

FILED

SID J. WILSON

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

THE FLORIDA BAR:
PETITION TO AMEND THE
RULES REGULATING THE
FLORIDA BAR -
ADVERTISING ISSUES

Deputy Clerk

CASE NO.

74,98

PETITION TO AMEND THE RULES
REGULATING THE FLORIDA BAR

The Board of Governors of THE FLORIDA BAR, pursuant to Rule 1-12.1, Rules Regulating The Florida Bar, hereby petitions the Court to amend the Rules Regulating The Florida Bar in the manner set out below and says:

1. At their meeting which ended September 22, 1989, the Board of Governors of The Florida Bar approved amendments to rules 4-7.1, 4-7.2, 4-7.3; and 4-7.4; creation of a new rule 4-7.5; amendment and renumbering of existing rules 4-7.5 and 4-7.6; renumbering of existing rule 4-7.7; amendment of rules 3-5.1 and 4-1.5; and creation of rules 15-1 to 15-4.2, Rules Regulating The Florida Bar. The proposed amendments relate to the regulation of attorney advertising and creation of a Standing Committee on Advertising. At that meeting, the Board of Governors also authorized the filing of this Petition.

2. Notice of the proposed amendments was published in the October 1, 1989 edition of The Florida Bar News as required by Rule 1-12.1, Rules Regulating The Florida Bar. See Exhibit A.

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attached 1-45

3. This Petition seeks amendment of the following rules regulating attorneys:

4-7.1 Communications concerning a lawyer's services.

The proposed amendment to Rule 4-7.1 adds to the existing prohibition against false or misleading communications the requirement that an attorney shall not make "deceptive or unfair" communications. It also creates a new subsection (d), which prohibits the use of testimonials in advertising.

The comment to Rule 4-7.1 has been changed to make it clear that the rule prohibits all advertisements that are not truthful, including advertisements with misleading omissions. The comment also has been changed to explain that the existing prohibition in paragraph (c) of comparisons of one lawyer's services with other lawyers' services that cannot be factually substantiated would preclude a lawyer from representing that the lawyer or the lawyer's law firm is "the best," "one of the best," or "one of the most experienced" in a field of law.

Finally, the proposed comment explains that the prohibition in paragraph (d) precludes endorsements or testimonials because they are inherently misleading to laymen untrained in the law who infer from testimonials that the lawyer will obtain similar results in future cases. Because existing Rule 4-7.1(b) and its comment make it clear that the lawyer cannot directly make the assertion that the lawyer will obtain similar

results in future cases, the comment to paragraph (d) explains that the lawyer is not permitted to make it indirectly through testimonials.

4-7.2 Advertising.

The amendments to Rule **4-7.2** are multi-faceted. **As** explained in the changes to the comment of the rule, the rule balances competing interests. To assist the public in obtaining legal services, the rule allows advertising which provides the public with useful, factual information about legal rights and needs and the availability and terms of legal services from a particular lawyer or law firm. However, certain types of advertising create the risk of practices that are misleading or overreaching, that can create unwarranted expectations by laymen, or that can adversely affect the public's confidence and trust in our judicial system. Because the state must ensure a system by which justice will be administered fairly and properly, the state must regulate and monitor the advertising practices of lawyers.

In subsection (a), the rule change clarifies the scope of permitted advertising media. Subsection (a) already allows advertisements in public media such as a telephone directory, legal directory, newspaper or other periodical, radio, and television. The change further identifies billboards and other signs, and recorded telephone messages as permissible media. Further, the change specifies that the lawyer advertising rules do not apply to advertisements broadcast or disseminated in other

jurisdictions, provided the advertisement complies with rules governing advertisement in that jurisdiction and is not intended for broadcast in Florida.

New Rule 4-7.2(b) is limited to the electronic media. As the changes to the comment explain, the unique and powerful characteristics of electronic media make them especially susceptible to abuse and especially subject to regulation in the public interest. Thus, proposed Rule 4-7.2(b) provides that television and radio advertisements may contain the same factual information and illustrations as are permitted in the print media, but shall be articulated by a single voice, with no background sound other than instrumental music. The voice may be that of the lawyer whose services are advertised, but may not be the voice of a recognizable celebrity. The lawyer may appear on the screen, but only lawyers who will provide the advertised services may appear unless the advertisement discloses that others in the firm may also perform the advertised service. Any person appearing on the screen must be a member of The Florida Bar.

