30

FILED
SID J. WHITE
JAN 16 1990
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

IN RE PETIT ON TO AMEND THE RULES REGULATING THE FLORIDA BAR -- ADVERTISING ISSUES	))))	Case No. 74,987

BRIEF OF CBS INC., COMBINED BROADCASTING OF MIAMI, INC. AND POST-NEWSWEEK STATIONS, FLORIDA, INC. IN OPPOSITION TO FLORIDA BAR PETITION FOR FURTHER RESTRICTIONS ON LAWYER ADVERTISING

Of Counsel:
Steven Uhlfelder
Steel Hector & Davis
215 S. Monroe Street
Tallahassee, Florida 32301

Douglas P. Jacobs
John W. Zucker
51 West 52 Street
New York, New York 10019
Attorneys for CBS Inc.

Goldberg & Spector
1229 19th Street, N.W.
Washington, D.C. 20036
Attorneys for Combined Broadcasting of Miami, Inc.

L. Stanley Paige
1000 15th Street, N.W.
Washington, D.C. 20071
Counsel for Post-Newsweek Stations, Florida, Inc.

w/call

TABLE OF CONTENTS

INTRODUCTION

CBS Inc. is licensee of television station WCIX, Miami; AM radio station WSUN, St. Petersburg; and FM radio station WYNF, St. Petersburg. CBS also operates the CBS Television and Radio Networks, which supply programming, including network commercial messages, to television and radio stations in Florida.

Combined Broadcasting of Miami, Inc. ("Combined Broadcasting") is licensee of television station WBFS, Miami.

Post-Newsweek Stations, Florida, Inc., is licensee of television stations WPLG, Miami, and WJXT, Jacksonville.

The parties to this brief all operate broadcast properties in the State of Florida. They join in oppostion to the Florida Bar's proposed new restrictions which would disserve the public interest and violate the First Amendment rights of lawyers, broadcasters, and broadcast audiences.

STATEMENT OF THE CASE

The Board of Governors of the Florida Bar has petitioned this Court to adopt a number of amendments to Bar rules which would place sweeping new restrictions on attorney advertising, particularly advertising by means of the electronic media. Included in these proposed restrictions are the following:

-- The use of testimonials or endorsements would be absolutely prohibited, Proposed Rule 4-7.1;

-- Information in any broadcast advertisement would be required to "be articulated by a single voice, with no background sound other than instrumental music," and such voice could not be that of a "celebrity whose voice is recognizable to the public," Proposed Rule 4-7.2(b);

-- No person would be permitted to appear in any broadcast advertisement "other than a lawyer in the law firm which is advertising," and such person would be required to be a member of the Florida bar and to be the person who would perform the service advertised (unless the advertisement disclosed that others in the firm might perform the services), id.;

-- No advertisement would be permitted to include any "dramatization," including any "audio or video portrayal of an event or situation," Proposed Rule 4-7.2(e) and Comment thereto:

-- All broadcast advertisements would be required to contain a disclaimer stating that the hiring of a lawyer should not be based solely on advertising, Proposed Rule 4-7.2(d):[1/]

As discussed below, the proposed regulations would severely limit the flow to the public of truthful, nonmisleading information about legal services, thus disserving the public interest and violating the First Amendment. The restrictions are far broader than necessary to protect against the dissemination of false or misleading lawyer advertising, and no other asserted rationale is sufficient -- under Supreme Court decisions or as a matter of sound policy -- to justify their curtailment of protected speech.

1/ The complete text of this required disclosure is as follows: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience."

I. LAWYER ADVERTISING IS PROTECTED UNDER THE FIRST AMENDMENT AND SERVES THE PUBLIC INTEREST IN PROMOTING ACCESS TO LEGAL SERVICES.

