IN THE FLORIDA SUPREME COURT

IN RE PETITION OF THE FLORIDA EAR TO AMEND TEE RULES REGULATING THE FLORIDA EAR (ADVERTISING ISSUES)

CASE NO. 74,987

COMMENTS OF FRANK MALLORY SHOOSTER, P.A. IN OPPOSITION TO THE PETITION

Our Experience with Yellow Page Advertising

We are a small civil litigation firm whose practice emphasizes plaintiff's personal injury, civil rights and commercial work. Many of our clients find their way to us through the Yellow Pages, though most of our work continues to come from personal referrals and repeat business.

We are proud that we have been able to help so many people, and we are not ashamed that we depend on bringing in new cases to survive and prosper. Advertising is important to our livelihood: so important that we have invested substantial time over the years learning about marketing in general and lawyer advertising in particular.

w/call w/partygate in o.a.

Having experimented with different copy, layouts, and graphics, we have found that the most effective advertising is straight-forward, informative advertising. You will not find us depicting accident victims, cartoon characters, moneybags or the like. Our current ad contains separate paragraphs highlighting our experience, credentials, accomplishments, and so on. In fact, we have received so many compliments from callers telling us how professional it is, we run reprints of it for use as a

brochure that we hand out in our reception room.

Judging from press reviews and articles in the Florida Bar News, most of the controversy about the proposed rules is over their expected impact on TV advertising. Virtually nothing has been said about Yellow Page advertising, with the exception of the rules intended to eliminate so-called "alphabet abuse." Although we have our own thoughts about the wisdom of the petition as applied to the media in general, our comments are directed to Yellow Page advertising. Users of the other media are better able than we to voice their concerns.

Consumer Benefits of Yellow Page Advertising

Unlike any other major advertising medium, the Yellow Pages is non-intrusive. You only look in it when you need it. In Broward County, our primary area of practice, a glance in the phone book reveals 60 pages listing almost 4000 lawyers. No other medium in Broward County offers such a comprehensive listing that reaches so many people. Only a small percentage advertise, but those who do make it easier, in theory, for the consumer to compare the services offered.

The Realities of Yellow Page Advertising

In reality, consumers first suffer information overload as they try to sort out the lawyers handling their type of problem. After sorting them out, it becomes extremely frustrating to make reasoned comparisons from one attorney to the next, when there are hundreds in any one category. Information content is minimal since few firms get into credentials or any other meaningful

information beyond areas of practice. With few exceptions, the only obvious differences among the lawyers are their apparent ethnic group or their address. It's no wonder that consumers are confused about where to turn, because advertisers generally do little to aid them. Information overload becomes information starvation.

With so many firms vying for the same reader, most advertisers zero-in on gaining the consumer's attention, an expensive endeavor. The Yellow Pages arranges ads by size first, and within each size category, by alphabetical order. A full page ad in the Fort Lauderdale Yellow Pages runs upwards of $18,000 per year.

Buying the most expensive ad doesn't guarantee consumer attention. If you were born with the wrong name, a potential client may have to turn some 20 pages before reaching your ad, even if you bought the most expensive ad. You might get around the problem with a fictitious name, but that doesn't work well either since you find more than a dozen firms using names like "A Able Something or Other", and leaving you with the option of joining the pack or using an even more ridiculous name like Aardvark.

Realizing that the right name isn't going to totally solve the problem, you look to eye-catching graphics, huge headlines, or red print, the latter at extra cost. Graphics and headlines are also costly, because they use up space. If all goes well, prospective clients see your ad, but that's not enough. Now you

have to communicate something of value to them. Otherwise they keep turning pages. More often than not, they do just that, because many ads look alike: "Injured? Call now for a free consultation."

You would think that the Bar's proposals would actually improve the situation, by encouraging lawyers to run more informative ads. However, the proposed rules would have the opposite effect, particularly the proposed rules on self-laudatory statements, testimonials, and illustrations. These rules will make Yellow Page advertising less informative, and thus less effective. That means not only fewr responses for the advertisers, but less benefit to the consumer. The less effective the message, the greater the cost to reach the same market. Faced with increased costs and decreased effectiveness, some lawyers will choose to advertise more and will attempt to pass this cost on to consumers. Other lawyers will advertise less--meaning less information to an already information-starved consumer. Either way the consumer loses.

The Evil of Putting Your Best Foot Forward?

Take the proposed ban on self-laudatory statements. There is a big difference between putting your best foot forward, and sticking it out to trip the public on false promises. The former is proper, indeed desirable; the latter reprehensible, and punishable under the existing rules. On the other hand, there's a fine line between puffery and self-laudatory facts. It's true puffers can get carried away with their own self-inflated

opinions, but they don't fool anyone; they just waste valuable ad space by foregoing the opportunity to communicate valuable information. That's why puffery isn't illegal--it's harmless drivel.

