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April 3, 1990

Justice Ben F. Overton  
Supreme Court of Florida  
Supreme Court Building  
Tallahassee, Florida 32399

Re: Case No.: 74987 - Proposed Amendment to Rule 4-7.2(b)

Dear Justice Overton:

I am writing in response to a proposed change to the rules regarding advertising. Please let this letter serve as my "comment" to these proposed changes.

It should first be noted that the proposed changes with respect to attorney advertising are just about the most radical ever contemplated in this nation. They are not only radical in comparison with other state's regulations of attorney advertising, but, they are radical in comparison to regulations regarding the advertising of any product or service in the history of advertising.

Under the proposed rules as they apply to television, the only way that the attorney can advertise is if he or she appears straight on to the camera and delivers the message in a "non-dramatic" way. Think of it, toothpaste or soap manufacturers would have more freedom to advertise than a lawyer under the proposed rules. Massage parlors would have more freedom. If the American-Nazi Party had a publication which they wanted to advertise, they would have more freedom. Doctors, hospitals, accountants, potentially dangerous products, such as three-wheel recreational vehicles or uncrash-worthy automobiles would have more freedom. The Governor

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of Florida and the President of the United States seeking re-election would have more freedom in the type or style of campaign ads that they could run on television. Only tobacco and liquor (which, as you know are banned from television advertising) would have less freedom in advertising than attorneys. Those products have been found to be harmful to the public. Attorney advertising has been anything but harmful. It is the great public service which lawyer advertising performs that will be the subject matter of the rest of this comment.

Our firm is one of the largest advertising firms in Florida and, knowing most of the other advertising lawyers well, as I do, it would be fair to say that we are typical of most of the other firms.

For whatever reason, lawyer advertising has the ability to reach the so-called middle class as well as the uninformed and financially depressed segments of the population. In spite of what the Florida Bar says, and in spite of all of the Florida Bar's efforts in public relations campaigns, pamphlets, Law Day, the truth is that, we, as lawyers, are making the justice system available to only a very small segment of the population. Statistics have shown that 50% of all adults will never use an attorney during their lifetime. Studies have shown that many of these people are in need of legal services. Basically they are afraid of the price of legal services and are intimidated by lawyers.

If the Florida Bar is unsuccessful in reaching these people and bringing legal services to many of the disenfranchised segments of the population, why should they pass regulations that could mark the death knell of advertising in Florida? Attorney advertising reaches great segments of the population. I can't begin to tell you how many clients of our firm are uninformed as to their legal rights prior to calling our office. Further, so many of our clients have told us that "we would not even begin to know how to find an attorney". Lawyer advertising fills a void that lawyers with their traditional ways of marketing their practices have been unable to fill.

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The real question is, who is being hurt by attorney advertising? Certainly not the clients of attorneys who advertise. I know at our firm, in the six years that we have been advertising, we have successfully handled literally thousands of cases. We settle cases when settlement is good for our clients and we try cases when trial is good for our clients. In general, we always put our clients interests ahead of our own. As I say, knowing many of the other advertising attorneys as I do, they all operate in a similar fashion. The Florida Bar has fostered the image of the advertising attorney as one who operates out of a phone booth, with no associates, no law library, no experience. The Bar thinks that the advertising attorneys merely act as a conduit for cases referring them out to other law firms. There is absolutely no proof of this. Many of the advertising law firms such as our's try or mediate cases on a weekly basis. Because of the extremely high amount of scrutiny that an advertising attorney receives, there has been next to no discipline (either in Florida or nationally) against an advertising attorney on problems relating to advertising.

**As** you well know, the Bar must allege that advertising affects a "substantial state interest" in order to attempt to abridge the rights of Commercial First Amendment Free Speech by the advertising attorneys. The Bar has cleverly concocted a theory to show the substantial state interest. The theory alleged is that heavy amounts of television advertising affects "the administration of justice". In other words, the Bar is claiming that nobody can get a fair jury trial because of the heavy amount of attorney television advertising. Supposedly, this pollutes the jury pools and juries are unable to award the proper amount in meritorious claims. Forgive my impertinence but, I believe this to be hogwash. The jury pools are bombarded with thousands of bits of information about lawyers in general. There is, to my count about 10 television shows currently on TV that deal with lawyers. Some depict lawyers in a favorable light and others, not so favorable. In addition, if one picks up the daily newspaper, there are probably at least a half a dozen stories about lawyers. Many of them have a negative slant. Unfortunately, lawyers are being prosecuted and disbarred for a myriad of violations. These are constantly reported in the newspapers. Also, the public helps spread a lot of negative (and, occasionally positive) information about attorneys based upon personal experience. I do not believe that any of this information at the disposal of the potential jury pools in any way will bias a juror one way or the other on a particular case. It would even be more preposterous to assume that attorney advertising could effect jury verdicts.

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In reality, there has been a great deal of attorney advertising since the Bates decision 13 years ago. During these 13 years, in Florida and other states, there have been thousands of trials and thousands of cases where Plaintiffs received fair amounts for the value of their claims. The Florida Bar would have this Court believe that no one can get a fair jury trial anymore because lawyers advertising on TV. I assure you that in every District and County Court in Florida, every day of the week, thousands of claimants are receiving fair trials without regard to what jurors may see on TV, read in the newspaper or hear on the street corner. If, in a particular case, there was a lone juror who was so effected by attorney advertising on TV that he or she could not render a fair opinion, could not that lone juror be discovered in the voir dire process and be removed? Wouldn't the removal of that one juror be preferable to virtually eliminating the entire attorney advertising system as it currently exists in Florida?

If these rules are passed and if, as I expect, attorney advertising is virtually eliminated or, its effectiveness greatly curtailed, thousands of citizens with meritorious claims will go without a remedy because the Florida Bar (with its traditionally ineffective way of reaching the public) will be unable to help them.

