IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE PETITION TO AMEND RULES REGULATING THE FLORIDA BAR 4-7.1 LAWYER-TO-LAWYER AND LAWYER-TO-CLIENT COMMUNICATIONS
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CASE NO. SC09-394

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 Report proposing that this Court amend Rule 4-7.1 of the Rules Regulating The Florida Bar regarding lawyer-to-lawyer and lawyer-to-client communications, and states:

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

2. The undersigned served as Ethics Director of The Florida Bar from 1989 to 1997, is a member of the Bar's Professional Ethics Committee, teaches legal ethics at an ABA-approved law school, and consults with and represents lawyers on advertising matters. These comments are those of the undersigned individually.

3. These comments are filed in response to the Notice published in the April 1, 2009, issue of the *Florida Bar News*.

Lawyer-to-Lawyer Communications

4. This Court should approve the Bar's proposal to expressly exempt lawyer-to-lawyer communications from the lawyer advertising rules.

5. Historically the Bar has not viewed lawyer-to-lawyer communications as a form of advertising or solicitation that is subject to the lawyer advertising rules. No evidence has been produced that would support a change to that long-standing position.

6. As suggested in the Bar's Report to this Court, lawyer-to-lawyer communication usually is made for one of two purposes: (1) the lawyer sending out the communication (the "sending lawyer") is informing the lawyer who receives the communication (the "receiving lawyer") of the sending lawyer's availability and is requesting referrals; or (2) the receiving lawyer is the potential client (such as where the receiving lawyer is given a traffic citation and sending lawyers mail brochures offering their services in fighting the citation). The protections of the lawyer advertising rules are unnecessary in both of these situations and therefore, as the Bar's Report indicates, requiring compliance with the lawyer advertising rules would run afoul of the *Central Hudson* test for regulations on lawyers' commercial speech (*Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)).

7. When the sending lawyer is seeking referrals, there is no need to consider the communication a form of advertising because the receiving lawyer is not the potential client.

8. The fact that the receiving lawyer may be in a position to make a recommendation to his or her clients concerning the sending lawyer's services is not a sufficient reason for subjecting lawyer-to-lawyer communications to the advertising rules. The fact that information about the sending lawyer's services is being communicated to the receiving lawyer, rather than directly to the receiving lawyer's client, actually provides an additional, beneficial layer of filtering and protection. Of course, lawyers have an ethical obligation to base their decisions regarding referrals on what is in the best interest of the client.

9. Even where the receiving lawyer may be viewed as a potential client of the sending lawyer, the lawyer advertising rules should not apply to lawyer-to-lawyer communications. A primary purpose of lawyer advertising regulations is to protect members of the public, who are not trained or experienced in the law, from deception or undue pressure. Such protection is unnecessary where the recipient of a lawyer's communication is another lawyer.

10. Sufficient safeguards will remain in place if this Court adopts the Bar's proposal concerning lawyer-to-lawyer communications. All lawyer-to-lawyer communications are subject to the general misconduct rule, R. Reg. Fla. Bar 4-

8.4(c), which prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Lawyer-to-Client Communications: Generally

11. This Court should approve the Bar's proposal to continue the past practice of the Bar and this Court of exempting lawyer-to-client communications from the lawyer advertising rules.

12. Under current R. Reg. Fla. Bar 4-7.4(a) a lawyer is permitted to engage in direct, in-person solicitation of persons with whom the lawyer has a "prior professional relationship." (Although the scope of this "professional relationship" is not defined in the rule, at a minimum it would seem to encompass a current or former lawyer-client relationship.) This exemption is one of long standing. As noted in the Bar's Report, it was contained in the former Code of Responsibility. It also has been contained in the Rules of Professional Conduct since their initial adoption, and was left intact when this Court enacted significantly more restrictive lawyer advertising rules in 1990 and 1999. See *Florida Bar re Rules Regulating The Florida Bar,* 494 So. 2d 977 (Fla. 1986), opinion corrected by *Florida Bar re Rules Regulating The Florida Bar,* 507 So. 2d 1366 (Fla. 1987); *Florida Bar: Petition to Amend the Rules Regulating The Florida Bar - Advertising Issues*, 571 So. 2d 451 (Fla. 1990); *Amendments to Rules Regulating The Florida Bar - Advertising Rules*, 762 So. 2d 392 (Fla. 1999).

