IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC09-394

COMMENTS OF BILL WAGNER TO THE FLORIDA BAR'S REPORT TO THE COURT ON RULE 4-7.1 - LAWYER-TO-LAWYER AND LAWYER-TO-CLIENT COMMUNICATIONS

COMES NOW, Bill Wagner, a member of The Florida Bar in good standing and files this, his Comments to The Florida Bar's Report to the Court on Rule 4-7.1 - Lawyer-to-Lawyer and Lawyer-to-Client Communications.

The Report concludes that the Bar requests that the Court amend Rule 4-7.1 exactly as presented in *The Florida Bar News* on August 1, 2005, and filed with the Court on December 14, 2005, over three years ago. See *Amendments To Rules Regulating The Florida Bar - Advertising*, 971 So.2D 763 (Fla. 2007 Case No. SC05-2194).

A HISTORY OF WHERE WE ARE NOW

In February 2004, the undersigned was appointed to serve as a member of The Florida Bar's Advertising Task Force 2004. The decisions of the Task Force were not unanimous, the undersigned being the author of a dissent of the Final Report of the Task Force. Ultimately, The Florida Bar filed its Petition to Amend The Rules Regulating The Florida Bar - Advertising Rules, Case Number SC05-

2194. On November 2, 2006, the Court filed its opinion addressing the proposed amendments, which opinion was later withdrawn and a revised opinion dated December 20, 2007, was substituted in its place.

In both opinions, the Court held:

> "Further, the Court requests that the Bar undertake an additional and contemporary study of lawyer advertising, which shall include public evaluation and comments about lawyer advertising as recommended by Mr. Bill Wagner in his written and oral comments to the Court."

To assist the Court in considering these comments, relevant portions of the written comments referred to above read as follows:

> The Faulty Process Used in Developing the Amendments
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> As one who responded to the invitation to serve on the new Advertising Task Force, I anticipated that, like the Special Commission on Advertising and Solicitation upon which I served in the late 1980s, an effort would be made to conduct an in depth review of the current status of entire field of lawyer advertising and marketing, determine to what extent it was or was not working, and at least accept the possibility that wholesale revamping was needed.
>
> Instead, the process that was used assumed that the regulation philosophy conceived over fifteen years ago still applied in today's marketing and advertising environment, and the role of the Task Force was to better organize the Rules and review them to discover discrete needed changes. In this writer's opinion a broader more in depth review was needed. This argument was presented to the Board of Governors in the form of the undersigned's Dissent from Final Report of Task Force, included as Appendix G to Appendix D (Pages 141 to 149) of the Bar's Petition. If this viewpoint is correct, only an Order from this Court will commence the process. If this viewpoint is

incorrect, then the process used resulted in many improvements to the existing rules, but left some unusual anomalies discussed below.

A Suggested Process for Further Review

Ideally, the Task Force should have first confirmed the goals of advertising regulation and then measured the success or expected success of each effort at regulation against those goals. The Task Force should have attempted the task of clarifying those goals for presentation to the Bar and the Court in Rule format. It did not. It should have or the Bar should have. If they won't, the Court should.

The undersigned believes that such regulation of advertising should be limited to accomplishing certain goals. Those goals, in summary, should be (1) to enhance the ability of the public to obtain useful information about the availability of legal services and the cost of such services, (2) prohibit the dissemination of false or misleading advertising, and (3) protect and enhance the public's respect for the legal system.

There may not be agreement on what the goals should be. This writer suggested more elaborate guidelines in the above reference Dissent at pages 143 through 145. By failing to tackle the question of goals or guidelines, however, the final product is, in this writer's opinion, unsatisfactory as an effort to solve the continuing problem faced by our state and country in dealing with lawyer advertising.

Central to this issue is the extent to which regulation is needed in the area of "marketing" as distinguished from "advertising". This writer believes that the concept of "marketing", which dominates today's thinking, is dramatically different from the concept of "advertising" as it was understood fifteen years ago when serious regulation was developed. Today most writers consider that "marketing" includes efforts to stimulate the audience to believe that they need a service about which they were unaware. Advertising in its narrow sense is intended to provide information about a service already needed, and the terms upon which that service will be provided. The Bar declined to adopt a definition of advertising, choosing instead to attempt to

define certain activities as being regulated and certain activities as not being regulated.

