IN THE SUPREME COURT OF FLORIDA

IN RE: THE FLORIDA BAR'S
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR– SUB CHAPTER RULE 4-7
LAWYER ADVERTISING RULES
_____ /

SC11-1327

UNOPPOSED NOTICE OF FILING COMMENTS FROM CASE NO. SC10-1014 AND PREVIOUSLY SUBMITTED COMMENTS AS TO THESE PROPOSED RULES BY SEARCY DENNEY AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A. ("SEARCY DENNEY") and the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC. ("ACLU"), through counsel, hereby file the following comments in support of Comments of Searcy Denney and the ACLU:

Appendix A - Comments From Case No. SC10-1014 filed June 28, 2010.

Appendix B - Previously Submitted Comments as to These Proposed Rules submitted to The Florida Bar dated February 28, 2011.

Appendix C - Previously Submitted Comments as to These Proposed Rules submitted by Searcy Denney to The Florida Bar.

Appendix D - Previously Submitted Comments as to These Proposed Rules submitted by J. Hopkins of Searcy Denney to The Florida Bar.

As grounds, SEARCY DENNEY and the ACLU state that neither of these comments appear to be part of the record in this case and might assist the Court in

understanding some of our concerns about why websites by lawyers should not be regulated as lawyer advertising.

In addition, SEARCY DENNEY and the ACLU adopt and incorporate the Comment of Eight Law Firms Regarding Rules Proposed July 5, 2011 and Additional Comment of Carlton Fields, P.A. and Bilzin Sumberg Baena Price & Axelrod LLP Regarding Rules Proposed July 5, 2011.

Undersigned has conferred with counsel for The Florida Bar, Barry Richard, who has no objection to these filings.

Respectfully submitted,

_____

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COUNSEL FOR THE AMERICAN
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FOUNDATION OF FLORIDA, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail on this 26th day of August, 2011, to: Timothy P. Chinaris, Esq., P.O. Box 210265, Montgomery, Alabama 36121-0265; Peter J. Winders & Joseph H. Lang, Jr., CARLTON FIELDS, P.A., Corporate Center Three at International Plaza, 4221 W. Boy Scout Boulevard, Suite 1000 Tampa, Florida 33607-5736; Elizabeth Clark Tarbert, Ethics Counsel, The Florida Bar, 661 East Jefferson Street, Tallahassee, Florida 32399-2300; Bill Wagner, Wagner Vaughan & Mclaughlin, P.A. 601 Bayshore Blvd., Ste. 910, Tampa, Florida 33606-2786; Charles Chobee Ebbets, Ebbets Armstrong & Traster, 210 South Beach Street, Suite 200, Daytona Beach, Florida 32114; Thomas R. Julin & Jamie Z. Isani, Hunton & Williams LLP, 1111 Brickell Avenue, Ste. 2500, Miami, FL 33131; Richard J. Ovelmen, Jorden Burt LLP, 777 Brickell Avenue - Ste. 500, Miami, FL 33131-2803; Douglas M. Halsey & Raoul G. Cantero, White & Case LLP, 200 South Biscayne Blvd., Miami, FL 33131-2352; L. Kinder Cannon, III, Holland & Knight LLP, 50 North Laura Street, Ste. 3900, Jacksonville, FL 32202; Charles D.

Tobin, Holland & Knight LLP, 2099 Pennsylvania Ave., N.W. Ste. 100, Washington DC 20006; Edmund T. Baxa Jr., Foley & Lardner LLP, 111 North Orange Avenue Ste. 1800, Orlando, Florida 32802-2193; and Edward Soto, Weil, Gotshal & Manges LLP, Espirito Santo Plaza, Ste. 1200, 1395 Brickell Avenue, Miami, Florida 33131.

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JAMES K. GREEN

February 28, 2011

Elizabeth Clark Tarbert, Esq.
Ethics Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Comment to The Florida Bar Review Committee on
Professional Ethics Regarding Lawyer Advertising Rules

Dear Ms. Tarbert:

Searcy Denney Scarola Barnhart & Shipley, P.A. and the American Civil Liberties Union Foundation of Florida, Inc. submit the following additional comments on the Committee's proposed revision of the Bar's lawyer advertising rules approved on December 9, 2010. ("proposed Advertising Rules").

We oppose the Committee's proposed Advertising Rules because: 1) existing rules already prohibit lawyers from making false and misleading statements; 2) information on lawyer websites should be treated as information on request; 3) they fail adequately to distinguish between conventional and digital media, especially with respect to lawyer websites; and 4) they otherwise subject lawyer websites to severe, unconstitutional restrictions of both commercial and noncommercial speech. *See* Comments of Searcy Denney and the American Civil Liberties Union Foundation of Florida, Inc. submitted in Case No. SC10-1014, Sections II and III. *See also,* Hunton & Williams Comment to The Florida Bar Review Committee on Professional Ethics Regarding Lawyer Advertising Rules dated February 28, 2011, recommendation for revision of Rule 4-7.3 (a) regarding prohibited communications.

