IN THE SUPREME COURT OF FLORIDA

CASE NO: 74,987

THE FLORIDA BAR
RE: AMENDMENTS TO THE
RULES REGULATING THE
FLORIDA BAR - ADVERTISING ISSUES

DADE COUNTY TRIAL LAWYERS' RESPONSE IN SUPPORT OF PROPOSED FLORIDA BAR REGULATIONS ON ATTORNEY ADVERTISING

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On Behalf of the Dade County
Trial Lawyers Association

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INTRODUCTION

The Dade County Trial Lawyers Association [DCTLA] is a voluntary organization of over 400 attorneys, who specialize in plaintiffs' trial practice in Dade County, Florida. In representing the group of individuals, who would perhaps be most affected by the Florida Bar's proposed Regulations on Advertising, the Dade County Trial Lawyers Association urges this Court to approve the proposed Amendments. As indicated herein, the DCTLA believes that there is an urgent need for these regulations and that the particular guidelines proposed by the Florida Bar clearly fall within the constitutional parameters set forth by the United States Supreme Court.

Although the DCTLA urges the adoption of the proposed Amendments in their entirety, it has limited its comments in this brief in support of those proposals relating to the regulation of television advertising.

A. THE PROPOSED BAR REGULATIONS ON TELEVISION ADVERTISING DO NOT VIOLATE THE FIRST AMENDMENT AS INTERPRETED BY PRIOR U.S. SUPREME COURT DECISIONS

Any discussion of attorney advertising must necessarily focus on the United States Supreme Court's landmark decision in Bates v. State Bar Association of Arizona, 433 U.S. 350 (1977) and its five progeny: Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), In Re Primus, 436 U.S. 412 (1978), In Re R.M.J., 455 U.S. 191 (1982), Zauderer v. Office of Diciplinary Council of The Supreme Court of Ohio, 471 U.S. 626 (1975) and most recently Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988).

These six decisions set forth the following express parameters for state regulation of attorney advertising by providing that states may not blanketly prevent attorneys from:

(1) Advertising the cost of certain routine legal services in the print media, Bates, supra,

(2) Advertising an accurate listing of an attorney's area of practice, either through general mailings, announcements to specific targeted groups, newspaper ads or telephone listings, In Re: R.M.J., supra,

(3) Advising target portions of the public of their rights to pursue particular types of cases (i.e. Dalcon Shield users) and the attorneys' willingness to handle said litigation, Zauderer, supra,

(4) Directly soliciting through the mail clients with a particular problem (i.e. impending foreclosure), Shapero, supra, or

(5) Directly soliciting prospective clients in person, where the attorney is motivated by the desire to promote political and ideological goals, rather than for purely pecuniary gain. In Re: Primus, supra.

It is immediately apparent that each of these decisions on attorney advertising, with the exception of the in-person solicitation cases, have dealt with advertising in the print media. The distinctions between print advertising and television

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'For a more detailed discussion of these cases, see R. Peltz, Legal Advertising - Opening Pandora's Box, XIX Stetson Law Review 43 (Dec. 1989).

broadcasts have been repeatedly noted by the Court in a variety of different contexts. In Bates, supra at p. 384, the majority warned that "the special problems of advertising on the electronic broadcast media will warrant special consideration," an admonition that was repeated again in In Re R.M.J., supra. Similarly, in Shapero, supra at 1922, the majority also observed that "[i]n assessing the potential for overreaching and undue influence, the mode of communication makes all the difference."

Other Supreme Court cases in different contexts have also imposed different regulations on television from those placed upon the print media. For example, in discussing the various modes of communicating purely commercial speech in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981), the Court observed:

> Each method of communicating ideas is "a law on to itself" and that law must reflect the "differing natures, values, abuses and dangers" of each method.

Similarly, in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 748 (1978), the Court made it very clear that different types of communication were entitled to different degrees of protection, when it stated:

> "We have long recognized that each medium of expression presents special First Amendment problems and of all forms of communication, it is broadcasting that has received the most limited First Amendment protection . . .
>
> The reasons for these distinctions are complex . . . First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans . . .

Another reason for this distinction, which was expressed in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973) is that "the broadcast media impose unique and special problems not present in the traditional free speech case", including the reality that in a very real sense listeners and viewers constitute a "captive audience".