The result creates confusion. Certain aspects of the current Rules appear to allow almost unlimited use of marketing concepts, noticeably in granting exceptions from regulation to information furnished "upon request," information furnished "to other lawyers", and information furnished to "former clients". The Rules seem to focus only on regulating traditional activities identified as pure advertising such as it existed in the late 1980s. Direct mail solicitation and print advertising (including Yellow Page advertising), dominated concerns of the Bar in the 1980s. Television advertising by lawyers was used only sparingly in the late 1980s. With the relatively dramatic increase in mass television and radio advertising, the expanding use of pamphlet mailings to former clients, lawyers, and other persons listed in computer data base entries as “professional” relationships, and the developing unique uses of the internet, it is unclear what regulation is needed. Whether this Court agrees that "marketing" as well as "advertising" could and should be regulated is uncertain in the mind of the undersigned. The Task Force certainly never considered the issue, and the record does not indicate whether it was a consideration of the Board of Governors. No clear direction has been given by the Court.

A complete review such as the above would necessarily involve the use of assets beyond those available when working with existing staff and volunteer lawyers. The Bar's selection of the process in this case was undoubtedly dictated to some extent by economic constraints. The process actually used also was undoubtedly driven by the normal political influences that govern any organization based on the representative process. The undersigned would suggest that if the Court decides that there should be a full and complete review of our regulation of advertising and marketing in today's climate, then the Court should assist the Bar by announcing the need for such study and giving the Bar some clearly defined goals to guide Bar's efforts.

…..

> The Board of Governors likewise relied almost exclusively upon the personal experiences and personal preconceived interests of its members in reviewing the Task Force's work product.
>
> Ideally, the Task Force and the Board should have had available empirical studies and expert objective opinion regarding how advertising is received by its intended audience. This would have helped in determining not only the likelihood that certain types of advertising in fact is inherently misleading or misunderstood, but more importantly, whether certain types of advertising create unreasonable distrust or lack of respect for the Courts and the entire legal system.

FAILURE OF SELF REGULATION

To date, the Bar has apparently taken no steps to accomplish the Court's "request" for a "contemporary study of lawyer advertising". Instead it has continued on the path of regulation first adopted in the late 1980's.

In the meantime, the Bar continues the time consuming and expensive chore of detailed review of certain advertising (yellow page and direct mail) but exempts for such detailed oversight, marketing on the internet and marketing to other lawyers, their clients and former clients.

The Bar did subsequently file a separate petition to amend the Rules Regulating The Florida Bar Relating to Computer Accessed Communications (Case No. SC08-1181). The more startling provisions of that petition freed attorneys from any restriction (except truthfulness) on championing "past results" throughout a website (except on the first page) ("We have obtained three million

dollars for our clients this year"). Likewise allowed for the first time were testimonials ("my lawyer got me one million dollars") which the Bar suggested should also be allowed.

Published news reports of the oral arguments on that matter indicate there is continued concern by members of the Court on these issues and the Court has yet to issue an opinion on that petition. It appears clear however, that the Bar's proposal was submitted without "an additional and contemporary study of lawyer advertising which shall include public evaluation and comments about lawyer advertising"[1].

The Bar has now submitted its report on a different subject. It renews its previous request that the Court exempt certain areas of the advertising rules allowing almost complete freedom if communications are with current or former clients or are communications directed to other lawyers. The report and the renewed proposal has likewise been submitted without any indication that the Bar has undertaken "an additional and contemporary study of lawyer advertising, which shall include public evaluation and comments about lawyer advertising."

Thus, except for creative argument, the Court has no way to judge how these changes will affect the consumer, which is the real reason behind any regulation.

[1] The undersigned submitted comments to the petition, which comments were rejected as untimely filed.

In the meantime, while the Court considers the issue, the Board of Governors of The Florida Bar directed that the rule regarding lawyer-to-lawyer communications as adopted by the Court not be enforced. See *Florida Bar News*, September 1, 2007, issue.

