IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC05-2194

COMMENTS OF BILL WAGNER, CORRECTED COPY

BILL WAGNER, a member in good standing of the Florida Bar, respectfully submits these comments regarding the captioned Petition:

"Compared to Whom[1]?"

This celebrated answer by Groucho Marks' to the question "How is your wife?" could equally be applied to the Florida Bar's latest effort to deal with lawyer advertising. Compared to the current Rules, the proposed amendments, in most respects, are certainly an improvement. Unfortunately they fall far short of what the Florida Bar could have accomplished.

I. The Faulty Process Used in Developing the Amendments

As one who responded to the invitation to serve on the new Advertising Task Force, I anticipated that, like the Special Commission on Advertising and Solicitation upon which I served in the late 1980s, an effort would be made to conduct an in depth review of the current status of entire field of lawyer advertising and marketing, determine to what extent it was or was not working, and at least accept the possibility that wholesale revamping was needed.

[1] As we all know, Groucho's quote was "Compared to who?', but he was not a lawyer.

Instead, the process that was used assumed that the regulation philosophy conceived over fifteen years ago still applied in today's marketing and advertising environment, and the role of the Task Force was to better organize the Rules and review them to discover discrete needed changes. In this writer's opinion a broader more in depth review was needed. This argument was presented to the Board of Governors in the form of the undersigned's Dissent from Final Report of Task Force, included as Appendix G to Appendix D (Pages 141 to 149) of the Bar's Petition. If this viewpoint is correct, only an Order from this Court will commence the process. If this viewpoint is incorrect, then the process used resulted in many improvements to the existing rules, but left some unusual anomalies discussed below.

A Suggested Process for Further Review

Ideally, the Task Force should have first confirmed the goals of advertising regulation and then measured the success or expected success of each effort at regulation against those goals. The Task Force should have attempted the task of clarifying those goals for presentation to the Bar and the Court in Rule format. It did not. It should have or the Bar should have. If they won't, the Court should.

The undersigned believes that such regulation of advertising should be limited to accomplishing certain goals. Those goals, in summary, should be (1) to enhance the ability of the public to obtain useful information about the availability

of legal services and the cost of such services, (2) prohibit the dissemination of false or misleading advertising, and (3) protect and enhance the public's respect for the legal system.

There may not be agreement on what the goals should be. This writer suggested more elaborate guidelines in the above reference Dissent at pages 143 through 145. By failing to tackle the question of goals or guidelines, however, the final product is, in this writer's opinion, unsatisfactory as an effort to solve the continuing problem faced by our state and country in dealing with lawyer advertising.

Central to this issue is the extent to which regulation is needed in the area of "marketing" as distinguished from "advertising". This writer believes that the concept of "marketing", which dominates today's thinking, is dramatically different from the concept of "advertising" as it was understood fifteen years ago when serious regulation was developed. Today most writers consider that "marketing" includes efforts to stimulate the audience to believe that they need a service about which they were unaware. Advertising in its narrow sense is intended to provide information about a service already needed, and the terms upon which that service will be provided. The Bar declined to adopt a definition of advertising, choosing instead to attempt to define certain activities as being regulated and certain activities as not being regulated.

The result creates confusion. Certain aspects of the current Rules appear to allow almost unlimited use of marketing concepts, noticeably in granting exceptions from regulation to information furnished "upon request," information furnished "to other lawyers", and information furnished to "former clients". The Rules seem to focus only on regulating traditional activities identified as pure advertising such as it existed in the late 1980s. Direct mail solicitation and print advertising (including Yellow Page advertising), dominated concerns of the Bar in the 1980s. Television advertising by lawyers was used only sparingly in the late 1980s. With the relatively dramatic increase in mass television and radio advertising, the expanding use of pamphlet mailings to former clients, lawyers, and other persons listed in computer data base entries as “professional” relationships, and the developing unique uses of the internet, it is unclear what regulation is needed. Whether this Court agrees that "marketing" as well as "advertising" could and should be regulated is uncertain in the mind of the undersigned. The Task Force certainly never considered the issue, and the record does not indicate whether it was a consideration of the Board of Governors. No clear direction has been given by the Court.

