IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC05-

PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR – ADVERTISING RULES

THE FLORIDA BAR, pursuant to rule 1-12.1, Rules Regulating The Florida Bar, petitions this court for an order amending the Rules Regulating The Florida Bar and states:

I. Rule Development History

This petition has been authorized by the Board of Governors of The Florida Bar.

The amendments and action proposed in this petition were specifically approved by the Board of Governors of The Florida Bar (the board) by voice vote at its April 8, 2005 meeting, except as otherwise noted in subsection II below.

The amendments and action proposed in this petition were specifically approved by the board's Disciplinary Procedures Committee by voice vote at its March 7, 2005 meeting, with the exception to the changes to Rule 4-7.7 regarding prior review of television and radio advertisements. Those changes were approved by the Disciplinary Procedures Committee by voice vote at its April 7, 2005 meeting.

The amendments and action proposed in this petition were specifically approved by the board's Rules Committee by voice vote at its March 23, 2005 meeting.

The proposed amendments affect subchapter 4-7 of the Rules Regulating The Florida Bar. The changes were developed by the Advertising Task Force 2004. As such, the amendments stand alone and are being filed separately from

the bar's annual rules filing. The final report of the committee, presented to the board at its April 8, 2005 meeting, is attached as Appendix D.

The Advertising Task Force 2004 was appointed by Florida Bar President Kelly Overstreet Johnson on February 9, 2004. The task force was charged with the following mission:

> The Advertising Task Force 2004 is charged with reviewing the attorney advertising rules and recommending changes to the rules if deemed necessary, including any changes to clarify the meaning of the rules and provide notice to Florida Bar members of the rules: requirements. Included within this charge is an analysis of the advertising filing and review requirement, including consideration of mandatory review prior to dissemination of advertisements. The task force should expect to make a final report to The Florida Bar Board of Governors in year 2004-05.

The task force included lawyers with widely varying practice areas, backgrounds, experience, and geographic location. The task force included lawyers who advertise extensively and lawyers who do not advertise at all. The task force included three members of the Standing Committee on Advertising and two members of the board, all of whom had varying degrees of experience interpreting the existing advertising rules.

The task force met numerous times in person and by telephone conference. Copies of the meeting minutes are attached to the task force final report (Appendix D, pp. 19). The task force held an organizational meeting in March 2004. The task force analyzed the rules balancing three interests: the protection of the public from false and misleading advertising, the protection afforded to commercial speech by the First Amendment, and the protection of the justice system and profession from denigration by improper advertising. Task force members agreed that the rules should be clear and consistent. The task force determined to divide into subcommittees to review the rules in depth, then meet as a group to review each subcommittee's recommendations.

The task force held a special meeting at the bar's 2004 Annual Meeting and invited lawyers to comment on the task force's charge. Notices were posted in the Florida Bar *News* and on the bar's website. The chair of the task force sent a letter to the chair of each bar section and standing committee, as well as the voluntary bar associations, inviting comment on the task force's charge and any proposals by bar members. A copy of the letter is attached to the task force final report (Appendix D, pp. 80). Numerous bar members provided written comments and attended the meeting to provide suggestions to the task force. A summary of

written comments received is attached to the task force final report (Appendix D, pp. 82).

The task force then drafted interim changes that were noticed in the Florida Bar *News* and posted on the bar's website. The task force sent a letter to the chair of each bar section and standing committee, as well as the voluntary bar associations, inviting comment on the interim draft. A copy of the letter is attached to the task force final report (Appendix D, pp. 85). The task force held a special meeting in conjunction with the bar's 2005 Midyear Meeting, reviewed numerous written comments, and heard from numerous bar members regarding various proposals. A summary of written comments received is attached to the task force final report (Appendix D, pp. 87). The task force then made final decisions on its recommendations to the board.

The board adopted most of the recommendations of the task force. Two significant areas in which the board declined to adopt task force recommendations include rule provisions dealing with regulation of websites and review of television and radio advertisements. Some of the proposed changes delete redundant or obsolete provisions of the rules. Some of the proposed changes clarify ambiguities within these rules. The most significant proposal would require members of the bar to seek and receive bar approval of most television and radio advertisements prior to their dissemination. All proposed changes are discussed more fully in section II under Rule 4-7.7. The full text of the proposed rules changes is attached as Appendix B. The full text of the proposed rules changes with explanatory notes in a two-column format is attached as Appendix C.

II. Summary and Discussion of Amendments

The bar proposes new rules or amendments to existing rules as shown in the listing below. Each entry provides an explanation of each amendment and adverse commentary or dissenting views, if any, regarding the proposals. The source, committee action, and board action are the same for nearly the entire package of amendments and are discussed above; the few exceptions are specifically noted in this section of the petition. The following paragraphs explain changes to individual rules in numeric order.

