

0/a 4-5-90

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 74,987

FILED
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MAR 28 1990

CLERK, SUPREME COURT

MEMORANDUM BRIEF OF HYATT LEGAL SERVICES

Deputy Clerk

OPPOSING A SINGLE PROVISION OF THE PETITION OF
THE FLORIDA BAR TO AMEND THE RULES REGULATING
LAWYER ADVERTISING

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PRELIMINARY STATEMENT CONCERNING THIS
MEMORANDUM BRIEF AND ITS LIMITATIONS

This Memorandum Brief submitted in behalf of Hyatt Legal Services law firm (Hyatt) addresses only the single provision of the proposed amendment submitted by The Florida Bar (the Bar), namely, that single sentence of the proposed amendment of Rule 4-7.2(b) which states:

Further, the lawyer who personally appears in any advertising must be a member of The Florida Bar.

Because the record consists of that submitted by the Bar, factual statements of necessity will appear herein which do not appear in the Bar's record. Such is deemed necessary due to the lack of proceedings in a judicial forum below and the nature of the proceedings in this court.

Nor does this brief purport to be the product of exhaustive research of all applicable legal authorities; rather, it accepts and argues those authorities cited and argued in the Bar's brief, plus a few additional decisions of the United States Supreme Court which are in point. The author of this brief concludes that the record submitted by the Bar, considered in the light of the authorities cited by the Bar, plus the additional authorities mentioned herein, mitigate against the adoption of the above-quoted provision of the amendment.

As to provisions of the proposed amendment other than that quoted above, Hyatt makes no presentation here in opposition or support.

STATEMENT OF FACTS AND THE CASE

Hyatt Legal Services (Hyatt) is one of the largest law firms in the United States. It is an interstate law firm with 171 offices and 450 lawyers in 19 states and the District of Columbia. Hyatt has had offices in Florida since August of 1985. Currently it has 23 lawyers in eight offices in Florida located in Orlando, Tampa and St. Petersburg. All lawyers in Hyatt's Florida offices are members of The Florida Bar.

Hyatt was founded in Ohio by Joel Hyatt, senior partner, and member of the Bar of the State of Ohio, who is the spokesperson for the firm in all 19 states and the District of Columbia.

Hyatt uses television as the medium of advertising the availability of its legal services, and Joel Hyatt is the single person who appears or speaks in Hyatt television advertisements. The ethics counsel of The Florida Bar has examined the dialogue of Hyatt's television advertising and has informed Hyatt that it is in compliance with Florida's Code of Professional Responsibility.

None of the jurisdictions in which Hyatt has offices require that the spokesperson for the firm be a member of the Bar of that jurisdiction. The adoption of the proposed amendment to which this brief is directed would result in Florida being the only jurisdiction in which Hyatt has offices imposing such a restriction and would be disruptive of Hyatt's operations and the offering of its legal services to the public, as well as imposing considerable increased costs on Hyatt.

Hyatt was founded for the purpose of making high quality legal services conveniently available and affordable to the large middle income segment of our population. The location of Hyatt's offices, the office hours, the training of its lawyer and its advertising programs have been consistent for that purpose. The Hyatt approach has been successful and in 1989 the firm provided legal counseling to **225,000** clients nationwide, including 9,000 in Florida.

The imposition of the proposed rule change requiring that the television advertising spokesperson of the law firm's Florida advertisements be a member of The Florida Bar would prevent the firm's senior partner, Joel Hyatt, from performing that function for Hyatt in Florida. Such would not only be disruptive and expensive to Hyatt, but would be a disservice to many persons in the vicinity of Hyatt's Florida offices in need of legal services and would serve no substantial state interest.

There has been no showing of impairment or likelihood or danger of impairment of a substantial state interest in Florida stemming from Joel Hyatt, a member of the Hyatt law firm and of the Bar of the State of Ohio, continuing to serve as Hyatt's advertising spokesperson in Florida. The record of the Bar filed with the court provides no facts and the arguments of the Bar's brief addresses no issues of a need in Florida of a rule requiring television advertising spokespersons who are members of the law firm and in whose behalf they appear and speak to be members of The Florida Bar.

The next succeeding sentence to the provisions of the proposed amendment to which this brief is addressed states:

Under no circumstances shall any person appear in any advertisement other than a lawyer in the law firm which is advertising.