Prospective clients have a legitimate interest in knowing how a law firm sizes up its own strengths. Most lawyers know their own strengths and weaknesses better than any single client. Yet the Bar would prevent the consumer from learning this valuable information in an advertisement. A firm's view of itself can be far more valuable to the consumer than say, a friend's referral. A friend may think he was treated well, but cannot really know whether he got a good result, and cannot really say that the firm would be as competent in some other area.

Granted, if I were looking for a lawyer, I want some independent information too. An "AV" Martindale-Hubbell rating is an independent expression of quality which lawyers and businesses rely on every day. Under the proposed rules, if we are ever earn an AV rating, we would risk forfeiting our fees should we commit the gross faux pas of letting the public know about it in a yellow page ad. Yet this is precisely the kind of information which benefits the consumer.

The Value of Testimonials

If I were searching for legal help, and I did not want to rely on a law firm's self-serving statements, I just might benefit from the words of a satisfied client. Our firm has never

used a testimonial, but we do not see why we should be prohibited from quoting an unsolicited, complimentary letter with a client's permission.

Lay clients are in the best position to know that they were treated promptly, courteously, and respectfully. Their testimonial is worth the same as a neighbor's recommendation. Suppose the client also happens to have special knowledge, e.g. the client is also an attorney. Maybe the client is someone whom the public regards as especially trustworthy. In these cases the testimonial is even more beneficial than the neighbor's opinion. In effect, the Commission says it's OK to ask your neighbor Mrs. Smith in person, but it's not OK if you read her opinion in a newspaper.

Consumers are smart enough to know how much or how little weight to attach to a testimonial, so the Bar should not be concerned about the football heroes and movie stars. Is it not hypocritical for lawyers to praise the intelligence and wisdom of lay juries in determining the veracity of witnesses while claiming that they lack the same virtues when it comes to interpreting a simple testimonial? Any judge will tell you that it goes to weight, not admissibility.

The issue is not the speaker but the message. If the lawyer uses a testimonial to create a false or misleading impression--that is already prohibited by the existing rules, and if not it should be.

A Picture vs. A Thousand Words

The Bar wants to censor "promotional or motivational" illustrations. Now these illustrations are no different than promotional or motivational text, which is inherent to advertising. It is intellectually dishonest to pretend otherwise. So why does the Bar single out illustrations? Because the Bar's High Priests of good taste know what's good for the rest of us.

There is nothing wrong in promoting a good cause, or good service. Not infrequently victims who need and deserve compensation are too intimidated by the system, or too lacking in self-esteem to take on a corporate Goliath. Motivating an otherwise reluctant victim to seek justice is perfectly ethical. Banning such illustrations will again only dilute the effectiveness of the message.

By the way, is a photograph an illustration? Just risk forfeiting your fees and you can find out. Some illustrations don't inform at all, they merely grab attention. Is an illustration of your office informative? Who knows? Certainly not the Bar. We are as offended by tacky graphics as much as anyone. But we don't need anyone to tell us what we like or don't like--and neither does the public. And when consumers find an ad tasteless or offensive, they still benefit by knowing whom to avoid.

If the Blue Pencil Pushers Have It Their Way

We resent being treated like children, but the Bar wants to do just that, by forcing us to file ads for review by its Censors, and to pay $25.00 a pop for the privilege of their

insights. In almost seven years of advertising, we have never received a single complaint. I don't want the expense, and I don't want the Thought Police looking over my shoulder. If we say something intentionally unfair, misleading or deceptive, we deserve to be punished, and depending on the gravity of the offense, disbarment or even criminal sanctions may be warranted. But again, these laws already exist.

If the Bar is going to be consistent about requiring that ads be filed, the next step will be requiring lawyers to file transcripts whenever they "shmooze" at the country club. This of course will never happen, because there's nothing unseemly about casually handing a business card at the request of someone sipping white wine next to you at a cocktail party; you know, like someone who just happens to overhear your spouse discuss your latest courtroom victory. After all, this is how one traditionally maintains the dignity of the profession.

There's nothing wrong, and probably everything right, about a voluntary program in which lawyers could, at their own expense, obtain an advance opinion on the legality of an ad. But it's downright un-American to require filing ads with the Bar. In this year alone, we have witnessed hundreds of millions of people the world over demanding freedom of expression, from the Gdansk shipyards to the Brandenburg gate, from Tiananmen Square to the the streets of Bucharest, from the boat people of Hong Kong to the slums of Santiago. How many thousands traded their lives for worshipping the Goddess of Liberty? Meanwhile we, the people

with the freedom of expression so many others are dying for, are about to muzzle the very institution entrusted with protecting free expression. Is this the civics lesson we want to teach our children?

