IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE PETITION TO AMEND RULES REGULATING THE FLORIDA BAR – ADVERTISING RULES
_____/

CASE NO. SC05-2194

COMMENTS OF FLORIDA BAR MEMBER TIMOTHY P. CHINARIS

COMES NOW Florida Bar member Timothy P. Chinaris, who files the following comments in response to The Florida Bar's Petition requesting that this Court amend the Rules Regulating The Florida Bar, and states:

1. The undersigned is a member in good standing of The Florida Bar.

2. These comments are filed in response to the Notice published in the January 1, 2006, issue of the *Florida Bar News.*

3. These comments are directed at several of the Bar's Proposed Rules, as identified in bold type below.

4. **Proposed Rule 4-7.1(b) (advertisements disseminated in Florida).** The Court should not adopt this Proposed Rule as written because it does not specify whether a lawyer's use of his or her website, by itself, is considered advertising for legal employment in Florida or targeting advertising for legal employment at Florida residents. This issue is of particular concern to out of state

Florida Bar members, many of whom are licensed to practice in more than one state. For example, a Florida Bar member who is also licensed in Michigan may be employed by a Detroit law firm that has a website. Websites are available worldwide to anyone with a computer and an Internet connection. The Detroit law firm's website, of course, is available for viewing by Florida residents. Does this mean that the Florida Bar member is targeting Florida residents or intends the law firm's website to be disseminated in Florida, thereby subjecting it to Florida's lawyer advertising rules? Presumably this is not what the Bar's Proposed Rule is designed to accomplish. The undersigned respectfully suggests that the Court revise Proposed Rule 4-7.1(b) (as well as Proposed Rule 4-7.1(d)) to specify that the mere operation of a website, without more, does not trigger applicability of the Florida lawyer advertising rules. Something further should be required (e.g., a Florida office, or language specifically directed at Florida law or Florida citizens).

5. **Proposed Rule 4-7.2(c)(1) ("unfair" communications).** The Court should adopt the Bar's proposal to eliminate references to "unfair" advertising throughout the Rules. As the Bar admits in its Petition, the term "unfair" is "unclear, overbroad, and unenforceable." It fails to provide Bar members with fair notice of what is required of them.

6. **Proposed Rule 4-7.2(c)(1)(F) (references to past results obtained).** The Court should reject the Bar's proposed changes and should eliminate Proposed

Rule 4-7.2(c)(1)(F) entirely. The Bar proposes to amend a rule that it candidly admits is "difficult" to interpret, but which currently has some degree of flexibility, by adopting a stricter blanket prohibition without supporting justification. Truthful information about a lawyer's past results clearly is valuable information for a prospective client. Lawyers should not be permitted to "promise results;" the Bar's Proposed Rule 4-7.2(c)(1)(G) expressly states this and should be adopted. Truthful information about past results, however, is *not* equivalent to a promise or guarantee of future results. If the Court believes that a rule concerning use of past results is needed, the undersigned respectfully suggests that the Court require that a mention of past results be accompanied by a disclosure statement to the effect that "each case is different and past results do not necessarily predict future results." This approach was used by The Florida Bar prior to the 1991 changes to the advertising rules. See also *Bates v. State Bar of Arizona*, 433 U.S. 450 (1977), where the United States Supreme Court rejected the Arizona State Bar's argument that an advertising prohibition was needed because advertising did not provide a complete foundation on which to base a decision about hiring a lawyer. The Court noted:

> [I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative the prohibition of advertising serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any

> justification that is based on the benefits of public ignorance. . . . Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, *the preferred remedy is more disclosure, rather than less*.

Bates, 433 U.S. at 374-75 (footnote and citation omitted) (emphasis added). Although the *Bates* Court was dealing with price and availability information, the rationale of the Court's decision is equally applicable to truthful information about a lawyer's past results.

7. **Proposed Rule 4-7.2(c)(1)(J) (testimonials).** The Bar proposes that the current ban on testimonials should remain in effect, but the Bar has adduced no empirical evidence supporting a complete ban on testimonials. Like truthful information about a lawyer's experience and past results, testimonials from a lawyer's former clients or colleagues may have value to a prospective client and so should not be categorically prohibited. Any concerns about truthful testimonials being potentially misleading can be resolved through the use of a required disclosure. Because there is no evidence of actual harms caused by testimonials, and there are less restrictive alternatives readily available to alleviate potential harms, it is doubtful that a complete ban on testimonials could pass the test for restrictions on commercial speech established by the United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 477 U.S. 557, 100 S.Ct. 2343 (1980). The undersigned respectfully suggests that the present ban on testimonials be lifted.

8. **Proposed Rule 4-7.2(c)(3) (portrayals and illustrations that are "likely to confuse").** The Bar proposes to add a provision banning visual or verbal descriptions, depictions, illustrations, and portrayals that are "likely to confuse the viewer." The Court should reject this proposed change. The Bar offers no justification for this change and provides no definition of "likely to confuse." It is incongruous for the Bar to urge adoption of this language, while at the same time asking the Court to delete references to "unfair" advertising as being "unclear, overbroad, and unenforceable." The proposed "likely to confuse" standard similarly is overbroad and is capable of being applied in a very subjective manner. Bar members who advertise should have a more definitive, easily understandable guideline to follow.

