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 FLORIDA BAR MEMBER TIMOTHY P. CHINARIS (INDIVIDUALLY)

COMES NOW Florida Bar member Timothy P. Chinaris, who files the following comments regarding The Florida Bar's Petition asking this Court to approve changes to Subchapter 4-7 of the Rules Regulating The Florida Bar, and states:

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

2. The undersigned served as Ethics Director of The Florida Bar from 1989 to 1997, and is a member and past chair of the Bar's Professional Ethics Committee.

3. These comments are those of the undersigned individually.

4. These comments are filed in response to the Notice published in the June 15, 2011, issue of the *Florida Bar News*.

Generally

5. The Florida Bar is to be commended for the manner in which it carried out its review of the lawyer advertising rules. Bar members were provided with meaningful opportunities for input throughout the process.

6. Overall, the changes proposed by the Bar are positive. They appear to be designed to bring the Florida rules closer conformity to the state of lawyer advertising nationwide as expressed in recent court decisions. See, e.g., *Harrell v. Florida Bar*, 608 F.3d 1241 (11th Cir. 2010); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010); *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011).

7. Comments on specific provisions of the proposed rules appear below.

Proposed Rule 4-7.1(b)

8. Paragraph (b) of proposed rule 4-7.1, and especially the accompanying portion of the comment, should be adopted. The "Websites" portion of the proposed comment provides useful guidance to the thousands of Florida Bar members who reside and practice in other states or with multistate law firms.

Proposed Rule 4-7.1(c)

9. Paragraph (c) of proposed rule 4-7.1 should not be adopted. It would apply the lawyer advertising rules to "communications made to referral sources

about legal services." This proposed rule, while perhaps well-intentioned, is overly broad and of questionable constitutionality.

10. As a practical matter, for example, a lawyer would violate the rule against solicitation by suggesting to a friend who is an accountant that the lawyer is available to represent clients of the accountant who may have disputes with the Internal Revenue Service. Lawyers in private practice routinely engage in this type of communication. Adoption of proposed rule 4-7.1(c) would expose those Bar members to the strict disciplinary measures that this Court imposes against lawyers who engage in prohibited in-person solicitation. See, e.g., *Florida Bar v. Barrett*, 897 So. 2d 1269 (Fla. 2005); *Florida Bar v. Wolfe*, 759 So. 2d 639 (Fla. 2000); *Florida Bar v. Weinstein*, 624 So. 2d 261 (Fla. 1993).

11. The United States Supreme Court has held that certain associational rights are protected by the First Amendment and that, consequently, state rules governing lawyer advertising or solicitation of legal business may not contravene these rights. See, e.,g, *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 84 S.Ct. 1113 (1964); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 91 S.Ct. 1076 (1971). The constitutional principles protecting associational rights have been applied in state court disciplinary actions against lawyers regarding advertising or solicitation. See *In re Teichner*, 387 N.E.2d 265 (Ill. 1979) (lawyer's conduct was constitutionally protected and thus not subject to

discipline for in-person solicitation that occurred in connection with activities of pastor who was leader in community severely affected by railroad disasters. Proposed rule 4-7.1(c) would violate the First Amendment if applied to lawyers' communications with referral sources in these types of situations.

Proposed Rule 4-7.2

12. The proposed definition of "bona fide office" contained in the comment to rule 4-7.2 should not be adopted as proposed.

13. The term "bona fide office" is defined in existing rule 4-7.2(a)(2) as "a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis." In the proposed rule, the existing definition is moved to the comment and the following sentence is added: "An office in which there is little or no full-time staff, the lawyer is not present on a regular and continuing basis, and *where a substantial portion of the necessary legal services will not be provided*, is not a bona fide office for purposes of this rule." (Emphasis added.)

14. The italicized phase is unnecessary and confusing, and should not be adopted. A lawyer or law firm may have several legitimate office locations but, for purposes of efficiency or convenience, may provide most of the services in a particular matter from only one location. This does not mean that the other offices are not bona fide.

15. Furthermore, in today's technology-driven law practice environment, legal services in a particular matter may be provided from multiple locations and it is not always easy to tell *where* a particular service was provided. If a lawyer reads a client email on an airplane, responds to the email by typing a letter at her hotel in a distant city, and directs her office staff to print and mail the letter from an office of the lawyer's firm, *where* was the legal service provided?