As the new comment explains, the restrictions on electronic media advertising in new Rule 4-7.2(b) are designed to ensure that the advertising is not misleading and does not create unreasonable or unrealistic expectations about the results the lawyer may be able to obtain in any particular case, and to encourage a focus on providing useful information to the public about legal rights and needs and the availability and terms of legal services. Thus, the rule allows all lawyer advertisements

in which the lawyer personally appears to explain a legal right, the services the lawyer is available to perform, the fees and costs for such services, and the lawyer's background and experience.

New Rule 4-7.2(d) requires the following disclosure in all advertisements in the electronic media: **"The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience."** Subsection (d) also requires this disclosure to appear in all print advertisements that contain illustrations or information other than information listed in Rule 4-7.2(n) (for example, the name of the lawyer or the law firm, a listing of attorneys in the firm, office addresses and telephone numbers, foreign language abilities, and fee schedules). **As** explained by the new comment, the disclosure is designed to encourage the informed selection of a lawyer. The comment also requires that the disclosure be conspicuous and readable and, if spoken, comprehensible.

Rule 4-7.2(e) is new and prohibits dramatizations in any advertisement, without regard to the medium. Like paragraph (b), paragraph (e) is designed to ensure that the advertising does not mislead the consumer or create unreasonable or unrealistic expectations. The new comment explains that paragraph (e) prohibits the use of scenes creating situations calling for legal services, scenes where a lawyer resolves a problem, and the audio or video portrayal of an event or situation.

New Rule 4-7.2(f) allows informational illustrations if the information conveyed can be factually substantiated and is not self-laudatory.

New Rule 4-7.2(g) provides that an advertisement or written communication that indicates one or more areas of law in which the lawyer or law firm practices shall conform to the requirements of Rule 4-7.6, a rule that regulates communication of fields of practice.

The proposed Rule 4-7.2(h) requires every advertisement and written communication that contains fee information also to disclose whether the client will be liable for any expenses. If a contingency fee is advertised, the advertisement or written communication must disclose that the client will be liable for costs, regardless of the outcome, if the attorney intends to hold the client responsible for expenses. If the fee will be based on a percentage of the recovery and that percentage will be computed before expenses, the attorney must also disclose this in the advertisement or written communication.

New Rule 4-7.2(i) provides that, if a lawyer advertises a specific fee or range of fees for a particular service, the lawyer shall honor the advertised prices for at least 90 days unless the advertisement specifies a shorter period. Furthermore, if the advertisement appears in the yellow pages of a telephone directory or other publication that is not reprinted more frequently than annually, the advertised fee or range of fees shall be honored for at least one year after the date of publication.

Rule **4-7.2(j)** prohibits lawyers from making self-laudatory statements or statements which describe the quality of services in advertisements or written communications. There is an exception for information furnished to potential clients upon their request and for information supplied to existing clients.

Rule **4-7.2(k)** provides that an attorney must not advertise services under a name that violates Rule **4-7.7**, which regulates firm names and letterheads.

The proposed subsection (l) of Rule **4-7.2** provides that all advertisements and written communications shall disclose the geographic location of the office of the lawyer who will actually perform the services advertised.

New subsection (m) of Rule **4-7.2** prohibits a lawyer from paying all or part of the cost of an advertisement by a lawyer in another firm unless the advertisement discloses the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer and the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer. Changes to the comment explain that the new rule allows a lawyer to compensate persons for preparing advertising, but otherwise a lawyer may compensate no other person for procuring legal work.

