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SID J. WHITE
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BEFORE THE
SUPREME COURT OF FLORIDA

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In Re

PROPOSED ADVERTISING RULE AMENDMENTS, As Set Forth in the Petition of the Board of Governors of The Florida Bar Submitted on November 1, ~~1898~~ 1989 : No. 74,987

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COMMENTS OF [THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES] ON THE PETITION OF THE BOARD OF GOVERNORS OF THE FLORIDA BAR

Pursuant to Rule 1-12.1 of the Rules Regulating the Florida Bar, this response is respectfully submitted on behalf of the American Association of Advertising Agencies, Inc. (the 'A.A.A.A.") in opposition to certain portions of the Proposed Advertising Rule Amendments submitted to this Court on November 1, 1989 by the Board of Governors of the Florida Bar. The A.A.A.A.'s purpose in submitting these comments is to highlight particular areas of the proposed Rule amendments which, if adopted, will unduly restrict the flow of valid information to consumers and violate the First Amendment rights of Floridians in general and members of the Florida Bar in particular.

IDENTIFICATION OF THE A.A.A.A.

The A.A.A.A. is a membership trade organization whose membership includes 760 advertising agencies doing

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business in the United States and around the world. More than 60 A.A.A.A. agencies are headquartered or have offices in Florida. In addition to creating and placing more than 85 percent of all national advertising placed by advertising agencies in this country, A.A.A.A. member agencies also handle a substantial amount of regional, local and retail advertising for goods and services, including those provided by entities such as law firms.

As specialists in the art **of** communication, and also as members of the consuming public, A.A.A.A. agencies and their employees take an interest in regulatory initiatives which will affect the ability of advertising information to reach the public at large. The A.A.A.A. shares the widespread desire for truthful and accurate advertising. However, we are concerned that certain provisions of the proposed amendments constitute rigid and excessive regulations which risk undermining the purpose and effectiveness of valuable forms of commercial communication.

I.

GENERAL COMMENTS REGARDING THE PROPOSED RULE AMENDMENTS.

More than a decade ago, the Supreme Court of the United States explicitly ruled that advertising is encompassed within the protections of the First Amendment. Virginia

State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). Since then, commercial speech has been protected from a wide variety of unjustified restrictions, e.g., Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (ban on real estate signs); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) (ban on electric utility advertising); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) (prohibition against contraceptive advertising).

Significantly, the Supreme Court has made several major pronouncements regarding the role of the First Amendment in a series of cases involving lawyer advertising. Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (prohibition against newspaper advertisement of clinic's services and fees struck down); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (attorney's in-person solicitation of accident victims to obtain their business); In re R.M.J., 455 U.S. 191 (1982) (restriction against published advertisements listing attorney's areas of practice and bar admissions struck down); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (prohibition against newspaper advertisements soliciting clients regarding Dalkon Shields struck down); Shapero v. Kentucky Bar Ass'n,, 108 S. Ct. 1916 (1988) (restriction against personalized mailings seeking business

of non-clients known to be facing foreclosure struck down). Taken together, these decisions make clear that in the absence of an overwhelming showing of direct public injury, an attorney may not be disciplined for, or otherwise prevented from, making truthful and non-deceptive commercial messages by means of targeted mail or through media advertising.

The public goals underlying such First Amendment protection have been reaffirmed continually since the Virginia Board decision in 1976. Advertising informs consumers of product and service options available in the marketplace, and it encourages competition among those seeking to obtain consumer favor.

> Even an individual advertisement, though entirely "commercial," may be of general public interest. . . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. Virginia Pharmacy, 425 U.S. at 763-65, See also Ohralik v. Ohio State Bar Association, 436 U.S. 447, 473-74 (1978) (Marshall, **J**., concurring).

In light of these strong Constitutional underpinnings, state restriction of advertising cannot be grounded on less than an overwhelming record **of** actual harm arising from an ad. For example, in Bates v. State Bar of Arizona, 433 U.S. 350, the State defended restrictions on attorney advertising by labeling as misleading such terms as "legal clinic" and "reasonable" prices. The Supreme Court rejected such "unpersuasive" assertions, noting the absence **of** facts supporting the State's claim that these aspects of the advertisement would cause any consumer difficulties. Id. at 381. Likewise, as Justice Brennan noted in his separate opinion in Zauderer, 471 U.S. at 658-659:

> Because of the First Amendment values at stake, courts must exercise careful scrutiny in applying these standards. Thus a State may not rely on "highly speculative" or "tenuous" arguments in carrying its burden of demonstrating the legitimacy of its commercial-speech regulations. Where a regulation is addressed to allegedly deceptive advertising, the State must instead demonstrate that the advertising either "is inherently likely to deceive" or must muster record evidence showing that "a particular form or method of advertising has in fact been deceptive," and it must similarly demonstrate that the regulations directly and proportionately remedy the deception. Where States have failed to make such showings, we have repeatedly struck down the challenged regulations (citations omitted).