In a series of decisions over the past 12 years, the United States Supreme Court has made clear that "[l]awyer advertising is in the category of constitutionally protected commercial speech." Shapero v. Kentucky Bar Association, **108** S.Ct. **1916, 1921 (1988)**; see also Bates v. State Bar of Arizona, **433** U.S. **350 (1977)**; Zauderer v. Office of Disciplinary Counsel, **471** U.S. **626 (1985)**; In re R.M.J., **455** U.S. **191 (1982).**

Like other commercial speech, lawyer advertising is accorded protection under the First Amendment because of the generalized interest in "inform[ing] the public of the availability, nature, and prices of products and services," thus promoting "informed and reliable decisionmaking." Bates, **433** U.S. at **364**. See also Virginia Pharmacy Board v. Virginia Consumer Council, **425** U.S. **748, 761-65** (1976). As the Court has recognized, the interest in protecting lawyer advertising is particularly compelling; such advertising offers "great benefits" to society by "'facilitat[ing] the process of intelligent selection of lawyers, and...assist[ing] in making legal services fully available.'" Bates, **433** U.S. at **377**. Indeed, because such advertising "tend[s] to acquaint persons with their legal rights who might otherwise be shut off from effective

access to the legal system, it [is] undoubtedly more valuable than many other forms of advertising." Zauderer, 471 U.S. at 646.

In light of the strong societal interests served by lawyer advertising, and the requirements of the First Amendment, the Court has stressed that both the content and the form of such advertising can be regulated only in very narrow respects. Specifically, it has held that particular kinds of lawyer advertising may be regulated if found to be misleading or deceptive or "inherently likely" to be so. R.M.J., 455 U.S. at 202. It has also upheld a ban on lawyers' in-person solicitation because of the inherent likelihood of abuse, intimidation or overreaching. Ohralik v. Ohio State Bar Association, 436 U.S. 445 (1978). But the Court has rejected efforts to achieve these results through broad prophylactic bans when case-by-case review of particular advertisements would suffice, and it has repeatedly rejected other asserted justifications for broad restraints on lawyer advertising, such as those based on the alleged interest in decorum or professionalism.

11. THE PROPOSED RESTRICTIONS CANNOT BE JUSTIFIED BY ANY OF THE BAR'S ASSERTED RATIONALES.

In its proposed comments to the rules and in its petition to this Court, the Bar has offered a number of rationales in support of its sweeping proposals. These include the following:

-- The proscriptions do not interfere with the free flow of "useful, factual" information, Pet. at 7;

-- The proscribed advertising practices are inherently false, deceptive, or misleading;

-- The proscribed advertising practices have the potential to provide false information, mislead or deceive;

-- The proscribed practices are damaging to the public's view of the dignity or professionalism of lawyers and the legal system;

-- Restrictions on the broadcast media are appropriate because "the unique and powerful characteristics of electronic media make them especially susceptible to abuse and especially subject to regulation in the public interest." Id. at 4.

Under Supreme Court precedent, none of these rationales is sufficient to justify the restrictions on either policy or constitutional grounds.

A. THE RESTRICTIONS CANNOT BE JUSTIFIED ON THE GROUND THAT THEY ARE AN INSIGNIFICANT CURTAILMENT OF COMMERCIAL SPEECH.

The Bar suggests that the proposed restrictions on the content and form of lawyer advertising do not constitute significant restrictions on commercial speech because they do not significantly restrict the dissemination of "useful, factual information." Petition at 7. Thus, the comment to the proposed Rule 7.2 states that the restrictions on narration, persons who may appear in the advertisement, background sounds and music, and dramatizations are intended to "encourage a focus on providing useful information to the public....[A] lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner."

The Supreme Court has made clear, however, that a state may not limit lawyer advertising to certain facts or certain styles of presentation simply because it feels that other information or formats are not sufficiently useful, "factual," or important. Thus, the Court in Zauderer held unconstitutional an Ohio ban on the use of illustrations in advertising of legal services. The Court recognized that

"the use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." Id. at 647. Both of these purposes were held by the Court to be of legitimate constitutional value. Precisely the same, of course, may be said of the types of information and formats barred in the proposed Florida regulations.