Chapter 4 Rules of Professional Conduct
Subchapter 4-7 Information About Legal Services

Rule 4-7.1 General

Explanation/Reasons: The task force discussed adding a definition of "advertising" or "advertisement" to this general rule. Ultimately, the task force determined that defining "advertisement" was counterproductive. Because of rapidly changing technology, any laundry list of communications subject to the

attorney advertising rules would likely be under-inclusive by the effective date of a rule change. The task force instead decided to address communications not covered by the rules, so lawyers would clearly be on notice that certain communications are not covered by the rules. The bar therefore recommends the addition of new subdivisions (e) through (h), which state that the attorney advertising rules do not apply to communications between lawyers, between a lawyer and the lawyer's own family members, between a lawyer and the lawyer's own current and former clients, and between a lawyer and a prospective client at that prospective client's request. To ensure members' compliance with general standards relating to their conduct, the bar also recommends adding new subdivision (i), which states that lawyers cannot engage in conduct involving deceit or misrepresentation in any form of communication, regardless of whether the communication is governed by the attorney advertising rules. See Rule 4-8.4(c), Rules Regulating The Florida Bar. The bar also recommends adding commentary that addresses these concepts.

To complement the new proposed subdivision setting forth the communications not covered by the attorney advertising rules, the bar also recommends adding new subdivision (b), stating that subchapter 4-7 applies to Florida Bar members who advertise in Florida. Existing subdivision (b) is renumbered as subdivision (d).

The task force also extensively discussed the issue of lawyers licensed in other jurisdictions advertising in Florida. In 1997, The Florida Bar asked the Supreme Court of Florida to adopt rules changes that would require lawyers licensed in other jurisdictions who advertise in Florida to comply with the Rules Regulating The Florida Bar governing lawyer advertising. The court declined to adopt those rules changes, stating that such advertising in Florida was the unlicensed practice of law. *Amendments To Rules Regulating The Florida Bar - Advertising Rules*, 762 So. 2d 392 (Fla. 1999). The court then invited the Bar to submit amendments refining chapter 10 of the Rules Regulating The Florida Bar, which address the unlicensed practice of law. *Id*. The Florida Bar did so, and the court adopted rule 10-2.1(a)(3) in 2002, which states as follows: "It shall constitute the unlicensed practice of law for a lawyer admitted in a state other than Florida to advertise to provide legal services in Florida which the lawyer is not authorized to provide." *Amendments to Rules Regulating The Florida Bar,* 820 So. 2d 210 (Fla. 2002). That rule amendment left a loophole: the rule does not address advertising by lawyers licensed in other jurisdictions advertising for services they are authorized to provide in Florida. Although these areas are limited, it is incongruous to allow lawyers licensed in other jurisdictions to disseminate advertisements that do not follow the strict requirements adopted by the court to protect the residents of the state of Florida. Therefore, the Special

Commission on the Multijurisdictional Practice of Law recommended changes to the Rules Regulating The Florida Bar to address advertisements by out-of-state lawyers for authorized legal services. The court adopted those and other changes in the case of *In re Amendments to the Rules Regulating The Florida Bar and the Florida Rules of Judicial Administration*, --- So.2d ----, 2005 WL 1118034 (Fla. 2005). The bar recommends adding new subdivision (c) that complements these rules changes. New subdivision (c) states that subchapter 4-7 applies to out-of-state lawyers who have established a regular practice in Florida to provide legal services they are authorized by law to perform, and who advertise in Florida to provide those authorized services.

Dissent: Florida Bar member Timothy P. Chinaris suggested that Rule 4-7.1(b) and (c) be modified to specifically state that Florida's lawyer advertising rules do not apply to websites of lawyers licensed in other jurisdictions. The bar disagrees with this general proposition. Whether Florida's rules will apply to websites of lawyers licensed in other jurisdictions will depend on the content of those websites. For example, if the content of such a website clearly targets Florida residents or involves matters of Florida law, the website should be subject to Florida's lawyer advertising rules.

Rule 4-7.2 Communications Concerning a Lawyer's Services

Explanation/Reasons: Rule 4-7.2 sets forth the requirements that govern all lawyer advertising and unsolicited direct mail. Probably the most extensive changes are made to this rule, in part because of the length of the existing rule. Many changes are organizational, to provide greater clarity and guidance in using the rule. The rule is reorganized to first set forth required information in proposed subdivision (a), then permissible content in proposed subdivision (b), then general regulations in proposed subdivision (c). Many of the organizational changes require renumbering of other subdivisions and numbering changes where the rules are referenced elsewhere.

The bar recommends deleting the requirement in subdivision (a)(2) that requires qualifying language to appear with a local telephone number where the lawyer does not have a local bona fide office. This subdivision already requires the lawyer to disclose at least one bona fide office location. The bar believes that if the actual physical location of the lawyer is important to a prospective client, the client will ask the lawyer.

The bar recommends reorganizing subdivision (b), which sets forth permissible content of advertisements, into three subdivisions. The three subdivisions would address permissible content for lawyers [proposed subdivision (b)(1)], for lawyer referral services [proposed subdivision (b)(2)], and for public

service announcements [proposed subdivision (b)(3)]. The bar believes that the rule will have greater clarity and provide better guidance with this change.