A complete review such as the above would necessarily involve the use of assets beyond those available when working with existing staff and volunteer lawyers. The Bar's selection of the process in this case was undoubtedly dictated to

some extent by economic constraints. The process actually used also was undoubtedly driven by the normal political influences that govern any organization based on the representative process. The undersigned would suggest that if the Court decides that there should be a full and complete review of our regulation of advertising and marketing in today's climate, then the Court should assist the Bar by announcing the need for such study and giving the Bar some clearly defined goals to guide Bar's efforts.

Process Actually Used

Instead, as the Petition states, the Task Force divided the existing Rules into groups for consideration by sub-committees, with the recommendations for change by the sub-committees then being considered by the full Task Force with a summary of the arguments made in the sub-committee. The results, as will be referred to below, create some unexplainable conflicts in philosophy.

Unhappily, as the Petition reflects, the Task Force relied almost exclusively upon the experience of its own members in reaching conclusions. Comments were solicited from members of the Bar, but responses received orally or in writing were mostly from those members of the Bar with opinions already heavily influenced by their own need for or adverse feelings toward the advertising of legal services. Even references to earlier studies by the American Bar Association were largely

ignored when it was discovered that the ABA reports were to a great extent outdated.

The Board of Governors likewise relied almost exclusively upon the personal experiences and personal preconceived interests of its members in reviewing the Task Force's work product.

Ideally, the Task Force and the Board should have had available empirical studies and expert objective opinion regarding how advertising is received by its intended audience. This would have helped in determining not only the likelihood that certain types of advertising in fact is inherently misleading or misunderstood**,** but more importantly, whether certain types of advertising create unreasonable distrust or lack of respect for the Courts and the entire legal system.

While from my viewpoint, the process used to develop the Petition was flawed, it did, however, produce many valuable improvements.

II. Improved Rules Cause More Confusion

There are many good proposals included in the Petition. There appears to be only minor objections surfacing, and I will not attempt to comment on all of the proposed changes. I will, however, select a few of the excellent proposals for favorable comment, and use those comments to emphasize how the process outlined above created anomalies which might have been avoided if a different process were used.

Rule 4-7.3

The Task Force sub-committee dealing with Rule 4-7.3 very wisely recommended elimination of the requirement of warning those reading print advertising (direct mail, billboards, Yellow Page advertisements) that "hiring of a lawyer is an important decision that should not be based solely upon advertisements". The sub-committee suggested that it would be impossible to prove and foolish to expect that such warnings had ever in fact provided any protection to a prospective client. The Bar's petition explains the Task Force decision by saying that the warning "was well-intended and served its purpose in the early years" but was now unneeded. "Well-intended," probably; that it ever truly served a purpose is at least doubtful.

More importantly, the test of "serving a purpose" was rarely applied elsewhere in reviewing the Rules. The decision to include or exclude regulation should not be based exclusively, or even principally, upon the intuition of those of a selected group voting on the issue.

For example, Rule 4-7.4(b)(2)(E) continues to require that a sample contract that is included in direct mail contain red ink stamps stating SAMPLE and DO NOT SIGN on the contract. Likewise, each item of direct mail must contain a statement: "If you have already retained a lawyer for this matter, please disregard this letter." By contrast, the same contract downloaded from a web site contains

no such warnings and the web site does not warn people away if they have already retained a lawyer. The web site should not. The warning required on direct mail solicitation is inconsistent with the frequent admonition by this Court that a client should always be free to change lawyers.