Lawyer-to-Client Communications: Current Clients

13. A lawyer has a fiduciary relationship with current clients. See, e.g., *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755 (Fla. 2005). This relationship is a personal one of trust and confidence.

14. The lawyer advertising rules were designed to provide protection to prospective clients who might be considering entering into a lawyer-client relationship. A lawyer's current clients, however, have already entered that relationship.

15. Requiring any lawyer-to-client communications to comply with the advertising regulations may confuse the lawyer's clients. It could create unnecessary concern or even suspicion on the part of the client. For example, a client is likely to wonder why a letter from his or her own lawyer – a trusted confidante and champion – would be marked "advertisement" and include a written statement detailing the background, training, and experience of the lawyer. See R. Reg. Fla. Bar 4-7.4(b)(2)(B), (D). No evidence has been offered that would support such a requirement.

16. Current clients will have sufficient protection if this Court adopts the Bar's proposal concerning communications between lawyers and current clients. All lawyer-to-client communications are subject to the general misconduct rule, R. Reg. Fla. Bar 4-8.4(c), which prohibits lawyers from engaging in conduct

involving dishonesty, fraud, deceit, or misrepresentation. Additionally, the law provides civil remedies for any conduct that constitutes legal malpractice or a breach of the lawyer's fiduciary duties.

Lawyer-to-Client Communications: Former Clients

17. Clients who were represented by a lawyer ordinarily developed a relationship with that lawyer during the course of the representation. Consequently, they do not look at the lawyer as a stranger. The lawyer advertising rules were written to govern situations in which the lawyer-client relationship does not yet exist – that is, when a prospective client is considering contacting a lawyer. The advertising rules were not intended to apply, and should not be applied, once the lawyer-client relationship has been established.

18. Clients who formerly were represented by a lawyer in a particular matter, or for a particular purpose, might reasonably expect the lawyer to contact them in the event of subsequent developments that may affect the continuing efficacy of the legal services provided by the lawyer. Requiring those types of communications to comply with the lawyer advertising rules not only is unnecessary, but would impose additional burdens that could discourage lawyers from providing valuable information to their former clients. See, e.g., R. Reg. Fla. Bar 4-7.7(b)(7) (requiring $150.00 payment to Florida Bar when lawyer sends out

direct mail letter to which lawyer advertising rules apply). Lawyers should not be discouraged from providing such information to their former clients.

19. A closer question is presented when a lawyer communicates with a former client about something that may fall outside the scope of the legal services provided to the former client. Nevertheless, this Court should adopt the Bar's proposal in this situation as well.

20. Whether a particular communication is considered related to the services previously performed by the lawyer often will be a question about which reasonable persons could reach different conclusions. For example, if a lawyer represented the seller of a business in a sale where part of the purchase price was to be paid over a period of time, and some tax laws subsequently changed that might affect the former client, are the tax law changes related to the lawyer's prior legal work for the former client? The rules should not place lawyers in that type of line-drawing situation, especially when they would face the very real possibility of later being second-guessed by the Bar. Because of this, and in view of the fact that there was a previously existing professional relationship between the lawyer and the former client, this Court should adopt the Bar's proposal to exempt all lawyer-to-client communications from the lawyer advertising rules.

Conclusion

21. For the foregoing reasons, this Court should adopt the Bar's proposed amendments to Rule 4-7.1, R. Reg. Fla. Bar, concerning lawyer-to-lawyer and lawyer-to-client communications.

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 29th day of April 2009, 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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