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IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,987

THE FLORIDA BAR
RE: AMENDMENTS TO THE
RULES REGULATING THE
FLORIDA BAR - ADVERTISING ISSUES

ACADEMY OF FLORIDA TRIAL LAWYERS' COMMENTS IN SUPPORT OF PROPOSED FLORIDA BAR REGULATIONS ON ATTORNEY ADVERTISING

ACADEMY OF FLORIDA TRIAL LAWYERS

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INTRODUCTION

The Academy of Florida Trial Lawyers (hereinafter referred to as the **"Academy"),** is an organization of more than 3,000 trial lawyers who handle primarily personal injury, wrongful death, and other related civil litigation. Its members include both lawyers who choose to advertise on TV and lawyers who do not. The Academy, through its Board of Directors, being aware of the harm to the civil justice system and the inability of the Bar to regulate attorney advertising under the existing rules, voted unanimously to support the proposed regulations of the Florida Bar and file a Brief on behalf of their trial lawyer members. Never before has the Florida Supreme Court been faced with an issue that more directly goes to the heart of the civil justice system as the topic of lawyer advertising.

The Florida Bar, based upon a strong record, has proposed regulations rather than a ban on lawyer advertising, and those regulations are reasonable in light of the substantial state interest sought to be achieved and the direct relationship between those regulations and that interest. Rather than addressing each rule on a paragraph by paragraph basis, it is the purpose of this brief to focus upon the significant portions of the record collected by the Florida Bar that support the proposed regulations and the constitutional and case law analysis that should be made on the Bar package as a whole with a brief analysis of the more significant provisions of the proposed rules.

SUMMARY

Traditionally, the United States Supreme Court has evaluated two types of speech and prescribed to them two entirely different tests as it relates to the state's ability to regulate those types of speech. Obviously, the first form of speech is political speech and that speech cannot be regulated even if it is false or misleading. The second type of speech is commercial speech and it, under the Central Hudson test as applied in all the lawyer advertising cases, clearly can be regulated in the furtherance of a substantial state interest. The record in this case shows a tremendous substantial state interest in the preservation of the civil justice system as we know it today. The unfettered lawyer advertising that has existed in this state since Bates burst upon the scene has, according to the undisputed evidence, resulted in a constant and relentless assault on the civil justice system.

Although the SUNY case probably represents a major shift in the thinking of the Supreme Court of the United States towards a view that might ultimately result in Supreme Court approval of a ban on several forms of lawyer advertising, it is clear throughout all the cases that the state is empowered to regulate lawyer advertising in the furtherance of a substantial state interest.

The Florida Bar is proposing a set of regulations rather than a ban as to all topics except solicitation. The only cases out of the United States Supreme Court that have precluded state court action have been those in which there was a total ban imposed in

the absence of a record showing a substantial state interest. The total ban on solicitation is clearly supported by our record in Florida and the regulations are long overdue.

The Academy urges this Court to adopt the regulations proposed by the Florida Bar.

FACTUAL HISTORY OF LAWYER ADVERTISING IN FLORIDA

Lawyer advertising burst upon the Florida scene in 1977, shortly after the Supreme Court's decision in Bates v. State Bar Association of Arizona, 433 U.S. 350 (1977). It was lauded as a new vehicle to make legal services more available at a lower cost. As outlined in the original Bates decision, lawyer advertising was intended to be merely informational and was limited to simple uncontested matters.

Lawyer advertising in this state has grown and flourished to the point now that it addresses not only simple matters, but extremely complicated matters such as products liability, medical malpractice, civil rights actions, and the like. Ads in this state now appear on TV, radio, newspapers, park benches, the sides of buses, and on billboards, to name a few. Television advertising in particular has been increasing at an alarming rate. According to the Television Bureau of Advertising (TBA), in just the first 6 months of 1989, lawyers spent $39.8 million on local television advertising across the country, a 22% jump from 1988, and a 35% increase from 1987. (Appendix p.1) According to TBA, lawyer advertising is increasing at a rate almost 3 times that of other

industries. In Florida, as across the country, there is a dramatic disparity in the quality and message sent by lawyers in advertising for personal injury cases. Although there are some ads in which lawyers simply inform the public of their address and the fact that they are board certified, there are currently ads running in this state which depict a young child whose barber threatens to cut his ear off, with the child then advising the public of the name of his lawyer and that if cut, he intends to file suit immediately. (Appendix p.2-3) The phone books now have a tremendous amount of yellow page lawyer advertising in which there is a race to get to the front of the phone book, presumably under the theory that location sells more than information. In the appendix is a copy of the first sheet of the Miami phone book in which a law firm has changed their name to the **"A.** Aardvark Academy Accidents Advocacy Office of Cahen Stephen, **P.A."** (Appendix p.4)