We may submit some additional technological and feasibility comments later this week and request a further opportunity to address the Bar Review Committee at its March 24, 2011, meeting in Orlando.

Thank you for this additional opportunity to share our thoughts and concerns.

Sincerely,

James K. Green

Florida Bar Board of Governors

c/o Elizabeth Tarbert, Esq.

Florida Bar Counsel

etarbert@flabar.org

Honorable Board Members:

Our firm has been involved from the beginning of the journey toward redrafting section 4-7 of the Rules Regulating the Florida Bar. We appreciate the substantial time and energy put into the most recent draft of the proposed rule revision by the committee members and by Bar Counsel.

We feel compelled to set forth some very general comments about the proposed revisions. As a point of reference, we also are including our comments previously submitted to the committee in January of 2011.

Our law firm was represented at the hearing held by the committee on January 27, 2011. At that hearing, the committee was advised by Charles Tobin, from Holland & Knight, as well as by other lawyers who are specialists in constitutional law, that the proposed rules will not pass constitutional scrutiny. Mr. Tobin offered that he and others would be willing to meet with the committee to lend their expertise, without charge, in order to assist the committee. As far as we know, that offer was not accepted and the present proposals appear to be no less vulnerable to serious constitutional challenge.

During discussion of the constitutional issues, the committee chairman voiced concern when he inquired how the committee could propose rules to the Supreme Court that were not in keeping with the Court's mandates. The clear answer was provided by several of those testifying. The recent decisions in the 2nd Circuit, the 5th Circuit and the 11th Circuit, have substantially clarified the constitutional restrictions on the regulation of lawyer marketing since the Court issued its first mandate. Should the Bar feel compelled to submit proposed rules to the Court that conform to the Court's request but, it feels, will not pass constitutional muster, the Bar should clearly disclose those constitutional concerns to the Court.

We were disappointed to see no acknowledgement in the committee's most recent draft of the rules that web-based (digital) marketing requires different regulation than conventional marketing. The drafted rules acknowledge neither the unique nature of the web nor the methods for application of the rules in that context. Perhaps as disappointing was the committee's removal of "information upon request" as an exception to regulation for web and other methods of marketing. This radical departure from the existing regulatory scheme lacks empirical justification and magnifies constitutional concerns.

In addition, the new rules now bring into strict regulation things such as firm brochures and newsletters that were previously not regulated, beyond Rule 4-8.4, as long as they were provided at the request of prospective clients or to current and former clients. Although the rules do not require submission of these materials, they do assert more stringent regulation upon them than existing rules do.

We want to reiterate that technology such as the web provides an opportunity to better protect the interests of consumers and to provide useful information. It might better serve all lawyers, all consumers, and the Court if education of lawyers about marketing were given a higher priority than regulation that will cause ethical Florida lawyers to abandon digital forums to unregulated competing sources originating outside this state.

Respectfully Submitted,

Searcy Denney Scarola Barnhart & Shipley, PA

2011

Searcy Denney Scarola
Barnhart & Shipley, PA

Contact: John Hopkins

SEARCY DENNEY SCAROLA BARNHART & SHIPLEY PA
Attorneys at Law
A Passion for Justice™

[COMMENTS TO THE PROPOSED LAWYER ADVERTISING RULES (2010.12.09)]

Honorable Committee Members:

Thank you for undertaking the difficult and time consuming task you have been given to amend the advertising rules and attempt to bring them into present day application.

At the last public hearing you requested detailed comments in connection with the entire proposed draft of Lawyer Advertising Rules (12.09.2010). The following represents our comments on those rules.

We are intentionally omitting any discussion of the constitutional issues raised by the current and the proposed rules. Those issues have been addressed elsewhere, by others.

We appreciate the committee's invitation to provide input in connection with alternative language to the various rules. We believe; however, that Rule 4-8.4, an amended Rule 4-8.1, and other already existing rules provide more than sufficient regulation. It is our feeling that educating lawyers in the areas of marketing and advertising will achieve far greater progress than applying additional layers of regulation.

We believe that, in large measure, the Rules Regulating the Florida Bar already contain sufficient regulation of lawyers through the following rules:

Rule 4-8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

> *(a) knowingly make a false statement of material fact;*
>
> *(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by rule 4-1.6; or*

(c) commit an act that adversely reflects on the applicant's fitness to practice law. An applicant who commits such an act before admission, but which is discovered after admission, shall be subject to discipline under these rules.