Consider also that the warning requirement (and in fact the entire Rule 4-7) does not apply "to communications between a lawyer and a prospective client if made at the request of that prospective client." New Rule 4-7.1(h). Therefore, if the skillfully designed ten second "marketing" television spot suggests that the prospective client "call or write to us for more important helpful free information" the prospective client who follows the suggestion will not be burdened with either of the warnings. Is this logical? The warning provisions also do not apply if the prospective client selects one or several lawyers by reference to the hundreds of advertisements appearing in the Yellow Pages and, upon calling each, receives a contract without warnings, and other carefully developed materials totally free from many marketing restrictions including the direction to ignore the materials "if you have already retained a lawyer." Finally, is there any indication that any person has ever in fact been protected by the inclusion of the red stamp warnings or the admonition not to be contaminated by any mailed materials "if they have already retained a lawyer?”

Rule 4-7.2

The Bar adds the Statue of Liberty to a long list of illustrations that apparently the Bar finds will provide valuable information to prospective clients and will be "presumed not to be misleading or deceptive." While this is a salutary addition, one cannot help but ask whether the list could realistically include many other illustrations common sense says would not be misleading or deceptive.

The real purpose of the list is to reduce the burden of reviewing all proposed advertisements. If the only illustrations in the advertisement are "presumed" not harmful to the public, the lawyer does not have to submit the advertisement (with a fee) for review. The result, however, is the indirect control of the content of advertising by providing an economic incentive to lawyers to limit content to pre-approved illustrations. Such regulation is frowned upon by the U. S. Supreme Court. The economic and manpower problem faced by the Bar would go away if the Bar did not continue to insist to review of essentially all print advertising.

This insistence on review of all advertising creates other problems. The Bar staff repeatedly expressed the extreme concern over the economic and manpower difficulties which would be created if the staff were required to evaluate and review every web page beyond the home page. This is of course a reasonable consideration. It also suggests that the Bar, as a matter of policy, could change its enforcement policy of required filing and review of substantially all advertising

materials. Apparently only four states do such extensive review of advertising. It has not been demonstrated that the results actually accomplished are worth the effort. Perhaps the Bar should consider the adoption instead of a review process triggered by the filing of complaints about specific advertisements. The Bar could, likewise, conduct random reviews of only some advertisements. The Bar could conduct follow up reviews of advertisements filed by lawyers with previous violations. Adoption of this type of process would reduce the cost of advertising for many lawyers, and reduce the staff time needed to conduct such reviews. The preventative and punishment features of Bar oversight of advertising would remain, but could be accomplished more efficiently. The idea deserves study. It works for the Internal Revenue Service. It might work for the Bar. It will only be considered if the Court suggests the entire process be reviewed.

Rule 4-7.2(c)

The Bar quite reasonably proposes to remove a prohibition against "unfair" communications as well as a reference to "unjustified expectations." They retain the prohibition against "misleading" or "manipulative" content or content that is "likely to confuse the reader."

This Court has recently discussed the use in a television commercial of an advertisement that used the term "pit bull" in reference to the advertising lawyer's practice of law. The history of the matter as reported in the opinion reflected that

there had been uncertainty within the Bar and its enforcement mechanism regarding the nature of the alleged violation. Fortunately, the Court focused a significant part of the analysis on the impact such advertisement would have upon the public's understanding of the justice system and its respect thereof. While this writer agrees with the result of the decision, it does focus attention on a question concerning the degree of specificity that the Rules should include.

The Task Force, with regularity, heard staff explanations of the great frequency that staff determinations regarding advertisements were reversed by the committee of the Board of Governors charged with responsibility of reviewing appeals from staff decisions. We also heard about conflicting decisions from the Board regarding advertisements which were quite similar. Both the staff and the members expressed dissatisfaction with this uncertainty and with what appeared to be an unreasonable amount of time that the Board had to devote at each meeting resolving such disputes. The problem is made more acute by the economic investment potentially made by lawyers honestly attempting to comply with the Rules, and the potential professional and financial risks involved if the attempt to comply fails. Absences of carefully detailed restrictions and their exceptions, may lead the unwary to believe that a prospective action is permissible.