Existing Rule of Professional Conduct 4-7.6(b), which would not be changed by the proposed rule, but is renumbered, states that a law firm in more than one jurisdiction may use the same name in each jurisdiction. Existing Rules of Professional Conduct, including specifically Rule 4-5.1, makes lawyers in a law firm responsible for violation of the Rules of Professional Conduct by other lawyers of the firm which the first orders or ratifies, and the rule imposes on partners the duty to make reasonable efforts to insure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

POINTS ARGUED

The specific points argued by this brief are that the single provision of proposed amendment 4-7.2(b) which would require that any person appearing on the television screen must be a member of The Florida Bar should be rejected, because:

Point One: Neither the record submitted by the Bar nor the arguments made by the brief of the Bar provides facts or addresses the issue of need in Florida of a rule suppressing by banning otherwise lawful and permissible commercial speech expressions of a lawyer spokesperson consisting of television advertisement of the availability of legal services at the Florida offices of the law firm of which the spokesperson is a member, solely because the spokesperson is not a member of The Florida Bar.

Point Two: If indeed there is a substantial state interest to be served by the suppression by banning of otherwise lawful and permissible commercial speech expressions consisting of television advertisements of the availability of legal services in Florida, except that articulated by members of The Florida Bar, the Bar has failed to show that the ban the proposed amendment would impose is not more extensive than necessary to further such state interest.

Point Three: There has been no showing by the Bar that the provision of the proposed amendment which would suppress by banning by all who are not members of The Florida Bar expressions of otherwise lawful and permissible commercial speech consisting of television advertisements of the availability of legal services in

Florida, is a reasonable means (reasonable fit) of accomplishing a substantial state interest.

Point Four: The provision of the proposed amendments which requires that any person appearing in television advertising be a member of The Florida Bar would deprive Joel Hyatt and other non-Florida resident members of the Hyatt Legal Services law firm who are not members of The Florida Bar of privileges and rights protected by the privileges and immunities clause (Article IV, Section 2) and the due process and equal protection of laws provision (Article XIV, Section 1) of the United States Constitution.

SUMMARY OF ARGUMENTS

The Bar, by its petition, seeks approval of amendments of the Rules Regulating The Florida Bar relating to lawyer advertising of legal services and submits to the court the proposed amendments which it says respond to the need discovered by the Bar's Commission on Advertising and Solicitation (Commission).

The Bar, by its brief, argues that information consumers need in making decisions as to the need for and selecting a competent lawyer is not conveyed by much current advertising, that much of it is "nonrational and often misleading." (Brief of The Florida Bar at 1-2, 19)

The Bar argues that information assembled by its Commission establishes a substantial state interest advanced by the regulation of lawyer advertising and that the provisions of the proposed rule amendments are a "reasonable fit" of the rule regulating commercial speech and the state interest it advances.

The Bar argues that the United States Supreme Court in Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. ___, 109 S. Ct. 3028 (1989) (hereinafter SUNY), established the "reasonable fit" rule as to the applicability of First Amendment free speech provisions to commercial speech expressions such as lawyer advertising. The Bar argues that since the SUNY decision, the "least restrictive" regulation test, that is, the least restrictive regulation which will accomplish the substantial state interest

being advanced pronounced by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y., **447 U.S. 557 (1990)** (hereinafter Central Hudson), is no longer applicable in applying the First Amendment free speech clause to commercial speech.

Hyatt argues and it is undisputed that lawyer advertising is commercial speech expression protected by the free speech clause of the first amendment as announced in Bates v. State Bar of Ariz., **433 U.S. 350 (1977)**, and that unless Hyatt's advertising statements by its senior partner and spokesperson Joel Hyatt are false, deceptive, misleading or otherwise run afoul of lawful regulations, advertisements cannot be prohibited by rules regulating lawyer advertising in Florida, simply because Joel Hyatt is not a member of The Florida Bar. Hyatt furthers argues that the Bar's record before the Court in no wise discloses false, deceptive, misleading or otherwise prohibited advertising activities by Hyatt in Florida, although all of Hyatt's Florida television advertising has consisted entirely of appearances and statements by senior partner Joel Hyatt.

Hyatt further argues that respecting the provisions of the Bar's proposed rule amendment which would prevent Hyatt's senior partner Joel Hyatt from being the firm's television advertising spokesperson in Florida solely because he is not a member of The Florida Bar will not pass First Amendment muster under the rules of either SUNY or Central Hudson, and further that SUNY is

inapplicable because facts are not before the court on which to invoke the SUNY "reasonable fit" test.

Hyatt further argues that the provisions of the proposed rule to which this brief is directed, if adopted and enforced against Hyatt, would deprive Joel Hyatt and other non-Florida resident members of the Hyatt law firm who are not members of The Florida Bar of the benefits of the privileges and immunities clause (Article IV, Section 2), and the equal protection of laws provision (Article XIV, Section 1) of the United States Constitution.