You can call it exaggeration when all they are talking about is toning down the ad for your garden-variety accident case, but tomorrow the same blue-pencil pushers will act as a deterrent to representation when, some future government, reacting to some future crisis, tries to crush the civil rights of the latest out-of-fashion minority group. When you silence a society's lawyers, you silence their Thomas Jeffersons and their Abraham Lincoln's, not just their high profile advertisers.

Legal Fictions: Or Who's Kidding Who?

The Bar wants to stop "alphabet abuse," the practice of using fictitious names to gain an alphabetical advantage in the yellow pages. The present system is unfair but the alternative is worse: As long as the Yellow Pages lists attorneys in alphabetical order, then the advantage is to the top of the list. If attorney Zuckerman purchases the largest ad they sell, he would still be twenty one pages back in the Fort Lauderdale directory. This is no small matter when the charge is over $18,000.00 per year. An advantage will exist with or without the rule: in the one case to attorneys who Create an advantageous name, in the other to attorneys born with one. Either way is unfair.

We live in a free enterprise system, not a caste system. If

the proposal is adopted, lawyers will literally start hiring associates because they like the sound of their name--especially the sweet lilting sound of a surname like Aaron.

Lawyers who use fictitious names for advertising dislike the system as much as anyone. But the alternative is worse. In order for a Washington to get the same benefit from an ad as an Adams, he would have to spend much more, since he would need more exposure to make up for his worse position. Washington can call himself A Able Washington to even out the playing field, but under the proposed rule he has to pay dearly for the indignity. Granted, as more and more law firms use a fictitious name to get to the top of the pack, they push those who refrain further and further back, which is also unfair, since it forces them to switch to a fictitious name as well just to keep from falling behind. If all advertisers use a fictitious name, the advantage will be to those who picked a certain nonsense name before their competitors. So the present system is hardly perfect.

This is unfortunate because if we could put aside our blinders about the propriety of using fictitious names at all, we would see that they could actually benefit the public as well as our profession. A fictitious name can be much more informative than a string of surnames. Compare Budget Legal Center with Mergers and Acquisitions International, or Advocates for Victim's Rights with Corporations-R-People-2, P.A.

Lawyers may well enhance their image if they start using fictitious names. Using surnames to identify law firms may

contribute to the public perception of lawyers as egomaniacs who are more interested in promoting themselves than their clients. It also encourages the public to select a lawyer by ethnicity rather than expertise. The medical profession has long-used such names like "Institute" without any public outcry. Quite the contrary. The medical profession outscores us every time in public opinion polls. If law firms start calling themselves names like "Institute", maybe they will start acting like Institutes--by sponsoring educational programs and rendering more pro bono services.

That does not mean we will not see tacky names. But whether it's garish, gaudy, vulgar, or tawdry, it's a matter of personal opinion protected by the First Amendment, not something for regulation by Bar censors. "Aardvark" may be silly, but it's hardly deceptive. Some people will never hire the Aardvarks of the world while others will admire their resourcefulness and willingness to buck tradition.

The solution to nonsense names is not tampering with our precious right of free speech. All that is needed is a change in the manner by which the Yellow Pages allocates space. For example: (1) first come, first serve; (2) A to z one year, Z to A the next; (3) random placement; or (4) a premium charge for premium position. Once the Yellow Pages acts, you can rest assured that Aardvark & Co. will change their name. But if the proposal is adopted, some enterprising, if shameless, lawyer just might ask a court to change his real name to Aardvark.

The petition attempts to sidestep the issue, by pretending to permit the continued use of fictitious names provided that a fictitious name used in the telephone directly is also used on the firm's letterhead, pleadings, and office signs--apparently on the claim that this will somehow eliminate a false or deceptive trade practice. This rule will effectively ban all the nonsense names, and many more. That is because few self-respecting attorneys would want judges or peers to see "A AA Achen Able Advocacy Law Offices of Smith & Jones, P.A." on their letterhead, pleadings, or office door. Though not quite the epitome of what we traditionally call "professionalism," names like that comprise 99 percent of the fictitious names you find in the phone book. You find the same kind of names under professions like psychologists, chiropractors, insurance agents, mortgage brokers, and real estate agents. With the possible exception of insurance agents, all of these professionals enjoy reputations better than ours. The fact is that the public expects to find such names for businesses which depend on Yellow Page advertising, and no one complains--except the Bar.

