IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR -
ADVERTISING RULES

CASE NO. 92,297

THE FLORIDA BAR'S RESPONSE TO COMMENTS FILED
REGARDING THE AMENDMENTS TO THE ATTORNEY ADVERTISING RULES

The Florida Bar, pursuant to the Court's order dated March 24, 1998, hereby responds to comments filed in response to The Florida Bar's Petition to Amend Rules Regulating The Florida Bar - Advertising Rules.

The Florida Bar respectfully suggests that the Court consider limiting oral argument to those rules about which a comment was filed.

A. Response to Comments of C. Rufus Pennington

The Florida Bar declines to respond to the comment filed by C. Rufus Pennington, III, which requests that the Court adopt a rule that prohibits advertising in the electronic media.

B. Response to Comments of Wilson Jerry Foster

Regarding the comments on the amount of the review fee and the requirement that direct mail communications be marked "advertisement" in red ink, there is no substantive change to these rules; they have merely been renumbered. The Florida Bar therefore respectfully suggests that they were well-considered in connection with prior rule amendments and need not be addressed by the Court at this time. See Amendments to Rules Regulating the Florida Bar--Rules 4-7.2 & 4-7.5, 690 So.2d 1256 (1997); The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar--Advertising Issues, 571 So.2d 451 (1990).

Should the Court choose to consider these comments, The Florida Bar would point out that, even with the $100 review fee, the fees do not cover the costs of administering the advertising review program.

With regard to the requirement that direct mail communications be marked "advertisement" in red ink, the requirement permits the recipient to recognize the communication as an advertisement and discard the entire advertisement without opening or reading it should the recipient so wish. The requirement allows free commercial speech in the form of direct mail communications while protecting the privacy of prospective clients from intrusive advertising. Mr. Foster argues that there should be a "sophisticated client" exception to this requirement. The Rules Regulating the Florida Bar are rules of general application; the Court has previously

declined to create exceptions or special rules for particular types of law practice. See e.g. Amendment to Rules Regulating the Florida Bar--Rule 4-1.18, Client-Lawyer Relationships in Family Law Matters, 662 So.2d 1246 (Fla. 1995)(the Court declined to adopt a rule which would govern attorney conduct in family law matters); In re Rules Governing the Conduct of Attorneys in Florida, 220 So. 2d 6, 8-9 (Fla. 1969)(the Court declined to adopt a rule which would "develop a double standard of ethics for salaried and non-salaried lawyers" in the context of representation of insureds by house counsel for insurance companies). Additionally, The Florida Bar's Standing Committee on Advertising has previously considered the possibility of treating "sophisticated clients" differently from other prospective clients and concluded that such an approach would be impracticable.

Concerning Mr. Foster's comment that attorneys should not be prohibited from advertising areas of law in which they do not currently practice, The Florida Bar argues that to advertise areas of practice in which attorneys do not currently practice is misleading, in addition to raising legitimate concerns regarding the brokering of cases.

Mr. Foster also expresses concern about the geographic disclosure requirement. Although Mr. Foster does not disagree with the requirement that advertising lawyers must disclose the geographic location of an office, he disagrees with the definition of bona fide office as including a place where an attorney or firm "reasonably expects to furnish legal services in a substantial way on a regular basis." He then cites examples such as a part-time practice or an attorney who ceases practice during the summer for a vacation. Such examples do not necessarily fall outside the scope of "furnish[ing] legal services in a substantial way on a regular basis." The rule intentionally does not specify a number of hours per day or number of days per year which an attorney must practice in order to meet such a standard, but rather defines what a prospective client might reasonably expect from an attorney who advertises in a medium which is broadcast in the prospective client's geographic location. The purpose of the rule is to provide useful information to the client regarding the geographic location of the attorney so that prospective clients will not be misled as to the attorney's ability to meet with the client in a location that is convenient to the client or as to the attorney's availability to the court in which the case might be filed. Further, it is unlikely such a regulation would work a substantial hardship on an attorney who "wants to advertise and do one case a year," as it is unlikely such an attorney would invest in advertising if he or she only takes on one case per year.

C. Response to Comments of C.L. Darrow

The comment suggests that the Court should not limit the spokesperson for a television or radio advertisement for a lawyer referral service to a lawyer who is a participant in the lawyer referral service, nor should the Court limit the type of information that can be provided in a television or radio commercial. The Magid survey (Appendices I, J, K of Task Force Final Report) indicates that the public currently is not provided with useful information about legal services in attorney advertising. The purpose of the proposed rule is to eliminate irrelevant and extraneous factors to the process of choosing an attorney, such as the appearance of an actor or

other nonlawyer spokesperson for a law firm or lawyer referral service, which is a logical extension of the current rule which prohibits misleading information. Electronic media such as television or radio can reach the largest numbers of the public and cause the greatest harm to the public's perception of the legal system. Therefore, it is important to restrict attorney advertisements in this media to factual, useful information about the provision of legal services that a prospective client should consider when selecting an attorney.

