

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC08-1890

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 Rule 4-7.10 of 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 September 1, 2008, issue of the *Florida Bar News*.
3. The Florida Bar (the "Bar") has petitioned this Court to amend Rule 4-7.10, "Lawyer Referral Services." The Bar's petition presents two different proposals for amending Rule 4-7.10. This comment addresses only the second of those two proposals, which concerns the definition of "lawyer referral service."
4. The Bar proposes to amend Rule 4-7.10(c)(1) as follows:

(c) Definition of Lawyer Referral Service. A "lawyer referral service" is:

(1) any person, group of persons, association, organization, or entity that receives ~~a fee or charge~~ any consideration, monetary or otherwise, given in exchange for referring or causing the direct or indirect referral of a

potential client to a lawyer ~~drawn~~ selected from a specific group or panel of lawyers[.]

5. The undersigned respectfully requests that the Court reject the Bar's proposed amendments to the definition of "lawyer referral service."

6. The Bar has proposed two related amendments to Rule 4-7.10(c)(1). The first would replace the phrase "a fee or charge" with the broader phrase "any consideration, monetary or otherwise, given in exchange." This proposed change is overbroad. It is also unnecessary.

7. The proposed language is overbroad because it would have the effect of bringing informal referral activities in which lawyers routinely engage under the definition of "lawyer referral service." For example, a lawyer may occasionally refer clients to an accountant, and the accountant may sometimes refer clients to the lawyer. There is no formal agreement between the two professionals, and no referral fees are paid. Yet, under the Bar's proposal, the accountant could fall within the definition of a "lawyer referral service" because, in hindsight, the Bar might view this informal exchange of referrals as a non-monetary "consideration."

8. The phrase "fees or charges" in the existing rule puts lawyers on fair notice of the type of conduct that implicates the requirements of Rule 4-7.10. The Comment to Rule 4-7.10 explains that "a lawyer may participate in lawyer referral programs and *pay the usual fees charged by* such programs, subject, however, to the limitations imposed by rule 4-7.10." (Emphasis added.) The Bar has not

presented a justification for the proposed change from a relatively clear standard to an unclear, overbroad one.

9. Additionally, the proposed substitution of the existing phrase “a fee or charge” with the broader “any consideration, monetary or otherwise, given in exchange” is unnecessary. The type of conduct that the Bar apparently is concerned about is already adequately regulated by Rule 4-7.2(c)(14), which provides:

(14) *Payment for Recommendations; Lawyer Referral Service Fees.* A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these rules, may pay the usual charges of a lawyer referral service or other legal service organization, and may purchase a law practice in accordance with rule 4-1.17.

10. The second proposed amendment to Rule 4-7.10(c)(1) would replace the existing phrase “drawn from” with “selected from.”

11. The concept underlying the operation of a lawyer referral service is that someone who contacts the service will be *referred to* a lawyer. This presumes that *the service* will engage in activity that effectuates the referral. The use of the existing term “drawn from” is consistent with this basic understanding of what a lawyer referral service is and does. The service is expected to “draw” a lawyer from a group and refer the prospective client to that lawyer.

12. Replacing “drawn from” with “selected from” is at odds with this basic understanding of how a lawyer referral service operates. “Selected” implies that the act of selection could be done by the prospective client rather than the service. If the proposed amendment is adopted by this Court, lawyers would be at risk of being subject to the requirements of Rule 4-7.10 even though no act of “referral” takes place and the lawyer is “selected” through the action of the prospective client rather than any action on the part of the person or entity that the Bar would like to call a “lawyer referral service.”

13. Some examples illustrate the problems inherent in the Bar’s proposal. Lawyers typically pay to be listed in the yellow pages section of the telephone directory. A prospective client may look at the directory and then select a lawyer from those listed. Under language of the Bar’s proposal, the telephone directory company would be a “lawyer referral service”: it charged the lawyer for the listing; and the publication of the listing directly or indirectly caused the referral of the prospective client to a lawyer “selected” from the list by the prospective client.

14. The “Find a Lawyer” section of the Bar’s website provides another example. A prospective client who is looking for a Florida Bar member in Montgomery, Alabama can type in “Montgomery” and be provided with an on-screen list of all Bar members located in that city. This list, a “specific group or panel of lawyers,” happens to include the undersigned. The prospective client can

choose to “select” the undersigned from this group. The undersigned pays annual dues to the Florida Bar and, in exchange, receives privileges that include being listed on the Bar’s “Find a Lawyer” website. Under the proposed amendment to 4-7.10(c)(1), all of the elements of the definition of “lawyer referral service” are present. Under the proposed amendment, the Florida Bar therefore would be a “lawyer referral service.”

15. The same analysis would apply to other online directory listings such as Martindale-Hubbell, FindLaw, or Westlaw.

16. These examples show that the Bar’s proposed rule change is too broad to provide meaningful guidance to lawyers and would vest too much discretion in the hands of the Bar’s disciplinary authorities. As a practical matter, it may be doubtful that the Bar would consider a telephone directory to be a lawyer referral service. That, however, misses the point: under the proposed rule, the Bar *could* make that determination and thereby subject a lawyer to disciplinary action. The Bar has presented no reason justifying the Court’s approval of this proposed amendment.

17. For the foregoing reasons, this Court should reject the Bar’s proposed amendments to Rule 4-7.10(c)(1).

18. In the event that this Court wishes to consider an alternative proposal, the undersigned would suggest the following:

(c) Definition of Lawyer Referral Service. A “lawyer referral service” is:

(1) any person, group of persons, association, organization, or entity that receives a fee or charge for referring ~~or causing~~, through the actions of its agents or through its software, ~~the direct or indirect referral of~~ a potential client to a lawyer drawn from a specific group or panel of lawyers[.]

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 5th day of November 2008, 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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