Clearly, merely envisioning ways in which a truthful message might be misunderstood is not enough.

In the final analysis, no regulation of attorney advertising--or of any other type of advertising--should rest on a belief that the public will be better served by ignorance than by information. As the Court observed in Virginia State Board: "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U.S. at 770. See also, Linmark Associates, Inc., 431 U.S. at 96-97; Bolger, 463 U.S. at 79 (Rehnquist, J., concurring in the judgment).

As the Supreme Court explained in Bates, a paternalistic regulatory attitude "assumes that the public is not sophisticated enough to realize the limitation of advertising. . . . If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." 433 U.S. at 375. The Court went on to state:

> It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort.

Id. at 379.

At bottom, government restrictions on commercial speech such as lawyer advertising cannot be permitted

whenever the creative censor can imagine ways in which consumers might misunderstand a truthful, nondeceptive message. Otherwise all lawyer advertising could be subject to prohibition, Bates and its progeny notwithstanding, and the First Amendment protections afforded commercial speech will be worthless.

These well-established principles must guide this Court's evaluation of the Rule amendments proposed by the Board of Governors. Where an incomplete or inadequate showing has been made on behalf of a proposal, the restriction must fail in light of the First Amendment's protections for truthful commercial speech. And where no showing has been made apart from speculation about a possibility of deception, the restriction must immediately be recognized as an unlawful infringement of the right to speak.

II.

COMMENTS REGARDING SPECIFIC PROVISIONS OF THE PROPOSED RULE AMENDMENTS.

Applying the general legal principles set forth above to the provisions of the proposed Rule amendments, it is clear that several provisions run afoul of First Amendment protections.

A. Section 4-7.1(d): The Absolute Prohibition on Client Testimonials.

Proposed rule 4-7.1(d) would prohibit communications containing testimonials from current or former clients or from anyone else who might have information to impart regarding an attorney. In this respect it is even more stringent then the current Rule, which appears to ban testimonials only insofar as they contribute to "unjustified expectations" as to the results that may be expected from a lawyer. Rule 4-7.1(b).

Such an absolute ban on a means of communicating is clearly in violation of the First Amendment. Advertising operates within the confines of time and space, on the one hand, and the varied interests and attentions of consumers on the other. In the midst of such opposing forces, advertising attempts to persuade, and it must be creative to be able to do so. Truthful testimonials are but one means of attracting the interest of consumers regarding a product or service, and there is no reason why an attorney's services cannot be as worthy a subject of a testimonial as any other product or service. In the absence of some showing that testimonials are necessarily deceptive, an absolute prohibition against them is clearly overbroad.

We believe that truthful testimonials from actual clients m y often be valu ble to consumers of legal ervices. Advertising in which clients attest that they use a firm's legal services provides the general public the same type of information that is now available to attorneys who use legal directories. For example, the listing of certain clients such as major banks or corporations in the Martindale-Hubbell legal directory suggests that a firm can handle complicated legal problems in which large sums of money may be at risk.

Indeed, advertising in which past or present clients discuss their reasons for satisfaction with a law firm conveys even more information than legal directories can convey. **And** advertisements in which, say, a famous athlete or actor states truthfully that he or she uses a particular firm or attorney indicates to consumers that someone who can spend a substantial sum to find an attorney, and who may have significant assets at stake, believes a particular lawyer to be effective. Such testimonials are not **per** se misleading, and to prohibit them will necessarily impede the flow **of** useful informations to consumers.

B. Section 4-7.2 (b), (e) and (f): The Restrictions on Radio and Television Advertising.

These new provisions of the proposed Rule amendments would virtually kill the creative potential of the

visual and aural portions of television and radio advertisements. Taken together, they would prevent use of actors, background sounds, visual action, dramatic voices, and other features common to much radio and television advertising.