RULE 4-8.4 Misconduct

A lawyer shall not:

(a) *violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;*

(b) *commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;*

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation...

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

These rules provide the best regulation of lawyers by requiring honesty, clarity and candor. These are principles that should guide lawyers in every aspect of their conduct, including marketing and advertising.

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Lines 8 – 17; Rule 4-7.1 Application of Rules

Rule 4-7.1 Application of Rules.

(a) Type of Media. *Unless otherwise indicated, this subchapter applies to all forms of communication in any print or electronic forum, including but not limited to newspapers, magazines, brochures, flyers, television, radio, direct mail, electronic mail, and Internet, including banners, pop-ups, websites, social networking, and video sharing media. The terms "advertising" and "advertisement" as used in chapter 4-7 refer to all forms of communication seeking legal employment, both written and spoken. [replaces current rule 4-7.1(a), (e) and (f)]*

Our comments: By this definition, for the first time the Bar is bringing into direct regulation a vast number of media. Newspapers, magazines, flyers, television, radio and direct mail have traditionally been stringently regulated by the Bar. Television ads, radio spots, magazine ads and newspaper advertising must be submitted to the Bar and ~~there exists~~are subject to ~~-~~stringent criteria for permitting a lawyer to publish and use this form of media.

The reference to "brochures" broadly includes firm brochures typically given to prospective clients when they are considering hiring a lawyer or firm. This type of media has traditionally been considered to be "information upon request" and not specifically regulated, except as set forth in 4-8.1 and 4-8.4. Virtually any publication could be created and called a "brochure,"~~,~~ but, depending on the context in which it is used, it might or might not ~~should or should not~~ be subject to the traditional strict oversight by the rules. For example, if a "brochure" is published and disseminated at the state fair by handing them out to the crowd, that "brochure" is rightly an advertisement and c~~sh~~ould be governed in some way by the rules. That, however, is not what most lawyers consider to be a "firm brochure." Regardless, the way in which the proposed rules will treat both is identical. Once again, the exception to "information upon request" should be inserted into the rules to provide exceptions to detailed regulation where a prospective client or member of the public requests information from a lawyer or law firm. We believe this type of consumer requested information is not necessary to regulate beyond that already provided in 4-8.4.

As we set forth in our comments at the hearing, it seems apparent that marketing and advertising rules should~~, at least for the purpose of the rules, must~~ distinguish between "conventional" and "digital" media.

The proposed definition is so broadly written that it includes "internet" without any clear distinction of the type of web content; except to delineate, "including banners, pop-ups, websites, social networking, and video sharing media."

Digital media historically has not been regulated by ~~is something~~ the Bar ~~has not been accustomed to regulating~~ and is, in fact, a new frontier for most lawyers. The definition proposed at lines 10 – 17 clearly attempts no distinction between any particular type of "advertising," but instead simply lumps every possible form of advertising media into one definition and, by application, every type of media into identical regulation. The inclusionary language seems to indicate the Bar's understanding that web (digital) content is distinguishable from conventional media, but the proposed rule does not distinguish any different application of this type of content.

The rule sets forth definitions of the terms "advertising" and "advertisement" to mean "all forms of communication seeking legal employment, both written and spoken." Does this mean that the Bar seeks to regulate things such as speeches, seminars and other spoken forms of media by lawyers? How? Why? It seems impractical, if not impossible, to regulate lawyer speech beyond Rule 4-8.4.

It seems unnecessary to specially define terms such as "advertising," but if the rules are to set forth a unique definition to apply to regulating lawyers, that definition should be much clearer and provide a better understanding than is currently proposed.

Lines 19 – 27

> ***(b) Lawyers.*** *This subchapter shall apply to lawyers, whether or not admitted to practice in Florida or other jurisdictions, who advertise for legal employment in Florida or who target advertisements for legal employment at Florida residents. The term "lawyer" as used in chapter 4-7 includes one or more lawyers or a law firm. This rule shall not be interpreted to permit the unlicensed practice of law or advertising for legal*

employment the lawyer is not authorized to provide in Florida. [replaces current rule 4-7.1(b), (c) and 25 (d) - some concepts in the current subdivisions will be addressed in the comment]

Our Comment: This definition is ~~somewhat~~ confusing. It seems to be applicable to both lawyers who are admitted to practice in Florida and lawyers who are not admitted to practice in Florida, but "who advertise for employment in Florida." We appreciate the subsequent "comment," ~~;~~ which seems to attempt a clarification of this verbiage, but, even that comment does not clarify it for "digital" media.