Hyatt argues that under the privileges and immunities pronouncements of the United States Supreme Court in New Hampshire v. Piper, 470 U.S. 274 (1984), and Supreme Court of Va. v. Friedman, 487 U.S. ___, 101 L. Ed. 2d 56 (1988), a state may discriminate against non-residents only when its reasons are substantial and the difference in treatment bears a close or substantial relationship to those reasons.

ARGUMENT

POINT ONE

NEITHER THE RECORD SUBMITTED BY THE BAR NOR THE ARGUMENTS MADE BY THE BRIEF OF THE BAR PROVIDES FACTS OR ADDRESSES THE ISSUE OF NEED IN FLORIDA OF A RULE SUPPRESSING BY BANNING OTHERWISE LAWFUL AND PERMISSIBLE COMMERCIAL SPEECH EXPRESSIONS OF A LAWYER SPOKESPERSON CONSISTING OF TELEVISION ADVERTISEMENT OF THE AVAILABILITY OF LEGAL SERVICES AT THE FLORIDA OFFICES OF THE LAW FIRM OF WHICH THE SPOKESPERSON IS A MEMBER, SOLELY BECAUSE THE SPOKESPERSON IS NOT A MEMBER OF THE FLORIDA BAR.

The provisions of the proposed amendment to which this brief is addressed is that part of Rule 4-7.2(b) relating to television advertising of legal services which states:

Further, the lawyer who personally appears in any advertising must be a member of The Florida Bar.

The brief of the Bar makes no argument supporting the quoted provisions of the proposed rule, nor does the record submitted by the Bar present facts which would justify or necessitate such a requirement.

Joel Hyatt, the Hyatt law firm senior and founding partner is the sole advertising spokesperson for the Hyatt law firm in all of the 20 jurisdictions (19 states and the District of Columbia) where Hyatt has offices. The effect of the quoted portion of the proposed rule would be to prevent Joel Hyatt from being the Hyatt law firm's advertising spokesperson in Florida and to deny the firm the use of his services in that respect.

The sentence which follows the above-quoted proposed rule states:

Under no circumstances shall any person appear in any advertisement other than a lawyer in the law firm which is advertising.

Existing Rule of Professional Conduct 4-5.1 in pertinent part states:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

* * * * *

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when consequences can be avoided or mitigated but fails to take reasonable remedial action.

It is readily apparent that the inclusion in the rules regulating lawyer television advertising of the provision that the person appearing in the advertisement must be a member of The Florida Bar is unnecessary and will serve no useful purpose. The proposed rule has the additional requirement that the person appearing in any advertisement be a lawyer of the law firm which is advertising. Existing Rule 4-5.1 affords both the court and the Bar the means to assure compliance with provisions of the rule regulating advertising. The proposed rule's requirement of Florida Bar membership by no means assures that legal service

advertisements of a law firm comply with the rule's advertising provisions. The content of the television ads will not be changed by the omission of the provision, only the presenter would be changed. With equal or greater logic, it could be argued that the writer of the television script should be a member of the Florida bar, but obviously there is little logic favoring either such proposition.

None other of the 20 jurisdictions in which Hyatt has offices have rules requiring that the spokesperson on the television screen be a member of the Bar of the jurisdiction where legal services are advertised. There has been no showing of necessity or justification for such in Florida and the court should reject the proposal.

POINT TWO

IF INDEED THERE IS A SUBSTANTIAL STATE INTEREST TO BE SERVED BY THE SUPPRESSION BY BANNING OF OTHERWISE LAWFUL AND PERMISSIBLE COMMERCIAL SPEECH EXPRESSIONS CONSISTING OF TELEVISION ADVERTISEMENTS OF THE AVAILABILITY OF LEGAL SERVICES IN FLORIDA, EXCEPT THAT ARTICULATED BY MEMBERS OF THE FLORIDA BAR, THE BAR HAS FAILED TO SHOW THAT THE BAN THE PROPOSED AMENDMENT WOULD IMPOSE IS NOT MORE EXTENSIVE THAN NECESSARY TO FURTHER SUCH STATE INTEREST.

The proposed amendment to which this brief is addressed would ban all advertisements of legal services of law firms by persons who are not members of The Florida Bar even though advertisements are neither inaccurate, deceptive or misleading and are not related to an unlawful activity and are articulated by a member of the law firm whose services are being advertised. Such advertisement is commercial speech and is protected by the First Amendment as applied to the states by the Fourteenth Amendment.

