

April 27, 2012

BY OVERNIGHT MAIL

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

Re: Proposed Amendments to Advertising Rules

Dear Mr. Chief Justice and Justices:

In the April 1 issue of The Florida Bar News, The Florida Bar published a Notice of proposed amendments to the advertising rules. This letter is written to comment on the Bar's proposed amendment to Rule 4-7.3(b)(10) of the Rules Regulating The Florida Bar, entitled "Deceptive and Inherently Misleading Advertisements." This proposed amendment is opposed by Charles T. Wells, Major B. Harding, and Arthur J. England, Jr., each of whom is a practicing attorney and a former Chief Justice of the Court.

The Bar's Proposed Rule 4-7.3(b)(10)

Proposed Rule 4-7.3 prohibits "deceptive or inherently misleading advertising." Rule 4-7.3(a) defines a deceptive or inherently misleading advertisement as one that:

- "(1) contains a material statement that is factually or legally inaccurate, or
- (2) omits information that is necessary to prevent the information supplied from being misleading, or
- (3) implies the existence of a material nonexistent fact."

Rule 4-7-3(b) provides examples of deceptive and inherently misleading advertisements. Proposed Rule 4-7.3(b)(10) would add as an example:

“(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.”

The Bar’s Comment to proposed Rule 4-7.3(b)(10) offers the following explanation:

“Use of a title is inherently misleading in that it implies that the current or former officer has improper influence.”

The Comment then explains that the prohibition of Rule 4-7.3(b)(10) includes, but is not limited to, “advertisements and written communications, computer-accessed communications, letterhead, and business cards,” but *not* to “background and experience in bios, curriculum vitae and resumes.” The Comment further indicates, however, that it *is* permissible for a former legislative, judicial and executive branch official to follow his or her name with “Florida Bar member, ABA member, former [governmental position]” and “[. . . years of service].”

Opposition Commentary

The word “former” after the name of a bona fide former public official on a letterhead, business card or advertisement for a Bar-sponsored CLE course -- such as “Jane Doe, former Justice of the Florida Supreme Court” -- would be an accurate statement of fact. It would not be not factually or legally inaccurate, omit information necessary to prevent it from being misleading, or imply some material nonexistent fact. Words which merely reflect a person’s actual verifiable governmental service cannot be misleading, according to WEBSTER’S NEW WORLD DICTIONARY, which defines “misleading” as something that causes another to believe what is not true.

The undersigned do not find any rational justification for the Bar’s proposed ban on former public officeholders using the word “former” with an accurate description of their governmental positions in any form of public communication.

The identification of a former public position is the recitation of a historical fact, conveying accurate information about experience and a dedication to public service. In fact, the use of a former title in public literature provides information useful for the selection of an attorney for any purpose, and is a fact the public is entitled to know. It is the very antithesis of “misleading.”

The notion that the identification of a former governmental position inherently implies improper influence sweeps too broadly. While some persons might find such an implication if legal work is to be performed before the governmental unit in which the former officeholder served -- although “experience with” rather than “influence over” would be more an accurate descriptor -- there is certainly no basis for such an implication in the performance of legal work in judicial, legislative or executive branches in which he or she did not serve. Similarly, there could be no implication of improper influence on the use of “Jane Doe, former Justice of the Florida Supreme Court” on a business card or advertisement which offers only arbitration and mediation services.

The undersigned respectfully urge the Court to reject the 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 to John F. Harkness, Jr., Executive Director of The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300.