During the 1980's, although there are some exceptions, most lawyer ads are for personal injury cases and are designed around gimmicks and other attention-grabbing techniques intended to induce the consumer to buy **a** particular lawyer's legal services. Through the use of extremely sophisticated polling data and demographic surveys, lawyer ad consultants have determined that there are certain types of ads that appeal more to people of lower mentalities who may, incidentally, be more susceptible to personal

injury.[1] The system that our legal forefathers designed to protect the less fortunate in our society is now being used by the members of the legal profession to take advantage of those very same people. It is clear that the advertising consultants can document that the public now hires attorneys solely because of their "T.V. image" as opposed to ability or experience. (See Landauer letter, Appendix p.5)

What is more disheartening is the fact that the high volume of TV and other media advertising by lawyers has severely reduced public confidence in the administration of justice and, as a result, is undermining the very foundation of our civil justice system. According to a poll conducted by the Florida Bar, ***82.5%*** of Florida's circuit judges feel that lawyer advertising had an impact on the public's confidence in the administration of justice and virtually all indicated that the impact had been negative. (Appendix p.6-7)

Two methods used for gauging the effect on the civil justice system of high volume lawyer advertising such as we are seeing in the State of Florida are polls and focus groups. There have been a number of polls conducted in the State of Florida over the last 5 years which document the problems caused by lawyer advertising. In May, 1988, the Academy conducted a study for the purpose of

[1] This material is contained on a videotape prepared by Paul Landauer and Associates, inc. and will be available for viewing by the Court.

determining the likelihood of prevailing in the Amendment10 battle and the impact that lawyer advertising would have on that battle.[2] That poll found that 59% of the Floridians surveyed felt that lawyer advertising on TV was bad for the public and made all lawyers appear to be unethical and encouraged unnecessary law suits. 45% of the respondents disagreed with the concept that lawyers advertise on television to inform people where to get legal help when they need it, 70% of those polled felt lawyers who advertise on TV reminded them of used car salesmen. The problem with lawyer advertising is of course, not limited to the State of Florida, and a most interesting thesis was completed in May of 1988 by Stephanie Moore Myers on the topic "Attorney Advertising: The Effect on Juror Perceptions and Verdicts." She summarizes her major findings on page 4 of her thesis in which she states:

> The major finding of this study was that although respondent jurors generally do not like lawyer advertising on television, it does not effect their trial verdicts unless jurors are actually confronted with a plaintiff's lawyer who advertises on television. When this becomes the case, jurors tend to vote for the defense. Other important conclusions were drawn from this research. There is strong sentiment that the law should be changed to limit jury awards. Advertising lawyers become the focus of this perception and therefore, jurors tend to vote against the plaintiff in these trials, voting their perceived economic self-interest. (Appendix p. 8)

Nevada apparently is having the same experience as Florida with advertising and its impact on the civil justice system. At

[2] Portions of the poll are contained in the appendix while the entire poll is contained in the Florida Bar record.

the request of the Florida Bar, a study was prepared by Harvey A. Moore, a noted sociologist at the University of South Florida.[3] Some of Dr. Moore's significant findings are as follows:

> On a broader level, both groups felt that television commercials by attorneys would have negative effects on society by appealing to people's greed and encouraging them to bring trivial suits and seek maximum settlements and by undermining respect for the legal profession, the courts, and the judicial system. Although there was a lack of consensus that attorney TV advertising should be entirely prohibited or restricted by law, there was a unanimous feeling that such advertising should be done responsibly so as to maintain respect for the legal and judicial system of society, as well as the dignity of the profession. Overall, the discussions in both (focus) groups strongly supported the Florida Bar's proposed rules as appropriate guidelines for attorneys to follow....
>
> Despite an ostensively weak experimental intervention (6 advertisements of only 30 seconds in duration each), the respondents showed consist alienation from the legal system in response to each advertisement. More significantly, consistent support for each element of the proposed rules was evidenced by a majority of respondents...
>
> Dr. Moore continues to comment in his findings:
>
> The profession of law is an integral part of the system of justice in this country. Respondents in these two studies found it especially difficult to differentiate between the conduct of attorneys depicted in the television advertisements and the intrinsic merit and value of the justice system itself. (Appendix p. 9-10)

While lawyer advertising was initiated on the theory of social benefit, as opposed to increased profits to attorneys, there has been no reliable data to substantiate any reduction in lawyer fees or any increased availability of those services. In fact, in

[3] "Television Advertising By Attorneys, An Evaluation of its Impact on the Public", Harvey Moore, 1989.

Florida, personal injury services have become less affordable to the point that the Florida Bar and this Supreme Court determined it necessary in 1986 to impose maximum fee limits in personal injury cases. In The Florida Bar re Amendment, 494 So.2d 960, 961 (Fla. 1986), this court noted that in 1977 it expressed its belief:

> That lawyer advertising would create greater public awareness regarding attorney's fees and services and that competition would provide a self-regulator on fees.... [However]such does not appear to be the case.

Lawyer advertising has in fact become a repetitive topic in jury selection throughout the state. 23% of the circuit judges surveyed in the previously mentioned poll indicated that potential jurors, witnesses, or parties had expressed opinions concerning advertising by lawyers during a part of the trial. (Appendix p. 6-7) Generally, advertising proponents argue that the claim that lawyer advertising is having a very detrimental effect on the civil justice system is anecdotal and without proof. The previously cited empirical data, however, collaborates the fact that lawyer advertising is causing a decline in the trustworthiness of the profession and the civil justice system.

In reviewing the facts supporting the proposed regulations by the Florida Bar, this court should address the experience of Iowa in the case of Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Humphrey, 355 NW 2d 565 (Iowa, 1984), reversed 472 US 1004 (1985), on remand, 377 NW 2d 643 (Iowa, 1985), appeal dismissed 106 Sup. Ct. 1626 (1986). Here the Iowa State

Bar had limited attorney advertising to informational material and had further restricted television advertising to a single non-dramatic voice with no background information, music or other materials. Lawyer Humphrey had challenged the rules by running a dramatized television ad, and as part of the defense of its rule, the Iowa State Bar commissioned a public survey on the effect of lawyer advertising. The respondents were questioned both before and after viewing television commercials as in the Florida studies by Dr. Moore, supra, and the Academy, infra. Following viewing, opinions changed significantly: Trustworthiness declined from **71%** to **14%;** professionalism from **71%** to **21%;** honesty from **65%** to **14%,** and dignity from **45%** to **14%.** When the Humphrey case was remanded by the United States Supreme Court, based upon the Zauderer case, infra, a second survey was commissioned that reinforced the results of the first survey that advertising lowers the public's perception of lawyers and the civil justice system. Florida's experience has been no different.

Polling and focus group information has also been gathered on the impact of targeted direct mail solicitation of accident victims on the civil justice system. Between January of **1987,** and June **of 1989,** the Ethics Department of the Florida Bar estimated that **500,000** direct mail advertisements were sent by Florida lawyers to accident victims or their survivors. By mid-year **1989,** the letters were being sent at a rate of about 300,000 per year, and there have

already been several highly publicized, outrageous incidents, such as the Bronson school bus solicitation.[4]

Lawyer solicitation has taken a new twist in that one lawyer in this state is now sending out a package including leaflets and professional brochures, coupled with a slick video tape presentation to be viewed by the relatives of a deceased victim or an injured person in the privacy of their own home. A polished Hollywood actor suggests to the bereaved or injured that they should hire a particular lawyer and bring a lawsuit. (Appendix p. 11-27) [5]