The task force reviewed the list of permissible content of advertisements to determine if there were possible changes that would provide better guidance to Florida Bar members and provide them with greater latitude to use information that is relevant, useful, factually verifiable, and not misleading. Based on this study, the bar recommends adding to the permissible content of advertisements military service in proposed subdivision (b)(1)(D), punctuation marks and common typographical marks in proposed subdivision (b)(1)(L), the Statue of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), and diploma(s) in proposed subdivision (b)(1)(M).

To better organize subdivision (b)(2) and delete confusing repetition, the bar recommends consolidating and deleting redundant information in the prohibition against misleading information; the proposed subdivision is numbered (c)(1).

The bar recommends deleting the term "unfair" throughout the rules because it believes the term is unclear, overbroad, and unenforceable, deleting references to "unfair" advertising in subdivision (b)(2)(E) and the comment to rule 4-7.2.

At the request of the board, the task force carefully examined subdivision (b)(1)(B), prohibiting statements that are "likely to create an unjustified expectation about results the lawyer can achieve." Bar staff reported to the task force that interpretation of this rule is one of the most difficult areas of the attorney advertising rules. The board disagrees with interpretation of this rule provision by the Standing Committee on Advertising more often than any other rule provision. The task force initially discussed defining "likely to create an unjustified expectation" in either the rule or the comment. The task force found the term to be unclear and incapable of adequate definition to provide guidance to bar members. The task force ultimately determined to recommend that the rule provision be deleted and replaced with a prohibition against statements that "guarantee results" in proposed subdivision (c)(1)(H). The board later refined the task force proposal to prohibit statements that "promise results" by voice vote at its June 3, 2005 meeting.

To better organize this rule, the bar also recommends consolidating the prohibitions against misleading illustrations and misleading visual and verbal portrayals in proposed subdivision (c)(3) [existing subdivisions (b)(3) and (c)(1)].

To simplify the rule, the bar recommends deleting the prohibition in subdivision (c)(2) against requiring all ads to conform to the requirements of advertising areas of practice, because it is redundant.

The Standing Committee on Advertising, through its decisions, has determined that use of terms such as "expert" or "expertise" implies that a lawyer

is board certified in the same way that the words "specialist" or "specializing" do. To put lawyers on notice of this requirement, the bar recommends adding to proposed subdivision (c)(5) and the comment that use of such terms is prohibited unless the lawyer is board certified.

The bar also recommends deleting the requirement in existing subdivision (c)(11) [proposed subdivision (c)(10)] that required information must be printed in type size at least one quarter the size of the largest type used in the advertisement. The task force finds the requirement to be overbroad and burdensome to advertising lawyers and bar staff. There are required disclosures that may be slightly smaller than one-quarter the type size of the largest type, yet still be perfectly readable and therefore adequate. This deletion would leave untouched the requirement that all required information be clearly legible.

Dissent: The task force recommended deleting the prohibition in subdivision (b)(5) against advertising for cases in an area of practice in which the lawyer does not currently practice, believing the regulation is overbroad to fit its purpose of preventing the "brokering" of cases, which purpose is not evident from the language of the rule itself.

Similarly, the task force recommended that the board delete the requirement in subdivision (c)(8) that the lawyer disclose in an advertisement that the lawyer intends to refer cases to another lawyer. A majority of the task force agreed that, although the rationale behind the rule is to address the "brokering" of cases, the regulation is overbroad, the rationale is not evident from the language of the rule itself, the underlying conduct of receiving payment for referring cases is not prohibited if in accordance with rule 4-1.5(g)(2), Rules Regulating The Florida Bar, and the regulation is therefore unenforceable. Florida Bar member Timothy P. Chinaris supported the task force recommendation regarding subdivision (c)(8).

Mr. Chinaris also suggested deleting the prohibition against testimonials and deleting prohibitions of "manipulative" advertising.

Board action: Changes to subdivision (c)(1)(H), changing the task force recommendation of a prohibition against statements that "guarantee results" to a prohibition against statements that "promise results," were approved by the board by voice vote at its June 3, 2005 meeting.

Rule 4-7.3 Advertisements in the Public Print Media

Explanation/Reasons: Rule 4-7.3 addresses print advertisements. The bar recommends deleting the following required disclosure for print advertisements in subdivision (b) and the rule's comment: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience." The hiring disclosure applies only to print advertisements that

include content other than the permissible content of advertisements currently listed in rule 4-7.2(c)(12). The bar believes that the hiring disclosure requirement was well-intended and served its purpose in the early years of attorney advertising. The bar questions its efficacy now, and believes that few, if any, members of the public actually read it.

Dissent: None.

Rule 4-7.4 Direct Contact With Prospective Clients

Explanation/Reasons: Rule 4-7.4 governs unsolicited direct mail communications. The bar recommends adding the term "unsolicited" to "written communication" in the title to subdivision (b) and within subdivision (b)(1). The change clarifies that the rule is applicable only to written communications that are sent to recipients who have not requested information from the lawyer or law firm.