The proposed amendments add a new subsection (n) to Rule **4-7.2**, which provides a safe harbor for attorney advertisements by supplying a listing of information that is presumed to comply with Rule 4-7.1. This information includes:

- 1) The name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, and a designation such as "attorney" or "law firm";
- 2) Date of admission to The Florida Bar and any other bars, and a listing of federal courts and jurisdictions other than Florida where the lawyer is licensed to practice;
- 3) Technical and professional licenses;
- 4) Foreign language ability;
- 5) Fields of law in which the lawyer is certified or designated;
- 6) Participation in prepaid or group legal service plans;
- 7) Acceptance of credit cards;
- 8) Fee for initial consultation and fee schedules; and
- 9) Listing the lawyer or law firm as a sponsor of a charitable, civic, or community program or event.

Like subsection (n), new subsection (o) does not restrict commercial speech but instead identifies a form of advertisement that is presumed to comply with attorney advertising rules. Specifically, Rule 4-7.2(o) permits an attorney or law firm to be included in law lists and law directories.

Amendments to Rule 4-7.2(p) require an attorney or law firm to provide a copy or recording of an advertisement or written or recorded communication to the Standing Committee on Advertising in accordance with Rule 4-7.5. (As discussed below, a new Chapter 15 will create the Standing Committee on Advertising.) In addition, this subsection incorporates the existing Rule 4-7.2(b), which requires that the attorney or law firm retain a copy or

recording of each advertisement for three years after its last dissemination, as well as a record of when and where the advertisement was used.

Rule 4-7.2(q) is existing rule 4-7.2(c), with a minor addition. The new subsection (q) would allow **the** lawyer to pay persons for the reasonable cost of recorded communications, in addition to the reasonable cost of advertising or written communications.

In summary, regardless of the medium, Rule 4-7.2 allows advertising that provides useful, factual information presented in a nonmisleading manner. Furthermore, the comment would specifically provide that the rule does not apply to communications between lawyers (including brochures for recruitment purposes), or to communications authorized by law such as notice to members of a class in class action litigation.

4-7.3 Legal service information.

As explained in the existing comment, Rule 4-7.3 recognizes that consumers have a right to receive factual information from advertising lawyers, **and this rule** creates mechanisms to notify them of that right and provide them with the information. Subsection (a) of the rule already mandates **that an** advertising lawyer or law firm shall have available a factual statement detailing the background, training, and experience of the lawyer or law firm, and, if the lawyer or law firm claims specific expertise or publicly limits the lawyer's or law firm's

practice to special types of cases or clients, the lawyer's experience, expertise, background, and training in such matters. The proposed amendments to Rule 4-7.3 would add a new subsection (b) which requires that a lawyer or law firm who advertises through written communications not involving solicitation (written solicitations are governed by Rule 4-7.4) must include in the communication the information described in Rule 4-7.3(a).

A proposed amendment to Rule 4-7.3(c) adds a new subsection (4), which requires any unsolicited fee contract sent to a prospective client to be clearly marked "**sample**" and to have the words "**do not sign**" on the client signature line.

Amendments to subsection (e) impose the disclosure requirement of Rule 4-7.2(d) ("ask us to send you free written information about our qualifications and experience") upon all advertisements under this rule unless Rule 4-7.2 provides an exemption or the communication is accompanied by a statement of qualifications and experience pursuant to Rule 4-7.3(a).

Rule 4-7.3(d) will reduce the period a lawyer or law firm must retain a copy of information furnished to clients from six years to three.

Subsection (f) currently provides that factual statements shall not be directly or impliedly false or misleading. Amendments preclude statements that are potentially false or misleading and omissions which are actually or potentially false or misleading.

4-7.4 Direct contact with prospective clients.

The current Rule 4-7.4(a) provides that an attorney may not personally solicit professional employment from a prospective client for pecuniary gain unless the attorney has a family or prior professional relationship with the prospective client. The proposed amendment to subsection (a) clarifies that a lawyer shall not permit employees or agents to solicit in the lawyer's behalf. Further, the lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of the solicitation rule.

New subsection (b)(1) to Rule 4-7.4 prohibits attorneys from sending written communications to a prospective client for the purpose of obtaining professional employment if the cause of action relates to personal injury or wrongful death or other accident or disaster involving the addressee or a relative of that person. Changes to the comment to this rule make it clear that the rule prohibits targeted mail solicitation only in those specific areas.

