IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR - SUBCHAPTER RULE, 4-7 LAWYER ADVERTISING RULES

CASE NO. SC11-1327

COMMENTS OF BILL WAGNER

Comes now Bill Wagner, a member of The Florida Bar in good standing, and respectfully submits the following:

IMPORTANT PRELIMINARY POLICY DECISIONS FOR THE COURT

It is respectfully submitted that the Court should make two, and perhaps three, policy decisions before examining the details of the Bar-proposed "comprehensive" revision of the rules relating to advertising and marketing.

1. SHOULD THE COURT CEASE USING THE RULES OF ETHICS AS THE BASIC FORMAT FOR RULES RELATING TO ADVERTISING AND MARKETING?

This respondent urges that the answer be "Yes," for reasons detailed in this response.

2. SHOULD THE COURT CREATE AN INDEPENDENT ENTITY TO MANAGE THE REGULATION OF ADVERTISING AND MARKETING AS A SUBSTITUTE FOR MANAGEMENT BY THE FLORIDA BAR?

This respondent has urged such creation in previous submissions which have not been ruled upon by the Court. Only brief additional argument on this issue will be submitted by this respondent at this time.

If the answer to both of the above issues is "No," the Court then must address the specifics of the Bar's present proposal. This respondent does not herein address criticisms of that proposal, in except to the extent that those criticisms form the basis for arguing for a "Yes" decision on one or both of the above policy issues.

If the answer to either of the above issues is "Yes," then the Court must face the issue of whether the current rules or the proposed new rules apply during the transition that will be necessary as a result of the Court's order. Only brief suggestions regarding that issue were previously offered by this respondent.

If the answer to the above two issues is "No," then the applicability of the current rules during transition to the new proposed rules, when finally adopted, must be considered in view of some of the substantial changes involved. This respondent makes no suggestion regarding that issue.

WHY NOT "START FROM SCRATCH"? A BRIEF HISTORY OF THE ISSUE

In February 2004, the undersigned was appointed to a Florida Bar committee charged with the responsibility of reviewing the then-current advertising rules. Its recommendations were to be submitted to the Board of Governors and various committees of the Board of Governors.

At that time, the undersigned filed a "Written Dissent of Task Force Member Bill Wagner" with the Board of Governors. (See Appendix A). That document, dated January 26, 2005, contained two principal dissents: one from the taskforce

policy favoring piecemeal amendment of the existing rules rather than a full review of the viability of the current rules' format and basic governing policies; and another based on its failure to establish guidelines for standards against which lawyer advertising can be tested. Those dissenting arguments, it is respectfully submitted, are as valid today as they were in 2005.

At various times thereafter, the undersigned was unsuccessful in his efforts to stimulate a complete and thorough study of the regulation of advertising. One such filing did, however, prompt a request by this Court, in its November 2, 2006, initial opinion in Case No. SC05-2194, as follows:

> 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.

The Florida Bar contested other features of that opinion, but on December 20, 2007, the Court filed an amended opinion which contained the exact same request. *In re Amendments to The Rules Regulating the Florida Bar - Advertising*, 971 So.2d 763 (Fla. 2007 Case No. SC05-2194).

On or about October 28, 2010, The Florida Bar asked the Court to dismiss the pending matters relating to amendments to the rules and to stay the effective date of the earlier decision of the Court regarding such rules. The Florida Bar represented that it was in the process of developing a "comprehensive revision of The Rules Regulating the Florida Bar pertaining to attorney advertising."

By that time, the undersigned had become convinced that the structure of The Florida Bar, including the revolving and often short-term membership of its various committees and subcommittees, special committees, and task forces, was totally inadequate to handle the rapidly changing and specialized issues involved in lawyer advertising and marketing. The undersigned filed a response in which he suggested that the Court assign responsibility for the regulation of lawyer advertising and marketing to a separate and distinct entity. See Bill Wagner's Response to The Florida Bar's Motion to Dismiss and Stay and Suggested Alternative Proposals, attached as Appendix B (absent the appendix). The document was filed in the record of SC10-1014, and the undersigned respectfully submits that the arguments in that response remain valid to this day. Supplemental comments on the same issues were filed, and applicable portions of that filing are attached hereto as Appendix C. This respondent believes that those comments also remain applicable to the current proposal by The Florida Bar. It is believed that both responses remain pending before the Court at this time.