The bar recommends deleting the prohibition against "unfair" statements or claims found in subdivision (b)(1)(E). The bar recommends deleting the term "unfair" throughout the rules because it believes the term is unclear, overbroad, and unenforceable.

The bar also recommends deleting from subdivision (b)(2)(C) a provision regarding retention of direct written communications. The language is being moved to rule 4-7.7(h), because it makes more sense to include the provision with other language addressing records retention, so all information about records retention is located in the same rule.

The bar recommends adding information defining "prior professional relationship" in the comment to the rule. The issue is an important one, because a lawyer may directly solicit those with whom a lawyer has a "prior professional relationship." The term has never been defined, except through decisions of the Bar's Standing Committee on Advertising. The Standing Committee on Advertising initially took the position that the term meant a prior attorney-client relationship, but later decisions expanded the term to include expert witnesses and others. The task force discussed replacing the term "prior professional relationship" in the rule with the term "prior lawyer-client relationship," but decided that the prior bar committees must have meant to be somewhat more expansive than that, because the term "lawyer-client relationship" could have been used originally, had that been intended. The task force determined that the term "professional" must have been used deliberately and must have been used to describe the lawyer's capacity as a professional as opposed to the person to be contacted. The task force also decided that the term "relationship" must encompass a personal, direct relationship with another, as opposed to a mere acquaintance. The recommended additions set forth these concepts and provide examples intended to provide guidance to Florida Bar members on this issue.

Rule 4-7.4 requires that a lawyer sending unsolicited direct mail that was "prompted by a specific occurrence" to inform the recipient where the lawyer obtained the information that caused the lawyer to send the communication. The bar recommends adding commentary addressing the standard to be used in determining if the lawyer has provided the appropriate disclosure. The bar believes the appropriate standard should be that the disclosure allows the recipient to locate for him or herself the information that prompted the communication.

Dissent: Florida Bar member Timothy P. Chinaris opposes the proposed definition of "prior professional relationship" in the comment as too narrow.

Rule 4-7.5 Advertisements in the Electronic Media Other Than Computer-Accessed Communications

Explanation/Reasons: Rule 4-7.5, addressing television and radio advertisements, was amended by the Supreme Court of Florida during the course of the task force's tenure. Because the changes are so recent, the bar believes significant amendments to the rule are inappropriate at this time. However, the bar does believe that two minor changes should be made.

First, the rule currently requires that, if a nonlawyer spokesperson is used, that spokesperson must make an affirmative verbal disclosure that the person is not a lawyer and is a spokesperson for the lawyer or law firm. The bar believes that there are situations in which it is clear to the advertisement's recipients that a nonlawyer spokesperson is being used. One example is the common use of disk jockeys to record radio advertisements. The bar doubts that anyone would be led to believe that a radio announcer who voices the news and weather reports, as well as recording advertisements for other local businesses, is a lawyer who is a member of the firm being advertised. In such situations, the bar believes it is unduly burdensome to require that the advertising lawyer or law firm use a portion of its limited radio time to state the obvious: that the announcer is not an attorney. However, the bar believes it is entirely appropriate to require an affirmative disclosure where it is not clear from the context of the advertisement that the spokesperson is not an attorney. The bar therefore proposes amendments to subdivision (b)(2)(B) and the comment that would require an affirmative disclosure that the spokesperson is not a lawyer only where it is unclear from the advertisement that that is the case.

The bar also recommends deleting a paragraph in the comment that defines "member" of a law firm. The commentary is obsolete in light of changes made to the rule by the court in *Amendment to the Rules Regulating The Florida Bar*, 875 So. 2d 448 (Fla. 2004)

Dissent: Florida Bar member Timothy P. Chinaris opposes the deletion of the requirement that advertisements make an affirmative disclosure regarding the

use of a nonlawyer spokesperson, but supports a change that would allow such a disclosure to be either spoken or written.

Rule 4-7.6 Computer-Accessed Communications

Explanation/Reasons: Rule 4-7.6 governs computer-accessed communications such as websites, electronic mail, and banner advertisements.

The task force extensively discussed the issue of websites sponsored by a lawyer or law firm, including how websites are accessed by members of the public, the swift technological advances that continue to be made, the type of information typically provided on websites, and the generally accepted principle of free flow of information through the Internet. The task force concluded that, typically, viewers would not access a lawyer's website by accident, but would be searching for that lawyer, a lawyer with similar characteristics, or information about a specific legal topic. The task force concluded that websites should be treated as information on request and therefore, as dictated by new rule 4-7.1(h), not subject to the attorney advertising rules. The task force also concluded that a person with computer access and search capability would be at least somewhat Internet savvy and understand that a lawyer is not necessarily located in a specific geographic location near the user or does not necessarily have the ability to handle the user's legal matter just because the user found the website on the Internet. The task force recommended deleting the requirement in subdivision (b)(1) that websites disclose all jurisdictions where the lawyer is licensed to practice and the requirement in subdivision (b)(2) that websites disclose one or more bona fide offices. The board referred the issue to its Citizens Forum, who informed the board of the forum's consensus that websites should be subject to the same general regulation as other forms of advertising. The board generally agreed with the Citizens Forum and disagreed with the conclusions of the task force, but recognized the practical problems in reviewing websites and enforcing lawyer advertising regulations in websites. The board's rationale can be best summarized by the proposed commentary to the rule:

> Websites cannot be easily categorized as either information at the request of the prospective client, which is subject to no regulation under this subchapter but is subject to the general prohibition against dishonesty, or as advertising in a medium that is totally unsolicited and broadly disseminated to the public, such as television, radio, or print media. Although some steps must be initiated by the viewer to access a website, the viewer might not necessarily be attempting to access that law firm's website, or a law firm website at all. It is therefore inappropriate to treat websites as information upon request,

> because it is not the same as direct contact with a known law firm and requesting information. On the other hand, the viewer is unlikely to access a lawyer or law firm website completely accidentally. Therefore, websites are treated at an intermediate level and are subject to most of the general regulations set forth in rule 4-7.2. In the context of websites, however which generally contain much more information than can be included in the context of a television, radio, or print advertisement, information about prior results and statements characterizing the quality of legal services are less likely to mislead the public because they will be contained in the much larger context of the full website.

The board, by voice vote at its June 3, 2005 meeting, therefore voted to keep the status quo, by continuing to subject websites to the general advertising regulations, with two exceptions: the prohibition against making statements that characterize the quality of legal services and the prohibition against advertising past results. However, the board agreed with the task force to recommend deleting the requirements to disclose all jurisdictions where the lawyer is licensed to practice and at least 1 bona fide office location in a website. The latter requirement is redundant, because rule 4-7.2(a)(2) already contains the requirement that all advertisements disclose 1 or more bona fide office locations. The board further voted to appoint a special committee to continue reviewing the issue of websites and make further recommendations to the board if appropriate.

The bar recommends minor changes to subdivision (c), addressing electronic mail. Although the task force believes that electronic mail already is governed by rule 4-7.2, the task force recommends adding that express statement to subdivision (c)(1) of rule 4-7.6 to provide clarity for Bar members. The task force was concerned that subdivision (c)(3) was not restrictive enough, because an unscrupulous lawyer could have so much information in the subject line that the "Legal Advertisement" required by the existing rule could be effectively "buried," whereas the task force believes that the court intended that the "Legal Advertisement" mark be prominent in the subject line. The task force therefore recommends amending subdivision (c)(3) to state that direct mail sent electronically must contain a subject line that begins with the words "LEGAL ADVERTISEMENT."

Subdivision (d) is a catch-all provision intended to cover all Internet advertisements that are not addressed elsewhere in Rule 4-7.6. The current rule provision lacks clarity. The task force proposed a change based on the assumption that websites would not be subject to any regulation at all, which would have compounded the ambiguity in the rule. The catch-all provision is intended to

simply indicate that all forms of computer-accessed communications not addressed elsewhere in the rule are subject to the general advertising rules set forth in Rule 4-7.2. The board recommends a change that is intended to clarify the existing rule provision by making the simple statement that other forms of computer advertisements are subject to the general rule. Refinements to this rule were approved by the board's Executive Committee by electronic mail vote on July 11, 2005.

Finally, to provide further guidance to bar members, the bar recommends adding commentary that examples of computer-accessed communications include pop-up ads and banner ads.

Dissent: As discussed above, the task force recommended that websites be exempt from application of all lawyer advertising rules.

Board action: Changes to subdivision (b), regarding websites, were approved by the board by voice vote at its June 3, 2005 meeting. Changes to subdivision (c), regarding the "catch-all" provision for Internet advertisements, were approved via electronic vote by the board's executive committee on July 11, 2005.

Rule 4-7.7 Evaluation of Advertisements

Explanation/Reasons: Rule 4-7.7 sets forth the requirements for filing advertisements and receiving an opinion from The Florida Bar.

The most significant change to this rule that the bar recommends would require that advertising lawyers submit their television and radio advertisements for review and approval by the bar prior to being broadcast. That proposed change appears in subdivision (a)(1)(A). The recommended commentary perhaps best explains the bar's rationale for this proposal:

> Television and radio advertisements are a special form of media requiring special regulation. The unique characteristics of electronic media, including the pervasiveness of television and radio, the numbers of viewers reached by the electronic media, the ease with which these media are abused, the passiveness of the viewer or listener, the short span of usage of individual television and radio advertisements, and the inability of the bar to patrol the airwaves, make the electronic media especially subject to regulation in the public interest. Advertisements in television and radio have short life spans, sometimes running their course within weeks. Television and radio advertisements can reach thousands of viewers even with one showing. Therefore, review of electronic media prior to its use is

> justified in electronic media, but may not be appropriate for advertisements in the other media.