As a basis for determining what effect solicitation was having on our civil justice system, the Florida Bar hired Frank N. Magid & Associates, who did the polling data in Iowa that served as part of the record in Iowa v. Humphrey, infra. In the Florida polling data, for example, "45% of the people believed that the phrase 'designed to take advantage of gullible or unstable people' describes the direct mail solicitation very well." Quoting from the number 8 summary of the polling data contained at the end of the poll:

> Beyond this, the phrases which immediately follow on the list are all negative. These include "annoying or irritating," 34% very well; an "invasion of your privacy," 26% very well; and "made you angry", 24%. (Appendix p. 28)

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[4] The Florida Bar, because of complaints of numerous solicitations, had to take formal action to discourage attorney harassment of relatives of school children injured or killed in this crash. A complete discussion of this incident is contained in the record filed by the Bar.

[5] The video tape will be available for viewing if the court so desires.

Ominously, the researchers concluded:

> Perhaps the most serious concern uncovered in this research is that the receipt of direct mail advertising may influence the decisions of potential jurors. (Appendix p. **29)**

While the **1987** Magid study principally examined only direct mail advertising, the relationship between all forms of advertising and juror attitudes was addressed in a **1988** six-month landmark study undertaken by the Academy of Florida Trial Lawyers.[6] Although this study was conducted by the Academy for the purpose of assisting its members to develop ways to insure that their clients continued to get a fair trial, some frightening things were discovered about lawyer advertising. In the words of the study:

> Lawyer advertising contributes mightily to the negative image of lawyers.

The focus groups done in conjunction with this polling, saw lawyer advertising as **"self-promoting,** as debasing, and as unprofessional" and **68%** of those polled stated that they had an unfavorable or very unfavorable opinion of lawyer television ads.

In comparison polling, from May, **1988,** until November, **1988,** the public increasingly has blamed the insurance crisis on lawyers who are encouraging people to sue, going from **17%** in May of **1988,** to 29% in November, **1988,** a 12% increase in just **6** months. This increase, although having not been analyzed directly, may well parallel the increased monies spent by lawyers in advertising. In reviewing the entire polling and focus group results, one of the

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[6] **"Civil** Jury Study **Project,"** the Analysis Group, Inc., A.F.T.L. **1988**

major recommendations of the study was that trial lawyers needed to project themselves as not being part of or responsible for the perceived "sue them or windfall" mentality.

The inescapable conclusion suggested by the polling data, focus groups and overall history of the Florida advertising experience points to a direct cause and effect relationship between lawyer advertising and the public's loss of confidence in the judicial system in general and lawyers in particular. It is on this record that the Court must analyze whether the regulations proposed by the Bar are consistent with the case law delineating its right to regulate lawyer advertising.

ANALYSIS OF THE LAW CONCERNING THE STATE'S RIGHT TO REGULATE LAWYER ADVERTISING

Any analysis of the case law on the topic must begin with Bates v. State Bar of Arizona, 97 S.Ct. 2691 (1977). That case involved the placing of an ad for legal services in a local newspaper, and the Court held that truthful advertising of the availability and terms of "routine legal services" was protected by the First and Fourteenth Amendments. The Court made clear, however, that the states may ban advertising that is inherently false, deceptive or misleading, or that proves to be misleading in practice. The Bates court stated that problems associated with advertising claims relating to the quality of legal services are not susceptible of precise measurement or verification and under some circumstances, might well be deceptive or misleading to the

public, or even false. (Id. at 2700) The court stated that:

> The only services that lend themselves to advertising are the routine ones, the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like, the very services advertised by the appellants. Id. at 2703.

The Court also commented:

> And the special problems of advertising on the electronic broadcast media will warrant special consideration.

The Bates decision represented a divided court in which Justices Berger, Powell and Stewart dissented, either in whole or in part, with the decision. Incidentally, prior to Bates, lawyer advertising had been prohibited since 1907.

Shortly after Bates, in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), the Supreme Court again addressed the issue of lawyer advertising and solicitation. There, the Ohio State Bar Association had initiated disciplinary proceedings against an attorney for in-person solicitation of accident victims in their home and in the hospital. The Supreme Court states:

> The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. Id. at 460.