For all of the reasons above, I strongly urge you to vote down the proposed rules. There are already rules on the books that call for the prosecution of any attorney who uses a false and misleading advertisement. Although these rules have been on the books for years, to my knowledge, there has not been one prosecution. A strict enforcement of the current rule is all the safeguard that the public needs.

Thank you very much.

Very truly yours,

  
DAVID W. SINGER,  
Attorney At Law

DWS :hrc

O/a 4-5 90

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CLERK, SUPREME COURT  
By \_\_\_\_\_  
Deputy Clerk

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April 19, 1990

Chief Justice Raymond Ehrlich  
Florida Supreme Court  
Supreme Court Building  
Tallahassee, Florida 32399-1927

Re: Rules Regulating the Florida Bar: Advertising Issues  
Case No. 74987

Dear Chief Justice Ehrlich:

I feel compelled to supplement a recent letter I sent to you on the issue of attorney advertising. A survey regarding Florida jury verdicts has recently come to my attention and should be considered by the Court given the Florida Bar's argument for increased regulations.

Before reviewing the findings of the survey, let me say that, although I am not a federal constitutional lawyer, I have read all of the United States Supreme Court decisions on the First Amendment Right of Commercial Speech. It is axiomatic, that in order for the State (or the Florida Bar acting as the State) to infringe the First Amendment Right of Commercial Speech by attorneys, the State must show a "substantial State interest".

The Bar, in attempting to assert a substantial State interest, is alleging that advertising has adversely affected the "administration of justice." The "administration of justice" argument simply asserts that jurors are being negatively influenced by attorney advertising as demonstrated by lower jury awards.

Yet, jury verdicts in Florida are not down. In fact, according to the survey I referenced, (a survey of jury awards in Dade, Broward and Palm Beach Counties), jury verdicts have increased. As you can see, jury verdicts in personal injury cases were up in Palm Beach County by an average of 5% from 1987/88 to 1989. In Broward County, in the same period, jury verdicts were up 176%. In Dade County jury verdicts were up 65%.

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During the years covered by the survey, attorney advertising rose significantly in the counties in question. How then can the Florida Bar assert that there has been a negative impact on jury verdicts in Florida? If the Bar's proposition were correct, shouldn't the average award by jury verdicts have declined during that period? Admittedly, Florida lags behind the national average in jury verdicts. If you read the article which I have enclosed, almost none of the trial lawyers quoted in the article asserted that lawyer advertising had anything to do with Florida being slightly below the national average. Some of the reasons given by these prominent trial lawyers are as follows:

1. "flimsy" cases are taken to trial;
2. wealthier people are making up the jury pools and they are not the type of people who give high awards;
3. the acrimonious Amendment 10 battle; **and**
4. with more and more lawyers in the State, they tend to bring less than meritorious claims into court.

The enclosed study indicates that jury verdicts in Florida's three largest counties have not decreased but, have increased during a time when attorney advertising has never been higher and continues to grow.

If juries are being affected in any way it is very presumptuous of anyone, to assert that it has to do with attorney advertising. The public's mistrust of attorneys goes back hundreds of years. In recent years, there have been television programs that have shown attorneys in a negative light. The insurance industry has been very effective in debasing the good names of claimants and attorneys who represent these claimants. The free press which now regularly publishes scandals about attorneys, judges, and politicians (many of whom are attorneys) on their front page, must also have had its impact on jurors. Nonetheless, jury verdicts in Florida were not down in 1989 (the last year of the survey), but, were in fact up.

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If, for a moment, one could contemplate that there might be a half dozen jurors statewide who are influenced by attorney advertising, wouldn't it be a far fairer and easier system to let the voir dire process exclude that tiny minority rather than burden a right of free speech? Doesn't the voir dire system provide a similar service where there has been bad publicity about a lawyer or a client?

These proposed regulations bring the ancillary but very important issue of "access to the courts" before you. The Bar, by its own admission, has not been good in reaching the average citizen. The advertising lawyer has filled the void and has been able to reach and bring justice to many of these otherwise disenfranchised citizens.

Sometimes it takes an ad with a touch of "**drama**" to reach an unsophisticated, yet needy citizenry. I don't believe that the United States Supreme Court's finding of a right of to commercial free speech under the First Amendment contemplated every single ad on TV looking alike. The public could not distinguish one lawyer or one lawyer's services from another if the Bar's proposed regulations are endorsed.

I believe the United States Supreme Court found the right of commercial free speech in the Constitution in order to breed competition among businesses and professions and to promote the dissemination of information about products and services. I do not believe that the United States Supreme Court would have the noble purpose behind it's rulings sidetracked by the rules contemplated by the Florida Bar.

The Bar's rules would in fact sidetrack those purposes. Instead of trying to enforce current rules as to false and misleading advertising, the Bar has in effect sought a prophylactic ban on the form and content of attorney advertising. Although the Bar is quick to point out that it is not proposing a ban on advertising, a similar rule in Iowa has led to the complete absence of attorney television advertising in that state - a fact the Bar ignores.


The Bar's regulations would hinder access to the legal system by the thousands of non-elitist, everyday people who are clued into the justice system only because of advertising. (Sometimes these people find out they have a legal need through advertising and end up hiring a traditional non-advertising attorney).

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The Bar's actions are being attempted under the preposterous notion that jury panels cannot render fair decisions in Florida courts. The facts do not support the Bar's assertions. The Bar has not met their burden and thus, please, in all of your wisdom, vote down these extremely pernicious regulations.

Thank you very much.

Very truly yours,

  
DAVID W. SINGER,  
Attorney At Law

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Enclosure