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April 30, 2012

Florida Supreme Court
500 S. Duval Street
Tallahassee, Florida 32399

Re: Comment on Proposed Amendments to Advertising Rule 4-7.3(b)(10)

Dear Chief Justice Polston and Justices:

On April 1, 2012, the Florida Bar News published its notice informing the public that the Florida Bar had filed with this Court proposed amendments to subchapter 4-7 of the Rules Regulating The Florida Bar. This letter serves as my objection to The Florida Bar's proposed Rule 4-7.3(b)(10).

Proposed Rule 4-7.3(b)(10) purports to address deceptive and inherently misleading advertisements by former justices and judges (as well as other former and current public officials) in the practice of law. This objection is limited to that sub-section and its commentary, and should not be construed as a comment on any other portion of the proposed amendment.

The Florida Bar's Proposed Rule

The Florida Bar's proposed amendment to Rule 4-7.3, provides in pertinent part:

> A lawyer may not engage in deceptive or inherently misleading advertising.

(a) Deceptive and Inherently Misleading Advertisements. An advertisement is deceptive or inherently misleading if it:

(1) contains a material statement that is factually or legally inaccurate;

(2) omits information that is necessary to prevent the information supplied from being misleading; or

(3) implies the existence of a material nonexistent fact.

(**b) Examples of Deceptive and Inherently Misleading Advertisements.** Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain:

* * *

(10) a judicial, executive or legislative branch title with or without modifiers, in reference to a current, former or retired judicial, executive or legislative branch official currently engaged in the practice of law.

Further, the proposed Commentary to 4-7.3, which is directed at proposed Rule 4-7.3(b)(10), provides:

Judicial, Executive and Legislative Titles

This rule prohibits use of a judicial, executive or legislative branch title, with or without modifiers, when used to refer to a current or former officer of the judicial, executive or legislative branch. Use of a title is inherently misleading in that it implies that the current or former officer has improper influence. Thus, the titles Senator, Representative, Former Justice, Retired Judge, Governor (Retired), Former Senator, and other similar titles used as titles in conjunction with the lawyer's name are prohibited by this rule. This includes, but is not limited to, use of the title in advertisements and written communications, computer-accessed communications, letterhead, and business cards. However, an accurate representation of one's judicial, executive, or legislative experience is permitted in reference to background and experience in bios, curriculum vitae and

> resumes. For example, a former state representative may not include "Representative Smith (former)" or "Representative Smith, retired" in an advertisement, letterhead or business card. On the other hand, a former representative may state, "John Smith, Florida Bar member, ABA member, former state representative [. . . . . years of service . . . . .]." Similarly, a former judge may not state "Judge Doe (retired)," or "Judge Doe, former," but may state "Jane Doe, Florida Bar member, ABA member, former circuit judge [. . . . . years of service . . . . .], " "Jane Doe, circuit court judge [. . . . . years of service. . . . .]," or "Jane Doe, retired circuit court judge." Similarly, the statement "John Jones was governor of the State of Florida from [. . . . . years of service . . . . .]" would be permissible.

The Proposed Rule is Flawed, Confusing, and Internally Inconsistent

Proposed Rule 4-7.3(b)(10) is flawed, confusing, and internally inconsistent. This Court should not adopt the rule.

The proposed rule emphatically states that an advertisement, letterhead, or business card used by a former or present justice, judge, legislator, or member of the executive branch of government is deceptive and inherently misleading if it contains, "a judicial, executive or legislative branch title with or without modifiers." The rule is categorical, regardless of whether the information contained in the advertisement, letterhead, or business card is true, correct, accurate, verifiable, or informative. The literal application of the proposed rule would prohibit any of the following variations even though the references would all be true, correct, accurate and verifiable:

> Speaker of the House Dean Canon (retired)
> Bob Martinez, former Governor of Florida
> Bob Graham, former US Senator of Florida
> Gerald Kogan, former Chief Justice, Florida Supreme Court
> Ben Overton, retired Florida Supreme Court Chief Justice
> Charles Trippe, former General Counsel to Governor Rick Scott of Florida
> Former Governor Ruben Askew, State of Florida

The proposed commentary contradicts 4-7.3(b)(10) as proposed. Whereas the rule does not make any allowances for the use of titles, the commentary does allow their use under limited circumstances. In particular, the commentary permits present and former public officials to set forth their governmental service in places, such as in resumes and biographies. However, if that same language is used in an advertisement, letterhead, or business card it is then elevated to being deceptive and inherently misleading.

Further, the commentary delineates so many similar permissible and impermissible permutations that it creates confusion.

Adoption of the Proposed Rule Might Create Litigation

By declaring the use of a legislator's, justice's, judge's or executive branch member's current or past public title in an advertisement, letterhead, or business card as a deceptive and inherently misleading act, this Court might be inviting numerous lawsuits against unsuspecting corporations and organizations.

The Florida Bar, local bars, and other groups frequently offer CLE courses to lawyers. It is not uncommon for former judges and justices to make presentations at various programs and be identified in the advertising brochure with their former title, i.e. John Doe, former Florida Supreme Court Justice. If this Court adopts the proposed rule and such a brochure was used, an argument might be made that the publishing organization and former official are engaged in deceptive and misleading advertising, even though the information set forth therein is completely true, accurate, and verifiable.

