IN THE SUPREME COURT OF FLORIDA

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IN RE THE FLORIDA BAR:
PETITION TO AMEND THE
RULES REGULATING THE
FLORIDA BAR -
ADVERTISING ISSUES

CASE NO. 74,987

ARGUMENT BY JOHN T. BLAKELY IN OPPOSITION
TO SOME OF THE PROPOSED RULE CHANGES

Since February 1987, the undersigned has directly solicited personal injury clients by mail. The details of this direct mail solicitation are set forth in an affidavit filed herewith. Based on the facts set forth in the affidavit, the petition by The Florida Bar for the rule changes that would prohibit targeted direct mail solicitation of personal injury and wrongful death clients, that would require an opening sentence stating "if you have already retained a lawyer for this matter, please disregard this letter," and that would require "advertisement" to be printed in red ink should be denied.

In light of the recent decision of the United States Supreme Court in Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988), the request by The Florida Bar for these three rule changes is nonsense. Perhaps The Florida Bar hopes that these three proposed rule changes will be lost in the crowd of the numerous other proposed rule changes and accidently approved by this Court, or perhaps The Florida Bar proposes these three rule changes knowing that they are without merit, but offers them as sacrificial requests to attempt to induce this Court to look upon the other proposed rule changes in a more favorable light.

167
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Regardless of the motive, however, the three rule changes that are the subject of this argument should be denied.

I. THE REQUEST BY THE FLORIDA BAR TO AMEND RULE 4-7.4(b)(1) TO PROHIBIT WRITTEN SOLICITATIONS OF PERSONAL INJURY OR WRONGFUL DEATH CLIENTS SHOULD BE DENIED.

In its Comment, The Florida Bar offers two reasons why it requests this rule change. The Comment states

> This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving the loss of a family member, and the abuses which experience has shown exist in this type of solicitation.

Let's address each of these reasons separately.

A. SENSITIZED ACCIDENT VICTIMS.

Is a blanket prohibition against direct mail solicitation of accident victims "reasonably required by the sensitized state of the potential clients." No. As the United States Supreme Court states in Shapero, supra,

> Of course, a particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity" for good judgment regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement--concededly constitutionally protected activities--or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communciation poses a serious danger that lawyers will exploit any such susceptibility...Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the reader of an advertisement...can effectively avoid further bombardment of his sensibilities

> simply by averting his eyes...a letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded.

Indeed, in Shapero, supra, the Court suggests that direct mail solicitation of personal injury clients would be permitted by the Court because it states

> Thus, Ohio could no more prevent Zauderer from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers.

The Florida Bar offers absolutely no evidence to support its contention that accident victims need to be shielded from written communications in which legal services are offered. Where are the studies? Where are the affidavits? Where is the proof?

On the other hand, the undersigned, in his attached affidavit, offers evidence to this Court that experience shows that accident victims who respond to direct mail solicitations are not "sensitized" in any manner that impairs their ability to converse objectively about their legal problems and to make rational decisions regarding the employment of an attorney. In other words, the only evidence on this issue before this Court refutes the assumption or contention upon which this proposed rule change is based.

Furthermore, the contention by The Florida Bar overlooks other laws or rules that would protect a "sensitized" accident victim who responds to a direct mail solicitation. Our common law already provides that a contract (including a contract to employ an attorney) made by a person who does not have the

capacity to make a contract is voidable. Other rules previously adopted by this Court provide that a contract to employ an attorney in a personal injury action may be unilaterally cancelled by the client "at any time within three business days of the date the contract was signed." Rule 4-1.5, FEE FOR LEGAL SERVICES, RULES OF PROFESSIONAL CONDUCT. And finally, any client, including "sensitized" accident victims, may unilaterally terminate an employment agreement with an attorney at any time. If a contingent fee agreement is not cancelled within three business days, the client may still terminate the agreement at any time, and the terminated attorney would only be entitled to receive a fee based on quantum meruit principles and calculations, if the client ultimately makes a recovery. Rosenberg v. Leven, 409 So.2d 1016 (Fla. 1982).