Perhaps even more importantly, however, the United States Supreme Court has already upheld similar, but even more restrictive, regulations in a series of cases involving Iowa's guidelines on television advertising, which were promulgated in response to Bates. The Iowa advertising rules sought to draw a line of demarcation between that advertising which informs the public and that which merely promotes the lawyer, prohibiting the latter as being outside the scope of the protections afforded to commercial speech. To this end, Iowa Disciplinary Rule 2-101(B) set forth 19 items of information which were "presumed to be informational and not solely promotional." These items included the attorney's name, field of practice, office hours, fees, date and place of bar admission, licenses and memberships in professional organizations and similar type information.

Although all attorney advertising is limited by the Iowa rules to the permissible areas of information, the regulations go on to place the following additional restrictions on television advertising:

> The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated on television. In the case of television,

> no visual display shall be allowed except that allowed in print as articulated by the announcer. . . . Any such information shall be presented in a dignified manner.

In violation of these rules, a law firm placed television ads featuring an actor and actress portraying a physician and nurse in an examining room advising injured persons to talk to a lawyer. Following this dramatization, the picture switched to another actress portraying a receptionist in a law firm, while the attorney's name, address, phone number and areas of practice were superimposed over the picture. The commercial concluded with a voice-over once again advising injured persons to call the firm, while listing its areas of specialty.

In Committee on Professional Ethics v. Humphrey, 355 N.W. 2d 565 (Iowa 1984), the Iowa Supreme Court concluded that these ads were misleading in two different ways. First, it found that the statement that personal injury cases were handled on a percentage basis with no charge for initial consultation misled prospective clients into believing that pursuing such cases was a cost free venture. Secondly, and much more importantly, the Court also found the ads to be misleading on the basis that they "implied" that the advertisers were experts in personal injury practice, when instead, they had little in the way of experience. One name partner had tried only six cases, all under the supervision of another law firm, while the other had virtually no trial experience.

After finding that the attorneys had violated the state's rules on television advertising, the Iowa Court next analyzed the constitutionality of its rules, concluding that Bates only condemned those regulations:

> . . . which amounted to restrictions on the flow of "relevant information needed to reach an informed decision" . . . The committee's position is that the Bates rationale does not apply to irrelevant information. Information is not relevant if it makes no contribution to informed decision making. In other words, prohibition of such information does not impede, in fact advances, the fostering of rational decision making and maintaining of the bar's professionalism. (Emphasis added).

Humphrey, supra at p. 570. Thus, the Court concluded that advertising which informs the public was permissible, while advertising which merely promotes the lawyer may be regulated, since it is outside the scope of the protections afforded to commercial speech.

The Iowa opinion was vacated by the United States Supreme Court the following year, with instructions to reconsider the case in light of its intervening decision in Zauderer. In its subsequent reconsideration, however, the Iowa Supreme Court reached the same conclusion and reaffirmed its prior decision. See Committee on Professional Ethics v. Humphrey, 377 N.W. 2d 643 (Iowa 1985). The Iowa Court concluded that unlike Bates and Zauderer, which protected information concerning the availability and cost of legal services, the subject television advertising was nothing more than "electronically conveyed image building."

This decision was once again appealed to the United States Supreme Court, which this time dismissed the appeal for want of a substantial federal question. Under the doctrine enunciated in Hicks v. Miranda, 422 U.S. 332 (1975) such an action constitutes a holding on the merits as to those questions properly before the Court, thereby upholding the Iowa regulations.

The approach taken by the Iowa court in allowing television advertising which informs the public, but prohibiting that which merely promotes the attorney, also is consistent with the Supreme Court's decision in Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980), which involved restrictions upon electric utility advertising during the midst of the "energy crisis." In this case, which was extensively relied upon in Zauderer, the Court concluded that commercial speech is afforded less constitutional protection than non-commercial communication, because:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. [Citations omitted]. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not actively inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it. . . (Emphasis added).

Central Hudson Gas, supra at p. 563. A similar conclusion was also reached by the Supreme Court in Friedman v. Rogers, 440 U.S. 1 (1979) in upholding a Texas ban on the use of trade names by optometrists.

This distinction between advertising, which is informational as opposed to that which is merely promotional, is also consistent with the rationale underlying the entire Bates line of cases. These decisions have been largely based upon the conclusion that the public has a First Amendment right to receive such information, rather than upon a recognition or creation of a First Amendment right inuring to the benefit of attorneys to make a profit. For example, in Ohralik, supra at page 459, the Court observed:

> A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the state's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests.

The Court further concluded that:

> The state bears a special responsibility for maintaining standards among members of the licensed professions. The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. While lawyers act in part as 'self-employed businessmen', they also act as 'trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.' . . .
>
> 'Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession.'

Ohralik, supra at page 460.