Use of these "soft" words such as “manipulative” in prescriptive sections not only creates uncertainty; it allows decisions at an administrative or lower

enforcement level to create regulation interpretations with which many would disagree. While continued use of these soft words may be inescapable, every effort should be made to limit unreasonable penalties for violations that cannot be charged without reliance only on those words to seek punitive enforcement. The use of soft words could also be allowed if there was no requirement that every piece of advertising material be reviewed. Discretion in enforcement at the staff level would therefore play a bigger role in actually protecting the public and the justice system from the results of inappropriate advertising.

III. The Failure to Develop a Rational Rule Regarding The Internet

The Bar proposal for regulations of Computer-Accessed Communications suffers from being what the Bar comments clearly describe; a compromise.

The Internet Problem

Today, the use of the internet as a marketing tool is developing at a pace that makes it impossible to regulate today a current method of using a computer for marketing without risking that tomorrow an equally attractive method of using the computer for marketing will go entirely unregulated. The recent survey by the Bar confirmed that in the short time between 1996 and 2004 the percentage of lawyers engaging in advertising of all kind increased from 38% to 48%. Of interest, 36% use Yellow Page advertising, 32% use the internet, and only 12% use direct mail.

The Bar currently operates under Rules that make only home pages subject to very limited regulation, and basically treats information on the internet as exempt from regulation because information on web pages is considered as information provided upon request (Current Rule 4-7.9). To some extent this was driven by the perceived impossibility of the Bar reviewing all of the many pages of the growing number of very extensive web sites.

The Task Force, driven to some extent by concerns for staff workload, recommended little change in current regulations. The Board of Governors found it necessary to appoint a special committee to further investigate the issue. The resulting proposed Rule not only fails to solve the problem, it now allows on the internet certain forms of marketing not allowed in any other form of advertising.

Advertising "Past Successes or Results Obtained"
Advertising "Quality of Lawyer's Services"

The proposed amendment is at least confusing and perhaps incomplete. First, it abolishes current application of the Rule to "home pages". The proposed amendment then makes web sites subject to the general provisions of Rule 4-7.2, but specifically allows web sites to contain "references to past successes or results obtained" and "statements describing or characterizing the quality of the lawyer's services." This self adulation remains prohibited in other forms of advertising.

There is nothing inherently wrong in allowing lawyers to provide information concerning the quality of their services, and to adequately do so there

must be some information given about past success and results obtained. It is in fact the policy of the Court to encourage a prospective client to carefully evaluate all information about a lawyer before engaging the lawyer's services.

This information has realistically always been provided to a prospective client when the client meets with the lawyer to determine whether the lawyer will be retained. It has been prohibited in communications seeking to convince the prospective client to employ the lawyer. The prohibition has been generally strictly applied when the contact with the client has not been initiated by the client. It is currently rarely enforced when the client initiates contact with the lawyer.

The problem is that it has been relatively easy to place early forms of advertising into the prohibited category. It has become more difficult when modern forms of marketing are designed to intrigue the client into contacting the lawyer. It is even more difficult when merely becoming aware of the existence of a lawyer or law firm on the internet results in the receipt of laudatory information. It is much like a lawyer having an office on the street with a glass front through which the passersby can clearly see a blow up of a newspaper headline reporting a huge verdict.

This grant of advertising authority in the new Rule is justified by the Bar because the otherwise prohibited statements "will be contained in the much larger context of the full web site." This assumes that only a small portion of the web site

will be dedicated to such statements, a foolish assumption indeed. But even if true, why does that justify treating web sites differently from other forms of advertising? Since the description of the "quality of service" has heretofore been essentially prohibited, is there now a need to more clearly define what descriptions may be misleading. This is but one of the issues that this new Rule raises without any apparent consideration by the Bar of suggested solutions. This Court recently sanctioned a lawyer in part for violation of Rule 4-7.2(b)(3) by using the term PIT BULL in television advertising *The Florida Bar v. Pape,* --- So.2d ----, 2005 WL 3072013 Fla., 2005, November 17, 2005. The Bar now seeks to exempt internet web sites from application of what is essentially the same Rule. Apparently, using the term PIT BULL on television is bad for the justice system, but using PIT BULL on the internet is acceptable. While the Bar continues to insist on reading every word of each direct mail solicitation to enforce Rules involving possible wording that might mislead a prospective client, there will be no oversight of the content of web pages or the so called "blogs" that are beginning to dominate internet use.

