

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC08-

**PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR
– RULE 4-7.6, COMPUTER ACCESSED COMMUNICATIONS**

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 board).

The amendments and action proposed in this petition were approved by the board.

The proposed amendments affect Rule 4-7.6, Rules Regulating The Florida Bar. Rule 4-7.6 governs computer-accessed communications such as websites, electronic mail, and other computer-accessed advertisements. The changes regarding regulation of websites found in Rule 4-7.6(b) were developed by the Special Committee on Website Advertising Rules (the special committee) and the board. The special committee's report to the board is attached as Appendix D. Other changes to Rule 4-7.6 were developed by the Advertising Task Force 2004, the board's Rules Committee, and the board itself. The Advertising Task Force 2004 (the task force) was appointed by Florida Bar President Kelly Overstreet Johnson on February 9, 2004 and information regarding the work of the task force was previously provided to the court in a petition filed in the case of *In re*:

Amendments to the Rules Regulating the Florida Bar - Advertising, 971 So. 2d 763 (Fla. 2007 Case No. SC05-2194). The court declined to adopt any changes to Rule 4-7.6, pending the special committee's study of regulation of websites, stating that "it is not efficient or sound for the Court to address the regulation of Internet advertising at this time, while the special committee is studying these very issues." *Id.* Therefore, all amendments to Rule 4-7.6 are presented here in one petition.

The amendments stand alone and are being filed separately from the bar's annual rules filing.

The full text of the proposed rules changes as approved by the board is attached as Appendix B. The full text of the proposed rules changes as approved by the board with explanatory notes in a two-column format is attached as Appendix C. Articles and comments on websites received by the bar during the development of these rules changes, unless otherwise noted, are attached as Appendix A.

II. Summary and Discussion of Amendments to Rule 4-7.6

A. Subdivision (a) Definition

Explanation/Reasons: The proposed changes were proposed by the board's Rules Committee to conform the terminology used in this subdivision to that used in other portions of the rule and replace current rule terminology with more commonly used terms, with no change in the meaning of the rule intended.

Dissent: None.

Board action: Changes to subdivision (a) were approved by the board by voice vote at its March 30, 2007 meeting.

B. Subdivision (b) Internet Presence (Websites)

Explanation/Reasons: Proposed changes to Rule 4-7.6(b) regarding lawyer websites take an intermediate position between full application of all lawyer advertising rules and no regulation of websites under the lawyer advertising rules. The board's proposal would require that the homepage of the website comply with all the substantive lawyer advertising regulations, which are set forth in Rule 4-7.2. The remainder of the website would also be subject to the substantive lawyer advertising rules except that the lawyer may provide truthful information about the

following, which are otherwise prohibited under the lawyer advertising rules: 1) statements that characterize the quality of legal services being offered; 2) information regarding past results; and 3) testimonials. The proposed rule provides that if a lawyer provides information on past results and/or testimonials, an appropriate disclaimer must be provided. Although the exact wording of the disclaimer is not dictated by the proposed rule, the lawyer must give a clear indication of whether all results are provided, that results are not necessarily representative of all results obtained by the lawyer, and that the facts and circumstances of the viewer's matter may be dissimilar to the matter in which either past results or a testimonial are given. Commentary provides the rationale for the rule and gives examples of appropriate disclaimers for past results and testimonials. No portion of the website must be filed with the bar for review.

The board's rationale for this intermediate position may best be explained by the following excerpt from the proposed commentary to the rule:

A website 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 a website as information upon request, because it is not the same as direct contact with a known law firm requesting information. On the other hand, the viewer is unlikely to access a lawyer or law firm website completely by accident. Therefore, a website is treated at an intermediate level and is subject to most of the general regulations set forth in rule 4-7.2. Websites generally contain much more information than can be included in the context of a television, radio, or print advertisement.

The board believes its recommendation strikes the appropriate balance between protecting consumers from misleading information, providing consumers with accurate, helpful information in the selection of a lawyer, and the lawyer's ability to provide information about him or herself to the public. Some of the dangers of other media are not as significant with a website. For example, television and radio advertisements are usually of short duration with a limited message to provide to consumers. Their fleeting nature makes it unlikely that the

use of disclaimers can be used to “cure” potentially misleading information. A website offers the lawyer the opportunity to provide much more information to a consumer than virtually any other medium. A lawyer may therefore offer a much more comprehensive picture of the lawyer’s experience than in other media. A website offers the consumer the opportunity for reflection that is not found in other media, particularly television, radio, and pop-up advertisements. Websites also present an element of volition on the part of the consumer that is not present in other media. Because of these factors, the board concludes that information that is prohibited in other media, such as past results and testimonials, may be appropriate for inclusion in a website as long as the information provided is truthful, is verifiable, is not presented in a misleading manner, and is accompanied by an appropriate disclaimer.

The task force and board also concluded that a person with computer access is at least somewhat Internet savvy and would understand that a lawyer does not necessarily have the ability to handle the user’s legal matter just because the user found the website on the Internet. The board therefore recommends deleting the requirement in current subdivision (b)(1) that websites disclose all jurisdictions where the lawyer is licensed to practice.