In Central Hudson, Justice Powell, in delivering the opinion of the court, wrote:

The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Central Hudson, 447 U. S. at 564.

It is evident that the state's interest can be no more than regulating the content of legal services television advertising to

see that such consists of information consumers need to make decisions regarding legal services (Brief of The Florida Bar at 19), and that the information provided by the advertisement be neither inaccurate, deceptive or misleading.

The record provided by the Bar presents no evidence disclosing that television advertisements of legal services articulated by non-Florida Bar members of law firms with offices in Florida will likely be different from that articulated by lawyers who are members of The Florida Bar, nor does the record present evidence that such advertising will likely be less accurate or more deceptive or misleading. Simply stated, there is no showing that such advertising will inherently run afoul of rules regulating advertising of legal services.

Nor is there any showing that the perceived problem of television advertising of legal services may not be controlled or corrected by less restrictive means than to ban all expression of such by non-Florida bar members of law firms with offices in Florida.

If indeed rules **relating commercial speech** expressions of non-Florida Bar members of law firms with offices in Florida are needed to achieve a substantial state interest, the rules for this already exist. If it should be argued that such did not exist, then such can be adopted and applied pursuant to the provisions of Rule 4-5.1 which imposes on partners and other lawyers of a firm responsibility for the assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

The Bar has totally failed to establish either the need for the proposed rule to which this brief is addressed or the absence of more limited restrictions than that which it proposes. The proposal should be rejected by the court as being violative of the freedom of speech of the First Amendment.

POINT THREE

THERE HAS BEEN NO SHOWING BY THE BAR THAT THE PROVISION OF THE PROPOSED AMENDMENT WHICH WOULD SUPPRESS BY BANNING BY ALL WHO ARE NOT MEMBERS OF THE FLORIDA BAR EXPRESSIONS OF OTHERWISE LAWFUL AND PERMISSIBLE COMMERCIAL SPEECH CONSISTING OF TELEVISION ADVERTISEMENTS OF THE AVAILABILITY OF LEGAL SERVICES IN FLORIDA, IS A REASONABLE MEANS (REASONABLE FIT) OF ACCOMPLISHING A SUBSTANTIAL STATE INTEREST.

The Bar argues that the "least restrictive means" test of Central Hudson has been replaced by a "reasonable fit" test of SUNY in applying First Amendment free speech provisions to commercial speech such as advertising of legal services offered by a law firm and that the proposed amendments of the rules relating to lawyer advertising constitute a reasonable fit.

According to SUNY concerning regulation of commercial speech:

[P]rior cases have not imposed the burden of demonstrating that (a) the distinguishment is 100 percent complete, or (b) the manner of restriction is absolutely the least severe that will achieve the desired end; instead, what is required is a fit between the legislature's ends and the means chosen to accomplish those ends that (1) is not necessarily perfect, but reasonable, (2) represents not necessarily the single best disposition, but one whose scope is in proportion to the interests served, and (3) employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective; within such bounds, it is for governmental decisionmakers to judge what manner of regulation may best be employed; such a narrowly-tailored-means test is not overly permissive of government regulation.

The Bar seeks to square its proposed rule in all of its provisions and applications to the rule of SUNY. The concluding

provision of the foregoing quote is "such a narrowly-tailored means test is not overly permissive of government regulation."

First then, we must ask what is the state interest that the rule seeks to serve, and second, does the inclusion in the proposed rule of a ban of otherwise lawful and permissible commercial speech consisting of television advertising of the availability of legal services by all members of a law firm with offices in Florida who are not members of The Florida Bar constitute a reasonable means (reasonable fit) of accomplishing the state interest?

The state interest as stated by the Bar in its brief is "the conveyance of useful factual information to consumers so they can make informed and rational decisions relating to legal services" (Brief of The Florida Bar at 2), and "to curb abuses and encourage advertising which provides consumers with information they need to make decisions regarding legal services" (Brief of The Florida Bar at 19). For purposes of argument of this point, the Bar's statement of interest is accepted, but how then does the Bar conclude that its ban on commercial speech legal services television advertising statements of non-Florida Bar members is a reasonable state purpose or goal? Simply stated, the Bar has not and cannot demonstrate that such a ban comports with First Amendment free speech provisions because the proposed ban rule is not and cannot be supported by evidence. The Bar has neither produced facts of record nor argued in its brief to justify such a ban.