In Shauero, the Kentucky Bar asserted that a lawyer's solicitation letter was not constitutionally protected, emphasizing its highly commercialized form (including underscored and uppercase lettering) and content (phrases like "Call NOW, don't wait" and "It may surprise you what I may be able to do for you"). The Kentucky Bar asserted that such format and content "stat[e] no affirmative or objective fact," but instead constituted "pure salesman puffery, enticement for the unsophisticated." 108 S. Ct. at 1924.

The Court flatly rejected this argument. So long as they are not employed in a deceptive or misleading fashion, the Court held, the protection of the First Amendment extends even to such matters of form and presentation as "[t]he pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction." Id.

The state may not -- consistent with the First Amendment -- limit lawyer advertising to "a bland statement of purely objective facts in small type":

> "[S]o long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient." Id.

The proposed restrictions here represent just such an attempt to limit lawyer advertising to "a bland statement of purely objective facts." By restricting background sound, permitting only a single narrative voice, eliminating depictions of scenes, and forbidding the appearance of any person other than a lawyer in the firm, the regulations would significantly reduce the ability of lawyers to convey truthful information about available legal services in an effective manner -- that is, in a manner that catches the attention of broadcast viewers and listeners and communicates information to them in an easily accessible fashion. As the Court has recognized, measures to enhance the effectiveness of a lawyer's message -- such as visual and other stylistic embellishments -- are not only unobjectionable; they are of positive value in promoting the widespread dissemination of information about legal services to the public. The use of techniques such as those the Bar proposes to ban is particularly important in permitting the presentation of information to the poor and under-educated, who rely most heavily on broadcast

services.

B. THE RESTRICTIONS CANNOT BE JUSTIFIED AS A MEANS OF AVOIDING FALSE, DECEPTIVE, OR MISLEADING ADVERTISING.

Obviously, any form of lawyer advertising -- or advertising of other services or goods -- can be employed in a manner which is false, deceptive, or misleading. As the Supreme Court has emphasized, however, the mere potential for such abuse is not sufficient to justify a prophylactic ban on advertising format or content. States may discipline lawyers for particular advertising found to be false or misleading, and they may also restrict forms or content of lawyer advertising found to be "inherently" or "inevitably" false or misleading. Bates, 433 U.S. 372-73; R.M.J., 455 U.S. at 202. But a blanket ban may not be imposed on a form of advertising simply because it could be used, in some circumstances, to deceive, mislead, or manipulate.

There has been no showing that any of the types of advertising that the Bar seeks to proscribe is inherently or intrinsically false or misleading. Clearly, all of the advertising techniques in question -- testimonials, narrators, depictions of scenes, background sounds-- can be employed in a manner which provides viewers and listeners with truthful, nonmisleading (and beneficial) information

about available legal services -- just as they are every day, thousands of times a day, on broadcast stations across the country, to present truthful, nonmisleading information about a wide range of products and services.

The Bar suggests that testimonials and dramatizations (i.e., "the audio or video portrayal of an event or situation", Comment to Rule 7.2) are "inherently" misleading because they suggest to viewers or listeners that they are likely to achieve similar results, when their particular circumstances may differ. Thus, the Bar notes that dramatizations "create unreasonable or unrealistic expectations." Pet. at 5, and endorsements or testimonials "are inherently misleading to laymen untrained in the law who infer from testimonials that the lawyer will obtain similar results in future cases." Pet, at 2.

Certainly, testimonials or dramatizations could be employed in a deceptive or misleading way. But this is not necessarily the case. A statement by an actual client that a lawyer performed a service for him -- prepared a basic will, performed a title search, filed for bankruptcy -- can be entirely accurate, truthful and nonmisleading. Similarly, a dramatic rendition of an event suggesting a need for legal service -- for example, a sudden death without a will -- can also be both informative and entirely

without false or misleading implications.

The Bar's position here is similar to that of the Arizona Bar in the Bates case, which argued that lawyer advertising is inherently misleading because it inevitably fails to address the precise legal needs and circumstances of the individual client and the client thus can misunderstand or miscalculate the likely outcome, cost, or requirements of his case. 433 U.S. at 372. The Court rejected these assertions, noting that many routine or standardized services could be advertised in entirely legitimate, truthful, and accurate ways:

> "Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price....Although the client may not know the detail involved in performing the task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself." Id. at 372-73.