In 1980, the Supreme Court issued its landmark opinion in Central Hudson Gas & Electric v. Public Service Commission of New York, 447 U.S. 557 (1980), which established the test to be applied to state regulation of commercial speech. In Central Hudson, the United States Supreme Court held that the state's Public Service

Commission's regulation completely banning promotional advertising by electric utilities violated the First Amendment. This case is cited by virtually every later case on lawyer advertising or solicitation. The test that evolved from this case for the analysis of commercial speech, as opposed to political speech, in relation to the First Amendment, is stated in Central Hudson as follows:

> In commercial speech cases, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Id. at 564.

It is clear, then, from Central Hudson that the state has the right to regulate lawyer advertising since it is undisputed that the state has a substantial interest in the preservation of the civil justice system.

In attorney advertising cases decided by the United States Supreme Court, following Central Hudson, three common factors emerge. First, almost all the cases on advertising, with the exception of Iowa v. Humphrey, infra, were being evaluated by the Supreme Court with the state's having created absolutely no record to support their substantial state interest. Secondly, all the cases seem to involve a total ban on advertising in a certain manner and finally, all the cases show a court sharply divided over

the issue of the total right to ban a particular type of advertising.

In Zauderer v. The Office of Disciplinary Council of the Supreme Court of Ohio, 105 Sup. Ct. 2265 (1985), an attorney had placed an advertisement in 36 Ohio newspapers publicizing his willingness to represent women who had suffered injuries resulting from their use of the Dalkon Shield. The Supreme Court upheld the reprimand by the Ohio Bar on certain issues, but as to the issue of the use of an illustration in his advertisement and an offer of legal advice, the court held the reprimand violated his First Amendment rights. The Ohio Supreme Court submitted no record to justify the ban of the use of illustrations in attorney advertisements. This is the first of a line of cases in which a ban on a particular form of attorney advertising was overturned on the basis of the total absence of a record. Here the Supreme Court states at page 2280:

> Because the illustration for which appellant was disciplined is an accurate representation and has no features that are likely to deceive, mislead, or confuse the reader, the burden is on the state to present a substantial governmental interest justifying the restriction as applied to appellant and to demonstrate that the restriction vindicates that interest through the least restrictive available means.

Because of the paucity of record support, the Court rejected the Bar's argument, noting:

> The state's arguments amount to little more than unsupported assertions; no where does the state cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys advertising cannot

be combatted by any means short of a blanket ban. Id. at 2281.

The court did, however, approve certain regulations on lawyers to the extent that they state at page 2283:

> The state's position that it is deceptive to employ advertising that refers to contingent fee arrangements without mentioning the client's liability for costs, is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.

This opinion reflected a strongly divided court, with Justices O'Connor and Rehnquist concurring in part and dissenting in part, stating their view that:

> State regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise and is entitled to greater deference than the majority's analysis would permit. (Id. at 2295)

Citing other cases, the dissent continues:

> At a minimum, these cases demonstrate that states are entitled under some circumstances to encompass truthful non-deceptive speech within a ban of a type of advertising that threatens substantial state interest. In my view, a state could reasonably determine that the use of unsolicited legal advice as bait with which to obtain agreement to represent a client for a fee poses a sufficient threat to substantial state interest to justify a blanket prohibition. (Id. at 2296)

As these cases on the topic are analyzed, it is important to keep the court's focus on the point that the Florida Bar's rules are primarily regulations on advertising and not a direct ban on the right of a lawyer to advertise, either on TV, radio, billboard, park bench, city bus, or whatever means he determines appropriate.

Probably the most important series of cases for the Florida Supreme Court to review in terms of parallel regulations, are those

cases concerning Iowa's effort to impose reasonable restrictions falling short of a ban on lawyer advertising. Iowa's restrictions on advertising, incidentally, went significantly further than the proposed Florida Bar regulation on advertising, and the manner of the handling of the Iowa regulations by the United States Supreme Court is significant. These decisions are collectively cited as Committee on Professional Ethics v. Humphrey, 355 N.W. 2d 565 (Iowa, 1984), and 377 N.W. 2d 643 (Iowa, 1985).