The Bar has now filed new proposals for rules regulating the advertising and marketing activities of lawyers. While there are some significant changes in the handling of some issues, the proposal is, to a great extent, a mere "tweaking" of the current rules. The "explanations" to proposed changes in the rules and comments contained in Appendix B to the Bar's submission show that major portions of the

rules have merely been relocated or given "minor amendments." Even those amendments are concentrated in the "comments" which, as noted below, are not binding on the Bar and are merely "guides to interpretation" of the rules. The Bar made no effort to "start from scratch" in consideration of the best and most efficient method of regulating the advertising and marketing of legal services.

The undersigned is stymied as to why this insistence on "tweaking" persists. It may just be human nature to stick with something that sometimes works, rather than to risk a complete review for possible major change. Perhaps traditional lawyer training is influencing the Bar to believe that new decisions must be explained by amending old decisions. Maybe the political problems inherent in changing the status quo are holding sway. Most of all, though, the Bar's reluctance may well be driven by a concern that the Court itself has not seen the necessity to direct that such a complete review be conducted. For that reason, in addition to a renewal of previous pleas by this respondent that such a review take place, this submission proposes a very specific major change in regulation: namely, that we quit amending the Articles of Confederation and, instead, consider a new Constitution. If such a change is needed and appropriate, it will apparently occur if the Court directs that it be accomplished. It is the undersigned's hope that the Bar's response will address these issues.

THE COURT SHOULD REMOVE REGULATION OF LAWYER ADVERTISING AND MARKETING FROM CHAPTER FOUR OF THE RULES REGULATING THE FLORIDA BAR. MARKETING REGULATION IS FAR MORE AND MUCH DIFFERENT THAN "RULES OF PROFESSIONAL CONDUCT"

Chapter 4 of the Rules Regulating the Florida Bar is the chapter of those rules identified as "Rules of Professional Conduct." The placement of the proposed rules in this chapter creates two significant problems.

This is the only chapter of the many rules regulating The Florida Bar in which substantive and procedural rules are stated to be binding, but are followed by "comments" that are not binding. Likewise, even the rules that are supposedly binding are further qualified as being either "imperative" or "permissive," with no clear distinction regarding which rules (or parts thereof) fall into which category.

The introductory portions of the chapter contain the Court's explanation of the intended operation of these "Rules of Professional Conduct."

> "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms of "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

> The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term "should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules."

In its response to comments filed in Case No. SC10-1014, The Florida Bar describes its understanding of Rules Regulating the Florida Bar, including the rules proposed in its current submission, as being "intended to be broad statements of principal that are then applied to specific circumstances."

Both the Court and the Bar provide a good description for most of the Rules of Professional Responsibility, which were, and to a great extent continue to be, aspirational statements describing professional ethics. In this modern legal era, however, should rules regulating marketing and advertising ever be merely aspirational? Could merely aspirational rules ever be constitutionally enforced?

Are these advertising rules really fit to be considered as part of Chapter 4 of Rules Regulating the Florida Bar? Nowhere in this proposed rewriting of the rules, or the lengthy presentation to this Court, does The Florida Bar advise the lawyers of this state that some unknown portion of the proposed rules are "partly obligatory and disciplinary" while other portions of the rules are merely "partly constructive and descriptive."

Most importantly, the Bar itself, in developing its proposal, adopted certain goals to be accomplished in making the revision. One of those goals was:

> Provision of clear and simple guidelines and, to the greatest extent practicable, establishment of "bright line" standards, violation of which will likely be clear so that violation will justify the conclusion that violation was either intentional or the result of gross incompetence, thereby allowing imposition of a harsh penalty.