The Rule and attached comments appear to then acknowledge that web sites are somewhere between advertising that should be regulated and communications provided at a prospective client's request. It continues, apparently, to consider web sites to be excluded from most restrictions by specific reference to and apparent

adoption of the exclusion provisions of Rule 4-7.1(h) [Information furnished on request].

Is Regulation of Internet Needed … or Possible?

In the fall issue of Litigation, the publication of the Litigation Section of the American Bar Association, under the heading *Bates* and Switch, the author notes that:

> In *Bates*, the Court decided that lawyer advertising was entitled to some First Amendment protection, and that there was little harm in lawyers conveying to potential clients what it would cost to hire them. A strict prohibition therefore seemed justified.
>
> Everyone seemed to know that the ban on lawyer advertising was related to professionalism in some way. But Justice Blackman dismissed such concerns with a wave of the hand. Scrutinized on its own discrete terms, lawyer advertising offered more positives than negatives. If nothing else it made the affordability of legal help known to segments of the population that otherwise might not have been aware of it.

I agreed then and agree now that strict prohibition of lawyer advertising harmed the public. Lawyer advertising, as envisioned in *Bates* and when our regulations were developed in the late 1980s, is far different than the aggressive television and radio marketing of legal services today. The Court in *Bates* clearly did not foresee the problems created by the use of the internet by lawyers for marketing.

The article in Litigation deals with the Ninth Circuit case of *Barton v U. S. District Court*, 410 F.3d 1104 (decided June 9, 2005). In that case, the lawyers provided questionnaires on the internet to a large number of people claiming they were looking for persons or their relatives who had suffered problems with Paxil, the antidepressant, as an information gathering process. The issue arose when the manufacturer sought to obtain such information from the lawyers and the persons answering the questionnaire objected that the information was protected by the attorney client privilege even though they were not clients of the lawyers. The Litigation article continues:

> It is difficult not to sense some difference, however, between *Barton* and the more customary situation. The difference, if there is one, is in the conduct of the lawyers. In *Barton*, the lawyers, not withstanding their pretensions of merely gathering information, were "trolling" the Internet for business. The Ninth Circuit specifically concluded as much, acknowledging that the questionnaires were a means of soliciting clients …. Citing *Bates* [the court] merely noted that times had changed.

Clearly "times have changed," but it is unclear whether the Bar has attempted to solve a problem, or has merely reached a compromise that answers a question one way for the future of a new technology for marketing legal services while preserving potentially unreasonable restrictions on marketing of lawyer services in other forms of advertising.

If it is appropriate to provide information about past successes and to compare lawyer's abilities in one format, is there any realistic reason to prohibit such information in other formats? Why do we restrict the public access to what could be valuable information anyway? Is this protection of the public, or protection of the lawyer? If we are concerned about exaggeration or untruthful or misleading information, is this the way to express this concern by allowing the information over the internet but prohibiting it in other forms of marketing?

There are other potential areas of marketing. While the comments suggest that the Rules, such as they are, apply to so called "pop-up ads", the description of that result in the Rule itself remains unclear.

Other marketing means are currently well known but are not mentioned or referenced at all. For example, the newest marketing idea is to create "blogs" on subjects of interest to potential clients. Such "blogs" provide helpful and interesting information which surfaces on Google and other search engines, but they do not directly solicit business. When the potential client finds the interesting information, the source for that information is naturally selected for further assistance. Like the case above, it is an indirect method of solicitation apparently impliedly approved by the Bar. Maybe it should be. Is it harmful to the public? Probably not. Is it harmful to the justice system? Probably not. But how is it different from the forms of marketing currently strictly regulated?

