**IN THE SUPREME COURT OF FLORIDA**

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

CASE NO. SC11-1327

**COMMENTS OF MICHAEL T. GIBSON, ESQ. REGARDING PROPOSED RULE 4-7.5(b)**

COMES NOW, MICHAEL T. GIBSON, ESQ., of Michael T. Gibson, P.A., and files the following comments regarding The Florida Bar's Petition asking this Court to adopt proposed Rule Regulating The Florida Bar 4-7.5(b), and states as follows:

1. These comments are filed in response to the Notice published in the February 15, 2012 issue of the *Florida Bar News*.

2. The undersigned is a Participating Attorney in 1-800-411-PAIN Referral Service, LLC (hereinafter "The Service"). The Service operates as a lawyer referral service pursuant to rule 4-7.10, Rules Regulating The Florida Bar.

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

4. As a Participating Attorney Member of a Bar-regulated Referral Service, the undersigned has a duty and obligation to make sure that all ads

run by the service, under which the undersigned is referred a case from, are in compliance with the Rules Regulating the Florida Bar. *See* Rule 4-7.10(b), Rules Regulating the Florida Bar.

5. In compliance with this obligation, the undersigned is constantly performing his due diligence to ensure that the advertisements of the Service are in compliance with the Advertising Rules promulgated by The Florida Bar.

6. In the last two years, the undersigned, in conjunction with another participating attorney firm in the Service, obtained email correspondence from Elizabeth Tarbert, Esq., on behalf of the Florida Bar, that the Service is in full compliance with Rule 4-7.10, Rules Regulating The Florida Bar.

7. The undersigned, as part of his diligence in compliance with Rule 4-7.10(b), has obtained copies from counsel for the Service, of all correspondence from The Florida Bar, approving advertisements run by the Service in the Orlando and Central Florida Area.

8. The undersigned files this comment to respectfully request that this Court reject adopting proposed Rule 4-7.5(b) submitted by the Board of Governors. *See* Rule 4-7.5(b), as detailed in Revised Appendix A, filed by The Bar in this case on or about February 10, 2012.

9. For reasons detailed below, the undersigned, as well as all participating attorneys and law firms in the Service, pursuant to their obligations under Rule 4-7.10(b), are prejudiced by the Bar's material change in position with regards to the prohibition against usage of "an actor portraying a law enforcement officer," as this prohibition appears to apply only to ads run by the Service. It thus directly affects, under the prohibitions of Rule 4-7.10, participating attorneys in the service, and their very participation in the same.

The undersigned respectfully submits that there has been no change in circumstances to warrant a departure from the Bar's previous rulings allowing the very same ad. Furthermore, the undersigned respectfully submits, in accordance with the opinions of the United States Supreme Court and Several Federal Courts of Appeal, that the prohibition is violative of the First Amendment to the United States Constitution.

For these reasons, the undersigned respectfully comments and asks that this Court not adopt Proposed Rule 4-7.5(b).

**The Bar Has Repeatedly Rejected The Exact Prohibition It Now Seeks To Enact – There Are No Changed Circumstances, Outside Of Market Competition Among Personal Injury Firms And Referral Services, That Warrant The Proposed Change**

The undersigned is an advertising personal injury attorney in the Central Florida area. The competition amongst advertising attorneys in this

area is intense, and it is quite costly to engage in the same. As an advertising personal injury attorney, the undersigned understands and respects the stark differences in opinion that exist amongst members of the Plaintiff's bar in regards to whether or not any advertising should be permissible, and, to a greater extent, what should be allowed in said ads. The United States Supreme Court has held since 1977 that Attorney Advertising is permissible and has First Amendment protections. *Bates v. State Bar of Arizona*, 433 U.S. 350.

Despite the now thirty-year-plus history of permissible lawyer advertising, it is the opinion of the undersigned, that a great deal of my colleagues lack a true familiarity with what is and what is not been allowed and permitted by the Florida Bar in personal injury advertising. A great deal of this confusion, again in the undersigned's opinion, comes from personal injury attorneys who do not advertise. As someone who must review these matters themselves when writing and scripting advertisements, I find it best to research what the Bar has historically deemed appropriate in the past. Thus, consistency on the part of the Bar is important for lawyers to accurately determine the application of complex rules and stringent regulations.