The U.S Supreme Court has previously indicated that electronic media might be regulated more stringently. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In *Bates*, the court stated:

> As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. See *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S., at 771, 96 S.Ct., at 1830. Advertising concerning transactions that are themselves illegal obviously may be suppressed. See *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). **And the special problems of advertising on the electronic broadcast media will warrant special consideration.** Cf. *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (DC 1971), summarily aff'd sub nom. *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972).

Id., at 384 [emphasis added]. Such special consideration could include prior review. See, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) and *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). The court itself has suggested that prior review may be an appropriate regulation of commercial speech, stating:

> The Commission also might consider a system of previewing advertising campaigns to insure that they will not defeat conservation policy. It has instituted such a program for approving "informational" advertising under the Policy Statement challenged in this case. See *supra*, at 2348. We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it. *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S., at 771-772, n.24, 96 S.Ct., at 1830, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

Central Hudson, at 571, n. 13. The court reiterated this position in the context of lawyer advertising, stating:

> The Court previously has noted that, because traditional prior restraint principles do not fully apply to commercial speech, a State may require "a system of previewing advertising campaigns to insure that they will not defeat" state restrictions. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S., at 571, n.13, 100 S.Ct., at 2354, n. 13.

Zauderer, at 668, n. 13.

The bar contends that prior review of television and radio advertisements does not constitute a significant burden on commercial free speech of lawyers. Many lawyers who advertise do so on a regular basis with a series of advertisements that change over time. In most instances, the advertisements are not particularly time sensitive. Lawyers will not stop advertising on radio and television because they are required to submit their advertisements for review prior to dissemination. The court recognized this in stating above in *Central Hudson* that commercial speech is robust enough to withstand prior review.

The percentage of advertisements filed with the bar that do not comply with the lawyer advertising rules for any reason ranges from a high of 59% in fiscal year 1990-91 to a low of 41% in fiscal year 1993-94. Charts regarding noncompliance are attached as Exhibit 1. In fiscal year 2004-05, 56% of the advertisements filed did not comply. In most fiscal years, the majority of advertisements filed for review failed to comply with the lawyer advertising rules. Television and radio show similar rates of noncompliance as other advertisements. The percentage of television and radio advertisements filed with the bar that do not comply with the lawyer advertising rules for any reason ranges from a high of 60% in fiscal year 1998-99 to a low of 37% in fiscal year 1991-92. Nearly half of all television and radio advertisements in recent years have been found not to comply with lawyer advertising rules. A videotape that includes examples of noncomplying television and radio advertisements that were disseminated by the advertising lawyer concurrently with filing the advertisement for review with The Florida Bar is attached as Exhibit 2. Transcripts and the initial opinion letter (but not the entire file) for each of the noncomplying television and radio advertisements in Exhibit 2 are attached as Exhibit 3.

The bar also commissioned a telephone survey to determine Florida consumer opinions regarding advertising, including prior review. The survey, performed by Frank N. Magid Associates, Inc., is attached as Exhibit 4. The survey indicates that Florida consumers do not believe that the information in

lawyer advertisements is accurate, do believe that prior review is important, and 48% of consumers believe that lawyers currently are subject to prior review of their advertisements. Significantly, of those who are likely to use advertisements to help them select a lawyer, 63% believe that lawyer advertisements are subject to prior review. Over half of consumers responding stated that they would be more confident in the accuracy of the information contained in lawyer advertising if there were prior review of the advertisements.

The current rule requires filing only concurrently with the first use of the advertisements and that the bar's opinion must be provided within 15 days. Under the current rule, some advertisements run for days or even weeks before an opinion from the bar is issued. Noncomplying advertisements therefore potentially reach many thousands of viewers before the bar can take action under the current rule. Although the bar believes it could request prior review for all forms of advertisements, the bar has determined it is more appropriate to conserve bar resources by requesting prior review only of those media that potentially reach the largest number of consumers and allow the least time for consumer reflection on the advertisements' content: television and radio.

Turning to other proposed changes to Rule 4-7.7, the rule allows a lawyer to file and obtain an advisory opinion even on advertisements that are exempt from the filing requirement. The task force recommends in rule 4-7.1 that a number of communications be exempt, not just from the filing requirement, but from the attorney advertising rules altogether. Such communications remain subject to the general prohibition against conduct involving deceit, dishonesty, or misrepresentation under rule 4-8.4(c). Because the filing requirement requires review for compliance under the attorney advertising rules, such communications cannot be reviewed under rule 4-7.7. Therefore, the bar recommends adding to subdivision (a) that a lawyer cannot obtain an advisory opinion regarding communications that are not subject to the attorney advertising rules as set forth in subchapter 4-7.