16. For these reasons, the italicized phrase should be deleted from the proposed comment to rule 4-7.2.

Proposed Rule 4-7.3

17. The Bar asks this Court to permit the use of objectively verifiable past results, objectively verifiable comparisons or characterizations of lawyers, dramatizations of events accompanied by disclaimers, and testimonials that comply with specified conditions. These changes are desirable for prospective clients and should be adopted.

18. The Bar's research survey, conducted at the direction of this Court, supports these proposals. Almost three-quarters of respondents (74.1%) stated that they considered past results important when choosing a lawyer. "Survey of Public Attitude toward Lawyer Advertising" (hereinafter "Survey"), Appendix D to Bar's Petition, pp. 138, 154. Similarly, 61.1% of respondents considered endorsements

or testimonials from a lawyer's past clients important when choosing a lawyer. See Survey, Appendix D, pp. 138, 156.

19. Existing law also suggests that these proposals be approved. Regarding the use of testimonials or past results, see *Alexander v. Cahill*, 598 F.3d 79, 92 (2d Cir. 2010) (striking down rule prohibiting client testimonials about matters still pending; not all testimonials are misleading, especially if they include disclaimer); *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212, 221-23 (5th Cir. 2011) (striking down rule prohibiting advertising of truthful references or testimonials about past results; appropriate disclaimer may be required). Regarding the use of dramatizations, see *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d at 227-28 (upholding rule permitting portrayals of events accompanied by disclaimer).

Proposed Rule 4-7.5

20. Proposed rule 4-7.5 is objectionable because neither the rule nor the comment attempt to define what the term "unduly intrusive" means or how it would be applied.[1] Furthermore, this standard is not contained in the existing lawyer advertising rules. If the proposed rule is adopted lawyers will be subject to

[1] It is unclear whether the word "unduly" modifies both "manipulative" and "intrusive" or only "manipulative." Presumably "unduly" is intended to modify both words.

discipline without having been provided with fair notice of what is or is not permitted. The “unduly intrusive” standard should not be adopted.

Proposed Rule 4-7.5(a)

21. Paragraph (a) of proposed rule 4-7.5 should not be adopted. Undoubtedly some lawyers believe that appeals to emotions should not be used to attract clients. Personal views, however, are not constitutionally sufficient to support such a restriction. The Bar has presented no evidence to support a ban on the use of appeals to emotions that are not based on false or misleading information or images.

22. The Bar’s own Survey data does not support proposed rule 4-7.5(a). For television ads, 66.4% of respondents agreed or strongly agreed that the ads play on emotions and feelings rather than logic and truthfulness. For Internet ads, 48% of respondents agreed or strongly agreed that the ads play on emotions and feelings rather than logic and truthfulness. Yet, of persons who had actually used a lawyer within the past five years, *only 8% stated that they chose their lawyer as a result of an advertisement*.

23. Furthermore, in contrast with the proposed rule, the law does not require that all aspects of a lawyer ad appeal to a “rational evaluation of a lawyer’s suitability to represent the prospective client.” In *Zauderer v. Office of*

Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 647, 105 S.Ct. 2265, 2279-80 (1985), the United States Supreme Court stated:

> The use of illustrations or pictures in advertisements serves important communicative functions: *it attracts the attention of the audience to the advertiser's message*, *and it may also* serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test. (Emphasis added.)

24. The Second Circuit Court of Appeals recently struck down as unconstitutional a rule prohibiting ads that "rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel." The court explained: "Defendants here appear to conflate *irrelevant* components of advertising with *misleading* advertising. These are not one and the same." *Alexander v. Cahill*, 598 F.3d at 93 (emphasis in original).

Proposed Rule 4-7.5(b)

25. Paragraph (b) of proposed rule 4-7.5 should not be adopted. This paragraph defines "unduly manipulative" to include the use of a voice or image of someone who is a "celebrity." The use of celebrities in ads should be permitted. Although the appearance of a recognized "celebrity" in an ad may not result in the addition of much information that would be useful to a potential client, the Bar has offered no evidence suggesting that a celebrity appearance in an ad is always "unduly manipulative." The use of celebrities should be allowed, provided that the

celebrity makes truthful statements and the celebrity's appearance is accompanied by an appropriate disclaimer.

Proposed Rule 4-7.5(c)

26. Paragraph (c) of proposed rule 4-7.5 should not be adopted. It defines "unduly manipulative" to include the offer of "an economic incentive to employ the lawyer or review the lawyer's advertising." Again, the Bar has offered no evidence to support this prohibition. Lawyers should be free to compete for business by offering lawful incentives to prospective clients.

