D/A 6-8-87

IN THE SUPREME COURT OF FLORIDA

In Re: Petition to Amend the Rules Regulating The Florida Bar (Rules 4-1.5 and 4-7.3 Regarding Advertising and Referral Fee Practices)

CASE NO: 70,366

RESPONSE OF THE ACADEMY OF FLORIDA TRIAL LAWYERS TO PETITION OF THE FLORIDA BAR TO AMEND RULE 4-1.5 AND RULE 4-7.3 OF THE RULES REGULATING THE FLORIDA BAR

The Academy of Florida Trial Lawyers files this response to the petition of The Florida Bar to the Supreme Court of Florida to amend The Rules Regulating The Florida Bar that pertain to attorney advertising and referral fee practices (Rules 4-1.5 and 4-7.3).

Respondent's Interest

The Academy of Florida Trial Lawyers is a large, statewide association of over 3,000 attorneys specializing in all areas of litigation. However, the great majority of our members are dedicated to the representation of persons injured through the negligence of tortfeasors. Our organization's goal as stated in our Charter is "to promote public safety and welfare while protecting individual liberties." Our purpose is to assure that the courts of this state remain accessible to every person for the redress of any injury and that the right to trial by jury remains inviolate. Article II, Sections 1(g),(h), Charter, Academy of Florida Trial Lawyers. It is the Academy's further stated objective to uphold the honor and dignity of the profession of law. Id., Article II, Section 1(e). Accordingly, the members of the Academy and the clients they represent are very much interested in and will be affected by the petition which has been filed by The Florida Bar to amend The Rules Regulating The Florida Bar with respect to attorney advertising and with respect to the regulation of referral fee practices.

Discussion

The Academy, perhaps more than any other group, is sensitive to the negative impact that television and other media advertising has had on the image of the plaintiffs' trial bar. Indeed, the membership of the Academy of Florida Trial Lawyers has worked diligently to try to enhance the public image of trial lawyers and to elevate the stature of the plaintiff's representative to a position of respect and responsibility within The Florida Bar. Thus, it should come as no surprise that the

Academy is very much concerned about perceived and actual abuses of advertising and of brokering litigation. These problems are complex, and any attempt to address them will inevitably have profound effects on our profession.

Whatever benefits to the public there may be from attorney advertising following Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977), lawyer advertising has also had a detrimental effect — i.e., the erosion of the level of respect and trust of attorneys on the part of the public. Nevertheless, consumers of legal services also clearly have a right to know the truth with respect to all relevant information, including rates charged, areas of expertise and particular skill and experience. The Academy respectfully observes that the negative impact of attorney advertising is not limited to plaintiff's personal injury trial attorneys — a cursory review of any large city's yellow pages or newspapers will reveal that aggressive lawyer advertising covers the gamut of legal services offered to the general public.[1] The Commission's and the Board of Governors' proposals are a laudable step in the direction of balancing the consumer's right to know against the potential for abuse in aggressive over-stepping by attorneys who advertise. The Academy supports the proposed rule modifications with respect to attorney advertising wholeheartedly; the Academy's only suggestion is that fairness and the degree of perceived and perhaps actual abuses requires that the new regulations on attorney advertising should apply to **all** lawyers who advertise. See discussion, infra.

Although endorsing the concept of closer regulation and limitation of "brokering" of cases, the Academy has serious reservations about some of the methods proposed by the Bar to implement this worthwhile goal. The Academy is concerned that the regulation of the amount of fee allocation between multiple attorneys retained by a client (as opposed to regulation of the total amount of the contingent fee) represents an unprecedented level of regulation of the client's right to contract with associate counsel of the client's choosing and an extreme intrusion into counsel's exercise of professional judgment. We submit that these are legitimate concerns, particularly when it is recognized that the proposed rule modifications may actually work to discourage the general practitioner from associating trial counsel while encouraging true brokering. The Academy would request the Court to give serious consideration to these factors when deciding whether to implement the proposed modifications.

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[1] Such as "bankruptcy," "wills," "adoptions," "divorce," "child support," "name change," "incorporation," "real estate," "DUI," "traffic," etc.