Although there is an obvious difference between in-person solicitation found in Ohralik and television advertising, the difference is one of degree. Many of the same policy arguments which militate against in-person solicitation apply equally as

well to television advertising. In considering the effect upon the public's perception of attorneys and their role in the administration of justice, the effect of mass media television advertising is much more insidious than that of in-person solicitation in the sense that advertising reaches a infinitely wider audience.

Another important aspect of the Humphrey cases, which is not readily apparent from the opinions themselves, was Iowa's creation of an evidentiary record to support its contentions that such restrictions were necessary, something that was lacking in most of the other lawyer advertising cases to reach the Supreme Court. The contents of the record was discussed in more detail by Iowa Supreme Court Chief Justice W. Ward Reynoldson in a subsequent article entitled "The Case Against Lawyer Advertising", ABA Journal (Jan. 1989) p. 60. Chief Justice Reynoldson noted that before the case even reached the Iowa Supreme Court, a complete evidentiary record was obtained, including a public survey on attitudes and opinions regarding advertising by law firms, which questioned respondents on their attitudes about lawyers, both before and after viewing television commercials. According to this survey:

> Following viewing the opinions dropped significantly with respect to those characteristics of a lawyer: trustworthy, from 71% to 14%; professional, from 71% to 21%; honest, from 65% to 14%; and dignified, from 45% to 14%.

A second public opinion survey was commissioned by the Iowa Bar Association prior to the state court's re-consideration of the case on remand. This survey reinforced the prior survey's conclusion that advertising lowered the public's perception of lawyers and contained the further additional highly troubling finding that a significant number of those surveyed were even willing to admit that they would be prejudiced against a party who retained an advertising lawyer if serving as jurors.

Like Iowa, the Florida Bar has also accumulated a substantial evidentiary record which supports the need to promulgate its proposed restrictions. As is discussed in detail in the next section of this Brief, in addition to its own survey involving the effects of solicitation on public opinion, the Florida Bar has also utilized another detailed survey conducted on behalf of the Academy of Florida Trial Lawyers in 1988 specifically dealing with attorney advertising on television. The Bar has compiled considerable additional evidence of the problems and abuses caused by such advertising as well. Thus, there is ample support both factually and legally for giving separate treatment to television advertising in considering permissible regulations under the First Amendment.

The proposed Florida Bar regulations on television advertising are even less restrictive than those approved in Humphrey. Although encouraging informational advertising, the Floria proposals do not go quite as far as the Iowa rules in

attempting to prohibit all forms of **"promotional"** advertising and instead attempt to strike a balance. This attitude is seen in the Comment to proposed Rule 4-7.2, which states in part:

> The purpose of advertising should be not merely promotion of a particular lawyer or law firm, but also the provision to the public of useful information about legal rights and needs and the availability in terms of legal services. (Emphasis added).

Unlike those restrictions in the print media struck down in the Bates line of cases, it was also important to note that the Florida regulations do not attempt to blanketly prevent attorneys from television advertising. Instead, the particular regulations are directly related to specific abuses in such advertising and seek to correct these abuses in the least restrictive manner.

For the foregoing reasons, it is clear that the proposed Florida Bar regulations on television advertising clearly pass constitutional muster.

B. EMPIRICAL EVIDENCE ON THE EFFECTS OF TELEVISION ADVERTISING CLEARLY SUPPORT THE NEED FOR THE BAR'S PROPOSED REGULATIONS

Contrary to the prediction in Bates, the substantial majority of legal advertising has not involved the publication of routine legal services in the print media, but rather television advertising. According to the Television Bureau of Advertising, nearly $59 million dollars was spent by attorneys on television advertising in the year 1987, which represented a $12 million dollar increase over the preceding year.[2] Such advertising has

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[2] New York Times, Propriety on Trial in Lawyers Ads (March 21, 1988), p. 21.

increased annually from a mere $900,000 in 1978, making its greatest strides since 1983, growing by at least $10 million each year thereafter.

As is perhaps too readily apparent to anyone who watches television, the overwhelming majority of such advertising is geared to the personal injury practice. Such cases are almost always handled by attorneys on a contingency fee basis. Prior to Bates, the customary fee charged for handling such cases in South Florida was in the range of 33 1/3 to 40% of the total recovery. Despite the tremendous onslaught of personal injury advertising subsequent to Bates, the amount of such fees has not changed at all in practice. For example, compare Phillips v. Nationwide Mutual Ins. Co., 347 So. 2d 465 (Fla. 2d DCA 1977) and 610 Lincoln Rd, Inc. v. Kelner, 289 So. 2d 12 (Fla. 3d DCA 1974) with Kopplow & Flynn, P.A. v. Trude, 445 So. 2d 1065 (Fla. 3d DCA 1984), King v. Nelson, 362 So. 2d 727 (Fla. 2d DCA 1978), Sanchez v. Friesner, 477 So. 2d 66 (Fla. 2d DCA 1985), Stabinski, Funt & DeOliveira v. Alvarez, 490 So. 2d 159 (Fla. 3d DCA 1986).

