

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC09-394

REPORT TO THE COURT ON RULE 4-7.1 - LAWYER-TO-LAWYER AND
LAWYER-TO-CLIENT COMMUNICATIONS

THE FLORIDA BAR makes its report to this court in response to this court's order in *Amendments to Rules Regulating The Florida Bar - Advertising*, 971 So.2d 763 (Fla. 2007 Case No. SC05-2194), in which this court asked The Florida Bar (the bar) to further consider an amendment to rule 4-7.1 of the Rules Regulating The Florida Bar. As grounds, the bar states as follows:

In that case, the bar asked this court to amend the lawyer advertising rules. Among the changes requested by the bar were amendments that would specifically exempt lawyer to lawyer communications as well as communications between lawyers and their own past and current clients from application of the lawyer advertising rules. These changes were intended codify long-standing policy that the lawyer advertising rules did not apply to such communications. This court

declined to do so at that time, but invited the bar to provide further support for the bar's position at a later time. *Amendments to Rules Regulating The Florida Bar - Advertising*, 971 So.2d 763 (Fla. 2007). In its order, this court stated as follows:

The Bar proposed several amendments to rule 4-7.1 (General), including adding subdivisions that would exempt certain areas from the advertising rules. The proposed exemptions included, along with other areas, communications with family members, communications between lawyers, and communications with current and former clients. We adopt the exemption in respect to communications with family members. We request further information from the Bar as to why communications between lawyers, and communications with current and former clients, should be exempted from the advertising rules, including any research or evidence supporting such exemptions. We defer adoption of those two exemptions at this time.

Id., at 764.

This court further ordered that the bar either provide this additional information in its next bi-annual rules filing or file a request for an extension of time. This court granted the bar's request for an extension of time.

The Board Review Committee on Professional Ethics (the committee), a subcommittee of the Florida Bar Board of Governors (the board), further examined the original proposal and this court's request for additional information. The committee requested comments from Florida Bar members via articles in the *Florida Bar News* and by writing to all voluntary bar leaders to request comments. Articles and correspondence are attached to this report as Appendix A.

A large majority of individuals and organizations responding to this request supported the bar's position that the lawyer advertising rules should not apply to lawyer-to-lawyer communications and communications between lawyers and their own current and former clients. One organization indicated that the advertising rules, if applicable to former clients, should be applicable only where they do not relate to the matter in which the lawyer represented the former client.

Organizations responding to the bar's request include the Sarasota County Bar Association, the Board of Legal Specialization and Education, the Out-of-State Practitioners Division, and the Florida Association for Women Lawyers.

The committee also obtained the board's permission to expend funds to perform a survey of Florida Bar members to obtain information about member opinion regarding application of the advertising rules to these types of communications and information from members regarding whether members have received such communications, whether such communications should be subject to the attorney advertising rules, and whether Florida Bar member recipients of communications from other lawyers had ever been misled by such communications. Survey results were provided to the full board for its December 2008 meeting, and were reviewed by the committee in a conference call held in preparation for the board's meeting.

The survey was performed by the bar's Research, Planning & Evaluation Department. Survey results are attached to this report as Appendix B. The Florida Bar mailed 2,627 surveys to a random sample of in-state Florida Bar members, 502 of which were completed and returned, for a return rate of 19%. The survey error of estimation rate is reported at approximately plus or minus 4 percent at the 95 percent level of confidence.

Survey results indicate that 44% of those surveyed initiated some form of communication to another lawyer to solicit business. 72% of those surveyed indicated that they had received some form of communication from another lawyer to solicit business. A large majority of lawyers surveyed (91%) indicated that they have not received a communication from another lawyer that contained false or incorrect information. Finally, a majority of lawyers surveyed (69%) believe that the bar should not regulate communications between lawyers that are made for the purpose of soliciting business.

The bar's anecdotal experience, through telephone conversations with members via the bar's ethics hotline, correspondence, and voluntary filings, is that the majority of these communications between lawyers are requests for client referrals. The recipient attorney therefore often is not the prospective client. The communications range from professionally published brochures, to newsletters about areas of law, to personal letters.

The United States Supreme Court has determined that commercial speech is protected First Amendment speech and may not be prohibited absolutely. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the United States Supreme Court (U.S. Supreme Court) extended this doctrine to lawyer advertising, holding that a total prohibition on the advertisement of routine legal services is unconstitutional. The U. S. Supreme Court has found that the content of non-misleading commercial speech can be constitutionally regulated only when a substantial government interest is at stake, the regulation directly advances that interest, and the regulation is no more extensive than is necessary to serve that interest. *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the U.S. Supreme Court clarified the *Central Hudson* test for regulating commercial speech by determining that only a "reasonable fit" must be necessary between the state interest and the regulation.

The main state interests that the bar has advanced in regulating 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. Those purposes are not met by applying lawyer advertising regulations to communications between lawyers. Therefore, the bar's position is that the regulation of communications between lawyers is not a reasonable fit to the rationale of the bar in propounding lawyer advertising regulations.