The Bar has abandoned this goal -- and, worse yet, makes it impossible for its staff and various enforcement and interpretive committees to accomplish this goal. It is urged that this substantial problem dramatically affects not only the understanding of the proposed rules by lawyers but also the quality of the protection of the public that the rules are intended to accomplish.

To be purposeful and complete, reevaluation of the regulation of lawyer marketing and advertising would have to recognize this problem as being one of major import and requiring careful study. Instead, for over five years, the Bar has determined that it is easier to "tweak" the current rules than it would be to do a careful study of what could be and should be done to protect the public and the lawyers in this difficult field of the practice of law. Its submission should at least have recognized this issue and brought it to the attention of the Court. Since for whatever reason, the issue has not even been discussed, the undersigned uses this opportunity to have the Court become aware of the problem and hopefully take action to require the problem be carefully studied and resolved.

THE COURT SHOULD CLEARLY ANNOUNCE THE GOALS TO BE ACCOMPLISHED BY REGULATION OF LAWYER ADVERTISING AND MARKETING

In paragraph 24 of the Bar's petition, The Florida Bar tells us that the Board Review Committee on Professional Ethics established certain "recommended goals regarding the regulation of lawyer advertising." The Board approved the recommended goals, which read as follows:

> The primary purpose of lawyer advertising should be to benefit the public by providing information about the need for and availability of legal services.
>
> Primary goals of advertising regulation are:
>
> - Protection of the public from false, misleading, or deceptive information by lawyers for the purpose of obtaining representation of prospective clients;
>
> - Promotion of advertising that provides information that will assist a prospective client in making an informed and meaningful decision about the prospective client's need for legal services and about which lawyer can best fulfill those needs (protecting public access to knowledge about reasonably priced quality legal services);
>
> - Protection of the public from advertising that contributes to disrespect for the judicial system, including disrespect for the judiciary;
>
> - Protection of the public from advertising that causes the public to have an inaccurate view of the legal system, of lawyers in general, or of the legal profession in general;
>
> - Enforcement that will not have an unreasonable economic impact on lawyers who provide information about legal services by methods that do not require expenditure of significant funds as

compared to those who provide information about legal services by more expensive means; and

- Provision of clear and simple guidelines and, to the greatest extent practicable, establishment of "bright line" standards, violation of which will likely be clear so that violation will justify the conclusion that violation was either intentional or the result of gross incompetence, thereby allowing imposition of a harsh penalty.

From the perspective of this respondent, the statement of goals appear to be exceptionally well considered. I have no knowledge of other proposed goals considered or of those which were perhaps rejected or amended. Perhaps a careful consideration of the goals might produce appropriate modifications. But the goals are obviously not binding on anyone, not even the Board of Governors.

Instead, we are told in paragraph 22 that: "The proposed amendments are designed to make the rules more cohesive, easier for advertising lawyers to understand and the Standing Committee on Advertising to apply, and easier and less costly to defend" (emphasis supplied). Which purposes are the driving forces behind the current submission?

I respectfully suggest that the Court determine and announce whether The Florida Bar's recommended goals are the Court's goals to be accomplished in regulating lawyer advertising. Those goals might fairly be included in the action of the Supreme Court in creating the kind of entity with the time and specialty knowledge to move rapidly to address those or substituted goals. It would then be

possible to fairly test whether or not proposed regulations in fact address the achievement of the Court's stated goals.

OTHER PROBLEMS THAT MIGHT BE RESOLVED BY AN INDEPENDENT ENTITY ESTABLISHING RULES OUTSIDE OF THE RULES OF PROFESSIONAL CONDUCT

It is not the purpose of this comment to detail or argue perceived deficiencies in the current submission. A quick review of the submission, however, easily produces a list of issues that might be resolved if rules were completely re-written with the goal of eliminating problems rather than squeezing them into the current format. Some examples of those issues are:

1. There is a problem of regulating law firms, many of which are quite large and/or include offices in many states and even foreign countries. When a law firm violates the rules, who is responsible? While The Florida Bar may very well enforce these rules against William H. Harrell and potentially even the firm of Harrell and Harrell, what if the violation is by one of the other respondents to the earlier petition of The Florida Bar? Take, as an example, the well-respected firm of Holland and Knight. Which of the 1000 lawyers in its 18 law offices in the United States or its three offices in foreign countries is subject to discipline? Only 375 of Holland and Knight's lawyers are members of The Florida Bar, although it is not clear how many of them actually practice in Florida. Are they in harm's way if The Florida Bar finds the firm's marketing practices to be in violation of proposed rules?