The web has no geographic lines or divides. A New York lawyer is potentially providing information (in terms of these rules, "advertising") to Florida residents; whether intentionally or unintentionally. A Florida lawyer is similarly providing information to a person in Wisconsin, or in India, or in Russia. On the web, geographic boundaries are not simply blurred – they do not exist. This rule does not make any provision or distinction for this issue. In addition, given other regulations on the right to practice in only particular jurisdictions in which a lawyer is licensed, this is something that is already regulated.

Rule 4-7.2 Required Content.

Lines 73 – 75;

The proposed text is:

"(a) All advertisements for legal employment shall include:…"

Our comment: This section of the rules sets forth what every "advertisement" must include. In a conventional media application it is much easier to apply the rules.

On a website, for example, must this information be included on each page, each section, or is it sufficient to include the information in a section of the website titled "contact us" or a similarly descriptive title?

Once again, the rules as drafted have failed to provide application in the digital realm.

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Rule 4-7.3 Deceptively and inherently misleading advertisements.

Lines 144 - 154

The proposed text is:

> ***(a)*** *An advertisement shall be considered deceptive or inherently misleading if it:*
>
> *(1) contains a material statement that is factually or legally inaccurate; [current rule 4-7.2(c)(1)(A) material misrepresentation of fact or law]*
>
> *(2) omits information that is necessary to prevent the information supplied from being misleading; or [current rule 4-7.2(c)(1)(C) fails to disclose material info to prevent info being false or misleading]*
>
> *(3) implies the existence of a nonexistent fact.*

Our Comments: This proposed rule is confusing. To understand the intent of the proposed rule, we have referred to the "Comment" to the rule. We assume the comment presents examples as an effort in clarifying definitions to terms used in the rule.

The comment explains that a material omission is, as an example, *"stating over 20 years experience when the experience is the combined experience of all lawyers in the advertising firm."* This statement is either true or it is a lie. If it is a true statement, it should not be prohibited and if it is false, it is already prohibited by Rule 4-8.4.

If the text sets forth the "firm has over 20 years of combined experience" that statement is either true or a lie. If the statement is "I, Joe Smith, have 20 years of experience" that is either true or a lie. In both cases, the verbiage is already regulated under Rule 4-8.4.

The comment applying to an "implied existence of a nonexistent fact" sets forth two examples in an attempt to define the terms.

In one example it discusses a lawyer claiming to have offices in multiple states, if the lawyer is not licensed in those states. The comment goes on to explain: "such a statement implies the nonexistent fact that a lawyer is licensed or is authorized to practice in the states where offices are located." Could this be corrected if the lawyer sets forth the states in which they are authorized to practice and still stated they had multiple state offices? Can an advertisement comply with this rule if it sets forth the lawyer is authorized to practice in Florida, but has offices for consultation in Georgia, Alabama, and Mississippi?

Another example cited of an "implied existence of a nonexistent fact" ~~:~~ is a statement in an advertisement that a lawyer is a founding member of a legal organization when the lawyer has just begun practicing law. The comment states "Such a statement implies that the lawyer has been practicing law longer than the lawyer actually has." Again, the statement is either true or false. If the statement is true, how is that an implied existence of a nonexistent fact?

Once again, the statements are either true or untrue in compliance with Rule 4-8.4.

The pertinent portions of proposed paragraph (b) to Rule 4.7.3 are set forth as:

Lines 156 – 211

> *(1) statements or information that can reasonably be interpreted by a consumer as a prediction or guaranty of success or specific results;*

Comment: What does this mean? Again, the statement or information is either true or it is false. How can an attorney anticipate what a consumer might interpret to be a "prediction or guaranty of success or specific results"?

Statements contained in the comment, such as, "I will save your home," ~~;~~ "I will get you money for your injuries," ~~;~~ and "come to me and get acquitted" are simply untrue and any lawyer knows them to be untrue. They are already prohibited by Rule 4-8.4

We believe this is the type of problem that might better be handled with some form of disclaimer.

> *(2) references to past results unless such information is objectively verifiable, subject to rule 4-7.4;*

Comment: What exactly does this mean? Past results are probably one of the best examples of information that is either true or false. What might make sense in crafting a rule would be to require that the attorney set forth or make available all of the facts in a given case, which would reasonably provide a consumer with sufficient information to fully understand the basis for the outcome in that case. That information can be provided by the lawyer on an as requested basis or as a part of the information when initially provided. The only harm, which could be caused by this type of information, would be to a client who ultimately hires the lawyer based solely upon that, particular information.