These provisions are clearly overbroad and in conflict with the First Amendment principles set forth above. While they are presumably intended to maintain the dignity and professionalism of the legal community, they seek to do so by preventing many forms of communication that pose no risk of demeaning the Bar. And they do so by stifling communications that are helpful to consumers. Graphics, dramatizations, reenactments, and similar techniques can help consumers understand their legal rights and obligations and can identify attorneys who appear responsive to particular needs. The unavailability of such techniques will inevitably make it harder for consumers to reach informed decisions about hiring legal counsel. These prohibitions will inevitably hinder citizens who might remain uninformed about their legal rights in the absence of television advertisements. These prohibitions will also make it harder for lawyers to devise vivid advertising images that will engage the viewer's attention and convey the attorney's messages.

The overbreadth of these provisions is best demonstrated by their failure to recognize that many truthful and nondeceptive dramatizations, illustrations, and other communication techniques will be prevented merely to guarantee prohibition of a few particular advertising abuses. But the First Amendment prohibits such a "scorched-earth'' policy in the area of commercial expression. Prohibitions, if they are warranted at all, must be narrowly directed to prevent particular abuses.

C. Section 4-7.2(d): The Caution Against Reliance on Advertising.

Proposed Rule 4-7.2(d) would require that virtually all advertisements contain a 33-word disclaimer cautioning consumers against excessive reliance on advertising and offering free written information on lawyer qualifications.

Any disclosure obligation tends to interfere with an ad's message and to increase attorney advertising costs. That is because it may increase the length of the message and also because it may force attorney advertisers to omit some other portion of a message that would have been delivered had the space (or time) not been occupied by the disclosure. Unnecessary disclosure requirements thus decrease the quantity of useful information available to consumers. These adverse effects promise to be especially burdensome with this

proposed disclosure because its very length guarantees to chill many messages, particularly in television advertising.

By its very nature, advertising can convey only a limited quantity of information. When too much information is forced into a confined space or time, the result is simply a less effective communication as a whole. Moreover, when too much is placed in an ad, the risk of consumer confusion and erroneous perceptions increases dramatically, as does the chance that some consumers seeing or hearing the advertisement will simply ignore it entirely. Given the limits of a 15- or 30-second radio or TV advertisement, an advertiser must avoid cluttering the advertisement with messages not directly relevant. Required add-ons such as that mandated by this proposed Rule amendment will simply guarantee the ineffectiveness of advertising messages, and surely chill some advertising entirely.

D. Section 4-7.1: Use of the Term "Unfair."

The Petition seeks modification of Section 4-7.1 to add the term "unfair" to the terms "false" and "misleading" as a descriptor for communications which would violate the rule. Yet, addition of the term "unfair" promises to do incalculable mischief in any future efforts at fair regulation. "Unfairness" should never be employed as a purported standard to regulate commercial advertising.

The Federal Trade Commission's experience with Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, is instructive. That statute has prohibited "unfair" practices for decades. Until the mid-1970's, however, the Commission moved against commercial advertising practices only when they were false or deceptive to consumers, thereby treating the term "unfair" as essentially synonymous with "deceptive" as a statutory authorization for regulation. In the late 1970's, an "activist" FTC attempted to breathe independent life into the term "unfair," creating a grave risk of over-regulation and inappropriate restrictions, and giving rise to such a storm of national protest that the FTC has needed more than a decade to recover its regulatory equilibrium.

Advertisers recognize and can understand such terms as "false," "deceptive" and "misleading." These are measurable, definable terms, and their meanings are understood by advertisers and consumers alike. In contrast, "unfairness" is a subjective and unmeasurable term open to an unlimited variety of individual judgments. Reliance in the proposed Rule amendment on a vague standard such as "unfairness" could lead to problems such as over-regulation, waste of governmental and private sector funds and, ultimately,

restriction on the free flow of information to consumers. The term "unfair" should therefore be omitted from the proposed amendment to Rule 4-7.1.

Dated: 11-29-89

Respectfully submitted,

AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.

By _____

Harold A. Shoup
Executive Vice President and
Director of the Washington, D.C. Office

Dated: 11/30/89

Respectfully submitted,

ENSSLIN AND HALL ADVERTISING, INC.

By _____

Thomas Hall
Chairman, Florida Council
American Association of Advertising Agencies, Inc.

By _____
AAAA
Member of the
Washington, DC bar