In Zauderer, the Supreme Court overturned Ohio's ban on lawyer advertisements containing information or advice regarding a specific legal problem. The advertisement in question in Zauderer included a drawing of a Dalkon Shield intrauterine birth control device, advised readers that the shield had been alleged to cause various medical problems, advised that the lawyer was handling such claims, and said "if you or a friend have had a similar experience, do not

assume it is too late to take legal action against the Shield's manufacturer." 471 U.S. at 631.

The Court held that advertising concerning particular legal problems or offering legal advice is not inherently misleading, and pointed to the advertisement in question as an example of truthful and nonmisleading advertising -- advertising which did not promise results or suggest special expertise in handling such matters, other than the factual information that the attorney was indeed engaged in such representation.

The Court also rejected in Zauderer the State's argument that a prophylactic ban on illustrations in lawyer advertising was justified because illustrations "play on the emotions of [the lawyer's] audience and convey false impressions...operating on a subconscious level," thereby creating "unacceptable risks that the public will be misled, manipulated, or confused." Id. at 648. The Court held that illustrations are not inherently misleading, pointing to the Dalkon Shield drawing as an example of a visual depiction which presents accurate information in a truthful manner. And the Court flatly denied the proposition that "a State may prohibit the use of pictures or illustrations in connection with advertising...simply on the strength of the general argument that the visual

content of advertisements may, under some circumstances, be deceptive, or manipulated...[B]road prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force." Id. at 649.

The constitutionally acceptable way to guard against false and deceptive use of pictorial representations, the Court emphasized, was with case-by-case review, not a blanket ban:

> "We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations....Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, appellant may not be disciplined for his use of an accurate and nondeceptive illustration." Id.

The use of a trained narrator to describe a lawyer's practice, with the clear indication that he is not himself that lawyer; the use of a scene to conjure up a possible situation requiring legal services, without misleading promises or suggestions about likely outcomes if such outcome may be in doubt; the use of a client, stating that he received a routine service from a lawyer -- all of these provide truthful, nondeceptive, nonmisleading information to the public. There is no justification, under public policy or the First Amendment, for banning them

prophylactically, simply because such techniques -- like any method of communication -- have a potential for abuse.[2/]

Florida Bar rules currently proscribe "false" and "misleading" lawyer advertising, and the definition of false or misleading includes advertising which "is likely to create an unjustified expectation about results the lawyer can achieve." Rule 4-7.1(b). There has been no showing that this rule cannot adequately be enforced against advertisements containing misleading testimonials, dramatizations, or other features -- and in a way which does not sweep so broadly, and encroach so significantly on truthful speech, as a blanket ban.

c. THE RESTRICTIONS CANNOT BE JUSTIFIED BY THEIR ALLEGED PROTECTION OF THE PUBLIC'S CONFIDENCE AND TRUST IN THE JUDICIAL SYSTEM.

The Bar also seeks to justify these restrictions on the basis of their alleged harm to "the public's confidence and

---

2/ The use of these advertising practices in the advertising of other goods and services demonstrates that they are not inherently false or misleading. Federal and state enforcement actions, as well as private lawsuits, are all available for policing advertising on a case-by-case basis for false and misleading information or implications. "Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are...equally unacceptable as applied to [lawyers'] advertising." Zauderer, 471 U.S. at 646-47.

trust in the judicial system," suggesting that the identified practices somehow diminish "the effectiveness and dignity of our system of the administration of justice." Pet. at 3, 17.