I. REFERRAL FEE REGULATION

The notion of a member of The Florida Bar being paid for simply advertising and obtaining and brokering a case is offensive. It is offensive to trial lawyers and to the public. It should not be condoned and it should certainly not be promoted by the Court which, unfortunately, the proposed rules may have the effect of doing. The Academy has supported efforts by The Florida Bar to establish rules to minimize the risk of abuse of the contingent fee and to improve public understanding of the roles of attorney and client. In that regard, the Academy has supported efforts to deal with abuses of advertising and the perceived problem of brokered cases and unjustified referral fees. However, the Academy believes the proposed rules regarding division of fees are overly broad and constitute an unnecessary intrusion into the attorney-client relationship; moreover, the proposed "standard referral fee" of 25 percent, which is to be paid regardless of any work performed by the referring attorney, will likely foster the very problem addressed by the proposal — i.e., the brokering of litigation.

A "Standard Referral Fee" of 25%, Which Requires No Work on the Part of the Referring Attorney, Will Promote the Brokering of Litigation by Advertising Lawyers and Will Penalize Legitimate Practitioners Who Seek to Associate Trial Specialists

In the past, the traditional model of the "referral fee arrangement," whereby an attorney who customarily represents the plaintiff on routine matters associates a trial specialist when the client requires particular litigation skills, has clearly provided a useful and beneficial function. This has been particularly true when the attorneys agreed to allocate among themselves, with the client's permission, a contingent fee. See The Florida Bar Re: Amendment to the Code of Professional Responsibility (Contingent Fees), 494 So.2d 960, 961 (Fla.1986) ("the legal profession has generally viewed contingent fees as the 'poor man's keys to the courthouse....'") Traditionally, the general practitioner has shared the work in the case with the trial specialist; traditionally, the general practitioner served the client's immediate needs and arranged for responding to discovery from the client, while the trial attorney conducted the majority of the legal work, the discovery from the opposing side and the trial itself; and traditionally, the referring attorney has received somewhat more than twenty-five percent (25%) of the total contingent fee.

The Bar's proposals may well have the unintended effect of legitimizing the brokering of personal injury claims at the expense of the legitimate, honest general practitioner. Under the proposed rules, the "traditional" role of the referring attorney as a non-trial specialist whose responsibility primarily rests in the area of contact

with the plaintiff is no longer a rationale or justification for receiving a portion of the fee; indeed, under the current and the proposed rules it is **unnecessary** for the referring attorney to perform **any** work in connection with the case in order to receive a portion of the fee; moreover, the traditional activity of the general practitioner is held **not** to justify any greater fee than twenty-five percent (25%). See existing and proposed versions of Rule 4-1.5.

The comment to proposed Rule 4-1.5(F)(4)(d) provides that a secondary lawyer shall **not** be entitled to a fee greater than twenty-five percent (25%) "merely" because the lawyer agrees to do some **or all** of the following: (a) consult with the client; (b) answer interrogatories; (c) attend depositions; (d) review pleadings; (e) attend the trial; (f) assume joint legal responsibility to the client. The comments go even further to provide that the rule does "not contemplate that a secondary lawyer who **does more than the above** is necessarily entitled to a larger percentage of the fee" than the twenty-five percent (25%) limitation. By its comments which will direct the trial court in determining whether to grant the "sworn petition" of counsel, the Bar has established a presumption that even though the "secondary lawyer" participates substantially in all phases of the case, he is not entitled to more than twenty-five percent (25%) of the fee. On a practical or economic level, one would question why an attorney would actively participate in litigation to the extent of devoting the time and effort to answer interrogatories, attend depositions, review pleadings, attend the trial and actively assist in the representation, when the fee for his or her services would be the same if no work was performed.

The intent of the Bar's proposal may be to eliminate a perceived "charade" of referring attorneys documenting minimal involvement in a case in order to justify receiving a portion of the fee; and there are probably cases of the referring attorney doing nothing but documenting activity on a case for such a purpose. However, an unintended effect of the Bar's approach will be to impede, and in some instances effectively to prohibit, the traditional and beneficial association of trial specialists by general practitioners; and, further, to promote the active brokering of cases for a twenty-five percent (25%) referral fee by attorneys who have absolutely no intention of assisting in the representation of the client. Thus, there is concern on the part of the Academy's membership that the Bar's proposal may in practice actually favor the brokering of litigation at the expense of the traditional association of trial counsel (which is apparently not considered abusive by anyone). Moreover, on a strictly economic level, the proposed rule modifications may encourage less competent

attorneys to attempt to handle complex cases without associating qualified trial specialists. In short, the Academy of Florida Trial Lawyers is concerned that the Bar's proposal, while clearly well intentioned, may actually have the effect of exacerbating the problems caused by abusive lawyer advertising and brokering of litigation. With respect to these issues, we would respectfully request the Court to consider the Partial Dissent from Recommendations by Special Commission to Study Contingency Fees and Referral Practices filed by the Honorable Bill Wagner.