Other schemes for internet marketing involve paying a fee to assure "top listing" on search engines even without banner ads being involved. Google's results display placement on its list of information based on the number of "hits" it has recorded in recent times for any page of a web site or a blog. If you develop an interesting web site or blog which rewards you with a large number of hits, you are further rewarded by increasing the chance that your web site will be on the first page of Google's report of search returns. Google will tell you, and common sense confirms, that this gives you a significant advantage in competition for business. Are these marketing ideas to be ignored? Have they been? Is the real problem that we are trying to devise regulations on internet marketing that do not conflict with the regulation of advertising as conceived in the early 1990s? Would it be better to reconsider all the policies approved in 1990?

The Bar's proposed Rule on internet use is merely the first step in what is likely to be a significant problem in the future. It is not clear that these issues have been considered fully by the Bar. The *Bates* Court authorized lawyer advertising based to some extent on a view of future advertising that has proven quite wrong. This Court has passed elaborate Rules in the past to regulate advertising only to find, or at least suspect, that the Rules adopted do not adequately function in today's reality. This first step in the attempted regulation of the internet should not be taken unless the Court is convinced that some of the questions raised above

have been carefully considered, and that the rationale for proposed regulation have been adequately explained.

IV. The Failure to Define Advertising

The Bar was urged to define advertising so that its members could know what activities were being regulated. Instead the Bar chose to regulate the broad area of providing information, identify a few specific activities as clearly covered by the Rules, and then, by broad definitions describe certain activities as exempt from the Rules. As a result there is confusing conflict in the methods used to achieve the desired goal of protection for the public.

Rule 4-7.1(e)

Rule 4-7.1(e) exempts from regulation communications between lawyers. As stated by the Bar in its Petition, this is the method used to define what is not an advertisement. This exemption has generated a huge market in pamphlets and marketing folders directed not just to other lawyers, but intended for consumption by the clients of those lawyers. Perhaps regulation of these forms of marketing is impractical or even undesirable, but to suggest it is appropriate to champion past successes and the quality of services on web sites and in advertisements directed to other lawyers but to prohibit such comparisons in direct mail solicitations requires a leap of logic.

Rule 4-7.1(g)

Section 4-7.1(g), again defines what is not an advertisement by granting an exemption from most Rules for communications with current or former clients. While the exemption perhaps makes sense when applied to everyday communications to current clients, it is unrealistic when applied as a blanket exemption for communications of all kinds.

In recent conversations involving a central Florida personal injury law firm, it was revealed that the firm had current clients numbered in the area of 26,000. Another attorney confirms that the average number of new clients each month for his firm is 1000. Sending a brochure to such a large number of current clients is obviously not intended as a means of keeping the clients aware of current trends in the law or changes in law firm personnel. It is intended as a marketing device to get new clients from among the friends, relatives, and fellow employees of current clients. This is not to suggest that such communications should be discouraged. It is to suggest that to ignore such marketing devices because they are "not advertising," while insisting on detailed scrutiny of each piece of other direct mail cannot stand a reasonable test of logic.

The same observation can be made regarding communications with former clients although the numbers involved would obviously be much greater. In addition, when dealing with former clients, there is no actual need to keep them

advised of current firm personnel changes or other such news. Again, the detailed prohibitions placed on direct mail solicitation and Yellow Page advertising are dramatically more restrictive than those placed on these other marketing programs. For example, there is no required warning in communications to former clients that they should ignore the communication if they already have a lawyer. It is doubtful if many of the restrictions on direct mail solicitation make sense, but to say they make sense in one context but not in others requires some proof rather than merely an unsupported statement of belief.