There is no showing of a basis for such a ban rule being a reasonable response to the goals sought by the Bar and if, in fact, the Bar seeks to ban such speech expressions by non-Florida Bar members simply because of their non-membership, the proposed rule should be declared facially non-reasonable.

When considered in the light of the provisions of existing Rule 4-5.1, which requires partners in a law firm to make efforts to insure conformance with the Rules of Professional Responsibility and impose on all lawyers of the firm responsible for violations of another which the first ratifies, any arguable reasonableness of such a ban rule diminishes to zero.

Any attempt to measure the total ban provision of the proposed rule by the "reasonable fit" test of SUNY requires rejection of the proposed rule as unreasonable.

POINT FOUR

THE PROVISION OF THE PROPOSED AMENDMENTS WHICH REQUIRES THAT ANY PERSON APPEARING IN TELEVISION ADVERTISING BE A MEMBER OF THE FLORIDA BAR WOULD DEPRIVE JOEL HYATT AND OTHER NON-FLORIDA RESIDENT MEMBERS OF THE HYATT LEGAL SERVICES LAW FIRM WHO *ARE* NOT MEMBERS OF THE FLORIDA BAR OF PRIVILEGES AND RIGHTS PROTECTED BY THE PRIVILEGES AND IMMUNITIES CLAUSE (ARTICLE IV, SECTION 2)1 AND THE DUE PROCESS AND EQUAL PROTECTION OF LAWS PROVISION (ARTICLE XIV, SECTION 1) OF THE UNITED STATES CONSTITUTION.

The requirements of the proposed amendment of rules applicable to lawyers television advertisements as applied to Joel Hyatt, the senior partner and spokesperson of the Hyatt law firms, but who is not a member of The Florida Bar, and to others similarly circumstanced, deprive them and the members of their firms of the benefits of the privileges and immunities clause and equal protection of laws provisions of the United States Constitution.

The requirement of Florida Bar membership as a prerequisite to articulating legal service television advertisements is not unlike the residency requirement sought to be imposed by some states for bar admission which the United States Supreme Court has found unconstitutional.

The recent rulings in Friedman and Piper reject such requirements as violative of the privileges and immunities cause of the Federal Constitution (Article IV, Section 2) applicable to bar admissions in New Hampshire and Virginia, respectively.

In both Piper and Friedman, non-residency discrimination was rejected by the Supreme Court as violative of the privileges and

immunities provisions of the Federal Constitution. The syllabus by the reporter of the decision in Piper states the ruling in Piper to be:

A State may discriminate against nonresidents only where its reasons are 'substantial' and the difference in treatment bears a close or substantial relationship to those reasons.

The discrimination against non-Florida Bar members of the Hyatt law firm and others similarly situated, precluding their qualifications to articulate television advertising commercial speech, has no basis in the Bar's record filed with the court or in logic and appears to implicate the equal protection and due process protection of the United States Constitution. Nothing which the Bar states in its brief it seeks to accomplish, no substantive state interest is furthered or achieved by the purely arbitrary provisions.

The court should reject that part of the Bar's proposed advertising rule amendment.

CONCLUSION

The court should reject that provision of the proposed amendment of the Bar to the Rules Regulating the Florida Bar applying to television advertising of legal services which states:

Further, the lawyer who personally appears in any advertising must be a member of The Florida Bar.

The provision, if implemented, would prevent Joel Hyatt and others similarly circumstanced from acting as television advertising spokespersons in Florida for their multi-state law firms.

The reasons for rejection have been argued in this brief, but one reason succinctly stated is that the Bar has failed to establish by "facts" in its record or to argue in its brief the case for the specific proposed rule to which this brief is addressed.

Nor has there been a showing that significant state interest has been impaired or threatened by that which the above-quoted portion of the rule seeks to accomplish, namely, no television advertising of legal services by non-Florida Bar members.

Nor has it been shown that the proposed ban would in anywise achieve the Florida Bar's stated goal of providing consumers with factual information "so that they can make informed and rational decisions relating to legal services."

It is readily apparent that the provisions of the proposed rule to which this brief is addressed would be costly and disruptive to those upon whom it directly impacts and would be a disservice to those to whom they direct their television advertising and without reasonable basis would impact constitutionally protected rights of the law firm members of Hyatt Legal Services.

The proposal should be rejected by the court and it is so prayed.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery this 28th day of March, 1990, to:

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A handwritten signature in black ink, appearing to read "Robert M. Erbe". The signature is written in a cursive style with a large initial "R" and a long horizontal flourish at the end.

Robert M. Erbe
Attorney for Hyatt Legal
Services