

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC05-1150

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

OPPOSITION TO PROPOSED CHANGES TO RULE 4-1.5(f)(4)(B)
OF THE RULES OF PROFESSIONAL CONDUCT

_____The undersigned, Brad E. Kelsky, Esq., hereby files this Opposition to Proposed Changes to Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct and states as follows:

1. The undersigned, BRAD E. KELSKY, ESQ., is an attorney admitted to practice law in the State of Florida; the undersigned's Florida Bar Number is: 0059307.

2. The undersigned requests that the Court reject the proposed changes to Rule 4-1.5(f)(4)(B).

3. The undersigned opposes the Grimes' petition on the basis that said petition is a misguided interpretation of the provisions of Amendment 3.

4. The Grimes' petition, at the very least, is exceedingly premature. Amendment 3 is going to be challenged for various reasons and the ultimate interpretation of the amendment is going to be addressed by the courts of this state up to and including this Court. The Court intimated this sentiment in its *Advisory*

Opinion regarding the single-subject requirement and the Ballot Title and Summary. *Advisory Opinion To The Attorney General Re The medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675, 679 (Fla. 2004)(“Although the opponents argue that the efficacy of the amendment is at issue because of the vague “medical liability” term, the issue as to the precise meaning of this term is better left to subsequent litigation, should the amendment pass”). As the Court has already foreseen the need for subsequent litigation concerning the

amendment, it would be premature to enact the rule to cover situations that have not been judicially resolved.

5. The proposed rule change is going to be challenged under the federal constitution on the basis that same impairs a client's right to due process, inhibits freedom of association, denies a client's right to equal protection, limits a client's access to courts and violates various interpretations of the Supremacy Clause of the United States Constitution. Until these substantial federal questions are answered – let alone the fact there will be state constitutional challenges to be resolved, it would be premature to change the rule.

6. The Court should further reject the rule change as the proposed language would force a person to accept the limitations of the amendment without affording them the opportunity to knowingly waive their constitutional right. As a result, a person would be stuck with the amendment's limitations. It would be grossly inconsistent to allow a citizen to waive their fundamental right to remain silent or their right to a jury trial but require them to accept the amendment's limitations. There can be no doubt that it is fundamentally more important as a society for an individual to be able to seek the redress of their injuries in a court of law with the attorney of their choosing than it is to have legal fees limited in order to discourage bringing medical negligence suits. As Justice Lewis pointed out: "However, the amendment actually has the singular and only purpose of impeding a citizen's access to the courts and that citizen's right and ability to secure representation for a redress of injuries." *Advisory Opinion To The Attorney General Re The Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675, 682 (Fla. 2004)(Lewis, J., dissenting). Were the Court to

approve the rule change, the net effect would be to deny access to the courts and to deny a Florida citizen of their right to contract with whom they please.

7. It should also be noted that the amendment, itself, mentions nothing about attorney's fees— it merely creates arbitrary percentages of ultimate recovery. The construction of the phrase “all damages” is going to require judicial resolution. Such phrase contemplates the abrogation of comparative fault, the new caps on non-economic damages for medical negligence claims and sovereign immunity as these defenses presently *limit* what a plaintiff can potentially recover. In other words, the amendment's “all damages” language suggests that a plaintiff be entitled to recover all damages he/she may have *without limitation*. Clearly, just as the phrase “medical liability” is vague and in need of judicial interpretation, “all damages” is just as vague.

8. For the foregoing reasons, undersigned counsel requests the Court to reject the proposed rule change to Rule 4-1.5(f)(4)(B).

WHEREOFRE, BRAD E. KELSKY, ESQ., respectfully requests the Court to reject the proposed change to Rule 4-1.5(f)(4)(B).

Dated this ____ day of August, 2005.

BRAD E. KELSKY, ESQ.

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