IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULE REGULATING THE FLORIDA BAR 4-7.1 – LAWYER –TO- LAWYER AND LAWYER-TO-CLIENT COMMUNICATIONS

Case No.: SC09-394

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COMMENT IN SUPPORT OF THE FLORIDA BAR'S AMENDMENT TO RULE 4-7.1 OF THE RULES REGULATING THE FLORIDA BAR

On behalf of Searcy, Denney, Scarola, Barnhart & Shipley, P.A. (the "Firm"), undersigned counsel respectfully files this comment in support of The Florida Bar's amendment to Rule 4-7.1 of the Rules Regulating the Florida Bar and states as follows:

On April 1, 2009, the Florida Bar ("Bar") published a notice seeking comments on its proposed amendments to Rule 4-7.1 of the Rules Regulating the Florida Bar. The proposed changes to the rule would codify the longstanding position of the Bar that communications between lawyers and communications between lawyers and their current or former clients are not subject to the rules regulating lawyer advertising, Subchapter 4-7 of the Rules Regulating the Florida Bar. The Firm supports the amendments proposed by the Bar and respectfully requests that this Court adopt the proposed changes.

Under current legal precedent, lawyer advertising is considered commercial speech entitled to First Amendment protection. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632, 115 S. Ct. 2371, 132 L.Ed. 2d 541 (1995); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed. 2d 810 (1977). As protected speech, lawyer advertising may not be banned by a state unless it is "false, deceptive, or misleading." *Mason v. Florida Bar*, 208 F. 3d 952, 955 (11th Cir. 2000). Accordingly, the Courts have limited the regulation of lawyer advertising to "the limited class of circumstances where state interests are strong and the potential harm of nonregulation severe." *Ficker v. Curran*, 119 F. 3d 1150, 1152 (4th Cir. 1997); *see also Mason*; *Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980).

In the Bar's report to the Court in this case, the Bar acknowledged that the main interests it has advanced to support its regulation of lawyer advertising are as follows: "protecting the public from misleading information; encouraging lawyers to provide useful, relevant information in their advertisements; protecting the privacy of the public against invasive advertising by lawyers; protecting the vulnerable public from undue influence and overreaching by a trained advocate; and protecting the integrity of the justice system by preventing the dissemination of advertisements that tend to promote disrespect for lawyers by the public and, by extension, disrespect for the justice system." *Report to the Court on Rule 4-7.1 –*

Lawyer-To-Lawyer and Lawyer-To-Client Communications, pg. 5-6. The common element of these interests is the protection of the public. The rules are to protect the layperson who may lack the expertise to recognize misleading claims in lawyer advertising.

The interests espoused by the Bar are similar to the interests that the courts have upheld as substantial interests warranting some regulation. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed. 2d 541 (1995)(upholding the Florida Bar's regulation precluding the solicitation of victims within 30 days of an accident and finding that the state had a substantial interest in protecting the privacy of the public); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed. 2d 444 (1978)(upholding the Ohio Bar's regulation banning a lawyer from soliciting clients in person for pecuniary gain in light of the state's substantial interest in protecting the public). As with the interests listed by the Bar, the common thread among these cases is the protection of the unsuspecting public or lay persons from the influence of or overreaching by a lawyer.

In contrast, lawyers have the professional training, sophistication and expertise to interpret another lawyer's advertising and thus, have no need for protection. *See, e.g. Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F.Supp. 1328, 1371 (E.D. TX 1995)(finding the exemption from the advertising

rules for intellectual property attorneys did not violate the equal protection clause because the clients of intellectual property attorneys "tend to be sophisticated persons who generally need less protection from false or misleading advertising"). Moreover, lawyers, unlike the general public, have the necessary resources and training to research whether claims made in any lawyer communication is substance or fluff. Whether through docket searches, Westlaw or LexisNexis, lawyers can verify the veracity of claims made in advertisements. Because lawyers are aware that their colleagues can recognize any false, misleading or exaggerated claims and that they are well versed in the rules regulating the profession, any advertising disseminated to other lawyers is unlikely to include claims that cannot be substantiated. Since the purpose of the communication is often to solicit referrals, the inclusion of false or misleading claims or irrelevant information would have a deleterious effect.

In many respects, lawyer to lawyer communications are self policing since one's reputation in the legal community is at stake. Whether through legal proceedings, bar associations or community organizations, lawyers are likely to know of one another. To engage in false, misleading or exaggerated claims within the community one works and upon whom one relies for referrals would be career suicide. The whole purpose for this type of marketing would be circumvented. The Bar's survey that is attached to its report to this Court as Exhibit B verifies this

point. Ninety-one percent (91%) of the lawyers who responded to the survey reported that they had not received any communication from another lawyer that they perceived to contain false or incorrect information.

For these reasons, the substantial interests supporting the regulation of lawyer advertising to the general public do not exist in the context of lawyer to lawyer communications, and therefore, regulation of lawyer to lawyer advertising would not be constitutionally permissible. Accordingly, the Bar's proposed amendment to codify the exemption of lawyer to lawyer communications from the provisions of subchapter 4-7 is well supported and should be adopted.

Similarly, communications between a lawyer and his or her current or former clients also lack the requisite state interest warranting regulation. Current and former clients have a relationship with the lawyer and are capable of forming their own opinion of the quality of the lawyer's services. They are unlikely to be swayed by advertising when they can rely on their own personal knowledge of the lawyer. More importantly, several of the rules within the Rules Regulating the Florida Bar already protect current and former clients against misrepresentations by their lawyer.

Additionally, as noted by the Bar in its report to this Court, direct, in-person contact with current and former clients is permitted under subchapter 4-7. This authorization follows the model rule of the American Bar Association and all but

five states in this country. In hypothesizing on what areas of legal advertising may need regulation, the Supreme Court in *Bates* referred to in-person solicitation. 433 U.S. at 384. The Court recognized that in-person solicitation is more problematic than written communications. Thus, to allow direct, in-person contact while forbidding written contact is nonsensical. [1]

CONCLUSION

While the state may have substantial interests warranting the regulation of lawyer advertising to the general public, those interests do not exist in the context of lawyer to lawyer and lawyer to client or former client advertising. Without the requisite interest supporting regulation, the First Amendment's protection of commercial speech precludes the regulation of the communications at issue in this case. Therefore, the Firm respectfully requests that the Court adopt the Bar's proposed amendments to Rule 4-7.1 of the Rules Regulating the Florida Bar.

DATED this ____ day of May, 2009.

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[1] Even the ban on in-person solicitation upheld by the Court in *Ohralik* contained an exemption for unsolicited legal advice to a close friend, relative or former client. The Court noted that the regulation at issue "recognizes an exception for activity that is not likely to present these problems." *Ohralik,* 436 U.S. at 466 n. 26.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this ____ day of May, 2009, to: John F. Harkness, Jr., Executive Director, and Elizabeth Clark Tarbert, Esquire, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief uses font size Times New Roman 14 in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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