IN THE SUPREME COURT OF FLORIDA

IN RE THE FLORIDA BAR:
PETITION TO AMEND THE
RULES REGULATION THE
FLORIDA BAR-
SOLICITATION ISSUES

CASE NO. 74,987

RESPONSE TO PETITION TO AMEND RULES REGULATION THE FLORIDA BAR

COMES NOW Respondent, RONALD J. SCHWEIGHARDT, and in response to the Petition to Amend Rules Regulating the Florida Bar, states:

1. Respondent is a member in good standing of the Florida Bar.

2. Respondent is opposed to the proposed amendments, and respectfully submits that the proposed amendment to Rule 4-7.4, to absolutely prohibit direct mail communications with prospective clients in personal injury cases would be in violation of the First Amendment to the United States Constitution. See Argument, below.

3. Respondent further submits that the findings of the Florida Bar's Special Committee on Solicitation, set forth in its Final Report, as paragraphs 1 through 6, are unfounded and unsupported, and, in any event, do not justify the absolute ban on direct mail communications sought by the proposed amendment to Rule 4-7.4. More specifically, Respondent submits:

A). Petitioner contends that most lawyers and nonlawyers are opposed to direct mail solicitation. However, even assuming that this conclusion was supported by the isolated examples set forth by Petitioner, such a conclusion is completely irrelevant to the constitutional

issue presented to this Court. Petitioner is asking this Court to place an absolute restraint on the exercise of First Amendment rights. Public opinion, however, has never been the standard by which such rights are determined.

B). Petitioner also contends that direct mail solicitation has generated "considerable" negative publicity and condemnatory editorials for the legal profession, as well as having caused public respect and confidence in the profession and the court system to plummet. This conclusion, again, is factually unsupported and is irrelevant to the constitutional issue presented.

C). Petitioner suggests that direct mail solicitation infringes on recipients' rights to privacy as guaranteed by Article 1, Section 23, of the Florida Constitutional (1968). This is simply untrue. The constitutional provision relied upon only proscribes "governmental intrusion." Clearly, private attorneys acting on personal motives are not agents of the goverment. Moreover, an advertisement letter from an attorney is no more an invasion of privacy than any other advertisement in the mailbox.

D) Petionioner contends that direct mail solicitation cannot be effectively regulated. In support of this proposition, Petitioner alleges that lawyers are violating

Rule 4-7.3 by sending solicitations to persons whose physical, mental, or emotional state is such that they cannot make reasoned decisions, or to persons who have already retained legal counsel in the matter, Petitioner points out, and Respondent concedes, that lawyers have no way of determining whether intended recipients are in such a physical, mental, or emotional state, or whether they have already retained another attorney, The problem with the Petionioner's observation, then, is that Rule 4-7.3 is never violated, rather than often violated, as suggested by Petionioner. Rule 4-7.3(2) only proscribes direct mail solicitations to persons who the lawyer "knows or reasonably should know" are within the above described categories.

E). Petitioner contends that direct mail solicitations often cause recipients emotional distress. Petitioner bases this proposition on complaints received by the Florida Bar from various recipients of direct mail solicitations. No other evidence or empirical data is cited. Obviously, complaints are complaints. For this reason, it is apparent that the Petitioner's contention is unfounded. Even assuming that Petitioner has received a large number of complaints from direct mail solicitation recipients, it does not follow that these recipients are representative of all recipients as a whole.

F) Finally, Petitioner contends that the use of public records to identify accident victims has both burdened law enforcement agencies and created unease among those who did not realize that the circumstances of their

accident were open to public scrutiny. The fact that public records are viewed by the public, however, is not justification for the absolute ban on First Amendment freedoms sought by Petitioner.

ARGUMENT

Attorney advertising, like other advertising, is entitled to at least limited constitutional protection under the First Amendment. Indeed, it is now well settled that in order to restrict such advertising, which is not false or deceptive and does not concern unlawful activities, the state must assert a substantial governmental interest and the restrictions must be no broader than is absolutely necessary to further that interest. IN RE R.M.J., 455 U.S. 191, 293, 102 S.Ct. 929, 937, 71 L.ED.2d 64 (1982).

In Sharpero v. Kentucky Bar Association, 486 U.S. _____, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) the United States Supreme Court struck down a Kentucky Supreme Court Rule that prohibited the mailing or delivery of written advertisments by attorneys precipitated by a specific event.... involving or relating to the addressee.. .. as distinct from the general public, In striking down the Rule, the Court recognized,

> that a State may not, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems. Such advertising is constitutionally protected commercial speech, which may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.

108 S.Ct at 1917, 1918.

The Court stated that the issue presented was

> whether a State may consistent with the First and Fourth Amendments, categoically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

108 S.Ct. at 1919, 100 L. Ed. 2d 481.

The Court's answer to this issue was such prohibition was not allowed.