(4) references to areas of practice in which the lawyer or law firm does not practice at the time of the advertisement;

Comment: Florida Bar Rule 4-1.1 discusses competence and, in fact, in the comments sections, it specifically sets forth:

"A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems."

So, why sh~~w~~ould a lawyer be prohibited from referencing areas of practice not being practiced at the time if the lawyer, as required by the rules, takes some CLE courses or otherwise familiarizes him or herself the new practice area? What if a law firm wants to begin taking real estate transactions, but in order to begin, they want to market for those cases. Lawyers are ethically obligated to become familiar with Are they prohibited? If the concern lies in a lawyer advertising for cases he or she intends not to handle, but to refer to other lawyers, that is already regulated through Rule 4-7.1(g).

(5) a voice or video that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm;

Comment: It is one thing to prohibit advertisements that use the voice of a person other than a lawyer in the firm without a disclaimer of some kind. This rule creates

a burden upon the lawyer to try and determine whether a voice of someone other than the advertising lawyer "creates an erroneous impression" in the mind of some unknown consumer.

> *(6) a dramatization that could reasonably be believed by a consumer to be a recording of an actual event unless the dramatization contains the following prominently displayed notice: "DRAMATIZATION. NOT AN ACTUAL EVENT." When an advertisement includes an actor purporting to be engaged in a particular profession or occupation, the advertisement shall include the following prominently displayed notice: "ACTOR. NOT ACTUAL [DOCTOR, LAWYER, POLICE OFFICER, ETC.]"*

Comment: What this rule seems to be trying to control are those advertisements in which a lawyer inserts an actor costumed as, for example, a paramedic, or a firefighter and has that actor say something about the lawyer or law firm. This is an instance in which the regulations in Rule 4-8.4 should apply. This is also the type of advertisement, in which the context of the advertisement is important.

All advertising is designed to appeal to some aspect of the consumer; whether mentally or emotionally. This type of advertisement is clearly designed to communicate the feeling that the lawyer is particularly well respected by firemen, police officers, etc. This is an example in which the statement and portrayal can only be either true or false.

It is possible that a disclaimer will not be effective enough to protect the consumer from this type of scripted portrayal. Having the actor actually state they are not a police officer, for example, and include a printed disclaimer would be helpful to consumers in sorting out fact from fiction. The base problem with the advertisement is it conveys an opinion about the lawyer or law firm is or is not based on actual experience and may not be a truthful testimonial. Again, the portrayal is true or false; subject to regulation under Rule 4-8.4 .

Conversely, the portion of the rule set forth as, "a dramatization that could reasonably be believed by a consumer to be a recording of an actual event…" is much less clear. What might "reasonably be believed by a consumer" will undoubtedly vary greatly from one consumer to another. The rule might be clearer if it prohibited an advertisement which attempts to portray the advertisement as an

actual event or as a news report than to prohibit some unknown event and try to determine whether a consumer may or may not believe it to be an actual event. It is far more likely that a consumer will assume an event in an advertisement is not an actual event unless the advertiser makes the effort to create a contrary belief.

(8) a personal testimonial that directly or indirectly refers to a lawyer's or law firm's professional qualifications or skills;

Comment: Testimonials can be very useful and helpful information for consumers. The regulation belongs in the lawyer's solicitation of the testimonial and the ultimate editing of the testimonial. If a regulation is to be drafted, perhaps it should require that the entire testimonial of a client must be set forth by the client and the lawyer is prohibited in participating in any way in the client's drafting of the testimonial. That sort of regulation might be much more effective than prohibiting some, but not other, types of testimonials.

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Rule 4-7.4 Potentially misleading advertisements. A lawyer shall not engage in potentially misleading advertising.

Lines 417 – 470

(a) An advertisement is potentially misleading if:

(1) it is subject to varying interpretations, one or more of which would be materially misleading;

(2) it is literally accurate, but could reasonably mislead a consumer regarding a material fact.

(b) A lawyer may use an advertisement that would otherwise be potentially misleading if the advertisement contains information or statements that adequately clarify the potentially misleading issue.

Comment: Most forms of advertising are "subject to varying interpretations. If it is literally accurate, how could it mislead or if it does mislead, how is that the fault of the lawyer? The advertisement is either true or it is false. This is currently regulated under 4-8.4 or it is not subject to any type of reasonable regulation.