To reiterate, most communications between lawyers are for the purpose of soliciting referrals, and the recipient lawyer is usually not the prospective client. In those circumstances, the recipient lawyer therefore has no direct interest that would cloud the recipient lawyer's judgment. The recipient lawyer also is in a much better position than the lay public of analyzing the soliciting lawyer's representations and background, as well as the potential benefits of hiring the soliciting lawyer. The solicited lawyer has his or her own background and experience, as well as that of colleagues to compare to the information supplied by the soliciting lawyer. Also, the solicited lawyer may have some familiarity with the soliciting lawyer that may otherwise not be available to the lay public, via professional organizations, through prior direct contact with the soliciting lawyer,

or through information provided by other lawyers. Thus, the potential for the soliciting lawyer to mislead, whether intentional or inadvertent, is eliminated, or at least drastically reduced.

Similarly, the current or former client who has already selected a lawyer to represent him or her in a particular matter is in a position to judge the lawyer in a way that the lay public, which has had not contact with the lawyer, is not. The client has had the opportunity to evaluate the lawyer's services first-hand. Current and former clients are accustomed to receiving communications from their lawyer and would not be surprised or startled to receive a new communication in their ordinary correspondence, although they might be surprised or startled to receive correspondence from their own lawyer marked "advertisement." As indicated in the correspondence from the Out of State Practitioners Division (which may be found in Appendix A), "imposing advertising regulations on these communications could confuse clients and interfere with the attorney-client relationship."

If the lawyer has already performed certain services for a client, changed circumstances may require updating of services already performed (i.e., in the case of a will, the client may have new heirs or tax laws may have changed, or in the case of a business corporation, new laws may impact operations significantly). The client's best interests are served when a client is made aware of changes in the law or other circumstances potentially requiring changes in their legal matters. A

lawyer should be free to communicate this relevant information to the client without the concern of being subject to the lawyer advertising rules. There is no abuse inherent or demonstrable in a communication designed to ensure that the client's previously provided legal services remain up-to-date and sufficient to meet the client's needs. Clients normally expect such service from their lawyers, and such communications actually serve to enhance the image of the profession.

Rule 4-7.4(a), Rules Regulating The Florida Bar prohibits direct solicitation of persons with whom the soliciting lawyer has no prior professional relationship. Lawyers therefore may engage in direct, in-person solicitation of their current and former clients. The comment to ABA Model Rule 7.3, which defines solicitation similarly to Florida, provides that “[t]here is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client.” The Alabama Supreme Court set forth a similar rationale, stating as follows:

Such an individual is less likely to be the subject of unethical practices or pressures. Presumably such an individual knows the competence and integrity of the advising attorney and can better evaluate the propriety of employing him than can laymen who are not within these categories [familial or prior professional relationship].

Goldthwaite v. Disciplinary Board, 408 So.2d 504 (Ala. 1982).

According to the American Bar Association Center for Professional Responsibility, all but 5 states contain similar provisions allowing direct, in-person contact between a lawyer and a person with whom that lawyer has a prior

professional relationship. American Bar Association, Center for Professional Responsibility, *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct* (February 1, 2008), available at <http://www.abanet.org/cpr/professionalism/state-advertising.pdf> (last visited January 23, 2009). This exception also pre-dates the existing rules. *See* Florida Code of Professional Responsibility DR 2-104(A)(1); ABA Model Code DR 2-104(A)(1).

To require lawyers to follow other advertising rules when they are permitted to directly contact current and former clients is incongruous. Examples include marking a letter “advertisement” in red ink, or requiring the first sentence “if you have already retained a lawyer, please disregard this letter.” *R. Reg. Fla. Bar 4-7.4(b)(2)(B)* and *(b)(2)(F)*. Applying the *Central Hudson* test, regulating communications with current and former clients using the lawyer advertising rules is not a reasonable fit to the state interests advanced by the bar in regulating lawyer advertising.

Lawyers are subject to rules of professional conduct other than the lawyer advertising rules. For current clients, lawyers remain subject to conflict of interest rules which prevent a lawyer from placing his or her own interests above those of the client. *R. Reg. Fla. Bar 4-1.7(a)(2)*. Lawyers also are prohibited from engaging in conduct involving deceit, dishonesty, or misrepresentation under the

general misconduct rule, regardless of application of lawyer advertising rules. *R. Reg. Fla. Bar 4-8.4(c)*.

To aid the court, a copy of Rule 4-7.1 in its current form with the changes previously approved by the board and filed with the court in legislative format is attached as Appendix C.

Therefore, the bar respectfully submits this report to this court and respectfully requests that this court amend Rule 4-7.1, Rules Regulating The Florida Bar, in the manner requested in the bar's original petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following this 27th day of January, 2009.

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CERTIFICATE OF TYPE SIZE AND STYLE

THE FLORIDA BAR HEREBY CERTIFIES that this notice of appearance is typed in 14 point Times New Roman Regular type.

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