This type of argument against various forms of lawyer advertising has been repeatedly and forcefully rejected by the Supreme Court. Most recently, in Zauderer, the Court declined the suggestion that a ban on the use of pictures or illustrations in lawyer advertising was merited because such techniques were not sufficiently "dignified." Said the Court:

> "[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity." 471 U.S. at 648.[3/]

Similarly, the Court has held that "the potentially adverse effect of advertising on professionalism and the quality of legal services [is] not sufficiently related to a substantial state interest to justify so great an interference with speech." R.M.J., 455 U.S. at 203-04; see also Bates, 433 U.S. at 367-71. Indeed, the Court has emphasized that just the opposite is true: that effective

---

3/ See also Bates, 433 U.S. at 372 (dismissing as "an anachronism" the suggestion that lawyer advertising may be restricted, for taste and etiquette reasons).

lawyer advertising, conveying truthful information to the public about the availability of legal services, provides "great benefits" to society. It has therefore rejected the suggestion that lawyer advertising is detrimental because it tends to "stir up" litigation, Zauderer, 471 U.S. at 642:

> "That our citizens have access to their...courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. Accordingly, it is not sufficient justification for the discipline imposed on appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits." Id. at 643.

D. THE RESTRICTIONS CANNOT BE JUSTIFIED BY REFERENCES TO THE "UNIQUE CHARACTERISTICS" OF THE ELECTRONIC MEDIA.

The Bar also contends that placing special restrictions on lawyer advertising on radio and television is justified because "the unique and powerful characteristics of electronic media make them especially susceptible to abuse and especially subject to regulation in the public interest." Pet. at 4.

The Bar's rationale appears to be a reference to Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.D.C. 1972), summarily aff'd, 405 U.S. 1000 (1972), which upheld a Congressional ban on the broadcast of cigarette commercials. Capital has been cited by the Supreme Court

in several of its commercial speech cases in noting "special problems of advertising on the electronic broadcast media" which could "warrant special consideration" with regard to certain kinds of advertising. See, e.g., Bates, 433 U.S. at 384; Virginia Pharmacy Board, 425 U.S. at 773.

Reference to Capital Broadcasting, however, does not support the restrictions proposed by the Bar here. The holding in Capital Broadcasting was based principally on the unique accessibility of broadcasts to children, and the ill effects of cigarette commercials on such children. 333 F.Supp. at 585-86. This same characteristic was the focus of the Supreme Court's decision in FCC v. Pacifica Foundation, 438 U.S. 726, 750 (1978), upholding the federal ban on the broadcast of "indecent" material in hours in which children were likely to be in the audience.[4/]

This basic concern is not presented by lawyer advertising, which is plainly not directed to children or likely to have significant appeal to or influence on children. Compare Capital Broadcasting, 333 F.Supp. at 585

4/ "[B]roadcasting is uniquely accessible to children, even those too young to read...The ease with which children may obtain access to broadcast material...amply justif[ies] special treatment of indecent broadcasting." Id. at 750-51. See also id. at 759 (Powell, J., concurring).

(stressing "the close relationship between cigarette commercials broadcast on the electronic media and their potential influence on younger people"). Certainly it is difficult to imagine any particular adverse impact on children that could be caused by such advertising, given its subject matter and intended audience.

The Bar refers generally to the "powerful characteristics" and "pervasiveness" of the electronic media in support of the proposed restrictions. That radio and television are widespread, readily available to numerous people, and effective means of communication is no reason, however, to restrict their dissemination of truthful, nonmisleading information about legal services. "(T)he First Amendment does not permit a ban on certain speech merely because it is more efficient." Shapero, 108 S.Ct. at 1921.

Indeed, it is not a vice but a value to society that television and radio can convey information about legal services to vast numbers of people, including the less-educated and less well-to-do who rely most heavily on the broadcast media for information. As stated in the current Comment to Bar Rule 7.2:

> "Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, .therefore, would impede the flow of

> information about legal services to many sectors of the public. Limiting the information that may be advertised [on television] has a similar effect..."