9. **Proposed Rule 4-7.2(c)(3) (portrayals and illustrations that are "manipulative").** The Bar proposes to continue the existing prohibition against visual or verbal descriptions, depictions, illustrations, and portrayals that are "manipulative." The undersigned respectfully suggests that the Court delete this term from the Rule. In one sense, all advertising is inherently "manipulative" in that it is designed to inspire action on the part of the reader or viewer. Additionally, as with "unfair" and "likely to confuse," the lack of a definition of "manipulative" in the Rule offends notions of due process because a lawyer is not

given fair notice of the conduct that is prohibited. Retaining the existing ban on deceptive and misleading depictions is sufficient to protect the public.

10. **Proposed Rule 4-7.4, Comment (disclosure of how lawyer obtained information prompting direct mail communication).** The Bar has proposed a useful revision to the Comment to Rule 4-7.4, and the Court should adopt this change. The Bar's proposed standard is "sufficient information or explanation to allow the recipient to locate for himself or herself the information that prompted the communication from the lawyer." Adoption of this change will help Bar members better understand the type of disclosure that they must make as part of their direct mail communications with prospective clients.

11. **Proposed Rule 4-7.5(b)(2)(B) (disclosure of non-lawyer who appears in TV or radio ad).** The Bar proposes that this Rule be amended to require an affirmative disclosure that a non-lawyer spokesperson in a television or radio ad is not a lawyer *only* if "it is unclear from the context of the advertisement that the spokesperson is not a lawyer." The Court should decline to adopt this proposed change because doing so would establish an unclear standard that capable of being applied in a subjective manner. There is no evidence that the current rule is overburdening advertising lawyers or is not working effectively.

12. **Proposed Rule 4-7.7(a)(1)(A) (prior review of TV and radio ads).** The Court should reject the Bar's proposal to require all television and radio ads to

be reviewed by the Bar before they are broadcast. The report of the Bar's own special Advertising Task Force 2004 states: "[T]he task force ultimately determined *by unanimous vote* not to recommend amending the rules to require prior approval of advertisements before the advertisements may be disseminated" (emphasis supplied). Despite this overwhelming recommendation from a group that studied the issues in great detail, the Bar's Board of Governors voted to ask this Court to approve a rule requiring prior review. The Bar's purported justifications for this rule are weak. The Bar argues that a high percentage of TV and radio ads do not comply with the advertising rules. The data filed as the Bar's "Exhibit 1" shows that during the past three years a total of 47% of TV and radio ads filed with the Bar did not comply with the rules for one reason or another. During the same time period, however, almost the same percentage of newspaper and print ads (46%) and yellow pages ads (45%) did not comply. Significantly, *70% of direct mail ads* filed during this period failed to comply. If prior review is considered necessary for broadcast media ads, surely it would be even more important for direct mail ads – ads that, as the United States Supreme Court has noted, may invade the privacy of the recipients and cause them to think less of the legal profession. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626-27, 115 S.Ct. 2371, 2377 (1995). Yet the Bar has singled out only television and radio ads for prior review. This may be due less to any empirical reason than to the fact that

many members of the legal profession simply find broadcast advertising offensive. Finally, it should be noted that, although very few consumer complaints are filed with the Bar regarding any form of advertising, the Bar has recently established a special grievance system to oversee prosecution of lawyer advertising cases. The undersigned respectfully suggests that this process be given more time to prove itself before the Court adopts a burdensome and arguably unnecessary prior review requirement.

13. **Proposed Rule 4-7.7(a)(2)(F) (binding nature of Bar opinions finding compliance).** Apparently as part of its proposed system of prior review of television and radio advertisements, the Bar has proposed that Bar findings of compliance "in television and radio advertisements shall be binding on The Florida Bar" unless an ad contains misrepresentations that are not apparent on its face. This Proposed Rule is laudable, but it does not go far enough. Bar members acting in good faith should be able to rely on the Bar's determinations in conducting their advertising affairs, and this reliance should not be limited to TV and radio ads. The undersigned respectfully suggests that this Proposed Rule be adopted with one change: the words "television and radio" should be stricken.

Respectfully submitted,

TIMOTHY P. CHINARIS
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P.O. Box 210265
Montgomery, Alabama 36121-0265

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail on this 26th day of January, 2006, to:

John F. Harkness, Jr.
The Florida Bar
650 Apalachee Parkway
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Timothy P. Chinaris
Florida Bar No. 0564052

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this document is typed in 14 point Times New Roman Regular type.

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Timothy P. Chinaris
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE PETITION TO AMEND RULES REGULATING THE FLORIDA BAR – ADVERTISING RULES
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CASE NO. SC05-2194

NOTICE OF CORRECTION TO COMMENTS OF FLORIDA BAR MEMBER TIMOTHY P. CHINARIS

COMES NOW Florida Bar member Timothy P. Chinaris, and files this NOTICE OF CORRECTION to the Comments of Florida Bar Member Timothy P. Chinaris that were filed in response to The Florida Bar's Petition seeking amendments to the Rules Regulating The Florida Bar, and requests that the Court and interested parties take note of the following corrections:

1. The correct citation in paragraph 6. is: *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691 (1977).

2. The correct citation in paragraph 7. is: *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

3. Paragraph 13. should be deleted in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail on this 27th day of January, 2006, to:

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this document is typed in 14 point Times New Roman Regular type.

_____

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