The Court Should Not Adopt Rules Which Unfairly Stigmatize Plaintiffs' Personal Injury Attorneys as Generally Unethical

Of great concern to the Academy is the unstated premise about the integrity of our profession: The Bar would paint the plaintiff's personal injury trial bar with a broad brush which ignores the traditional and well-founded assumption that the great majority of attorneys truly serve as officers of the court and deal fairly and in the best interest of their clients. Instead, it substitutes a rigid, arbitrary system of division of fees which is inconsistent with traditional practices and which will have the effect of institutionalizing and legitimizing the very wrong which is sought to be corrected.

The Academy is familiar with the argument that unless strict rules and regulations are implemented, those who would broker cases and take an unjustifiable share of the fees will continue to do so. (The cynical answer is that if they disregarded or circumvented the rules before, why should one think they will stop now.) The real answer, however, is that the underlying premise is wrong. Otherwise, we are no longer an honorable profession. The Academy believes that to an extent not prevalent in most professions, attorneys adhere to the rules of law and of their profession and take seriously their obligations as public servants and officers of the court. The best method to prevent abuses is for The Florida Bar to vigorously enforce the provisions of The Rules Regulating The Florida Bar against all attorneys who charge excessive fees, whether under contingent fee contracts or some other means of compensation, and to establish a meaningful system of review of cases involving division of fees or other suspect categories. Instead, the proposals before the Court abrogate the right of attorneys as professionals to enter into employment agreements with the knowing consent of their clients and substitute a system which presumes ill-motive in the division of fees. Such a system is particularly unwarranted in light of the laudable procedures already adopted and being proposed which assure that the

client is aware of his rights and assures the brokering attorney must disclose his true role and afford the client the opportunity to choose other counsel.

The Academy respectfully submits that in its zeal to respond to perceived abuses and adverse public opinion, the Bar is tacitly accepting a distorted image of our profession; and is responding with rules and procedures conceived in that unfair light which will ultimately assure the reality of the misperception. Incredibly, pursuant to existing Rule 4-7.3(b), a brokering attorney can now ethically consult the obituaries or newspaper accounts of tragedies or scan police accident reports to find "prospective" injured plaintiffs. He can write these "prospective clients" a letter expressing his sympathy for their injury, advising of his prior review of the incident, his belief that they may have a claim, his specialty in the particular area and his willingness to assist them in their hour of need — as long as somewhere on the letter it says "advertisement".[2] Under the proposed rules, that same attorney can then broker the case to a primary attorney, do nothing more and "ethically" receive twenty-five percent (25%) of the fee. Yet, an attorney who has represented a client for many years, has a trusting and professional relationship with the client, provides valuable services and desires to associate trial counsel to assist in assuring the client's best representation is thrown into the same category as the solicitor/broker.

The Proposed Rules May Be Burdensome on the Circuit Courts and Will Require an Unwarranted Level of Intrusion into the Attorney-Client Relationship

On a more pragmatic level, the Academy is also concerned as to whether the circuit courts are the appropriate forum for requesting departures from the seventy-five percent/twenty-five percent guidelines. Some determination as to the expected administrative impact of this proposal should perhaps be considered before implementation. From the practitioners' viewpoint, there would appear to be quite a few cases that would fall within the committee note's contemplation of deviations from the guideline. Primarily, these would include "out-of-town" cases where the plaintiff resides in one location, but must file his action in another city, requiring phases of the litigation to be carried out in both locations. In addition, the committee note appears to provide for deviations from the fee allocation guideline where co-counsel have different areas of expertise in specialized matters. If the rule contemplates situations where a competent trial attorney associates co-counsel in the fields of admiralty or medical negligence or aviation law or products liability, as it

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[2]The Academy understands that precisely this type of activity is now being practiced by some Florida lawyers on a large-scaled, computerized basis.

appears to, then there will be a substantial number of cases which would justify departure from the guidelines. In short, a wide number of routine cases, as well as perhaps most of the complex cases, would at least raise the possibility of ancillary proceedings before the circuit court. Accordingly, it would seem appropriate to have some input from the Conference of Circuit Judges before the rule modifications are promulgated.