There is a danger that an advertisement, specifically designed to improve the quality of the legal profession, is in violation of the Florida Deceptive and Unfair Trade Practices Act. F.S. 501.201, et seq. After all, the Act states, "Unfair methods of competition, unconscionable acts or practices, and unfair or *deceptive acts or practices in* the conduct of *any* trade or *commerce* are hereby declared unlawful." (Emphasis added) F.S. 501.204.

The Proposed Rule May Abridge Free Speech

Adoption of the Florida Bar's proposed 4-7.3(b)(10) may violate the First Amendment to the United States Constitution by unlawfully restricting free speech. A former legislator, judge, justice, or member of the executive branch of government retains the same fundamental constitutional rights to engage in free and truthful speech as others in our state and country. The Florida Bar's mere designation that something is "deceptive and inherently misleading" does not necessarily make it so.

In *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the United States Supreme Court held that lawyer advertising is a form of commercial speech entitled to protection by the First Amendment. In *In re R.M.J.,* 455 U.S. 191 at 203 (1981), 102 S.Ct. 931 at 937, Justice Powell, writing on behalf of the unanimous Court, set forth the standards applicable to such claims:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. *But the States may not place an absolute prohibition on certain types of potentially misleading information*, e.g., *a listing of areas of practice, if the information also may be presented in a way that is not deceptive.... Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.*
>
> Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served." (Emphasis added.)

The proposed rule's blanket ban precludes former public officials from informing the public about their backgrounds in public service. It prohibits

truthful, accurate, correct, and verifiable information from assisting the public in making a choice. The rule makes no exceptions.

Improper influences must neither be permitted nor countenanced. However, by supporting this proposed rule and commentary, The Florida Bar takes the position that the mere mention of a former public official's title and status, by itself in an advertisement, letterhead, or business card, somehow conveys to others the former public servant *has* improper influence. The Florida Bar's position of equating this mere mention with deceptive and inherently misleading advertising is unsupported by any empirical evidence.

The Florida Bar appears not to recognize that there are members of the public who do not want to be associated with present or former elected/appointed public officials. The proposed rule denies them the right from making informed choices based upon truthful, accurate, correct, and verifiable information. It also denies this same right to those who want to retain a person who formerly worked in the legislature, judiciary, or executive branch.

In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), the Illinois Supreme Court censured a lawyer whose letterhead truthfully stated he was certified by the National Board of Trial Advocacy (NBTA) as a civil trial specialist. The state supreme court ruled that the lawyer's letterhead was inherently misleading and violated the Illinois Code of Professional Responsibility by holding himself out as a certified legal specialist in contravention of Rule 2-105(a)(3) of the Illinois Code of Professional Responsibly which provided, "A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as 'certified' or a 'specialist.' " 496 U.S. 91, 97.

In censuring the attorney, the Illinois Supreme Court found the attorney's letterhead was *inherently misleading* and gave three reasons for its holding. First, "the juxtaposition of the reference to the petitioner as 'certified' by NBTA and the reference to him as 'licensed' by [other states] 'could' mislead the general public into a belief that [the attorney's] authority to practice in the field of trial advocacy was derived solely from NBTA certification." 496 U.S. 91, 98. Second, it reasoned that the attorney's

letterhead was *misleading* "because it tacitly attests to the qualifications of [the attorney] as a civil trial advocate." Id. Lastly, it concluded that the term "specialist" was *misleading* since "it incorrectly implied that Illinois had formally authorized certification of specialists in trial advocacy." 496 U.S. 91, 99.

The United States Supreme Court accepted certiorari and addressed whether the Illinois Supreme Court blanket prohibition on the attorney's speech violated the First Amendment. The Court stated, "[T]he question to be decided is whether a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his or her certification as a trial specialist by NBTS." 496 U.S. 91, 99-100.

In reversing the Illinois Supreme Court, the majority noted that, "The facts stated on [the attorney's] letterhead are true and verifiable." 496 U.S. 91, 100. Further, [the attorney's] letterhead was neither actually nor inherently misleading, and that "[d]isclosure of information such as that on [the attorney's] letterhead both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys." 496 U.S. 91, 111. Finally, the Court noted, "A State may not, however, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA." 496 U.S. 91, 110

The adoption of The Florida Bar's ban may run counter to the decision in *Peel* and the First Amendment of the United States Constitution by prohibiting constitutionally protected speech. The information that The Florida Bar seeks to prohibit is neither actually nor inherently misleading nor deceptive. Instead, The Florida Bar is attempting to prohibit truthful, correct, accurate, and verifiable information that by itself does not convey anything other than what appears on its face.

Final Comments

I respectfully submit that the First Amendment to the United States Constitution protects statements that present truthful, accurate, correct, and verifiable information. The information The Florida Bar's proposed rule would ban deprives the public from making a informed, enlightened, thoughtful, reasoned, and intelligent decisions.

The mere mention in an advertisement, letterhead, or business card that a named person previously served as a governor, justice, judge, senator, representative, state attorney, public defender, speaker of the house, or president of the senate (and the advertisement, letterhead, or business card avers that person is no longer in office) does not, in and of itself, imply that the individual has any "improper influence." So long as the statement is accurate, it conveys nothing more then the truth.

The information The Florida Bar seeks to ban is neither deceptive nor inherently misleading in any respect. Accordingly, the undersigned respectfully requests this Court to reject The Florida Bar's proposed Rule 4-7.3(b) (10).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this letter has been sent by U.S. mail this 31st day of April 2012, to John F. Harkness, Jr., Executive Director of the Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, and to The Florida Supreme Court, Clerk of the Court, 500 South Duval Street, Tallahassee, Fl 32399-1927.

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