In the first case, the Iowa Supreme Court held that the rule on lawyer advertising expressly prohibiting television advertisements containing background sound, visual displays, more than a single non-dramatic voice or self-laudatory statements, was a proper form of regulation and therefore upheld the state bar action. The United States Supreme Court vacated that judgment and remanded the matter to the Iowa Supreme Court for further consideration in light of its decision in Zauderer. Then the Iowa Supreme Court re-addressed the issue and found nothing in Zauderer at variance with their prior decision. They stated:

> [As to]....Bates v. State Bar of Arizona which acknowledged the special problems inherent in electronic broadcast which warrant special consideration. We took this exclusion seriously and at face value because we emphatically agree that special problems do exist in the field of electronic advertising.

They continue:

> Electronically conveyed image building was not a part of the information package which has been described as needed by the public.

The United States Supreme Court denied certiorari of the second Iowa decision for want of a substantial federal question. Under the doctrine in Hicks v. Miranda, 422 U.S. 332 (1975), this is deemed a ruling on the merits, i.e., that this is a reasonable regulation better left to the states.

The handling of this case indicates that there is no question that a state has the right to impose reasonable regulations on the right of attorneys to advertise.

The classic case showing the division of the court, coupled with the impact of the lack of any record whatsoever to support state regulation of lawyer activities, is Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988). Justice Brennan delivered the opinion for the divided court, holding that a state may not prohibit lawyers from soliciting business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems. The Court held that such advertising was constitutionally protected commercial speech which may be restricted only in the service of a substantial governmental interest and only through means that directly advance that interest. In the absence of a record, the Court states:

> The states may not place an absolute prohibition on certain types of potentially misleading information... if the information may also be presented in a way that is not deceptive, unless the state asserts a substantial interest that such a restriction would directly advance... aside from the interest that we have already rejected, respondent offers none.

In a strongly worded dissent, Justice O'Connor, joined by Rehnquist and Scalia, stated:

> Applying the Central Hudson test to the regulation at issue today, for example, I think it clear that Kentucky has a substantial interest in preventing the potentially misleading effects of targeted direct mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards.

The dissent then states:

> Bates was an early experiment with the doctrine of commercial speech and it has proved to be problematic in its application. Rather than continuing to work out all the consequences of its approach, we should now return to the states the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The Central Hudson test for commercial speech provides an adequate doctrinal basis for doing so and today's decision confirms the need to reconsider Bates in the light of that doctrine... Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth.

The obvious and major difference between the Kentucky experiment and the Florida experience is the vast record that the Florida Bar has accumulated supporting the proposed regulations on lawyer advertising.

Within the last 6 months, the United States Supreme Court has dramatically changed the Central Hudson test which is applied to all commercial speech, including lawyer advertising, to eliminate the least restrictive means portion of the test.

In Board of Trustees of the State University of New York, Petitioners v. Fox, heard before the United States Supreme Court, the opinion being rendered on June 29, 1989, and reported initially in 57 Law Weekly 5015, Justice Scalia delivered the opinion of an again divided court concerning a State University of New York

regulation which prohibited private commercial enterprises from operating on State University campuses. The court states:

> The Court of Appeals also held, and we agree, that the governmental interest asserted in support of the resolution are substantial; promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students and preserving residential tranquility. Id. at 5017.

Citing all the cases previously discussed in this brief, the court states:

> Our jurisprudence has emphasized that commercial speech enjoys a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values and is subject to modes of regulations that might be impermissible in the realm of non-commercial expression.... We uphold such restrictions so long as they are narrowly tailored to serve a significant governmental interest.... On the other hand, our decisions upholding the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. Id.

This means that the Central Hudson test of commercial speech cases as it applies to lawyer advertising is that the court must determine whether the regulation directly advances the governmental interest and if so, is it narrowly tailored to serve the interest. Virtually all of the lawyer advertising cases in which a total ban was upheld, such as Zauderer, based the decision upon, among other things, the Central Hudson test of least restrictive means which is no longer the law of the land.

It is clear from this review of the law that the Florida Supreme Court, at the instance of the Florida Bar, has the right to regulate lawyer advertising. Since the record clearly supports the claim that lawyer advertising is causing significant

harm to the civil justice system, then the state has a substantial interest in regulating lawyers to preserve the system.