Are there any procedures that can be adopted to regulate such firm's marketing activities without being forced to deal with violations of the Rules of Professional Conduct?

2. A related problem exists in dealing with interstate law firms with national marketing programs. The Florida Bar suggests restrictions apply only if an advertisement is "targeted" to Florida residents. What happens when Hunton and Williams, LLP, another respondent, violates the rules while it, in its own words, competes "for legal work with law firms throughout the United States and the world, including many firms that do not have lawyers who are members of The Florida Bar"? That firm states that its work "is on behalf of clients in Florida and outside of Florida as well as clients with legal matters in both locations." I am sure it would not agree that it is "targeting" Florida residents, but I suspect that the firm would be happy to accept cases on behalf of Florida residents who were not "targeted" but just happen to become familiar with its advertisements.

3. Can a more speedy method be developed for regulating new and rapidly changing marketing methods? The Florida Bar is to be congratulated for its restatement and, in some respects, reformulation of the current rules in its present submission. However, it has taken five years -- and the process still is not complete. Taking the regulation of advertising and marketing out of the Rules of Professional Conduct and creating a separate series of rules would include the possibility of

developing more rapid means of responding to changes in marketing concepts. As an example, the current submission does not deal with the very peculiar and specific issues with law firms that keep, and rapidly update on a weekly or even daily basis, so-called online "blogs." These blogs comment to their current and perspective clients about changes in the law and similar subjects. These firms intend to keep the public and their clients advised of these changes, but they also, by reason of the manner of presenting these blogs, attract and develop new clients in the process. Is this advertising? Maybe. Is it marketing? Obviously. The June issue of the ABA Journal contained an example of two entirely new means of developing contacts with potential clients (See Appendix D). Are these new ideas governed by any of the rules of the Bar's latest proposal? I suspect not. Will these new devices even exist when The Florida Bar, using current processes, develops an amendment to the current proposed rules to cover these new unique methods of marketing? Depending on the number of years needed to modify rules, possibly not. Is it possible to develop a procedure which would legally authorize The Florida Bar to act more rapidly? It would seem so.

4. Are there economic or other methods of enforcement of advertising and marketing regulations that would be more effective and fair than threatened discipline under the Rules of Professional Conduct? Appropriate enforcement methods could be developed outside of the current enforcement of professional

ethics. Because the current enforcement methods for the violation of the Rules of Professional Conduct have potentially dramatic consequences upon the practice of law of individual lawyers, there are many protections built into the rules to make their enforcement almost in the nature of the enforcement of criminal laws. Advertising and marketing firms may be in violation of the rules without in any way being morally in violation of the professional qualifications of the lawyer or law firm involved. The Court should have an entity that has the capability of using a variety of enforcement methods, including fines, cease and desist orders, advertising suspension orders, and even, when individual clients are directly affected, provision for economic reimbursement to affected clients. The rapid and efficient enforcement of advertising and marketing rules and regulations is dramatically limited by the Bar's need to use The Rules of Professional Responsibility as the enforcement method for violations. It should not be.

5. What about other problems that the Bar continues to struggle with that apparently even the current proposal does not cover? While the current proposal was being developed over this past year, still other problems were arising in the general field of marketing and advertising of legal services, as reflected in the June 1, 2011, edition of *The Florida Bar News* (Copy attached as Appendix E). One problem is created by the so-called "referral services," based substantially on internet referrals, but also involving famous television referral services such as 1-

800-ASK-GARY. Another problem involves the Bar's attempts to prohibit a lawyer from using past legislative, executive, or judicial positions as part of his or her marketing activities. Apparently, the rules do not contemplate the recent appearance of former Governor Charlie Christ in television advertisements -- which is probably allowed under the proposed rules so long as he does not mention that he is a former Governor. Another article describes the problems created by for-profit lawyer referral services and notes that a new special committee has been established by The Florida Bar regarding the regulation of such entities.