Under this rule, the bar must review advertisements within 15 days. The board recommends that the court adopt a provision in subdivision (a)(2)(C) that would exempt voluntarily filed advertisements from the 15-day review requirement. The bar has previously received voluminous filings on advertisements that were not required under the rule to be filed for review, but were voluntarily filed for review. The majority of such voluntary filings in future are likely to be websites. The task force recommended to the board that websites not have to comply with the advertising rules at all. As such, they would have fallen within a new provision of the filing rule that meant that bar staff would not review websites. The board instead approved a provision that subjects websites to most of the advertising rules, but not the filing requirement. However, lawyers can

voluntarily file websites for review by The Florida Bar. The proposed provision would exempt voluntarily filed advertisements from the 15-day rule. The exemption from the 15-day requirement would include any filing that is being made voluntarily as opposed to those advertisements that are required to be filed under the rules. Based on the bar's recent experience with voluntary filing of a small sample of bar members' websites, the bar cannot complete review of voluminous websites in 15 days. In one instance, a lawyer filed a website in late January that filled two banker's boxes. Review of that website was concluded in June. For filings of that magnitude, the bar is unable to respond within 15 days. Voluntary filings can be compared to ethics opinions requests. Ethics opinions requests are completely voluntary requests for assistance with an ethics issue. Nothing in the rules requires the bar to respond within a specified period of time to ethics opinions requests. The proposed change would require that the bar respond within a reasonable period of time. This change was approved by the board's Executive Committee by electronic mail vote on July 11, 2005.

Under the current rule, bar advertising opinions are not binding. The bar recommends that the rule be amended to require that findings of compliance are binding on the bar in disciplinary proceedings, addressing that concept in new subdivisions (a)(1)(F) and (a)(2)(F).

Many recommended changes to the rule regulating the filing requirement are technical in nature or have been recommended by bar staff to address issues that come up through the filing process. For example, the bar recommends changing references to the Standing Committee on Advertising or the committee to "The Florida Bar" throughout the rule, because the first level of review is performed by bar staff. The bar also recommends amending subdivision (a) to state that filings must be made to The Florida Bar headquarters address, to address the issue that attorneys sometimes attempt to file with the branch offices, affecting the bar's ability to comply with the 15-day deadline. The bar also recommends requiring that a complete filing must contain a printed copy of all text used in the advertisement in subdivision (b)(3). Another recommendation by bar staff endorsed by the task force and board is the addition to subdivision (b)(4) that a complete filing must include an accurate English translation if the ad appears in another language. These latter two recommendations would speed the review process.

The bar also recommends adding to subdivision (h) a provision regarding retention of direct written communications. The language is being moved from rule 4-7.4, because it makes more sense to include the provision with other language addressing records retention, so all information about records retention is located in the same rule.

Finally, the bar recommends the addition of commentary addressing a "safe harbor" for lawyers who voluntarily file and receive approval of the bar prior to disseminating advertisements. This commentary will encourage bar members to voluntarily seek bar approval prior to their publication for advertisements other than television and radio advertisements, to ensure compliance with lawyer advertising rules.

Dissent: The task force determined by unanimous vote not to recommend amending the rules to require prior approval of advertisements before the advertisements may be disseminated; the task force instead recommended that lawyers should be encouraged, but not required, to obtain prior approval through a safe harbor provision.

Florida Bar members Timothy P. Chinaris, J. Tuthill, and Mathew Weinstein provided commentary to the task force in opposition to prior review of lawyer advertisements.

Board action: Changes to subdivision (a)(2)(C) were approved via electronic vote by the board's executive committee on July 11, 2005.

Rule 4-7.8 Exemptions from the Filing and Review Requirement

Explanation/Reasons: Rule 4-7.8 addresses exemptions from the filing requirement. The current rule on public service announcements, set forth in subdivision (b), seemingly prohibits any information about the lawyer other than the lawyer's name and geographic location. The bar believes that lawyers' sponsorship of charitable and civic events is desirable and should be encouraged. The bar therefore recommends amending subdivision (b) to provide that a public service announcement may contain any of the permissible content of advertising listed in rule 4-7.2.

The bar recommends addressing that the attorney advertising rules do not apply to certain communications in rule 4-7.1 discussed above. Because the issue is addressed in rule 4-7.1, it is unnecessary to again state that these communications are exempt from the filing requirement in rule 4-7.8. The bar therefore recommends deleting as redundant the following subdivisions providing exemptions from filing: subdivision (d) concerning communications sent only to existing clients, former clients, or other lawyers, and subdivision (e) addressing communications provided at a prospective client's request.

Dissent: None.

Rule 4-7.9 Information About a Lawyer's Services Provided Upon Request

Explanation/Reasons: Rule 4-7.9 delineates regulations for information provided to a prospective client at that client's request. In light of the bar's recommendation to adopt a rule provision excluding such information from

application of the attorney advertising rules, the bar recommends deleting this rule in its entirety as redundant in light of proposed 4-7.1(h).

Dissent: None.

Rule 4-7.10 Firm Names and Letterhead

Explanation/Reasons: No substantive changes are recommended in this rule, governing law firm names and letterhead, but the bar recommends renumbering it in light of the bar's recommendation to delete rule 4-7.9 in its entirety.

Dissent: None.