(c) Potentially misleading advertisements include, but are not limited to:

(1) references to a lawyer's membership in or recognition by an entity that purports to base such membership or organization on a lawyer's ability or skill unless the entity conferring such membership or recognition is generally recognized within the legal profession as being a bona fide organization that makes its selections based upon objective and uniformly applied criteria and that includes among its members or those recognized a reasonable cross-section of the legal community the entity purports to cover;

(2) a statement or implication that a lawyer is board certified, a specialist, an expert, or other variations of those terms unless:

(A) the lawyer has been certified under the Florida certification 446 plan as set forth in chapter 6, Rules Regulating The Florida Bar, or

(B) the lawyer has been certified by an organization whose specialty certification program has been accredited by the American Bar Association. In such case, the advertisement shall include the following statement on the same page as the reference to specialization or certification: "Not certified as a specialist by The Florida Bar."

Comment: This area of Rule 4-7.4 discusses membership of groups, claiming specialization and certifications. In these paragraphs, the Bar seems to be saying that only it can determine what is and what is not an appropriate group or honor that a lawyer can claim. We suppose that if the Bar feels it necessary, a disclaimer could be provided explaining that the particular organization is not a part of the Florida Bar, but that seems to be an over reaching and presumptuous regulation. Many very fine and reputable lawyer "rating" organizations exist that are neither a part of the Florida bar nor "approved" by the Florida Bar. For example, ABOTA is a highly reputable organization to which membership requires very stringent requirements. Should reference to membership in ABOTA be subject to such a questionably necessary qualification?

Lines 460 – 470

> (3) information about the lawyer's fee, including those that indicate no fee will be charged in the absence of a recovery, unless the advertisement discloses all fees and expenses for which the client might be liable and any other material information relating to the fee. A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication;

Comment: it seems clear that this portion of the rule is intended, at least in part, to deal with the advent of the "no fee guarantee" pitch that has become very prevalent in lawyer advertising. The comment sets forth that advertisements must contain "information about the lawyer's fee, including a contingent fee, must disclose all fees and costs that the client will be liable for." The comment additionally sets forth, "On the other hand, if both fees and costs are contingent on the outcome of a personal injury case, the statements "no fees or costs if no recovery" and "no recovery - no fees or costs" are permissible."

The rule and the comment are an over simplification of a potentially serious problem. It is certainly true that many firms who work on a contingent fee basis will not charge their clients any fees or any costs unless the client makes a recovery. This ignores the other potential cause of a client owing "fees or costs". If a defendant prevails against the law firm client, that client may be found liable for "fees or costs" of the opposing party. If a Proposal for Settlement is filed by an adverse party, the client can be held liable for "fees or costs" if the adverse party prevails in the context of the rules governing Proposals for Settlement.

As a result, in a contingent fee arrangement in which the lawyer agrees to charge the client no "fees or costs" that does not mean the client will owe "no fees or costs if no recovery". In fact, setting forth in an advertisement or marketing material that the client owes "no fees or costs if no recovery" is not so much deceptive as it is an oversimplification.

We suggest that if a disclaimer is going to be used, it be clearly set forth and spoken as: "Our firm guarantees that unless we make a recovery for you, you will owe us no fee or costs. Certain laws allow adverse parties to recover their fees or costs under certain circumstances. We ~~can not~~cannot guarantee you will not be legally obligated to those types of fees or costs."

Without some form of further explanation, the "no fee guarantee" becomes untruthful and subject to Rule 4-8.4; since it does not provide the consumer with all the information required to make the simplistic statement true.

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Rule 4-7.5 Unduly manipulative or intrusive advertisements. A lawyer shall not engage in unduly manipulative or intrusive advertisements.

(a) An advertisement is unduly manipulative if it:

(1) uses an image, sound, video or dramatization in a manner that is designed to solicit legal employment by appealing to a consumer's emotions rather than to a rational evaluation of a lawyer's suitability to represent the consumer; or [current rule 4-7.2(c)(3) prohibiting deceptive, misleading, or manipulative visual or verbal depictions]

(2) contains, or is designed to cause a consumer to believe that it contains, the voice or image of a celebrity; [current rules 4-7.2(c)(15) and 4-7.5(b)(1)(B)]

Comment: Undeniably, the use of an "image, sound, video or dramatization" in an advertisement by their very nature are intended to influence the consumer. That influence may only very subtle in an effort to provide an ambience in the advertisement. It may be intended to motivate the consumer to take the action you want them to take. That is what advertising is intended to do.

Prohibiting anything other than those that permit the consumer to make a "rational evaluation of a lawyer's suitability" is somewhat less than instructive. Many noted scholars believe that "rational evaluation" is a myth and that as long as human beings are making decisions, irrational basis for a given decision is always a possibility even when the consumer is given nothing but "rational" facts. A

necessary part of a consumer reaching a conclusion to a "rational evaluation" necessarily involves characteristics of the individual consumer. By its very nature, then, it is not entirely "rational" as that term is generally accepted. The individual characteristics of the consumer are a variable that can not be anticipated by an advertiser or marketer.