ABC Legal Services is no more or less descriptive than a traditional name like Cadaver, Golf, and Boss, particularly where Cadaver's dead, Golf's retired, and Boss no longer practices law because he is too busy managing the firm. How many traditional firms who wouldn't be caught dead using a fictitious name list deceased partners for good will value? In some firms, each name partner is a dead partner, a fiction if there ever was one. A

trade name is not inherently false or deceptive merely because it is used in one setting but not all other settings. The Yellow Pages may establish its own standards for accepting fictitious names, such as the Southern Bell Yellow Page requirement that the name be used in three settings. Violating its standards might rise to the level of a false or deceptive practice, but that is not the issue here.

Florida's fictitious name statute, F.S. 865.09 was enacted for the purpose of ensuring that businesses could not hide behind a fictitious name to avoid accountability for their actions. By requiring that the fictitious name be registered in the county where it is to be used, anyone wronged by the business can check the public records to find the individual(s) or entity responsible. Nothing in the fictitious name statute says that a business can have only one name or that by using a fictitious name it is not permitted to use its corporate name in other settings as the business deems fit.

Many businesses use more than one trade name, depending on the area or application. When a company has more than one line of business, it will frequently conduct one business under one name, and another under another name. Nobody is deceived as anybody has the right and the ability to check the public records. Indeed, businesses buy and sell the rights to use business names all the time. When law firms merge, they use some names in certain states, and other names in other states.

Nowhere does the statute state that a business or profession

can only be undertaken in one name. The very notion that corporate entities are permitted to use fictitious names at all belies the notion that you can only use one name. If so, the law would require the corporation to change its corporate name rather than permit the corporation to file for a fictitious name.

Neither Florida's unfair and deceptive trade practices statute, F.S. 501 et seq., nor its false advertising statute, F.S. 817.06, has ever been used to prevent businesses from doing business under more than one name. I cannot imagine any lawyer in this state advising a client using more than one name to cease and desist for that reason alone.

In the case of law firms advertising in the Yellow Pages, no deception or confusion occurs where the law firm identifies itself by both names in equal type size in the same advertisement. A cursory examination of law firms using fictitious names in the Yellow Pages shows that this is precisely what happens in virtually every case. Even if the law firm chooses to omit its "real" name, it is still no more and no less deceptive than any other business using a fictitious name.

The Real Cause of Jury Pollution...

and What to Do About It

The anti-advertisers argue that the negative effect of advertising on the right of plaintiffs to get a fair trial outweighs any beneficial effect in educating the public, such as the now pervasive message that legal help is often available on a contingent fee basis.

The anti-advertisers claim that appeals to greed harm all plaintiffs and their lawyers, yet an argument can be made that such advertising serves a beneficial purpose, by informing jurors that plaintiff's attorneys are compensated by the size of the recovery. Jurors have every right to be concerned by such a system, just as they should question the motive of anybody who walks into court demanding money. Could it be that the anti-advertisers are afraid of the truth?

Then again, defense counsel are not exactly detached either: institutional clients expect results too--particularly after spending a small fortune mounting a vigorous defense. In other words, juries should maintain a healthy skepticism about each attorney and each party. Perhaps it's time to reexamine prohibitions in voir dire on discussing the financial relationship between parties and their counsel.

Absent radical change in the law, plaintiffs' counsel can still use voir dire to tackle the greed issue by reminding the jury that greed is a two-edged sword. Similar self-interest is present when an obstinate defendant refuses to pay just compensation to an innocent victim.

The best way to show a jury that you and your client are not just trying to win the lottery is to be honest and fair with them. Show them that you value your integrity more than winning.

Jury pollution is not caused by advertising; it's caused by lack of information. If advertising contributes to juror misperceptions about the civil justice system or the insurance

crisis, then its our job as trial lawyers to educate them. In other words, jurors need more information not less. You can't erase a message already embedded in a juror's memory merely by controlling advertising.

Advertising Can Improve Our Professional Image

Its ludicrous to say America survived without legal advertising for 200 years. Maybe the wealthy and mighty survived without legal advertising, but the poor and dispossessed went without lawyers most of the time. Even today, they suffer from inadequate access to legal representation. The Federal Trade Commission has demonstrated that advertising has led to lower prices and greater access to legal help.

If the Bar is truly serious about helping us improve our professional image, it would be encouraging public education rather than chilling it. We need help. Seminars, handbooks, and survey results need to be disseminated to lawyers, showing us how to make effective, informative ads. Teach lawyers that the best way to help themselves is to help consumers learn how lawyers can help them. That way everybody benefits--except the blue pencii pushers. You can't please everybody 'in a free society.

Respectfully Submitted,

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