In researching whether the Bar has historically allowed the use of actors dressed or portraying police officers, the undersigned has found that as far back as 2005, the Bar has approved such ads. In 2010, the Standing Committee on Advertising, not once, but twice approved the very same ad of 1800-411-Pain Referral Service that the Bar now seeks to prohibit. Furthermore, as recently as May of 2011, the Board of Governors had no interest in banning this exact type of ad. *See* Proposed Rule 4-7.3(b)(6), which stated: "A lawyer may not engage in deceptive or inherently misleading advertising . . . . (b) Examples of Deceptive and Inherently Misleading Advertisements. Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain: . . . (6) a dramatization of an actual or fictious event unless the dramatization contains the following prominently displayed notice: "DRAMATIZATION. NOT AN ACTUAL EVENT." When an advertisement includes an actor acting as a spokesperson for the lawyer or law firm, purporting to be engaged in a particular profession or occupation, the advertisement must include the following prominently displayed notice: 'ACTOR. NOT ACTUAL [. . . . DOCTOR, LAWYER, POLICE OFFICE, ETC. . . . .]'. (Emphasis supplied).

The dramatic change in position of the Bar on this matter begs the question, what has changed in the past seven (7) months, to warrant a departure from an advertising practice that has been allowed for almost a decade?

In its Motion to Amend, The Bar attempts to answer that question, and cites the following as purported justification for the substantial change in position:

> The board has reviewed several advertisements by law firms and lawyer referral services that use actors portraying police officers and judges acting as spokespersons, touting the advertising law firm or lawyer referral service. The bar believes the state has a substantial interest in prohibiting such advertisements for at least three reasons: (1) the advertisements are misleading because they suggest that judges and law enforcement officers endorse particular lawyers while engaged in their official functions, which they do not; (2) studies indicate that people are more likely to follow instructions from persons clothed with the indicia of authority without questioning the motives of such persons than to other persons and such advertising is thus unduly manipulative; and (3) the advertisements create a risk of causing the public to lose confidence in our system of justice by suggesting that lawyers and law enforcement officers are influenced by the identity of the lawyer representing a client. The use of actors purporting to be judges and law enforcement officers endorsing particular lawyers while on duty conveys no useful information to the public about the advertising lawyer and the advertising lawyer has adequate alternative means of effectively conveying information.

*See* The Florida Bar's Motion to Amend Pending Proposed Amendments, filed February 10, 2012, at p. 2.

With all due respect to the drafters of this Motion, all of whom the undersigned respects greatly, none of these conditions suddenly appeared, and all of them existed, and have existed, since the Bar first approved this type of advertisement. All of them also existed in May of 2011, when a disclaimer was protection enough.

Initially, despite the quotation that "studies indicate people are more likely to follow instructions from persons clothed with the indicia of authority . . .," no actual study is provided. If a departure from what has been established as a permissible form of advertisement is warranted, and if there is truly an exigent circumstance dictating the same, then this decision and departure should be based on actual evidence and fact, not speculation and antidotal innuendo from attorneys. *See Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, 632 F. 3d 212, 224 (5th Cir. 2011) (Louisiana Attorney Disciplinary Board did not provide evidence in the record connecting the common sense observation that a communication that states or implies that the lawyer has the ability to influence improperly a court is likely to be false, deceptive or misleading to portrayals of a judge or

a jury in attorney advertisements generally). *See also Alexander v. Cahill*, 5998 F. 3d 79, 93, *cert. denied* 79 U.S.L.W. 3102 (2010).

As a lawyer who both heavily advertises and who participates in Bar-regulated Referral Service, the undersigned would submit that there is a sect of fellow attorneys in the personal injury field who highly resent Bar-regulated Referral Services for reasons that these services compete in the open market with them for prospective clients. This Court need look no further that the comments made by State Representative, Rick Kriseman, at a Committee hearing on Lawyer Referral Services, on or about June 22, 2011,. At that hearing, Rep. Kriseman, who is a practicing Plaintiff's personal injury attorney, advised the Committee that he was filing a bill to regulate private lawyer referral services because he had noticed that his law firm was losing business as a result of advertising by the referral services.

