

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
PETITION TO AMEND RULE
REGULATING THE FLORIDA BAR 4-7.14

CASE NO. SC18-2019

**COMMENTS AND SUGGESTED MODIFICATIONS TO
THE FLORIDA BAR'S PETITION TO AMEND RULE
REGULATING THE FLORIDA BAR 4-7.14**

Introduction

These comments and suggested modifications to the Florida Bar's Petition to Amend Rule 4-7.14 are submitted by Joseph Barry Schimmel, a member of The Florida Bar. As discussed below, the Bar's proposal contains several ambiguities which can and should be cured to avoid unintended controversy and consequences.

1. Certification as proof of specialization or expertise.

Proposed Rule 4-7.14(5) provides that a lawyer may claim to be a specialist or expert only if the lawyer: (i) is certified under specified certification plans: or (ii) can objectively verify the claim. Proposed Rule 4-7.14(6) provides that a law firm may claim to specialize or have expertise only if the law firm can objectively verify the claim with respect to at least one of the lawyers in the firm. However, proposed Rule 4-7.14(6) is ambiguous because it has excluded any reference to specified certification plans. The Bar's proposed Rule 4-7.14(6) can be inappropriately interpreted to mean that certification of at least 1 lawyer in a firm

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(or, for that matter, certification of every lawyer in a firm) in a given area of practice is not, by itself, sufficient to support a claim that the firm specializes or has expertise in that area of practice. We assume that is not what the proposed rule intends.

In addition, proposed Rule 4-7.14(6) is also ambiguous because it says that a law firm may establish specialization or expertise by reference to the combined education, training, experience and substantial involvement by multiple lawyers in a law firm. Thus, proposed Rule 4-7.14(6) would allow a law firm to claim specialization in an area of law if one lawyer had extensive education and training in that area of law but neither experience nor substantial involvement, another lawyer had extensive experience in the same area of law but not education, training, nor substantial involvement, and a third lawyer had substantial involvement in the same area of law but no education, training or experience. This, we assume is also contrary to how the Rule intends to allow law firms to establish specialization or expertise.

There is a single change that would address both of the above concerns. Rule 4-7.14 could generally state that a lawyer is a specialist or expert in an area of practice only if the lawyer: (i) is certified under specified certification plans; or (ii) can objectively verify the claim. Rule 4-7.14(5) could then state that an

advertisement is potentially misleading if it contains a statement that the lawyer is a specialist or expert in an area of practice, unless the lawyer is a specialist or expert as defined under that Rule. Rule 4-7.14(6) could then state that an advertisement is potentially misleading if it contains a statement that a law firm specializes or has expertise in an area of practice, unless at least one lawyer is a specialist or expert as defined under that Rule. Similar changes would be made in the balance of Rule 4-7.14(6).

2. Use of the term “employee” of a law firm.

An additional ambiguity is created in Proposed Rule 4-7.14(6) by the use of the term “employee” of a law firm and allowing a law firm to establish expertise or specialization through the qualification of an “employee” lawyer. While Rule 4-7.14(6) does not define “employee,” the preamble to Chapter 4 of the Rules does define “law firm” as follows:

“Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization.

Proposed Rule 4-7.14(a)(6) specifically applies to “lawyers employed by the law firm.” The Rules suggest that, with respect to a law firm, there are at least two

types of lawyers – “partners,” and “employees.” The preamble to Chapter 4 of the Rules defines “Partner” as follows:

“Partner” denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

The Rules generally do not, however, currently use the term “employee” or its variants as the equivalent of a “partner” of a firm.

While the phrase “employed by” appears 51 times under the Rules, in those situations where the phrase applies to a private law firm, it almost invariably is referring to someone other than a “partner” or “member.” See, e.g., Rule 4-7.16(a)(12) (“lawyer or lawyers who are members of, or employed by, the firm”). Similarly, Rule 3-6.1, relating to the employment of suspended and former lawyers, defines “employed by” as “a salaried or hourly employee, volunteer worker, or an independent contractor providing services to the entity.” A suspended or former lawyer cannot of course become a “partner” or “member” of a firm, and therefore can only become an “employee.”

It is unclear how the proposed rule intends the term “employee” to be used. We propose that Rule 4-7.14(6) should work within the existing definition of “law firm.” It should do so in one of two ways. Either the Rule should explicitly apply to both “associates” and “partners,” or should explicitly apply solely to “partners.”

In no event should the Rule apply to the undefined term “employees.” In this connection, it would also be desirable if the Rule was clarified as to its application to the “of counsel” relationship.

3. Determining an attorney’s association with a “law firm.”

If the Court is going to permit and regulate law firm advertising of specialization, it would be helpful if the Court simultaneously adopted rules that made the identification of an attorney’s association with a law firm more straightforward.

In many cases, Florida Statutes require business organizations to be separately registered, and individuals engaging in business through an organization are required to register as an agent of the organization. See, for example, Section 473.3101 (accounting firms), Section 481.219(1) (architecture firms), Section 489.199(2) (contractors).

The requirement for separate registration of law firms would impose a minimal burden on law firms and on the Bar, while such registration would quickly allow the Bar and the public to verify compliance with the proposed Rule. Other state bars require registration of law firms. See, e.g., California Rules of the State Bar, Title 3, Chapter 3; Virginia State Bar Professional Guidelines 14.

Multijurisdictional law firms would be slightly inconvenienced by the need to provide their law firm registration number in nationwide advertising, but this issue is hardly unique to law firms.

Presently, the first task in reporting an illegal attorney advertisement is to identify the violator. Many advertisements provide only the law firm's "name" and a telephone number. Law firm registration would be an improvement. Additionally, requiring all advertisements to include the individual advertising attorney's bar number or law firm's registration number would further protect the public, and would promote enforcement of existing bar rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic mail through the Florida Courts E-Filing Portal. I further certify that a copy of the foregoing was furnished by electronic mail or U.S. mail to Joshua E. Doyle, Executive Director; Michelle R. Suskauer, President; John M. Stewart, President-elect; Lori S. Holcomb; and Elizabeth Clark Tarbert, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-6584 and Lawrence Edward Sellers, Chair, Review Committee on Professional Ethics, Holland & Knight LLP, 315 S. Calhoun Street, Suite 600, Tallahassee, FL 32301-1872 this 3rd day of January, 2019.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this Comment complies with the requirements of Florida Rule of Appellate Procedure 9.100 and is printed in Times New Roman 14-point font.

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