IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 74,987

COMMENTS IN OPPOSITION TO PETITION

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PRELIMINARY STATEMENT

My objective is discuss why I think some of the proposed rules should be rejected as unnecessary to protect the public and discriminatory to lawyers who advertise.

Admittedly, I have my own axe to grind. Since 1983, I have used targeted direct mail advertising, with the knowledge of the Bar, in my practice as a Department of Professional Regulation defense lawyer. However, my experience in professional licensing began on the Bar staff in 1972. Since then, I have had more than the average experience in observing professional regulation efforts by many professions and their regulatory bodies.

ARGUMENTS

I

There is No Need to Amend the Rules on Targeted Direct Mail Solicitation.

In Rules Regulating the Florida Bar, 494 So.2d 977, 978 (Fla. 1986) this Court permitted targeted direct mail solicitation saying:

> After studying this matter, we have concluded that such mailing cannot be prohibited. Instead, we have revised rule 4-7.3 to regulate, rather than proscribe, such communications. If this regulation proves unworkable or if a pattern of abuse in direct mailings is established, we will consider amending the solicitation rule. (emphasis supplied)

The Florida Bar has utterly failed to prove that the present regulation is unworkable or that a "pattern of abuse" exists. Moreover, after reading the record, I was struck by the lack of any evidence of harm to the public by mailed solicitations.

Over a million such letters have been mailed. Yet, the Bar has failed to show any consumer who has been injured, damaged, or intimidated by a letter complying with the present advertising rules.

The most that can be concluded from the Bar's record is that targeted direct mail letters are unpopular with many consumers, most members of The Florida Bar, the Bar's leaders, and the Florida Trial Lawyer's Association.

The unpopularity of the practice does not show that a pattern

of abuse exists — or that The Florida Bar is incapable of enforcing the current rules.

The proposed rules are designed to make direct mail advertising difficult and expensive. Moreover, they would give Floridians the impression that this Court thinks they need to be protected from advertising lawyers.

Instead of attempting to restrict the free flow of useful information to the consumer, The Florida Bar should be urging the Court to protect the consumer's right to find a lawyer by direct mail. After all, thousands of consumers are now using direct mail advertisements to help them find a lawyer.

II

Mandatory Standing Committee Review Should be Rejected

Of great concern to me is Proposed Rule 4-7.5 which calls for the mandatory review of direct mail solicitation by a standing committee of The Florida Bar. The rule would create an expensive system which would probably be biased and hostile towards advertising.

However, I like the idea of having a committee consider voluntary submissions and issue non-binding opinions.

As an advertising lawyer, I am concerned that a mandatory committee review system committee would be biased against advertising. I am afraid that such a committee would mirror the Bar leadership's present hostility towards mailed solicitations.

If a mandatory review is needed, it should be done by professional staff charged by this Court to render judgments independent

from the personal views of the members of the Board of Governors. Although this would be an unusual step for the Court to take, the record shows the issue to be too volatile to expect the Board of Governors or its appointees to act without prejudice towards advertising lawyers.

Proposed Rule 4-7.5 seeks to penalize lawyers who advertise and separate us from the rest of the Bar by charging us with fees not limited to financing the required "evaluation". Under proposed Rule 4-7.5 (d) (4), the fee also pays for the Bar's "enforcement" of the advertising rules. This departs from present rules where the burden of lawyer regulation is shared equally by all members of the Bar.

Another objection I have is that charging a $25 fee for every submission is too expensive for lawyers like myself who send out just a few letters at time but frequently make changes both minor and major in our wording.

III

Not All Testimonials Should Be Banned.

The ban against testimonials in Proposed Rule 4-7.1 (d) is too broad. It is true that testimonials about "results obtained" may create unjustified expectations and probably should be banned.

However, there is plenty of verifiable, useful information about a lawyer's services which could be presented by testimonials and would be useful to prospective clients. For instance, the total fees paid in a specific type of case or the lawyer's availability to the client could be truthfully discussed in tes-

timonials. Subjects such as this could be verified for accuracy and provide valuable information to consumers in making their choice among lawyers.