B. THE ABUSES WHICH EXPERIENCE HAS SHOWN EXIST IN THIS TYPE OF SOLICITATION.

Where is the evidence of these "abuses." The Florida Bar offers none. Furthermore, even if abuses occur, there is no showing that restrictions other than a blanket prohibition could not properly address and solve the alleged problems. As the Court stated in Shapero, supra,

> But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech...the state can regulate such abuses and minimize mistakes through far less restrictive and precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the state ample opportunity to supervise mailings

and penalize actual abuses.

The rules previously adopted by this Court have already implemented these safeguards suggested by the United States Supreme Court. The present rules can and should be enforced. The Florida Bar may review all letters mailed by attorneys involved in targeted direct mail solicitation. In addition, if The Florida Bar concludes that some attorneys are not accurately reporting about their mail solicitation, The Florida Bar could routinely and randomly contact accident victims and request permission to review all of the solicitation letters that they receive. No doubt, most accident victims will gladly turn over copies of those letters to The Florida Bar, thereby enabling The Florida Bar to monitor and enforce compliance with the requirements of the present rules.

11. THE REQUEST BY THE FLORIDA BAR TO AMEND RULE 4-7.4(c)(1)(a) TO REQUIRE THE USE OF RED INK IN PRINTING "ADVERTISEMENT" ON DIRECT MAIL SOLICITATIONS SHOULD BE DENIED.

The Court in Shapero, supra, states

> Commercial speech that is not false or deceptive and does not concern unlawful activities...may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest...since state regulation of commercial speech may extend only as far as the interest it serves...state rules that are designed to prevent the potential for deception and confusion...may be no broader than reasonably necessary to prevent the perceived evil.

What is the "substantial governmental interest" to be served by requiring the use of red ink in printing "advertisment" on all

direct mail solicitations? The Florida Bar offers no evidence that persons who have received direct mail solicitations marked "advertisement" in black ink did not see the mark. Indeed, The Florida Bar offers no evidence that anyone who has ever received direct mail solicitation from an attorney was confused by the letter or believed it to be some type of legal document or communication other than a solidication.[1] On the other hand, as indicated in the attached affidavit, experience shows that persons who receive solicitation letters that are marked "advertisement" in black ink have not been confused. In the absence of some evidence that red ink is needed, this requirement should not be imposed. The use of red ink will be more costly, and in the opinion of the undersigned, less professional in appearance.

111. THE REQUEST BY THE FLORIDA BAR TO AMEND RULE 4-7.4(c)(1)(g) TO REQUIRE THAT ALL DIRECT MAIL SOLICITATION MUST COMMENCE WITH "IF YOU HAVE ALREADY RETAINED A LAWYER FOR THIS MATTER, PLEASE DISREGARD THIS LETTER" SHOULD BE DENIED.

What "substantial governmental interest" would be served by this requirement? Absolutely none. This proposal is intended to

1 In IN RE THE FLORIDA BAR: PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR - SOLICITATION ISSUES, CASE NO. 72,3047, in the Supreme Court of Florida, The Florida Bar offered a "survey" to this Court regarding the responses of the public to direct mail solicitation during 1987 and/or 1988, when red ink was not required in the printing of "advertisement." The results of the survey indicated "virtually no one believes that the direct mail advertising they received from an attorney was either 'intimidating or frightening' or 'confusing.'" In this proceeding, The Florida Bar apparently decided not to offer this survey, and has elected to offer no evidence to support the requests for the rule changes that are the subject of this argument.

serve the interests of established lawyers and established law firms who want to shield their law practices from competition. This proposed rule change is anti-competitive and improper. In fact, if this proposed rule change were adopted, the public could be misled into believing that clients may not discharge attorneys with whom they have become dissatisfied. This proposed rule change should be denied.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: John F. Harkness, Jr., Executive Director, Stephen N. Zack, President, James Fox Miller, President-Elect, Patricia J. Allen, Ethics Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and Alan C. Sundberg, Esq., Carlton, Fields, Ward, et al., 215 S. Monroe Street, 410 First Florida Bank, P.O. Drawer 190, Tallahassee, Florida 32302 this 4 day of December, 1989.

JOHNSON, BLAKELY, POPE, BOKOR,
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BY _____
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