The Bar has presented no showing of widespread abuse to explain its abandonment of this earlier recognition of the valuable contribution to be made by permitting lawyers to advertise in the electronic media.[5/]

In referring to the alleged potential of the targeted advertising practices for "abuse," the Bar may also be alluding to the Supreme Court's decision in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), in which the Court upheld a state ban on in-person solicitation by attorneys. This holding was based on two factors: first, that in-person solicitation is "inherently conducive" to intimidation, invasion of privacy, coercion, overreaching, and other misconduct, and, second, that in-person solicitation is "virtually immune to effective oversight and regulation" because it is fleeting and "not visible or

---

5/ The cigarette advertising at issue in Capital Broadcasting promoted a product which is highly addictive and inherently hazardous and whose distribution could be entirely prohibited. Cf. Posados de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345 (1986) (in upholding restrictions on casino advertising, Court emphasizes that gambling is not "constitutionally protected" and is subject to complete state prohibition). The advertisements at issue here, in sharp contrast, involve a service which is affirmatively beneficial to society, and the individual's right of access to such service is of constitutional dimensions.

otherwise open to public scrutiny." Ohralik, 436 U.S. at 464, 466; see also Shapero, 108 S Ct. at 1922.

The Court in Ohralik took pains to point out that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." 436 U.S. at 455. In Zauderer and Shapero, the Court stressed that Ohralik was to be limited to the concerns about in-person solicitation and should not be extended to advertising or direct-mail solicitations. Advertising, the Court said in Zauderer, "poses much less risk of overreaching or undue influence" than in-person solicitation; while advertising may be of varying degrees of effectiveness, "in most cases, it will lack the coercive force of the personal presence of a trained advocate," and, "unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation." Zauderer, 471 U.S. at 642.

While Zauderer was concerned with a print advertisement, these characteristics are also true of broadcast advertising; like newspapers, magazines and direct mail, lawyer advertising on television and radio does not present "the potential client with a badgering

advocate breathing down his neck," Shapero, 108 S.Ct at 1922. Like the recipient of a letter, or the reader of a newspaper, a viewer or listener "'can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes"' or ears. Id. at 1922-23 (quoting Ohralik, 436 U.S. at 465 n.25). In sum, the viewer or listener can readily avoid or ignore a broadcast advertisement, much more readily than a personal visit by a lawyer, simply by changing channels, turning off the television or radio, or simply redirecting his attention.[6/]

The Bar also alludes to the so-called "passiveness" of the broadcast audience as presenting greater opportunities for "abuse." This is simply another attempt to characterize the cited practices as inherently likely *to* deceive or mislead audiences, an allegation which the Bar

---

6/ In Pacifica, the Court relied in part on its conclusion that indecent broadcasts were particularly invasive and that the ability to turn the channel was inadequate to completely avoid the "first blow" of the material. 483 U.S. at 749. Pacifica, however, was dealing with material that by definition was "highly offensive," so that exposure to any of the material was objectionable. Lawyer advertising does not share this characteristic -- it is not inherently objectionable or offensive, any more than any other sort of advertising. Indeed, given the subject matter and intended audience, lawyer advertising is likely generally to be more substantive, dignified, rational, and informative than other advertising, as the Supreme Court has noted. See, e.g., Zauderer, 471 U.S. at 649.

has failed to document. Even if the practices in question did provide certain enhanced potential for deception or overreaching, there is still no reason for a prophylactic ban, rather than case-by-case review and discipline of particular advertising found to be abusive. Like print advertising and letters, but unlike in-person solicitation, television and radio advertising are public and are almost always preserved on audio and/or video tape. Indeed, they are much more public than the individualized letters protected by the Court in Shapero, and more likely to be maintained in reviewable form. State and federal agencies and the courts all have for years reviewed broadcast advertising for false, deceptive claims or other abuses. Such review is also available for broadcast lawyer advertising, and the Bar has offered no reasons why such review cannot be an effective means of policing such advertising.

III. THE DISCLAIMER REQUIREMENT IS UNNECESSARY AND VIOLATES THE FIRST AMENDMENT.

The Supreme Court has indicated in its lawyer advertising and other commercial speech decisions that narrowly crafted disclaimers or warnings may in some circumstances be appropriately required to dispel the potential for deception or overreaching. See Zauderer, 471 U.S. at 651; R.M.J., 455 U.S. at 201; Bates, 433 U.S. at

384. At the same time, however, the Court has recognized that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." Zauderer, 471 U.S. at 651.

