be waived by citizens whenever they find it

in their own best interest to do so. Other constitutional rights are freely waivable and there is nothing in the ballot language or in Section 23 suggesting it is NOT freely waivable like other constitutional rights.

It is absurd for Petitioners to suggest to the Court that Amendment 3, placed on the ballot by the Florida Medical Association, was honestly intended by its sponsors to ensure that patients will make more money when they file malpractice claims, and thus have even more incentive to sue the very sponsors of Amendment 3. The sole and transparent reason for Amendment 3 was to make it less likely for victims of malpractice to find representation, and without competent representation they have no access to the courts.

It should be remembered that this Court previously found the current sliding scale fee amounts of 40/30/20%, to presumptively be a reasonable contingency fee in many cases. That means that there will likely be many malpractice cases for which this new 30/10% maximum fee now being promoted will be unreasonable.

If some victims of malpractice do sometimes find representation at the new severely reduced fee, their access to the courts will still be inherently unequal, because there are no counterbalancing restrictions on the right of the Petitioners' healthcare clients to pay whatever sums necessary to retain lawyers to defend

malpractice claims. And no matter how many billable hours, days, weeks, months, or years the case might take, those defense lawyers will be paid their unlimited fees whether they win or lose, unlike the contingency fee lawyers representing the victim.

The Petitioners are recognizable primarily as corporate healthcare lawyers and lobbyists (with a few malpractice defense lawyers sprinkled in) representing certain segments of the Florida healthcare industry. They come before The Florida Bar and this Court seeking to amend the Rules of Professional Conduct, not for the good of all Florida citizens, but to promote a wishful and highly partisan interpretation of Section 23, to gain for their special interest clients further advantage over Florida citizens who become the unfortunate victims of medical malpractice. The right of Florida citizens to have unrestricted and equal access the courts of this state is too important to be so lightly cast aside and The Rules of Professional Conduct are too important to be manipulated for partisan special interests.

This Court is respectfully urged to avoid endorsing a special interest rule change which would have the direct and intended consequence of severely limiting the ability of Florida citizens to hire the lawyer of their choosing to seek redress in

the courts of this state when they are victims of malpractice.

**CONCLUSION**

WHEREFORE, the undersigned respectfully submits that this Court should reject the proposed amendment to Rule 4-1.5.

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**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 E. Jefferson Street, Tallahassee, FL 32399-2300 and Stephen H. Grimes, Counsel for Petitioners, Holland + Knight, LLP, P.O. Box 810, Tallahassee, FL 32302-0810 on this the 7<sup>th</sup> day of July, 2005.

By: \_\_\_\_\_  
SCOTT R. MCMILLEN  
Florida Bar No. 290939