The proposed Rule 4-7.4(c)(1) requires that all written communications to prospective clients for the purpose of obtaining professional employment comply with the following requirements:

- a. Each page of the written communication, as well as the envelope, shall be clearly marked **"advertisement"** in red ink (the comment explains that this allows the recipient to choose to read or not read the solicitation without fear of legal repercussions);
- b. Each written communication and a sample of the envelope and a list of recipients (the list to be updated monthly for subsequent mailings) shall be

filed with the Standing Committee on Advertising and the lawyer shall retain a copy of the communication for three years;

- c. The written communication shall be sent only by regular U.S. Mail, not by registered mail or other forms of restricted delivery;
- d. The written communication shall not indicate it has received any kind of approval from The Florida Bar;
- e. Each written communication shall be accompanied by a written statement of the lawyer's or law firm's qualifications conforming to Rule ~~4-7.3~~^{1/};
- f. If a contract for representation is mailed, it shall be marked "**sample**" and have the words "do not sign" on the client signature line;
- g. The first sentence of the written communication shall be, "**If** you have already retained a lawyer for this matter, please disregard this letter";
- h. The written communication shall not resemble legal pleadings or other legal documents and (except for brochures and pamphlets) shall be on letter-sized paper;
- i. If a lawyer other than the one whose name or signature appears on the communication will actually handle the case, the client shall be so advised;
- j. Any written communication prompted by a specific occurrence involving or affecting the intended recipient or a family member shall disclose how the lawyer obtained the information as to such occurrence (the comment explains that this will prevent misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if he does not); and
- k. The envelope (or outside of a brochure or pamphlet) shall not disclose the nature of the prospective client's legal problem.

^{1/} In the October 1 Bar News, subsection (e) inadvertently referred to Rule ~~4-7.4~~ instead of ~~4-7.3~~.

4-7.5 Evaluation of advertisements.

New Rule 4-7.5 provides for the evaluation and review of lawyer advertisements or written communications by the Standing Committee on Advertising. This rule gives lawyers the option of submitting their advertisements to the committee for review prior to their first use or submitting their advertisements at the time of their first use. In either event, the committee will advise the filing lawyer in writing whether the advertisement appears to comply with the rules. The committee's opinion will be advisory only, but may be considered as evidence of a good faith effort to comply with these rules. A lawyer who wishes to rely on the committee's opinion as demonstrating the lawyer's good faith effort to comply with these rules has the responsibility of supplying the committee with all information material to a determination of whether an advertisement is false or misleading.

Certain publications are exempted from the filing requirements by Rule 4-7.5(c), such as yellow page advertisements that contain no illustrations and only the information specified in Rule 4-7.2(n),^{2/} brief public announcements of a firm's charitable donations or civic work, television advertisements if the visual display is limited to the words spoken by the announcer, listings in a law list, newsletters mailed only to

^{2/} In the October 1 ~~Bar News~~, Rule 4-7.5(c) inadvertently referred to information specified in Rule 4-7.5(n) rather than 4-7.2(n).

existing clients or other lawyers, and professional announcement cards mailed only to other lawyers, relatives, close friends, and existing clients.

Subsection (d) specifies the required content of the filing, and provides for a \$25 fee for each filing. Subsection (e) gives the Committee 15 days to complete its evaluation of the advertisement or written communication. Subsections (f) through (i) create other procedural requirements for the evaluation.

4-7.6 Communications of fields of practice.

The existing rule (currently numbered 4-7.5) permits a lawyer to indicate areas of practice in communications about the lawyer's services, with certain restrictions. An amendment to subsection (b) of the rule allows a lawyer who complies with the Florida Certification Plan, or who is certified by a national group which has substantially similar standards to the Florida Certification Plan -- and only those lawyers -- to state in communications to the public that the lawyer is a "specialist in (area of certification)."

4-7.7 Firm names and letterheads.