Our firm has actually submitted advertising in which the Bar refused to approve the ad unless we removed the sound of a light switch being turned off. One ~~can not~~cannot imagine how the sound of a light switch could "irrationally influence" a consumer.

This is another rule, which should be governed by the provisions of Rule 4-8.4. If the lawyer's ad, including the use of "an image, sound, video or dramatization" is true and is not deceptive, it should be permitted.

With regard to celebrity voices, no justification or explanation is given for prohibiting the use of voices. As importantly, no guide or measuring stick is given for how to determine whether a voice is or is not a celebrity; except a voice or image that is "recognizable to the intended audience."

Rule 4-7.6 Presumptively valid content.

Comment: We have no particular comment concerning this regulation except that it is unnecessary, but instructive.

Rule 4-7.7 Payment for advertising and promotion.

Comment: We have no particular comment concerning this regulation.

Rule 4-7.8 Direct Contact with Prospective Clients.

Comment: The areas of the rule requiring marking print copy with "Advertisement" should be made clearer as to the place and position for such stamps.

In addition, to the extent the regulation applies to digital communications, the rule requires "subject line shall begin with the word "Advertisement." The effect of this regulation will make the communication undeliverable to nearly every recipient. Spam filters will, more likely than not, block all such communications. This is similar to placing an instruction to the US Postal Service on an envelope: Do Not Deliver to Addressee Under Any Circumstances."

Finally, much of the regulations contained within this section of the proposed rules are unnecessary and would be better regulated through Rule 4-8.3.

RULE 4-7.9 EVALUATION OF ADVERTISEMENTS [*current rule on review is 4-7.7, requiring pre-filing of most TV and radio ads and concurrent filing of most print, direct mail, Internet, and other ads, subject to filing exemptions]*

Lines 936 - 1052

> ***(a)*** *Subject to the exemptions stated in rule 4-7.10, any lawyer who advertises services shall file with The Florida Bar a copy of each advertisement at least 20 days prior to the lawyer's first dissemination of the advertisement. The advertisement shall be filed at The Florida Bar headquarters address in Tallahassee.*
>
> ***(b)*** *The Florida Bar shall evaluate all advertisements filed with it pursuant to this rule for compliance with the applicable provisions set forth in rules 4-946 7.1 through 4-7.5. If The Florida Bar does not send any communication to the filer within 15 days of receipt by The Florida Bar of a complete filing, or within 15 days of receipt by The Florida Bar of additional information when requested within the initial 15 days, the lawyer shall not be subject to discipline by The Florida Bar, provided The Florida Bar subsequently notifies the lawyer of noncompliance, the lawyer may be subject to discipline for dissemination of the advertisement after the notice of noncompliance.*
>
> ***(c)*** *A lawyer may obtain an advisory opinion concerning the compliance of a contemplated advertisement prior to production of the advertisement by submitting to The Florida Bar a draft or script that includes all spoken or*

printed words appearing in the advertisement, a description of any visual images to be used in the advertisement, and the fee specified in this rule. The voluntary prior submission shall not satisfy the filing and evaluation requirements of these rules, but The Florida Bar shall charge no additional fee for evaluation of the completed advertisement for which a complete voluntary prior filing has been made.

(d) *A lawyer may obtain an advisory opinion concerning the compliance of an existing or contemplated advertisement intended to be used by the lawyer seeking the advisory opinion that is not required to be filed for review by submitting the material and fee specified in subdivision (h) of this rule to The Florida Bar, except that a lawyer may not file an entire website for review. Instead, a lawyer may obtain an advisory opinion concerning the 969 compliance of a specific page, provision, statement, illustration, or photograph on a website.*

(e) *Evaluation of advertisements is limited to determination of facial compliance with rules 4-7.1 through 4-7.5 and notice of compliance does not relieve the lawyer of responsibility for the accuracy of factual statements.*

(f) *A finding of compliance by The Florida Bar shall be binding on The Florida Bar in a grievance proceeding unless the advertisement contains a misrepresentation that is not apparent from the face of the advertisement. The Florida Bar has a right to change its finding of compliance and in such circumstances must notify the lawyer of the finding of noncompliance, after which the lawyer may be subject to discipline for disseminating the advertisement. A lawyer will be subject to discipline as provided in these rules for:*

(1) failure to timely file the advertisement with The Florida Bar;

(2) dissemination of a noncompliant advertisement in the absence of a finding of compliance by The Florida Bar;

(3) filing of an advertisement that contains a misrepresentation that is not apparent from the face of the advertisement; or

(4) dissemination of an advertisement for which the lawyer has a finding of compliance by The Florida Bar after the lawyer has been notified that The Florida Bar has determined that the advertisement does not comply with this subchapter.