6. Does the continued insistence upon filing of every advertisement with The Florida Bar for time-consuming review really make sense? Emphasis upon enforcing violations and responding to consumer complaints rather than on time-consuming and expensive pre-examination of almost all forms of advertising should be carefully considered. There is little factual information in its submission to determine the work activity involved in the Bar's current evaluation of lawyer advertising and the activities of the board committees providing advice concerning such advertising. Likewise, there is really little information concerning how the activities in that regard in fact benefit the public or provide protection to the public in any meaningful way. A new entity could carefully consider whether or not the financial and workload capabilities of the new entity might be more efficiently applied to achieve the goal of protecting the public by focusing consideration not on

all potential advertising, but upon responding to complaints of specific advertisements and marketing devices brought by citizens and ordinary members of The Florida Bar. The charged lawyer could respond and the new entity could possibly resolve issues by studying facts -- instead of guessing about how a proposed advertisement might affect the public.

7. Perhaps new rules for enforcement could eliminate the great uncertainty regarding enforcement under the current rules and the proposed rules. What is prohibited and what is not prohibited under current and proposed rules? Who makes the initial determination as to whether something is prohibited or not? On what basis is it made?

a. An example of the problem is the proposed rule 4-7.3, Deceptive and Inherently Misleading Advertisements. The rule straightforwardly provides that the lawyer "may not engage in deceptive or inherently misleading advertising." But what is such advertisement? The rule itself begins to create confusion by giving examples which themselves are uncertain. It provides a list of prohibited types of activity but states the types of prohibited activated are "not limited to" the list. The comment that follows the rule repeatedly provides "examples" of potential violations. Lawyers are advised that they cannot say "I will get you money for your injuries," but can say "if you've been injured

through no fault of your own, I am dedicated to recovering damages on your behalf." In further explanation, the comment suggests that advertisers use "modifying language" to prevent violations of the rule and offers use of the words "try, pursue, may, seek, might, could, and designed to" to avoid violation. Since a comment is not a "rule," does use of a given word provide a safe haven? Would use of a word not listed itself be the basis of a violation? I would suggest that there might even be disagreement among the members of this Court about the words selected. If so, think of the dilemma facing the lawyer. That some staff member thinks a word used is not sufficient may be the only test applied. It should not be the test. The test should be: "Is there a reasonable probability that the use of the phrase, without the modifying word, actually convinces a client to select a particular lawyer, whereas the use of the modifying word would have a brought a different result?" I challenge The Florida Bar to support such a conclusion with any type of evidence. Lawyer or staff speculation should not count as evidence to meet the challenge.

b. Consider another example that defies explanation. The Florida Bar offers the recommendation that the statement "a lawyer has obtained acquittals in all charges in four criminal defense cases" is

appropriate if true. This approval would apparently stand even though the four cases may have been drunken-driving cases. His competitor lawyer only won three acquittals, but they were in death-sentence cases. Which is the better lawyer? Reliance upon the "objective proof" of statements is on its face foolish. Far more important is the question of whether or not the statement provides information of value to the prospective client in judging the quality of the lawyer making the statement, as compared to the quality of another lawyer who cannot make the same precise statement.

c. The entire idea of giving "examples" which themselves are confusing and incomplete should be rejected -- and would be rejected if a new body concentrated on creating minimum rules of a clear and specific nature.

d. The goal of "bright line" rules is frustrated by the constant listing of "examples" of claimed rule violations or suggested "safe havens." Can a violation be cured by a slight change to an example? Would a slight change eliminate an otherwise safe haven? Is the initial determination driven by the personal reaction of the individual or individuals making the first determination for The Florida Bar?