D. Response To Comments of David Kingsley

This comment suggests that listing of all jurisdictions in which an attorney is licensed to practice in Internet advertising be made permissive rather than mandatory. The rationale behind the requirement that an attorney list all jurisdictions in which licensed to practice lies in the unique nature of the Internet. Unlike, e.g., yellow page advertisements, the Internet is not geographically restricted. Because the Internet is worldwide, a prospective client may be misled, through no fault of the attorney, to believe that the attorney can provide legal services in the client's jurisdiction. If any attorney does not wish to take cases from certain jurisdictions, the attorney could include that statement as part of the website or home page. Further, the attorney is free to decline representation of any prospective client if he or she is not inclined to practice in a particular jurisdiction.

E. Response to Comments Regarding Restrictions on Trade Names

The remaining comments all express concerns about one rule, the ban on trade names. The concerns expressed can be summarized as follows:

1. The Florida Bar has provided no empirical evidence to show that trade names are misleading and should be banned.

2. Trade names are not inherently misleading and there are therefore less restrictive means to regulate trade names.

3. Banning trade names amounts to a "taking" and attorneys practicing under existing trade names must be compensated if trade names are banned.

4. If the Court bans trade names, the court should "grandfather" existing trade names, permitting attorneys practicing under existing trade names to continue such practice indefinitely.

The Florida Bar, since the comments mainly express the same concerns, will respond to the concerns collectively as follows. Regarding the claim that no empirical evidence has been provided, The Florida Bar commissioned a study by Magid and Associates (Appendix I, Appendix K of Task Force Final Report), whose focus groups included responses to trade names. Magid and Associates presented participants in the focus groups with four print advertisements

which were identical except for the name of the law firm. Based on changes in the name only, the focus group research found that respondents believed that greater numbers of lawyers and/or other professionals were associated with the firm when the print ad contained the terms "group," "clinic" or "center" as part of the law firm trade name. Further, the Young Lawyer's Division study (Appendix G of Task Force Final Report) included a compilation of trade names that are currently being advertised in the yellow pages.

One argument for the inherently misleading nature of trade names is provided by the names adopted by the attorneys who have filed comments. The use of such words as " law group" "clinic" or "legal center," which are in use throughout Florida, have been shown in the Magid focus groups to be commonly understood as implying greater numbers of attorneys and greater amounts of resources than can be claimed by those who use the trade names. Some focus group participants also indicated that such terms implied affiliation with a governmental entity or with low-cost services. Trade names which include an area of practice implied concentration in that area, according to respondents, in addition to indicating participation in a franchise. None of these ideas expressed by focus group participants is necessarily true of law firms which use trade names.

The only support relied on by the commentors for the proposition that the ban on trade names constitutes a "taking" can be found in a footnote to a case in which the United States Supreme Court upheld the Texas Optometry Board's regulation which prohibited Texas optometrists from practicing under a trade name. Friedman et. al v. Rogers, 440 U.S. 1, 99 S.Ct. 887 (1979), footnote 11. Even assuming the restriction is considered a taking, The Florida Bar would argue that there is no value in an inherently misleading trade name and that there has therefore been no taking without due process. Further, the petition provides for an 18 month period in which attorneys may phase out the trade name and advertise in conjunction with the firm name, such that any possible goodwill or other intangible value associated with the trade name may be associated instead with the firm name.

Regarding the suggestion to permanently grandfather existing trade names, the United States Supreme Court, supra, did not address the question of whether such a clause would "cure" an unjust taking. Id. The Florida Bar would argue that it would be inappropriate to permanently grandfather trade names which have been found to be potentially or actually misleading. The Court previously, in finding that conduct within the legal profession has caused harm to the public, has not hesitated to prohibit that conduct and make the prohibition applicable immediately. For example, the Court, when first allowing referral fees, did not set limitations on the division between the referring attorney and the referred attorney. When the Court determined a limit was needed, the Court did not hesitate to impose one. The Florida Bar re Rules Regulating the Florida Bar, 494 So.2d 977 (Fla. 1986); The Florida Bar re Amendments to the Rules Regulating the Florida Bar, 519 So.2d 971 (Fla. 1987). Further, The Florida Bar would argue that it would be unfair to permit attorneys who have existing trade names to continue their use while denying the use of trade names to others. As stated above, the Court has previously declined to make exceptions from the general rules for specific categories of lawyers.

WHEREFORE, The Florida Bar prays this Court will enter an order amending the Rules Regulating The Florida Bar as requested in its petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Respond to Comments Filed and Motion to Extend Time to File Response to Comments on Advertising Petition, has been furnished by U.S. mail to the following on this the 30th day of April, 1998:

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