The disclaimer proposed by the Bar is both unjustified and unduly burdensome. It is burdensome because of its great length: its presentation on a television screen for a time sufficient to be read, or its reading in a radio or television commercial, would consume a large portion of the advertisement itself and, perversely, would greatly reduce the ability of the advertising lawyer to present substantive information in the body of the advertisement.

The disclaimer requirement is also unjustified -- that is, not supported by an adequate showing of need, as required by the Supreme Court. In Zauderer, the Court sustained a requirement that lawyer advertising of contingent fee services must disclose that clients may be liable for costs even if their lawsuits are unsuccessful. The Court upheld the required disclosure because it agreed with the State that it was "self-evident" and "a commonplace" that potential clients would otherwise be "misled" by the reference. 471 U.S. at 652.

Here, there is no such justification for the proposed

disclaimer. As we have discussed above, lawyer advertising in the electronic media is not, and has not been shown to be, inherently misleading or deceptive. While such advertising may not furnish complete information, this does not make it so unreliable as to warrant a disclaimer. See Bates, 433 U.S. at 2704 ("the argument...that the public is not sophisticated enough to realize the limitations of advertising...rests on an underestimation of the public").

There has been no showing that, absent the proposed disclaimer, clients are likely to exercise insufficient care in selecting an attorney. Indeed, it would appear that the hiring of a lawyer is a decision in which most citizens exercise far greater care than in the usual choice of providers of services or goods.7/ There is simply no demonstrated need for a blanket requirement that lawyer advertising in the electronic media bear the burdensome disclaimer proposed by the Bar.

7/ An important factor in this care is the personal visit by the potential client to the lawyer for a discussion of his or her particular needs; such consultations render the proposed disclaimer superfluous and unnecessary.

CONCLUSION

At bottom, all of the objected-to provisions rest on two assumptions: that it is unseemly for lawyers to employ advertising techniques commonly used to sell other services and products, and that the public -- particularly the television and radio audience -- is so easily taken in by commercials that it will be readily deceived and misled by unscrupulous lawyer advertising.

Both of these propositions have been repeatedly rejected by the Supreme Court. And both are at odds with the fundamental interest in promoting the effective, widespread dissemination of truthful, nondeceptive information about legal services to all elements of our population.

The Bar and the State are armed with more than adequate means under existing regulations to proceed forcefully and swiftly against specific lawyer advertisements, print or broadcast, which are found to be false, deceptive, or misleading. But advertising of legal services which is true, accurate, and nonmisleading should and must be permitted, regardless of its format. To do otherwise is to return to the discredited "paternalistic approach" of blanket bans on the content and style of commercial speech,

Bates, 433 U.S. at 2699, and to curtail unnecessarily the public's access to useful information about legal services and legal rights.

For these reasons, CBS, Inc., Combined Broadcasting of Miami, Inc., and Post-Newsweek Stations, Florida, Inc., oppose adoption of the proposed restrictions discussed herein.

Respectfully submitted,

Douglas P. Jacobs
John W. Zucker
5'1West 52 Street
New York, New York 10019
Attorneys for CBS Inc.

Goldberg & Spector
1229 19th Street, N.W.
Washington, D.C. 20036
Attorneys for Combined Broadcasting of Miami, Inc.

L. Stanley Paige
1000 15th Street, N.W.
Washington, D.C. 20071
Counsel for Post-Newsweek Stations, Florida, Inc.

Of Counsel:
Steven Uhlfelder
Steel Hector & Davis
215 S. Monroe Street
Tallahassee, Florida 32301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a true and correct copy of the foregoing to be sent by first-class mail to:

John F. Harkness, Jr.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Alan C. Sunberg, Esquire
Carlton, Fields, Ward, et al.
215 S. Monroe Street
Suite 410
First Florida Bank
P.O. Drawer 190
Tallahassee, Florida 32302

This 16th day of January, 1990.

Steven Uhlfelder