The Academy suggests that the proposed procedure of essentially pre-trying the case before a circuit judge and being required at an early stage of representation to make sworn representations regarding allocation of work, etc., may be completely unworkable and raises questions regarding confidentiality of the attorney-client relationship and counsel's work-product. The Academy would point out that in the existing contingent fee regulations setting the maximum amount of the total fee, Rule 4-1.5(f)(4)b.2, there is a similar provision for the client to choose to employ counsel at a greater fee by petitioning the court. However, the total fee is assumed to be reasonable if the court determines "the client has a complete understanding of his or her rights and the terms of the proposed contract." Yet, an opposite presumption would operate as to the division of the fee. Less than a year ago, the Bar and this Court recognized the importance of minimizing intrusion into the case and the attorney-client relationship by specifically providing that "the consideration by the trial court of the waiver petition is not to be used as an opportunity for the court to inquire into the merits or the details of the particular action or claim which is the subject of the contract." Comment to Rule 4-1.5. Under the Bar's new proposals, even though the client may want other counsel involved and agrees to the fee division, the trial court must inquire into the merits and details of the claim which is the subject of the contract -- the very thing that is expressly prohibited with respect to the amount of the fee in general. The Academy respectfully submits that although the Bar's obvious intention to "really crack down" on brokering may be well intentioned, the approach taken is totally inconsistent with traditional notions of the confidentiality of counsel's thought process and litigation strategy and is violative of the attorney-client relationship. We would also submit that the inconsistency between the two rules is neither rational nor sensible.

Finally, the Academy questions whether circuit judges should be providing this function at all, or whether the matter of reviewing allocation of contingent fees is more appropriately a Bar function. The Bar already has in place fee dispute panels, grievance panels, etc., which can provide a model for the Bar to review petitions on

the local level without involvement of the court. Such a procedure would probably provide more consistency in rulings (would each circuit judge exercise his discretion in a similar fashion?) and would allow for more expeditious handling of such matters. The Academy submits that Bar review is more appropriate and that the Bar's proposals should be modified to permit review of proposed deviations from the referral fee guidelines by Bar representatives rather than by circuit judges.

The Academy strongly endorses the concept of more closely regulating referral fee practices so as to cure apparent abuses in the brokering of cases. However, for the reasons stated, the Academy has grave reservations about some of the specific proposals made by the Bar to implement this laudable goal. The Academy commends the Special Commission and the Board of Governors for their efforts at dealing with this most complex and important issue. We agree that the evil to be eliminated is the brokering attorney who provides no function except to advertise and to forward the client to a competent trial attorney.[3] However, we believe the unintended effect of the Bar's proposals may be to aggravate this problem rather than to eliminate it; and that the proposals will in fact discourage some practitioners from referring cases to the potential detriment of the client and will unnecessarily invade the traditional relationship of attorney and client in determining how best to handle representation. Specifically, the Academy suggests that it would be more appropriate to have a review of proposed deviations from the referral fee guidelines performed by a panel of local Bar representatives rather than the circuit courts.

II. THE ADVERTISING PROPOSAL

The Academy wholeheartedly supports the proposed rule modifications regarding greater regulation of lawyer advertising. Furthermore, the Academy would strongly urge the Court to reconsider and modify the "written communication" exception to the Rule 4-7.4 proscription against solicitation. Although recognizing there are certain First Amendment rights of advertising, the Academy respectfully submits that the

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[3]One approach to limiting abusive adverising/brokering while maintaining the benefits of traditional association of trial counsel would be to link strict referral fee regulation to those lawyers who advertise themselves as trial attorneys, but who in fact refer cases out after they are obtained. If non-advertising attorneys were free to associate trial lawyers under the pre-existing traditional rules of conduct, then the benefits of referral would be preserved in the non-abusive context; and if the advertiser/broker were subject to strict regulation both with respect to truth-in-advertising and with respect to the referral fee, then the desired degree of control over potential abuses will still be maintained. While we do not address the First Amendment considerations of such an approach at this time, if the Court is so inclined, the Academy would be pleased to submit specific proposals for rule modifications, as well as an additional brief addressing First Amendment and other issues.