Finally, the board recommends deleting as redundant the requirement in current subdivision (b)(2) that websites disclose one or more bona fide offices. That requirement is already found in Rule 4-7.2(a)(2), to which websites would be subject under the board’s proposal.

Because of the extensive rule development history of this subdivision, that history will be discussed immediately below.

Rule Development History: In 1999, this court adopted Rule 4-7.6 addressing computer-accessed communications. *Amendments to Rules Regulating The Florida Bar - Advertising Rules*, 762 So. 2d 392 (Fla. 1999). In so doing, Florida became one of the first states, if not the first state, to adopt a rule specifically addressing regulation of computer-accessed communications, including the Internet. Prior to that time, the bar’s Standing Committee on Advertising determined via decision that a website homepage was regulated by the general advertising rules, including filing. Rule 4-7.6(b) provided that websites must include all jurisdictions where the advertised lawyers were admitted to practice law, must state at least one bona fide office location, and were otherwise subject to then-rule 4-7.9 regarding information at the request of the prospective client. Rule 4-7.9 provided that all information on request was subject to the

general advertising regulations except for statements characterizing the quality of legal services, truthful statements regarding prior results, and the requirement that the communication be filed with the bar.

In 2006, this court adopted the recommendation of the task force and board to delete Rule 4-7.9 regarding information at the request of the prospective client in its entirety and to adopt new subdivision (f) of Rule 4-7.1, which provides that information at a prospective client's request is not subject to the lawyer advertising rules. New subdivision (g) of Rule 4-7.1 provides that all lawyer communications remain subject to the general prohibition against conduct involving dishonesty, deceit, or misrepresentation even if the lawyer advertising rules do not apply.

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(f), should not be subject to the lawyer advertising rules.

The board referred the issue to its Citizens Forum, which 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, 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 three exceptions: the filing requirement, the prohibition against making statements that characterize the quality of legal services, and the prohibition against advertising past results. The board recognized that maintaining the status quo required a change to the rules, because of the task force recommendation to delete Rule 4-7.9 in its entirety and instead adopt new subdivision (f) of Rule 4-7.1, which would exempt all information on request from application of the lawyer advertising rules. 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 Special Committee on Website Advertising Rules (special committee) was appointed in July 2005, at the direction of the board. This court declined to adopt any changes to rule 4-7.6 pending recommendations of the special committee, stating that “it is not efficient or sound for the Court to address the regulation of Internet advertising at this time, while the special committee is studying these very issues.” *In re: Amendments to the Rules Regulating the Florida Bar - Advertising*, 971 So.2d 763, 33 Fla. L. Weekly S1, Fla., December 20, 2007 (Case No. SC05-2194). The bar filed a motion to reconsider this court’s ruling. The court denied the bar’s motion and released a corrected opinion, leaving Rule 4-7.6 unchanged except for deleting a reference to Rule 4-7.9 from subdivision (b). *Id.*

The special committee studied the issue for over a year, meeting numerous times both in person and via conference call. The special committee divided into four subcommittees: one that studied constitutional issues, one that compared Florida’s rules with the rules of other states and the American Bar Association, one to study the issues related to enforcement of the rules, and one to study the technological issues related to the area. The special committee was assisted by the bar’s Information Technology Department regarding technological issues and by outside counsel Barry S. Richard regarding constitutional issues. The special committee considered several different methods of regulating websites that ranged from the task force recommendation that websites be subject to no regulation under the lawyer advertising rules to application of all lawyer advertising rules except the filing requirement. The special committee discussed these different forms of regulation extensively. The special committee was unable to reach a conclusion until the special committee reviewed each substantive regulation found within Rule 4-7.2 individually. The special committee, with the dissent of one member as to a handful of regulations, determined that each substantive regulation should apply to websites. Therefore, the special committee ultimately determined that websites should be subject to the same regulation as other forms of media, with the exception of the requirement that they be filed for review with the bar.

At its December 2006 meeting, the board was provided with the recommendation of the special committee and alternatives that were considered but not recommended by the special committee. The board voted against adopting the special committee’s recommendation that all substantive lawyer advertising rules

apply to websites. A motion to adopt the special committee's recommendation plus additional drafted commentary was made, seconded, and failed 18-26.

At its January 26, 2007 meeting, the board voted to publish proposed changes to Rule 4-7.6 in the Florida Bar *News* that would require homepages to comply with general lawyer advertising regulations found in Rule 4-7.2. The proposed changes would require the remainder of the website to comply with the same lawyer advertising regulations but with three exceptions: in any part of the website except the homepage, lawyers would be permitted to provide truthful information regarding past results, testimonials, and characterizations of quality. Disclaimers would be required if past results or testimonials are provided. No part of the website would be required to be filed with the bar for review.