In fact, this Court has recently determined the need to place a limitation upon such fees by its adoption of Rule 4-1.5 of the Rules Regulating the Florida Bar, which creates a sliding scale of fees for such cases. The need for such a limitation imposed by Court rule is clear evidence of the failure of advertising to lower the rates customarily charged in this area.

Although the allowance of attorneys to advertise their areas of specialty or interest, whether it be in a telephone directory or on television, has increased the flow of some information to consumers, the net positive effect of this information is minimal at best. Since advertising directed toward the "quality" of legal services is one of the few areas which can be permissibly prohibited under Bates, there is an inherent limitation on the type or value of information that can be conveyed to the consumer about the attorney's practice, other than to publicize his **"interest"** in handling a particular variety of case. In fact, the real irony of allowing attorneys to publicize their areas of "interest", while prohibiting advertising based upon **"quality"**, is the creation of an even greater risk of misleading the public, since there is often very little correlation between the attorney's desire or interest to handle a particular type of case and his ability to do so competently.

Many critics of legal advertising also point to the fact that present day television advertising is far different from that contemplated by the Supreme Court in Bates, where the attorneys had merely communicated a straightforward listing of their fees for various services. By contrast, television advertising of the '80s is not only virtually devoid of any discussion of the costs of the attorneys' services, but is also totally lacking in any type of useful information to benefit the consumer in choosing between attorneys to represent his particular interests. Instead, this advertising is designed

solely to induce people to retain the advertiser and not in any way to educate or inform the prospective client as originally envisioned by the U.S. Supreme Court. The lure of potentially large fees and instant wealth has also led to more and more aggressive advertising by marginally competent or inexperienced attorneys as in Humphrey.

These criticisms are borne out by a 1988 statewide scientific polling survey conducted by the Academy of Florida Trial Lawyers, which provides clear empirical evidence of advertising's failure to substantially improve the flow of information to the public. Only *27%* of the respondents to this survey, which was designed to test the public's perception of lawyers who advertise on television, felt that such advertising "either helps people understand their rights [or] informs people of the help available to them". Kitchens & Associates, Issue Analysis of Lawyer Advertising (1988).

Because of these problems, many individuals and organizations have expressed the belief that advertising, especially on television, has merely created a new class of business brokers, who do little more than to sign up the cases which they receive through advertising and then refer them out to attorneys specializing in trial practice. For example, the Dade County Trial Lawyers Association recently determined the need to prepare a public service phamplet entitled "How to Pick Your Attorney". [App. 1]. In this pamphlet, the DCTLA expressed the concern:

> . . . that mass media advertising merely promotes a particular lawyer without conveying any meaningful information to the public concerning the attorney's experience or qualifications.

Accordingly, the DCTLA set forth a brief listing of sample questions for consumers to ask their perspective attorneys in order to assist them in making an informed choice. The questions, which seek to elicit information typically excluded from such advertising, include:

1. Will your firm personally handle my case or will you refer my case to another law firm?
   a) If you intend on referring my case to another law firm, why will you do so?
   b) If you refer my case to another law firm, what will be your role in handling my case?
2. Which specific attorney(s) will prepare my case for trial?
3. In the event that a trial of my case is necessary, which specific attorney(s) will personally try my case?
4. With regard to the attorney(s), who will prepare and try my case, I would like to know:
   a) How long have they been licensed to practice law in Florida?
   b) Are they board certified?
   c) What experience do they have in preparing cases similar to mine?
   d) How many cases have they actually tried which are similar to mine.
   e) What legal and professional organizations are they members of?
   f) What is the extent of the continuing legal education courses they have taken in the past five years?
   g) Have they ever been reprimanded or suspended by any state from the practice of law?
5. How will you keep me advised as to the progress of my case?

If television advertising has not had any significant effect in either lowering attorneys' fees or improving the flow of meaningful information to consumers, what affect has it had? It does not take any great leap of faith to understand how

television ads, such as one for a divorce attorney showing a chain saw slicing the family couch in half and then turning omniously toward the family dog[3] or how another Wisconsin ad, in which a lawyer draped in jewels and gold chains rises from a pool, proclaiming that his low cost bankruptcy service will keep customers' heads above the water,[4] adversely affect the image of the profession and the ability of attorneys to act as officers of the court.