Rule 4-7.11 Lawyer Referral Services

Explanation/Reasons: Rule 4-7.11 governs a lawyer's participation in a lawyer referral service. The bar recommends adding subdivision (a)(10), requiring that lawyer referral services affirmatively state in advertisements that they are lawyer referral services. The change comes at the request of the Standing Committee on the Unlicensed Practice of Law. Mr. Wayne Thomas, who was then vice-chair of the committee, attended the June 24, 2004 meeting of the task force and indicated that there are lawyer referral services whose names do not clearly indicate that they are not law firms and whose advertising does not affirmatively state that they are lawyer referral services. The opinion of the Standing Committee on the Unlicensed Practice of Law is that the practice is misleading to the public. Based on these statements, the bar recommends that the rule change be adopted.

Additionally, the bar recommends renumbering the rule to 4-7.10, in light of the recommended deletion of rule 4-7.9.

Dissent: None.

III. Comments/Dissent

As noted above, the task force's interim draft was circulated to the bar's standing committees and sections, publicized in the Florida Bar *News*, and posted on the bar's website. A number of comments were received in response to invitations to comment on the task force charge and its interim draft. The bar carefully considered all comments received, adopted some of the recommendations, and declined to adopt others. Comments of individuals or groups that remain in opposition to specific bar proposals are discussed in conjunction with the summary of those rules changes above.

The task force final report includes copies of the letters sent to the chairs of the bar's committees and sections requesting comments on the task force charge and on the interim draft (Appendix D, pp. 80 and 85), and summaries of all comments submitted to the bar in reaction to official notices or other published

accounts of the proposed amendments in this petition (Appendix D, pp. 82-83 and 87-92).

Additionally, the task force's recommendations in its interim draft regarding rules generated adverse comments. Specific adverse comments will be discussed in this subdivision of the petition, because ultimately the task force and board do not recommend adoption of those changes to these rules.

The bar received numerous comments in response to the task force charge and interim draft that ran the gamut from lawyers wanting all advertising banned, to requests for no changes to the rules, to statements that the bar does not engage in enough enforcement of the rules, to very specific suggestions for rules changes. These comments are too numerous to list in this petition, and a summary of comments and the full text of those comments can be found in Appendix E.

The task force considered extending the 30-day ban on unsolicited direct mail from personal injury to criminal defense and civil traffic matters. In response to the task force's interim report, the task force received a large number of comments from Florida Bar members. More comments were received on the proposed extension of the 30-day rule than any other issue, and the comments were overwhelmingly negative. Twelve Florida Bar members and two citizens attended the task force's January 2005 meeting. All of them spoke on this issue, and they stated numerous reasons why the proposed change not only did not serve bar members, it did not serve members of the public, who were being provided with valuable information through these communications. After reviewing the written comments and hearing from those who attended the meeting, the task force voted unanimously against adopting the change. The board similarly voted against making such a recommendation at its April 8, 2005 meeting, with opposition from a small minority of board members.

IV. Official Notice of Board Action

Notice of action was published prior to approval by the board of each of these proposed revisions in accordance with rule 1-12.1(d), Rules Regulating The Florida Bar.

Advance notice of the filing of this petition was published in the August 1, 2005 issue of the Florida Bar *News* to comply with the 30-day preview requirements of rule 1-12.1(g), Rules Regulating The Florida Bar. A photocopy of that official notice and the text of all Florida Bar *News* articles discussing the work of the task force are included with this petition as Appendix A.

V. Other Pending Petitions

The bar also notes that it has proposed amendments in three other matters presently before this court. The bar filed a petition with this court on December 1,

2004 (case no. SC04-2246) with proposed changes to Chapters 4 and 5, Rules Regulating The Florida Bar, at the recommendation of the Special Committee to Review the ABA Model Rules 2002. The bar also filed a petition with this court on September 15, 2005 (case no. SC05-1684) with proposed changes to Chapter 3, Rules Regulating The Florida Bar. The proposals within these two petitions are unrelated to this petition, do not address the same rules, and may be considered independent of it.

VI. Full Text of Amendments

The full text of the proposed amendments in this petition is included in Appendix B to this petition, followed by a separate 2-column presentation within Appendix C, which includes extracted text of affected rules, proposed amendments, and an abbreviated recitation of the reasons for the recommended changes.

VII. Official Notice of Filing

The bar received no comments in response to its official notice of this filing and the amendments published in this petition.

Absent any subsequent comments or objections of significance requiring further pleadings or appearances with respect to the proposed rules changes in this petition, the bar does not seek oral argument of the matters within this petition.

VIII. Effective Date of Court Order

Should the court adopt any of the requested amendments, the bar requests that any changes be made effective 60 days from the date of the court's order so that bar members can be educated regarding the amendments.

WHEREFORE, The Florida Bar requests that this court enter an order amending the Rules Regulating The Florida Bar in the manner sought in this petition.

Respectfully submitted,

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December 14, 2005

CERTIFICATE OF TYPE SIZE AND STYLE

THE FLORIDA BAR HEREBY CERTIFIES that this petition is typed in 14 point Times New Roman Regular type.

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