The first proposed amendment to Rule 4-7.7 (currently numbered 4-7.6) amends subsection (b) to prohibit attorneys from practicing under a deceptive trade name. As changes to the comment explain, names like "academy" and "institute" are prohibited because they imply the firm is something more than a

law firm. A firm may not use the name of a person who does not exist or is not associated with the firm, except for deceased former members of the firm. Terms such as "legal clinic" or "legal services" are misleading unless the firm provides only routine services and at lower fees than the prevailing community rate.

The proposed Rule 4-7.7(c) prohibits an attorney from advertising under a trade name unless the attorney actually practices under that trade name. As the comment explains, an attorney could not advertise under a contrived name such as "AAA Aardvark Legal Services" in order to gain an advantageous position in alphabetical listings unless the attorney actually practiced under that trade name. Under the new rule, a lawyer who advertises under a trade name must use that same name on the lawyer's letterhead, business cards, office signs, fee contracts, and court pleadings and other legal documents.

3-5.1 Types of discipline.

Having determined that it was necessary to amend the rules on advertising and solicitation by lawyers, the Board determined that it was necessary to amend the disciplinary rules as well. Proposed Rule 3-5.1(h) provides that a lawyer adjudicated guilty of charging or collecting a fee prohibited by the Rules Regulating The Florida Bar may be required to forfeit the fee or any part thereof to the Florida Bar Clients' Security Fund. If a fee is excessive, the excessive amount may be ordered returned to the client.

4-1.5 Fees for legal services.

A proposed amendment to Rule 4-1.5 provides that an attorney shall not enter an agreement for, charge, or collect a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. If made, such agreements will be unenforceable.

Chapter 15 Review of Lawyer Advertisements and Solicitations.

Finally, The Florida Bar recommends the creation of Chapter 15, to be entitled Review of Lawyer Advertisements and Solicitations. Rule 15-1.1 provides for the creation of a Standing Committee on Advertising which shall advise bar members on permissible advertising and solicitation practices as well as administer the advertising evaluation program as set forth in proposed Rule 4-7.5. The remainder of Chapter 15 provides the procedures under which the Standing Committee on Advertising will operate.

4. The Board of Governors created a Special Commission on Advertising and a Special Commission on Solicitation more than two years ago to study the issue of lawyer advertising and solicitation from start to end. After a year of independent study, the two commissions were combined into a Special Commission on Advertising and Solicitation. During the two years that the studies were underway, the commissions met more than two dozen times, conducted public hearings and numerous meetings at which

members of the profession who had an interest in the subjects were invited for additional input. Correspondence was received from advertisers, advertising agencies, broadcasters, members of the profession, and members of the public. Transcripts of public hearings and numerous studies on advertising and solicitation conducted in Florida and in other states were reviewed. A judicial survey was conducted and a review of virtually every classified ad in the yellow pages in every telephone book in the State of Florida was performed. As a result of this work and based upon its review of pertinent case law, these recommendations for amendments and additions to the Rules Regulating The Florida Bar were made by the Commission.

The Board, having the benefit of the information available to the Commission, debated the Commission's recommendations and, as a result of that debate, has arrived at the proposed rules presented with this Petition. The proposed amendments represent a studied attempt to ensure that consumers of legal services receive truthful and reliable information concerning their legal needs and the availability of legal services. At the same time, the amendments attempt to prevent the abuses identified by the Commission which result in misinformation and unjustified expectations by law clients, and that diminish the effectiveness and dignity of our system of the administration of justice.

5. Attached to this Petition are the individual rules which are the subject of the amendments. See Exhibit B.^{3/}

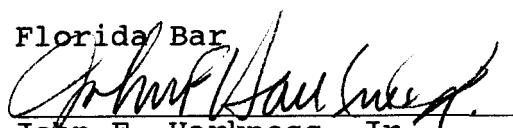
WHEREFORE, the Board of Governors of The Florida Bar prays the Court will amend the Rules Regulating The Florida Bar in the manner requested herein.

November 7, 1989

Respectfully submitted,

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^{3/} Note that two of the amended rules in Chapter 15 were misnumbered in the October 1 ~~Bar News~~. New Rule 15-4 was misnumbered 15-5, and Rule 15-4.1 was misnumbered 15-5.1. Those errors have been corrected in Exhibit B.