The statewide survey conducted by the Academy of Florida Trial Lawyers provides strong empirical evidence of the harm that such advertising has caused to the profession. According to this survey, 63% of the public have a favorable impression of attorneys in general compared to 27% with an unfavorable view and 10%, who are undecided. On the other hand, 69% of the general public have an unfavorable opinion of lawyers who advertise, compared to 23% favorable and 8% undecided. Thus, while lawyers in general have a five-to-two positive rating, television advertisers have a three-to-one negative rating.

The survey also reveals, however, that this high negative rating for television advertisers affects the remainder of the profession as well. For example, only 27% of the public consider legal advertising on television a "good public service", while

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[3]New York Times, Propriety on Trial in Lawyers Ads (March 21, 1988), p.30.

[4]USA Today, July 1, 1987, Opinion Column. Another noteworthy ad discussed in that article is one involving an attorney who offered clients a free ten-speed bicycle if he failed to obtain a DUI acquittal for them.

59% feel that it is "bad for the public [because] it makes all lawyers appear to be unethical and encourages unnecessary lawsuits." A majority of respondents, 55% to 36%, similarly felt that such advertising gives "all lawyers a bad image", while 70% stated that lawyers who advertise on television remind them of "used car salesmen". Thus, the unfortunate conclusion of the survey is that television advertising by attorneys not only lowers the credibility of the advertisers in the eyes of a substantial majority of the public, but also significantly impairs the public perception of all attorneys as well.

The results of the AFTL polling are very similar to those of the previously discussed Iowa survey utilized in Humphrey, as well as another Nevada study of the effects of television advertising on former jurors. See Myers, Attorney Advertising: The Effect on Juror Perceptions and Verdicts (1988). A similarly high 63% of the Nevada respondents expressed negative opinions toward television advertising by attorneys, while only 39% felt that such advertising helped to inform people of their legal rights and a still smaller 35%, considered it helpful in choosing an attorney. An even more remarkable finding of the study, however, was that 83% of the jurors rendered defense verdicts in cases where the plaintiff was represented by an advertiser, compared to only 40% of the jurors in cases where the plaintiff was represented by a non-advertising lawyer. None of the potential explanations for this tremendous discrepancy do much to advance the cause of those favoring advertising.

Similar findings resulted from a 1987 Florida Bar survey designed to measure public attitudes toward direct mail solicitation. See Magid Associates Attitudes and Opinions of Florida Residents Toward Direct Mail Advertising By Attorneys. (December 1987). Of those respondents who had received such advertisements, 80% did not believe that the ad was totally truthful. Almost as many surveyed, 71%, believe that direct mail advertising was designed to appeal to gullible or unstable people and violates the privacy of those who receive such advertising. A majority also believed that direct mail advertising promotes unwarranted and frivilous lawsuits and higher legal costs, while belittling the legal profession.

Perhaps even more importantly, 27% responded that their regard for the legal profession and the judicial process had been adversely affected as a result of such solicitations, while 11% admitted that direct mail advertising produce such concerns about competency and honesty in the legal profession that it could influence the way they would feel about lawyers or litigants if they were to serve as jurors in a civil trial. This latter figure, which corresponds to the nearly identical percentage in the Iowa surveys, is perhaps the most ominous of all in that regardless of their feelings, most persons are unwilling to express the highly unpopular and undesirable opinion that they could ever be biased jurors. Therefore, the number of people in fact holding this attitude is undoubtedly much higher.

III. CONCLUSION

Although there is no doubt that attorney advertising in some form is here to stay, it is equally as apparent that regulations - even significant ones - on such advertising are permissible, where they bear some reasonable relationship to a substantial state interest. Those regulations which have been stricken by the United States Supreme Court in the past have typically been either blanket prohibitions of certain types of advertising or regulations without any appropriate evidentiary record to support their need. Unlike those cases, however, the Florida Bar's proposed regulations are specifically designed to respond to specific advertising problems and abuses and have a very substantial evidentary record to support their need.

In this regard, the proposed Florida Bar regulations do not in any way restrict the flow of information to the public, but seek instead to restrict only that advertising, which is purely promotional in nature, in an effort to prevent the public from being misled. Since the proposed regulations clearly pass the constitutional requirements set forth by the United States Supreme Court in the Bates line of cases and are based upon a very specific need, it is respectfully submitted that this Court should promulgate them.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of December, 1989 to THE FLORIDA BAR c/o STEPHEN N. ZACK, ESQ., President, 175 N.W. 1st Avenue, 26th Floor, Courthouse Center, Miami, FL 33128.

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