V. Should Television and Radio "Spot" Advertising be Regulated Differently?

The undersigned obviously believes that current regulation of most marketing and advertising is too restrictive and probably ineffective to provide reasonable protection of the public. However, the Court should consider stricter regulation of television and radio “spot” advertising.

There is no agreed definition of “spot” advertising. As used in these comments, “spot” advertising refers to those relatively short advertisements on television and radio whose main marketing goals are to develop name recognition and to create a perceived need for a lawyer in the mind of the target audience when that need probably did not exist before the advertisement was seen or heard.

In what way is "spot" television and radio advertising different from other forms of advertising?

(a) It is the only form of advertising that is completely intrusive. The only way to escape is to turn off the radio or the television and thus be deprived of access to the underlying program that one desires to see or hear.

(b) By its restricted nature, it necessarily provides the very least amount of information that a prospective client might use to select a lawyer.

(c) By its restricted nature and the demand to cram a large amount of information into a small time, it creates the greatest risk that misleading information will be provided, whether by mistake or by design.

(d) It is not "recoverable" for immediate considered study or review by the listener or the viewer. Thus misunderstandings cannot be eliminated.

(e) It is often perceived as being used to create in the mind of the viewer or listener, the thought that a lawyer can provide some benefit that the client did not desire or need before listening to the advertisement.

(f) Spot legal advertising is most successful in its ability to develop name recognition, which is a marketing concept that is designed to cause the viewer or listener to select the advertiser without regard to any factor except name recognition. This in its nature favors the lawyer or law firm that can pay for the most appearances of the sponsors name to the most people, an expensive proposition not available to younger or less financially successful lawyers. The centralization and growth of large financially secure law firms at the expense of

other otherwise competent lawyers is not in the best interest of the public or the legal profession.

The Most Important Difference

Television and radio spot advertising is a major cause of increasing public disrespect for the legal system.

For purely self interest reasons, the Association of Trial Lawyers of American recently commissioned a study of attitudes of the American public regarding the civil justice system in general, and lawyers in particular. This information was felt to be valuable not only in the political arena, where public attitudes drive political decision, but also to lawyers in dealing with what is perceived by them to be an increasing hostility of jurors to claims presented in court.

The report in its entirety remains confidential, but some of the results are informative and can be released. The report is based on surveys taken quite recently in the summer of 2005. The Court should consider these findings which are based on surveys conducted in different types of communities throughout the country, including Florida.

58% of those polled reported dissatisfaction with the civil justice system

65% of those polled felt the civil justice system had a negative impact on the country

53% of those polled felt the civil justice system had a negative impact on average Americans.

And where did those people get these impressions? While they received their impression from many sources, each was asked to identify their *main* source of information.

20% say that lawyer advertising is their *main* source of impressions about the system. Of these 20% of respondents, 84% say the advertising leaves a negative impression. Only news stories were a greater *main* source of information about the trial lawyer.

Can the Court Do Anything to Address These Problems?

Clearly there is little the Court can directly do to influence reporting. There is probably much the Court can do to influence the impact of lawyer advertising.

In view of this Court's recent opinion in *In Re: Amendments to Rules Regulating the Florida Bar - Advertising Rules*, 762 So.2d 392 (Fla. 1999), it must be recognized that this Court probably is unwilling to again consider a complete ban on television and radio advertising. But a complete ban is not what is suggested. In view of the rapid change in television marketing, it may well be that conditions have sufficiently changed since the studies referenced, but not cited, in that opinion were conducted. It is not clear that the studies were focused on the narrow issue of spot advertising. As noted elsewhere, there are other whose

opinions on the danger of spot advertising differ, and there are certainly statistics showing the continued dramatic growth of television advertising. A survey conducted today may well demonstrate a worsening picture of public respect for the justice system driven by spot advertising on television and radio.