Other than arguments that could have been made in 2005 when the proposal was first advanced, the Bar now supports its proposal based on results obtained by asking for comments from its own committees and by requesting comments from its own members by way of articles in *The Florida Bar News*. It even spent money to perform a survey of its own members.

It is indeed a corruption of the concept of self-regulation, so jealously guarded by Florida lawyers, that the Bar seeks to accomplish the goal of protection of the public by taking a survey by mail of 2,627 of its own members of which only 502 expressed a sufficient interest (perhaps self-interest) to answer the questionnaire.

It is respectfully submitted that the Court should take no further action on pending petitions, either further limiting marketing activities of attorneys or further reducing the existing restrictions on marketing by attorneys, until such time as the Court has the benefit of "an additional and contemporary study of lawyer

advertising which shall include public evaluation and comments about lawyer advertising" which the Court requested long ago.

DEFICIENCIES IN THE SPECIFIC PROPOSAL

If the Court accepts the above recommendation, there would be no need to comment on the arguments submitted in support of the current proposal. Since the writer's suggestion may be rejected, the undersigned feels an obligation to make at least some observations regarding the balance of the "Report".

Solicitation of Business from Former Clients

There is no question but what some communications between lawyers and former clients are not only appropriate, but perhaps are even laudatory. The fact that a lawyer with reasonably recent contact with a client in a professional matter might recognize the client's need for being updated about new legal developments clearly is an example of such appropriate communication. That is far different however from the use of mass mailings to persons who may have only fleeting or limited contact with a lawyer or law firm on a limited subject, allowing former clients to be bombarded by broad based marketing solicitations for employment of a lawyer or law firm on matters totally unrelated to the prior representation. Such contact may come months or even years after the client's previous representation. That fact exposes the proposal to what it is: a smart marketing means of soliciting

new business on new subjects from members of the public who, because of other Bar restrictions, may not be able to receive similar comparative information from competing and potentially better qualified lawyers or firms.

Since the Bar relies in part upon “anecdotal experience”, I suggest the Court might be interested in knowing of an actual event involving the undersigned, which demonstrates a fatal weakness in the broad brush exception from marketing regulation of communications addressed to “former clients”.

The undersigned was recently contacted by a well-qualified law firm who had obtained special experience in settlement and litigation involving a widely used consumer product. The law firm proposed to create and pay for a marketing brochure calling attention to the problems in this consumer product and suggesting that any person who may have been damaged by use of the product should consider seeking legal advice. The proposal was that our law firm should use this marketing pamphlet and send it to all of the former clients of the firm under the exception allowing communications with former clients. Since our firm had no special knowledge or experience in this matter, and since gaining such experience was extremely expensive and time consuming if we represented but a single client, we were told that any former client who contacted us in connection with the matter could have their case reviewed under this proposal by the experienced law firm

which prepared the brochure. Our firm would not undergo any expense whatsoever, and if the case were accepted, our firm would be given the standard referral fee.

The proposal was rejected for various reasons, but it demonstrates that a broad brush unrestricted exemption of communication with "former clients" is unrealistic. In our case, the definition of a former client would include those which would be considered "clients" under other rules regulating the Florida Bar. These include the many people who contacted our firm and furnished information about potential cases, but whose cases were rejected by the firm. In a 45 year old firm such as ours, literally thousands might be considered "former clients".

The Survey

Although it is unclear exactly what the Bar intended to accomplish by conducting the survey included in the Report, a careful look at the statistics cited raises some interesting questions.

The survey does not appear to deal with the issues of mass marketing clearly involved in the Bar's petition, but rather includes all forms of communications. Apparently, 220 of the lawyers had "initiated some form of communication" to another lawyer to solicit business. 140 indicated they had received "some form of communication" soliciting business.

The survey revealed that 45 lawyers indicated that they had received "a communication from another lawyer that contained false or incorrect information". How a lawyer knows whether or not information received in a communication, such as a brochure, "contains false or incorrect information" is not explained. This statistic therefore is not about how much false information is being communicated, it is about how much false information is being detected by the recipient.