present rule is so broad as to allow intrusive communications with injured victims which is not in the public interest and most certainly is detrimental to the image and reputation of the profession. The Academy is already aware of attorneys screening police accident reports and writing "permissible" solicitations to victims. If this sort of practice is permitted and the Court puts its imprimatur on a twenty-five percent (25%) fee for such solicitation and brokering, we will have done our profession and the public an extraordinary disservice. From a purely practical standpoint, such rules and regulations will surely require that most attorneys begin directly communicating with injured victims and "prospective clients" if they are to have any opportunity to compete in the legal marketplace. The spectre of legitimized Bhopal-style lawyer solicitation of Florida accident victims (so long as it is "truthful" and says "advertisement") is appalling. Surely, even within First Amendment proscriptions, this sort of stigma of the profession can be alleviated.Further, the Academy does not understand why the legal service information disclosure requirements of Rule 4-7.3 are limited to contingent fee cases. If a lawyer advertises in the field of domestic relations, wills and trusts, taxation or commercial law, why should he be exempted from the same disclosure requirements? The Academy urges the Court to make all rules and regulations regarding advertising applicable to all attorneys, regardless of the type of case involved,[4] and further urges that the rules and regulations be made as strict and comprehensive as permissible so as to put our profession back on the road of public respectability and confidence.

Conclusion

The rule of law in our society dictates a regulatory system that strictly defines **unacceptable** conduct which the government is empowered to prohibit. If the government undertook to strictly define **permissible conduct** beyond which illegality was presumed — although surely a more convenient system to enforce — unacceptable and repressive restraints on legitimate activity would result. But that is what the Bar has attempted in its well-meaning approach to the referral fee/brokering problem.

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[4]Such a change could be accomplished simply by amending the introductory language in The Bar's proposed Rule 4-7.3 to read as follows:

> "4-7.3. Legal service information. Each lawyer or law firm advertising its services or availability to represent clients shall...."

What makes the broad encroachment on professional freedom even more unpalatable is that the system devised will in fact legitimize and institutionalize a "little" larceny (25%) by outright brokerage of litigation.

Our profession presumes that as officers of the Court, attorneys will adhere to broadly articulated standards of professional conduct, including "a lawyer shall not charge an illegal or clearly excessive fee." Such standards assume professional honesty and allow for professional judgment in bringing diverse legal problems and varied relationships within a policy of fair dealing. The Academy's chief concern with the Bar's division of fee proposal is that it has embarked on an heretofore unacceptable course of prior restraint of the **method** of handling representation. By strictly defining acceptable conduct, it has proposed a new regulatory scheme which inherently and neccessarily represses legitimate activity. Further, this new orientation toward rule making incorporates the circuit court as a fact-finding watchdog to try to assure that lawyers will not circumvent the rule; a policy that presumes ill-motive and involves a perilous departure from the Bar's historical role as self-regulator and executor of the Court rules. The Academy entirely agrees that the Bar should assure that attorneys do not charge excessive fees for services rendered — whether contingent or hourly fees — and that we must deal with abuses in brokering. We strongly disagree, however, with the underlying philosphy of the proposed rules. The Academy respectfully suggests that the Court should require the Bar to submit a system of regulation which more precisely delineates unacceptable fee sharing by those who do not provide commensurate legal services; but which is consistent with our profession's historical manner of regulating itself by entrusting responsibility to the attorney while providing mechanisms to enforce noncompliance.

As to the proposed advertising regulation, the Academy submits that the Bar should vigorously increase its efforts in this area before this public wound fatally infects our profession. The Academy urges **uniform** regulation of all advertisers — not just personal injury attorneys — and reconsideration of present rules which allow intrusive solicitation under the guise of written advertisement.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing has been furnished to The Florida Bar, by serving John F. Harkness, Jr., Executive Director, Tallahassee, Florida, 32301; Marsha K. Cypen, 7900 Northwest 27th Avenue, Suite 210, Miami, Florida 33147; Charles R. Steptor, Jr., P. O. Box 3189, Orlando, Florida, 32802; Thomas A. Pobjecky, General Counsel, Florida Board of Bar Examiners, 1300 East Park Avenue, Tallahasse, Florida, 32301; Larry D. Beltz, P. O. Box 16008, St. Petersburg, Florida, 33733; and Bill Wagner, 708 Jackson Street, Tampa, Florida, 33602, by U.S. mail, this 11 day of May, 1987.

ATTORNEY