Further the Court found that,

> ...the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

108 S.Ct. at 1921, 1922, 100 L. Ed. 2d 484.

Later the Court stated

> But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. See In re R.M.J., 455 U.S., at 203. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency.

108. S.Ct at 1923, 100 L. Ed. 2d 486.

In Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 144 (19781, the United States Supreme Court upheld an absolute ban on "in-person" solicitation by attorneys. In upholding the ban, the Court recognized that First Amendment concerns were implicated, but reasoned that the state's interests in preventing the evils of in-person solicitation were sufficiently compelling

to override the First Amendment concerns. In distinguishing between in-person solicitation and atttorney's print advertising, held protected in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L. Ed. 2d 810 (1977), the Court stated:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act on it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportuntity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individually.

436 U.S. at 456, 98 S.Ct. at 1919.

Seven years after Ohralik, in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985), the United States Supreme Court for the first time considered whether the same interests which justified the prohibiton of in-person solicitation in Ohralik would justify a ban on an attorney's targeted newspaper advertisements. Finding the state's interests concerning fact-to-face solicitation to be substantially different from its interests with respect to targeted newspaper advertisements, the Court held that the state could not constitutionally prohibit the latter. In distinguishing the state's interests in the two situations, the court stated:

> It is apparent that the concerns that moved the Court in Ohralik are not present here.

> Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement--and print advertising generally--poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in Ohrilik cannot justify the discipline imposed on appellant for the content of his advertisement.

105 S.Ct. at 2277.

It is clear that the same differences relied upon to distinguish the targeted newspaper advertisement in Zauderer from in-person solicitation are equally present with targeted direct mail advertisements. The crucial factor in both situations is time. The recipient of a targeted direct mail advertisement, like the reader of a targeted newspaper advertisement, is not under the pressure of a trained advocate for an immediate yes-or-no answer. The only difference between the two advertisements, essentially, is that one is on the door step and the other is in the mailbox. Recognizing the similarities in the two forms of

advertising, lower courts have applied Zauderer and held that targeted direct mail solicitation may not be constitutionally prohibited. Adams v. Attorney Registration and Disciplinary Commission, 617 F. Supp. 449 (N.D. 111. 1985), affirmed 801 F 2d 968 (7th Cir. 1986). See also Matter of Von Wiegen, 101 App.Div. 2d 627, 474 N.Y.S.2d 147, modified 63 N.Y. 2d 163, 481 N.Y.S.2d 40, 470 N.E. 2d 838 (1984), cert. denied, _____ U.S. _____ , 105 S.Ct.2701, 86 L.Ed.2d 717 (1985); Spencer, 111 v. Honoralbe Justices of the Supreme Court of Pennsylvania, 579 F.Supp. 880 (E.D.Pa. 1984); Bishop v. Committee on Professional Ethics and Conduct, 521 F.Supp. 1219 (S. D. Ia. 1981), vacated on other grounds, 686 F.2d 1278 (8th Cir. 1982);Koffler v. Joint Bar Assoc., 51 N.Y. 2d 140, 432 N.Y.S. 2d 872, 412 N.E. 2d 927 (1980); Kentucky Bar Association v. Stuart, 568 S.W. 2d 933 (Ky. 1978)

The thrust of Petitioner's argument in favor of an absolute ban on direct mail solicitation in personal injury and probate cases is that some recipients, under the *stress* of the event which promoted the solitation, are offended by the advertisement. However, " the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it." Zauderer, 105 S.Ct. at 2280. In the case of mailed

advertisements likely to offend recipients, the United States Supreme Court has held that the First Amendment prohibits the government from proscribing such advertisements. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). In rejecting the offensiveness argument, the Court reasoned that those offended need only discard the offensive material in order to avoid further bombardment of their sensibilties." According to the Court, "the short, though regular journey from the mailbox to the trash can is an acceptable burden, at least so far as the Constitution is concerned". Bolger, 463 U.S. at 72, 103 S. Ct. at 2883.

WHEREFORE, for the reasons and pursuant to the authorities cited herein above, the Court should disapprove the proposed amendment to Rules 4-7.3 and 4-7-4, Rules Regulation the Florida Bar, insofar as the proposed amendment prohibits direct mail solicitation in personal injury cases.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to JOHN F. HARNESS, JR., Executive Director; STEPHEN N. ZACK, President; JAMES FOX MILLER, President elect; PATRICIA J.

ALLEN, Ethics Counsel; 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and ALAN C. SUNDBERG, CARLTON, FIELDS, WARD, EMMANUEL SMITH & CUTLER, P.A., P.O. Drawer 190 Tallahassee, FL 32302, Counsel for The Florida Bar on this 21ST day of December 1989.

Respectfully submitted,
RONALD J. SCHWEIGHARDT, P.A.

By: _____
RONALD J. SCHWEIGHARDT, ESQ
400 S.E. 12th Street, Suite A
Fort Lauderdale, FL 33316
(305) 463-2891