But of course, the real question in terms of marketing should not be whether or not outright lies are being told. What should be of concern is whether or not non-lawyer members of the public are being mislead, confused or potentially offended by the marketing efforts, or, as a result of receiving such marketing efforts they begin to lose respect for our system of justice, our courts, and the jury system.

The series of questions in the survey regarding whether or not certain communications with lawyers or former clients should be subject to "the same advertising rules" as other advertising likewise misses the point. It assumes that the "same advertising rules" even fit the methods used in mass marketing. Again, the "broad brush" approach of the questions seek an answer that calls for either "no restrictions" or the "same advertising rules" that apply to other forms of

advertising. The reference to "same advertising rule" is likewise confusing since the current rules vary considerably between various forms of advertising.

The whole series of questions addressed to the attorney's opinions regarding communications between attorneys and "current or former clients" totally misses the point. Few doubt that it is appropriate to communicate with current clients. Conceivably some agree that it would be appropriate to create certain forms of marketing advertisements directed to recent former clients, about issues involved in the former representation. No effort was made to determine opinions on these selective issues.

Some of the questions are framed in terms of events "in the past five years" and therefore totally miss the point that the marketing of legal services is dramatically changing almost on a monthly basis. The rapid growth, for example, of legal blogs has occurred almost exclusively within the last year.

The survey asked whether or not "communications between attorneys and current or former clients" should be reviewed by the Florida Bar "prior to being conducted/disseminated". Since this is the most onerous, unforgettable and often expensive event coming to the mind of most lawyers who have done any advertising at all, it may very well have colored the responses to those questions as framed.

The survey reveals 80% of the respondents indicated the Florida Bar should not review "any type of attorney to client communications". One wonders what would be the result if the question was whether any current advertising should be reviewed by the Florida Bar prior to the advertisement's use?

Soliciting Business Through Other Lawyers

Finally, I am surprised at the report that only 78% of the lawyers had received written communications, letters and pamphlets and print media from other attorneys in the last five years. In an attempt to confirm the accuracy of the report, I attempted to survey the members of the Tampa Bay Trial Lawyers Association by posting a survey on their internet listserv. Of the 172 members of the listserv, not one responded that they had not received marketing mail from other lawyers within the last month and only one indicated that they had not received electronic (email) marketing information within the last month.

But the real issue is how are such marketing tools actually used. Are they perhaps being used as devices to use other lawyers to convince members of the public of a need for legal services where the public knowledge of the need did not exist independently?

The Bar suggests that the purpose of the brochures is to get referrals in a competitive referral market. The brochures do not appear to be directed toward

that goal. They often appear to be focused on getting other lawyers to find and intrigue potential clients into seeking legal advice, often by the dramatic use of examples of "past results".

Marketing today is affecting all lawyers in many ways. (See Exhibit A for an example). Again, the answer to the problem is not a broad exemption of this form of marketing, but instead a study to determine if some discrete regulation is needed to protect the public.

RECOMMENDATION TO THE COURT

The undersigned recommends to Court that: (1) the Court decline to accept any of the proposed changes to the current rules except such changes as the Court deems to be of an emergency nature; (2) the Court require the Bar to "undertake an additional and contemporary study of lawyer advertising, which shall include public evaluation and comments about lawyer advertising" before submitting further proposed amendments; (3) the Court clearly indicate that the Board of Governors does not have authority to determine that certain rules of the Court not be enforced; (4) as an economy matter, the Court consider suspending all further activity of the Bar regarding "pre-approval" of any form of advertising and allow the enforcement of the rules to be based upon complaints of incidents of violations including reports of frequent types of violations.

Since the Bar so far has taken no steps whatsoever to comply with the Court's "request", the Court should consider other means of obtaining unbiased broad based factual information on this complex issue without relying upon a clearly self-interested Bar to furnish such information to the Court.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the above was served by mail on _____, upon the following.:

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CERTIFICATE OF TYPE SIZE AND STYLE

Bill Wagner HEREBY CERTIFIES that this petition is typed in 14 point Times New Roman Regular type.

_____

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