ANALYSIS OF THE LAW APPLIED TO SPECIFIC PROPOSED REGULATIONS

Recognizing that the Florida Bar, in its brief, has prepared an analysis of each proposed change to the existing rules regulating lawyer advertising, the Academy brief will direct itself to those proposed regulations which most likely will be the ones attacked most vigorously by the high volume TV advertisers.

Rule **4-7.2** contains specific regulations as they relate to a lawyer's right to advertise on TV. As early as Bates, the Supreme Court recognized that the electronic media created special problems requiring the use of a different standard. The proposed Bar regulation does not preclude the lawyer who is responsible for the services from appearing on TV and giving factual information concerning his services. It does, however, require a disclosure to be made. In the Zauderer case, supra, which addressed the issue of disclosures, the court held at page **2282**:

> An advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.... thus, in virtually all our commercial speech decisions to date we have emphasized that because disclosure requirements trench much more narrowly on an advertisers' interest than do flat prohibitions on speech, warnings or disclaimers might be appropriately required... in order to dissipate the possibility of consumer confusion or deception.

To require the lawyer to appear in an advertisement clearly fosters the avoidance of deception created by the use of slick

Hollywood actors, such as is the custom in the State of Fiorida now both on T.V. and in solicitation. Here this regulation is clearly less restrictive than the regulation created by the Iowa Supreme Court, which was tacitly approved by the United States Supreme Court. The record created by the Florida Bar and attached as an appendix to the Bar's brief itself, strongly supports this particular rule.

Rule 4-7.4 (b) is a ban on direct mail solicitation of accident victims. In Shapero, supra, the divided court went to great lengths to state that Kentucky lacked a record to support the substantial state interest that they were asserting. The record on this issue in the State of Florida is substantial. Reviewing the Magid polls, supra, the Ethics Department findings of the numbers of letters, supra, and the actual results of the polls, it is clear that targeted direct mail solicitations, such as the Bronson incident, are causing tremendous damage to the civil justice system. It may well be irreparable, even with the enactment and enforcement of this regulation. The Florida Legislature was so motivated by this state-wide problem that in its 1989 amendment of Florida Statute 316.066(4), it specifically precluded the commercial use of accident reports to stop the state-wide practice of lawyers getting copies of all accident reports from all jurisdictions and then sending letters to the victims of the tragedy. In these letters they attempt to console those victims for their losses and then suggest that they can make substantial monies off the injuries or death of loved ones. (See

letter used by a Florida attorney in Appendix p.30). A quick review of the Shapero case makes it clear that the United States Supreme Court is simply waiting for a case such as one involving the Florida regulation in which a state bar has supported a ban on targeted direct mail solicitation of victims.

One of the practices that has clearly made the legal profession in the State of Florida a subject of ridicule has been the creation of fictitious names for law firms, beginning with the letter **"A"** to facilitate the lawyer getting in the front page of the phone book. This is apparently being done under the theory that the public will hire him more often than someone whose name begins with **"M"** or **"S"** or **"Z".** Although this practice appears throughout the State of Florida, a classic example of this appears in the Miami phone directory (see Appendix p. 4) in which a lawyer whose last name begins with **"S"** advertises the name of his law firm as the **"A** Aardvark Accidents Advocacy office of Cahen Stephen."

In Bates, the Supreme Court states:

> A rule allowing restrained advertising would be in accord with the bar's obligation to facilitate the process of intelligent selection of lawyers and to assist in making legal services fully available. (Id. at 2705)

This technique of advertising, not unlike the high volume, dramatic TV advertising for personal injury victims on TV, clearly does nothing to facilitate intelligent selection of lawyers.

CONCLUSION

The Florida Supreme Court has now been presented with an opportunity to take a positive step in the direction of the preservation of the civil justice system. The record mandates that the Florida Bar and this Court take strong affirmative action to regulate its member attorneys within the confines of the existing case law. These regulations may not be sufficient to rectify the assault on our great system, but they clearly represent a step in the right direction.

The Academy strongly urges this Court to approve the proposed changes to the existing rules regulating the conduct of our profession.