8. Rules should emphasize providing valuable information. The Florida Bar should get out of the business of attempting to approve or disapprove advertisements based upon a "guess" about how members of the public will understand what they see or hear in a 30-second television commercial. There is a well-known local television lawyer advertisement which almost exclusively talks about how the lawyers are "aggressive, dynamic, interested, forceful," and on and on. Almost no real information is provided. The Florida Bar, in its proposed comment on "Characterization of skills, experience, reputation or record," actually encourages use of some of these words and adds "intelligent," "creative," "honest," and "trustworthy." The Bar discourages use of the phrase "the best" because it is not "objectively verifiable." Are any of the approved words above "objectively verifiable"? Is there a difference in being "aggressive" and "combative" as suggested by The Florida Bar's comment condemning the word "combative"? If the justification for lawyer advertising and marketing is to provide useful and accurate information to potential clients, the rules should be developed to discourage or even prohibit advertising that provides little or no information except name, address, and telephone number and interesting claimed personality traits. The Bar, however, has proposed rules that encourage such meaningless advertising under the comment, which apparently approves of the use of "aspirational statements" of the goals that lawyers and law firms tell their prospective clients they offer. The suggested

approved words are “goal,” “strive,” “dedicated,” “mission,” and “philosophy,” “try,” “pursue,” “may,” “seek,” “might,” “could,” and “designed to.” The suggested approved phrase is, “My goal is to achieve the best possible result in your case.” What information does this really provide to the prospective client? Does it suggest that other lawyers will not try to achieve the best possible result? If the lawyer uses unlisted words like “endeavor” or “help,” is he or she risking greater scrutiny of a proposed advertisement? If a former judge or legislator truthfully tells a client that fact in an advertisement is he violating the rules? But is the lawyer not under restriction if an advertisement shows an actor pretending to be a doctor so long as the prospective client is warned? Most importantly, is there any support for the suggestion that these claimed distinctions really make the slightest difference in whether the client selects one lawyer over the other for any reason that is actually valuable to the client’s interests?

9. The entire subject of “paid lawyer referrals” could be considered in the overall context of lawyer advertising and marketing by an entity with more intense understanding of the issues rather than by special committees or sub–committees as referenced by the very recent report of the Bar’s activities as reported in *The Florida Bar News*, on July 15, 2011. See Appendix F.

THE CURRENT PROPOSAL

In compliance with the procedure of The Florida Bar, the undersigned has on several occasions filed with the Bar specific comments relating to some of the details of the most recent proposal. (The major comment appears at The Florida Bar's Appendix E, Pages 203-220). Many others as well have filed comments and suggestions or objections to the specifics of the current proposal. (See The Florida Bar's Appendix D, E, and F, totaling 655 pages).

The undersigned has not restated or further argued those points or submitted specific criticisms except as might have been given as examples of problems outlined above. If the undersigned prevails on either proposal as restated below, careful study of the current proposal is unneeded at this stage. If the undersigned fails in persuasion, there are many others ready and able to argue details of the current proposal.

CONCLUSION

It is respectfully submitted that the Court take the following steps:

1. Create a new independent entity for the purpose of regulating lawyer advertising and marketing. That entity should be required to immediately and completely review and revise procedures for regulation of lawyer advertising and marketing.

2. Direct that the rules regulating advertising and marketing of lawyer services be removed from Chapter 4, dealing with Rules of Professional Conduct, and instead be included as a new chapter without the limitations imposed by Chapter 4's provisions for "comments" as currently applied to such regulations.[1]

3. Should the Court see fit to keep lawyer advertising and marketing within the purview of The Florida Bar, the undersigned respondent urges the Court to require the Bar to conduct a more extensive, and timely, study on these very important issues.

Respectfully Submitted:

_____
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[1] If either of these proposals is adopted, the Court should consider additional transition measures as suggested in Appendix G.

CERTIFICATE OF SERVICE

I certify that a copy of the above was served by mail on this ____ day of July, 2011, 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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