Proposed Rule 4-7.6

27. Proposed rule 4-7.6 should be adopted. It continues to treat as presumptively permissible information about the advertiser's Florida Bar membership and positions held in The Florida Bar, its sections, and its committees. The Bar has asked this Court to expand this to include memberships and positions in other state bars. Many prospective clients have legal needs that touch on other states, and out-of-state bar memberships and bar positions can be important qualifications for those prospective clients. This rule change would be especially helpful for the more than 13,000 Florida Bar members who reside outside Florida.

Proposed Rule 4-7.9(a)

28. Proposed rule 4-7.9(a) should not be adopted. It would require the filing of *all* ads 20 days in advance of their first use. In contrast, the present rule

requires pre-filing of only television and radio ads. The Bar has offered no evidence to support the imposition of this additional burden on advertising lawyers.

29. A reason used to justify adoption of the 20-day pre-filing requirement for television and radio ads was that these ads are not easily "captured" by the Bar because of their fleeting broadcast nature. That justification does not apply to most other types of ads, such as newspaper or billboard ads.

30. Imposing a 20-day pre-filing requirement on all ads would negatively affect both advertisers and Bar staff. Under the present system, Bar staff members can and sometimes do send a filer a letter "tolling" the review period deadline to enable the staff to request guidance from the Standing Committee on Advertising before issuing an opinion on the ad. This process typically takes several weeks. This "tolling" process, however, cannot be used for TV and radio ads. Consequently, if Bar staff is not sure that a particular TV or radio ad is permissible, because they are unable to consult with the Standing Committee due to the rule's time constraints the staff's practice is to issue a finding of non-compliance and let the filer appeal the decision to the Standing Committee. This process is inefficient and can be costly to a filer in terms of time and, if represented by counsel, attorney's fees. Adopting proposed rule 4-7.9(a) would extend this inefficient process to *all* ads, which is not desirable.

Proposed Rule 4-7.9(f)

31. Proposed rule 4-7.9(f) is highly objectionable, especially to television advertisers, and should not be adopted. It would give the Bar "a right to change its finding of compliance" after such a finding has been made and communicated to the filing lawyer – *even if* there has been no misrepresentation by the filer, and *even if* the underlying rules have not changed. The Bar could revoke a finding of compliance simply because it "changed its mind."

32. Experience shows that, even when a rule has not changed, the Bar's *interpretation* of the rule often changes or is completely reversed within a short period of time. The seven-person Standing Committee on Advertising meets monthly and its interpretations of a rule can – and sometimes do – change dramatically from one meeting to another. Producing television ads requires a long lead time and a significant financial investment. A series of ads often is produced around a "theme." If a statement or a visual that is material to the theme is deemed permissible and the advertising lawyer invests in producing a related series of ads, it would be highly inequitable to allow the Bar to retract its approval within a matter of weeks. This proposed rule would have a chilling effect on the First Amendment right to advertise, especially on television.

33. In order to address the Bar's concerns about changing interpretations and applications *over time*, while recognizing the practical constraints that

advertisers must work within, a compromise solution should be considered. For example, the rule could provide that all findings of compliance (where there have been no misrepresentations in the initial filing) will remain valid and may not be withdrawn by the Bar (absent a rule change) for a *specified* reasonable period of time after the Bar's finding. A reasonable time might be in the neighborhood of nine months for television ads, with a shorter period for other types of ads.

34. Additionally, language in the Comment to proposed rule 4-7.9 contradicts the provisions of the rule itself. The comment states in pertinent part: "A lawyer who files an advertisement and obtains a notice of compliance is therefore immune from grievance liability unless the advertisement contains a misrepresentation that is not apparent from the face of the advertisement." This is inconsistent with the text of proposed rule 4-7.9(f).

Proposed Rule 4-7.10(g)

35. Proposed rule 4-7.10(g), which exempts websites from the filing and review requirement, should be adopted. Compared to other types of advertisements, websites are too voluminous and change too frequently to be subject to the filing requirement.

Proposed Rule 4-7.12 (a)(11)

36. Proposed rule 4-7.12(a)(11), requiring ads for lawyer referral services to state that lawyers pay to receive referrals, should not be adopted for the reasons

stated in the Comment filed with this Court by the lawyer referral service 1-800-411-PAIN Referral Service, LLC.

Conclusion

37. For the foregoing reasons, the undersigned respectfully requests that this Court act on the Bar's rule change proposals as set forth herein.

Respectfully submitted,

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I HEREBY CERTIFY that this document is typed in 14 point Times New Roman Regular type.

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