I suggest that testimonials be allowed if:

1. The testimonial is verifiable.

2. It is made by a present or former client.

3. It does not relate to the outcome of the case.

IV

The Rule Should Not Dictate the Wording of a Direct Mail Letter

Regarding proposed Rule 4-7.4:

1. Paragraph (1)(a) requires that each letter page be marked "advertisement" in red ink and that the envelope be marked likewise in red ink. The use of red ink is not required for consumers to understand that the letter is a solicitation.

Nothing in the record suggests that any consumers have been misled under the present rule. Further, the use of red ink is garish and makes the advertisement look tacky and unprofessional.

Nor is there any need to require that brochures included with a advertising letters be stamped as "advertising". The requirement serves no purpose not already served by the black ink header in the letter itself.

2. Paragraph (1)(d) forbids any reference to the communication having received any kind of approval from The Florida Bar. Such a ban has no useful purpose and flatly contradicts the

First Amendment protection of "truthful" statements.

Consumers are entitled to be reassured that the mailing of such letters is permitted by the rules of this Court.

Presently, my direct mail letter says, "Recently, the rules regulating lawyers in Florida have been changed. I'm now permitted to let you know that I represent professionals like yourself who face DPR actions against their license." Statements such as this should be permitted.

3. Paragraph (1)(g) requires that the first sentence state, "If you have already retained a lawyer for this matter, please disregard this letter." If the consumer already has a lawyer, he or she will disregard the letter. If the consumer wants to pay attention to the letter, he or she should be free choice to make that choice.

The tenor of this proposal shows a contempt for the intelligence and competence of the consumer. Once again, The Florida Bar is trying to tell consumers what they should do. The proposal is unnecessary and serves no valid purpose.

4. Paragraph (1)(i) requires that the letter state whether the matter will be referred to another lawyer. This is troubling to me.

On occasion, I advise the client that we need to retain another lawyer to help us on specific issues. When my letter is sent out, it is impossible to know whether the potential client's case might require such assistance.

Does the rule require that I make such a disclosure in my

letter? If so, it discriminates against sole practitioners in favor of large firms with multiple offices. The proposed rule would not require lawyers in a large firm to make the disclosure as long as they "keep the business in the firm."

5. Proposed Rule 4-7.2(d) requires display advertisements to state, "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."

In my view, the aforementioned statement should be limited to disclosing that written information is available on request.

Florida consumers are not stupid and they do not need to be told by us on basis to select a lawyer. Thousands hire lawyers because they are fellow civic or country club members, in-laws, or politically visible. Who are we to tell them differently?

The proposed rule serves no public interest. Furthermore, it scorns advertising lawyers because it has the discriminatory effect of calling into question whether the reader ought to use advertising to select a lawyer.

V

The Treatment of **Fees** is Discriminatory

Proposed Rules 4-7.4(a), 4-5.1(A) and (D) and 3-5.1(h) prohibit charging or collecting fees after an advertising rule violation and makes such fees unenforceable or even forfeitable.

The proposal is far too broad. The omission of the advertising mark from one page of a direct mail letter could be construed to justify the forfeiture of fees earned by conscientious counsel after hundreds of hours of work!

The proposal implicitly invites a consumer to obtain a lawyer's services and then sue for a refund of fees because of technical violations of the advertising rule.

This discriminates against advertising lawyers by treating them in a manner differently from other lawyers who violate the rules of ethics.

Why not provide for forfeitures of fees when any violation of the Rules of Discipline causes substantial prejudice to a client's rights or the public's interest in fair and honest judicial proceedings?

Under the present rules, a lawyer who actively encourages perjury in a criminal or civil trial, acts incompetently or violates the attorney-client privilege is not required to suffer the forfeiture or unenforceability of any fees. Surely, such conduct is more egregious than an advertising rule violation!

These rules appear to single out for unusual treatment those lawyers whose marketing efforts differ from the group norm.

I suggest that such drastic penalties should be limited to "in-person" solicitations or substantial, willful violations of the direct mail rule. Furthermore, unless applicable to all lawyers who violate the code of ethics during their representation