The board draft required that specific disclosure language be used. The board's Rules Committee reviewed and approved the rule as drafted. However, the Rules Committee also reviewed, approved, and recommended adoption of an alternative draft that requires a disclaimer but does not require that the disclaimer appear verbatim from the rule, allowing for some flexibility for bar members in posting an appropriate disclaimer. On March 30, 2007, the board approved the changes as drafted by the Rules Committee.

Dissent: The bar received numerous comments, both positive and negative, on website regulation at various stages of the bar's study of the issue. Comments that were not previously provided to the court in Case No. SC05-2194 are attached in Appendix E. As discussed above and in its final report (which can be found at Appendix D of the petition filed in Case No. SC05-2194, supra), the task force recommendation was to exempt websites from application of all lawyer advertising rules as "information at the request of a prospective client." Additionally, task force members Bill Wagner and William F. "Casey" Ebsary filed comments in response to the bar's petition opposing the bar's proposals relating to Rule 4-7.6 in Case No. SC05-2194. Those comments, having previously been provided to this court, are not included with this petition. The special committee recommended that websites should be subject to all the substantive lawyer advertising rules and should be exempt solely from the requirement of filing with the bar for review. The Citizens Forum appointed by the board recommended that websites should be subject to all the substantive lawyer advertising rules, without exception. The Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, Bureau of Competition and Bureau of Economics commented that it opposes restrictions on: comparative statements that cannot be factually substantiated, statements that characterize the quality of legal services (as to the

homepage), past results (as to the homepage), and testimonials (as to the homepage). These concepts long have been embodied in the Rules Regulating The Florida Bar and applied to most advertisements.

Board action: Changes to subdivision (b) were approved by the board by voice vote at its March 30, 2007 meeting.

C. Subdivision (c) Electronic Mail Communication

Explanation/Reasons: The board recommends minor changes to subdivision (c), addressing electronic mail that were recommended by the task force. Although the board believes that electronic mail already is governed by rule 4-7.2, the board recommends adding that express statement to subdivision (c)(1) of rule 4-7.6 to provide clarity for bar members. The board also recommends changes to subdivision (c)(1) that conform the requirements of direct electronic mail to the requirements of direct mail found in Rule 4-7.4, which was amended by this court's order in Case No. SC05-2194, *supra*.

Additionally, the board is concerned that subdivision (c)(3) is not restrictive enough, because an unscrupulous lawyer could include so much information in the subject line that the "Legal Advertisement" required by the existing rule could be effectively "buried" where it will not be viewed by the recipient. The board believes that the court intended that the "Legal Advertisement" mark be prominent in the subject line. The board therefore recommends that this court amend subdivision (c)(3) to state that direct mail sent electronically must contain a subject line that begins with the words "LEGAL ADVERTISEMENT."

Dissent: The Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, Bureau of Competition and Bureau of Economics commented that it opposes the filing requirement for electronic mail and restrictions on: comparative statements that cannot be factually substantiated, statements that characterize the quality of legal services, past results, and testimonials. These concepts long have been embodied in the Rules Regulating The Florida Bar and applied to most advertisements.

Board action: Changes to subdivision (c) were approved by the board by voice vote at its June 3, 2005 meeting.

D. Subdivision (d) Advertisements (Catch-All Provision)

Explanation/Reasons: 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 forms of computer advertising other than websites and electronic mail are subject to the general rule.

Dissent: The Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, Bureau of Competition and Bureau of Economics opposes the filing requirement and restrictions on: comparative statements that cannot be factually substantiated, statements that characterize the quality of legal services, past results, and testimonials. These concepts long have been embodied in the Rules Regulating The Florida Bar and applied to most advertisements.

Board action: Changes to subdivision (d), regarding the "catch-all" provision for Internet advertisements, were approved via electronic vote by the board's executive committee on July 11, 2005.

E. Comment (Pop-up and banner advertisements)

Explanation/Reasons: To provide further guidance to bar members, the bar recommends adding commentary that examples of computer-accessed communications include pop-up advertisements and banner advertisements.

Dissent: None.

Board action: Changes to the comment regarding pop-up and banner advertisements were approved by the board by voice vote at its June 3, 2005 meeting.

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. The special committee's proposals were publicized in the Florida Bar *News* and on the bar's website. Comments received were carefully considered. Comments of individuals or groups in opposition to specific bar proposals that were received during the course of the work of the special committee are attached in Appendix E. Prior comments in response to the work of the task force were previously provided to the court in Case No. SC05-2194.

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 January 15, 2008 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 in Appendix A.

V. Other Pending Petitions

The bar has requested amendments to other Rules Regulating The Florida Bar presently before this court in *Amendments to the Rules Regulating The Florida Bar and the Florida Rules of Judicial Administration - Multijurisdictional Practice of Law*, Case No. 07-1844. The proposed amendments in this petition are unrelated to the pending petition on multijurisdictional practice and may be considered independent of it.

VI. Full Text of Amendments

The full text of the proposed amendments described in this petition is included in Appendix B to this petition, followed by a separate two-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 filing this petition.

VIII. Oral Argument

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.

IX. 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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February 26, 2008

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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