The Florida Supreme Court and The Florida Bar are not here to regulate the open market. Both this Honorable Court and The Florida Bar serve the gatekeeper function of protecting the public from harm that an attorney may cause a client. This Court and The Bar should be ever diligent in their efforts to do the same. This should and does include appropriate review and regulation of lawyer, and Bar-regulated Referral Service ads, to make sure they are not deceptive or misleading.

However, there is a difference between regulating market competition and truly protecting against public harm. What is unclear to the undersigned is how after almost ten years of accepting this form of advertising, is it now suddenly harmful to the public? How, if a use of a prominent disclaimer is given, does the ad convey the indicia of authority, where it has not in the past?[1] What compelling reason exists now, that did not exist seven (7) months ago, to outright ban such an advertisement?

The undersigned respectfully submits that the answer to the above questions is none other then this is an anti-competitive measure against an advertising, Bar-regulated and compliant, Referral Service. Thus, the same is an anti-competitive measure against participating attorneys in the service. The measure would force attorneys in the service to either suspend participation in the Service until all ads with the impermissible material were removed, or to drop out all together. The undersigned submits that this is the true intent of this measure, and nothing more. The undersigned and all

[1] *See Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, 632 F. 3d at 224 (the only evidence on the record to support narrow tailoring is the LSBA Committee's statement that "a disclaimer would not be able to cure or prevent the conduct from misleading and/or deceiving the public" and that Rule 7.2(c)(1)(D) is "narrowly-tailored to address the harm in question and to achieve the desired objective of protecting the public from false, misleading and/or deceptive advertising." The committee did not support these assertions with evidence or explanation and "[t]he record does not disclose any . . . evidence . . . that validates the[se] suppositions."

participating attorneys in the Referral Service are thus prejudiced in their obligations and rights under the purported rule change.

**The Proposed Prohibition In The Rule Is Unconstitutional On Its Face Under Established Federal Law**

The Federal Appellate Courts that have examined this exact issue, have found that the exact prohibition advocated by the Bar was an unconstitutional restraint on free speech. In *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, 632 F. 3d 212 (5th Cir. 2011), the Fifth Circuit Court of appeals struck down a proposed rule by the Louisiana State Bar prohibiting communications that included the portrayal of a judge or a jury. The Fifth Circuit expressly held that the "portrayal of a judge in an advertisement may also be presented in a way that is not deceptive," *citing to Alexander v. Cahill*, 5998 F. 3d 79, 92-95, *cert. denied* 79 U.S.L.W. 3102 (2010). The Court expressly rejected the very argument advanced by the Bar in the instant case, i.e., that the public is assumed to be insufficiently sophisticated to avoid being misled. *Id.* at 224. (Emphasis supplied). As noted by the Court, the United States Supreme Court has explicitly instructed courts to reject such arguments when reviewing regulations of attorney advertising. *Bates,* 433 U.S. at 374-75, 97 S. Ct. 2691 (rejecting attorney advertising restrictions based only on a belief that "the public is not sophisticated enough to realize the limitations of advertising").

Thus, the express weight of authority from federal appellate courts reviewing this issue on First Amendment grounds under the Federal Constitution has flat out rejected the requested prohibition at issue. This is important, as if this measure and prohibition is advanced, the undersigned, as well as all attorneys who participate in the Referral Service, are likely to have to seek the intervention of federal district and appellate courts due to First Amendment violations. Again, if the same advertising did not pose eminent harm just seven (7) months ago, as it had not for a decade before, the undersigned would respectfully like to see the Bar stay clear of avoidable Constitutional litigation.

## Conclusion

As the requested prohibitions of Proposed Rule 4-7.5(b) are clearly unconstitutional on their face, and serve a punitive and anticompetitive purpose only, the undersigned would respectfully request that the proposed rule be rejected. The undersigned does approve of and fully endorse an appropriate disclaimer in such an ad, as was previously suggested by the Board of Governors in May of 2011, by Proposed Rule 4-7.3(b)(6).

Respectfully submitted,

_____

Michael T. Gibson, Esq.
Florida Bar No. 0026105

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail on this _____day of March, 2012, 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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