A Possible Solution to a Complex Problem

The undersigned does not suggest that the only solution for the problem is a complete ban on spot television and radio advertising is needed, although that should at least be considered. Instead the undersigned suggests that in exchange for a lawyer electing to use spot advertising to gain name recognition rather than convey a significant amount of usable information, the lawyer would be required to include a significant amount of information advancing the public's respect for and faith in the justice system. This proposal is for a reasonable limitation on the type of advertising that provides the least possible relevant information and does the most harm to the justice system. This proposal suggests a solution to hopefully change the public perception of the justice system from negative to positive. It would be no more burdensome on the lawyer involved than the burden placed upon lawyers today in regards to mandatory pro bono service. The legal justification for this type of contribution to the public good is not in any substantial degree at variance from the legal justification for mandatory pro bono service for the public good. To some extent there would be a quid pro quo. In exchange for the benefits

gained by use of this specific type of advertising, the justice system and the public would benefit, and perhaps even the lawyer would gain added respect for the quality advertisements that may be produced.

In reality, a proposal such as this will never receive honest consideration until two events occur:

First, the Court would have to be convinced that such a restriction would be constitutional under state and federal constitution. The United States Supreme Court indicated as early as 1982 that "a state may totally prohibit misleading advertising and may impose restrictions if the particular content or method of advertising is inherently misleading or if experience demonstrates that the advertising is subject to abuse." *In re R. M. J.*, 102 Sup.Ct 929,937 (1992)(emphasis supplied). The same Court also recognized that regulation must be related to a substantial government interest. This Florida Supreme Court's Rule totally prohibiting direct mail solicitation of personal injury clients within 30 days following an accident was upheld by the United States Supreme Court. *Florida Bar v Went For It, Inc.* 515 US 618 (1995). The United States Supreme Court opinions on the subject have not been unanimous. See *Shapero v Kentucky Bar Association*, 488 US 466 (1988) (Especially the dissent by Justice O'Conner joined by Chief Justice Rehnquist and Justice Scalia). While this is neither the time nor the forum to study this legal question in depth, without the Court expressing an

interest in the issue or least expressing a willingness to be open minded on the subject, such a regulation will never even be considered.

Second, this Court would have to obtain accurate and current information about how lawyer advertising is affecting the public's perception of our justice system and how it affects the implementation of that portion of the system influenced by juries. This would involve expenditures for the collection of such information on a current basis, and for the collection of such information from other available reliable sources. Only if and when the negative impact of spot television and radio advertising can be empirically demonstrated will the Court be in a position to strictly regulate the content of such advertising or prohibit it altogether.

Without more empirical knowledge about the nature and extent of the problem, it is difficult and it may be foolish to suggest a Rule that would accomplish the above goal. Development of the exact type of advertising to be regulated, and the type of advertising that would qualify for compliance, of necessity, would involve careful study and input from all involved. Such could be accomplished as part of the overall review suggested in the conclusion.

This last proposal is the proposal that will require consideration and discussion of a highly volatile issue, and that discussion will never occur without

an indication from this Court that the issue is open for consideration. No progress is ever made without open and free discussion of controversial issues.

V. Conclusion

The Court should conditionally accept the Bar's proposed amendments with the exception of the proposed Amendments to Rule 4-7.6 relating to Computer Accessed Communications which should be returned to the Bar for further consideration.

The Court should direct the Bar to commence a thorough study of the entire area of regulation of lawyer advertising and marketing with the goal of being able to demonstrate that the regulation which the Bar submits to the Court is really necessary. The goal of such regulation should be principally, if not exclusively, to provide protection to the public by prevention of false or misleading advertising and marketing, to protecting public access to knowledge about reasonably priced quality legal service, and finally, to enhance and protect the public's reasonable respect for and rightful reliance on the justice system.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the above, **COMMENTS OF BILL WAGNER, CORRECTED COPY,** was served by mail on January 13, 2006, upon the following.:

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Bill Wagner

CERTIFICATE OF TYPE SIZE AND STYLE

Bill Wagner HEREBY CERTIFIES that this petition is typed in 14 point Times New Roman Regular type.

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