(g) *If The Florida Bar determines that an advertisement is not in compliance with the applicable rules, The Florida Bar shall advise the lawyer that dissemination or continued dissemination of the advertisement may result in professional discipline.*

(h) *A filing with The Florida Bar as required or permitted by subdivision (a) 1000 shall consist of:*

(1) a copy of the advertisement in the form or forms in which it is to be disseminated, which is readily capable of duplication by The 1004 Florida Bar (e.g., videotapes, audiotapes, print media, photographs of outdoor advertising);

(2) a transcript, if the advertisement is in electronic format;

(3) a printed copy of all text used in the advertisement, including both spoken language and on-screen text;

(4) an accurate English translation of any portion of the advertisement that is in a language other than English;

(5) a sample envelope in which the written advertisement will be 1016 enclosed, if the advertisement is to be mailed;

(6) a statement listing all media in which the advertisement will appear, the anticipated frequency of use of the advertisement in each medium in which it will appear, and the anticipated time period during which the advertisement will be used;

(7) the name of at least one lawyer who is responsible for the content of the advertisement; and

(8) a fee paid to The Florida Bar, in an amount of $150 for each advertisement timely filed as provided in subdivision (a), or $250 for each

advertisement not timely filed. This fee shall be used to offset the cost of evaluation and review of advertisements submitted under these rules and the cost of enforcing these rules. If requested by The Florida Bar, the filing lawyer shall submit such additional information as necessary to substantiate representations made or implied in an advertisement.

(i) *If a change of circumstances occurring subsequent to The Florida Bar's evaluation of an advertisement raises a substantial possibility that the advertisement has become false or misleading as a result of the change in circumstances, the lawyer shall promptly re-file the advertisement or a modified advertisement with The Florida Bar at its headquarters address in Tallahassee along with an explanation of the change in circumstances and an additional fee set by the board of governors, which shall not exceed $100.*

(j) *A copy or recording of an advertisement shall be submitted to The Florida Bar in accordance with the requirements of rule 4-7.10, and the lawyer shall retain a copy or recording for three years after its last dissemination along with a record of when and where it was used. If identical advertisements are sent to two or more prospective clients, the lawyer may comply with this requirement by filing 1 of the identical advertisements and retaining for three years a single copy together with a list of the names and addresses of persons to whom the advertisement was sent.*

Comment: Most of this process should be unnecessary if Rule 4-8.4 was the prevailing regulation. Advertisements could still be required to be filed. A fee could still be required to be paid. Review by the Bar could be without any time restrictions and the advertisements could be used on a "file and use" basis. Enforcement and discipline for violations would remain the same. The Bar would be in a position to recommend guidance with advertisements. It may be useful to use a grievance committee to review advertisement violations and it could be done even on an ad hoc basis by the committees in the local where the ad was used.

Rule 4-7.11 Firm Names and Letterhead

Lines 1101 - 1160

Comment: We have no particular comment concerning this regulation.

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Rule 4-7.12 Lawyer Referral Services

Lines 1245 – 1247

> (4) carries or requires each lawyer participating in the service to carry professional liability insurance in an amount not less than $100,000 per claim or occurrence;

Comment: Although in the interests of consumers, we would support a requirement that all lawyers be required to maintain a minimum amount of legal malpractice insurance, we are doubtful the Bar can appropriately single out a special class, a lawyer participating in a referral service, to be required to carry insurance when other lawyers have no such requirement.

Lines 166 - 1271

> (12) maintains a relationship with at least one lawyer who is a member in good standing of The Florida Bar, reflected in a formal, written agreement, a copy of which is furnished to The Florida Bar, whereby such attorney assumes responsibility for ensuring that all advertisements by the referral service and all conduct of the referral service comply with this subchapter.

Comment: This could rightly be referred to as the "fall guy" provision. It is impractical, if not impossible, for a lawyer to know how a lawyer referral service handles any given aspect of its business. The lawyer can certainly require that information and receive representations from the service, but the lawyer is not in a position to assure compliance unless the lawyer operates the service. If any regulation is provided here it should include a "knowledge provision" in which the lawyer can rightly be disciplined or held accountable for their actual knowledge of a particular violation.

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Rule 4-7.13 Lawyer Directory

Lines 1292 - 1297

(**a) When lawyers may advertise in a directory.** A lawyer shall not advertise in a directory unless the directory:

(1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer;

Comment: Similar to 4-7.12, this regulation should stipulate knowledge on the part of a lawyer. If the lawyer does not know the directory is engaging in violative conduct, the lawyer should not be disciplined or held responsible until the lawyer learns of such violations.