

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR -
SUBCHAPTER 4-7, LAWYER ADVERTISING RULES

CASE NO.

PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR - SUBCHAPTER 4-7, LAWYER ADVERTISING RULES

The Florida Bar (the bar), pursuant to R. Regulating Fla. Bar 1-12.1, petitions this court for an order amending the Rules Regulating The Florida Bar and states:

I. Authority to File Petition

1. This petition has been authorized by the Board of Governors of The Florida Bar (the board).

II. Amendments History

2. This section provides information regarding development of these rules proposals as required by Part III of this Court's administrative order number AOSC 06-14 of June 14, 2006 in *In Re: Guidelines for Rules Submissions*. This Court requested that the bar "undertake an additional and contemporary study of lawyer advertising, which shall include public evaluation and comments about lawyer advertising, as recommended by Mr. Bill Wagner in his written and oral comments to the Court." *In re: Amendments to the Rules Regulating the Florida Bar - Advertising*, 971 So. 2d 763 (Fla. 2007, Case No. SC05-2194). The board tasked its Board Review Committee on Professional Ethics (BRC) with this project, as the body of the board with the most knowledge of and experience with lawyer advertising and the existing rules. The BRC undertook the requested study of lawyer advertising, including current advertising media and practices, public attitude toward lawyer advertising, current lawyer advertising rules and regulation, and constitutional law. The BRC's report, which sets forth the process by which

these amendments were studied and proposed in great detail, is attached to this petition in Appendix D, pp. 2-248.

3. First readings of these amendments were on the board's agendas of December 10, 2010 and March 25, 2011. These amendments were approved substantively by the BRC on April 20, 2011. These amendments were approved on a procedural review by the board's Rules Committee on April 26, 2011, on strategic plan review by the board's Program Evaluation Committee on May 26, 2011, and on fiscal review by the board's Budget Committee on May 9, 2011. These amendments were approved by the board at its May 27, 2011 meeting and were posted on the bar's website on May 31, 2011. At its May 27, 2011 meeting, the board also approved a motion to request waiver of any official requirements under the standing board policies and R. Regulating Fla. Bar 1-12.1 that the board was unable to meet because of the time constraints posed by the filing date of July 5, 2011, as dictated by this Court.

4. Prior to the BRC's final approval of these amendments, the BRC drafted proposed advertising rules on December 10, 2010. These proposed rules are in Appendix E, pp. 2-39. These draft amendments were posted on the bar's website for comment by bar members the following week. The BRC held a meeting on January 27, 2011, for the sole purpose of hearing comments from bar members and others with comments on the proposed advertising rules. These comments are in Appendix E, pp. 40-304. On that same date, BRC Chair Carl B. Schwait met with the Citizens Forum, a body appointed by the board, to obtain the Citizens Forum's input regarding the proposed advertising rules.

5. The BRC reviewed all comments and made changes to the proposed advertising rules in response to many of the comments filed. These revised proposed rules were approved by the BRC on April 20, 2011, and posted on the bar's website shortly afterwards. These revised proposed rules are in Appendix D, pp. 25-62. The BRC notified all those who filed comments that the revised proposed advertising rules were posted on the website. The BRC continued to review comments received after the later posting, to determine whether additional amendments to the proposed lawyer advertising rules were appropriate. These additional comments are in Appendix D, pp. 249-303.

III. Court's Request on Testimonials

6. This Court asked the bar to propose an amendment defining testimonials in its February 27, 2009 order in case number SC08-1181 and via letter dated November 19, 2009. The bar requested an extension of time, which was granted in a letter from Mr. Thomas D. Hall, Clerk of this Court, dated March 24, 2011. These letters are in Appendix D, pp. 304-306. Restrictions on testimonials are addressed in proposed rule 4-7.3(b)(8), and the definition of testimonial appears in the proposed comment to that rule under the header "Testimonials."

IV. Amendments Summary

7. Proposed amendments to the lawyer advertising rules (currently R. Regulating Fla. Bar 4-7.1 through 4-7.10) eliminate the existing rules in their entirety and replace them. The rules set forth a framework of application of the rules, required content, prohibited content, permissible content, specific rules for direct solicitation, the filing evaluation requirement, exemptions from the filing requirement, firm names and letterhead, and specific rules addressing lawyer referral services and lawyer directories. Prohibitory rules are divided into categories of information that the U.S. Supreme Court specifically has indicated can be regulated: deceptive and inherently misleading advertisements in proposed rule 4-7.3; potentially misleading advertisements in proposed rule 4-7.4; and unduly intrusive or manipulative advertisements in proposed rule 4-7.5. Rules prohibiting content set forth a specific prohibition, followed by a non-exhaustive list of examples. Commentary provides further explanation of how the rules should be interpreted and provides specific examples of permissible and impermissible content.

8. Proposed rule 4-7.1, Application of Rules, sets forth the forms of media that the lawyer advertising rules regulate, addresses application to Florida Bar members and lawyers admitted in other jurisdictions, and indicates that the rules apply to advertisements targeting referral sources.

9. Proposed rule 4-7.2, Required Content, requires that all advertisements include the name of the lawyer or law firm responsible for its content, a geographic disclosure of one or more bona fide offices by city, town or county, and whether the case will be referred to another lawyer. Additionally, required information must

appear in all languages used in the advertisement and must be clearly legible and/or clearly audible.

10. Proposed rule 4-7.3, Deceptive and Inherently Misleading Advertisements, prohibits deceptive and inherently misleading advertisements and sets forth a non-exhaustive list of violations. The proposed rule prohibits material statements that are factually or legally inaccurate. The proposed rule prohibits the omission of information necessary for an advertisement to not mislead. The proposed rule prohibits any implication of the existence of a material non-existent fact. The proposed rule prohibits predictions or guarantees of success. The proposed rule prohibits any references to past results unless the results are objectively verifiable. The proposed rule prohibits comparisons or references to skills, experience, reputation or record unless objectively verifiable. The proposed rule prohibits references to areas of practice the lawyer does not currently practice or intend to practice. The proposed rule prohibits the use of the voice or image of someone who creates an erroneous impression of being a firm member without an appropriate disclaimer. The proposed rule prohibits a dramatization of an actual or fictitious event without an appropriate disclaimer. The proposed rule prohibits any aspect of an advertisement that would indicate the lawyer would violate the Rules of Professional Conduct. The proposed rule prohibits testimonials that are misleading, including prohibiting testimonials: for which the person giving the testimonial is unqualified to evaluate; that is not the actual experience of the person giving the testimonial; that is not representative of the general experience of clients of that lawyer; that has been written by the lawyer; that has been paid for by the lawyer; or that fails to include a disclaimer that the viewer may not obtain similar results. The proposed rule prohibits statements or implications that the bar has approved the advertisement. The proposed rule prohibits use of 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.

11. Proposed rule 4-7.4, Potentially Misleading Advertisements, prohibits potentially misleading advertisements and sets forth a non-exhaustive list of violations. The proposed rule prohibits statements that are subject to reasonable varying interpretations without sufficient information to clarify the information given. The proposed rule prohibits statements that are literally accurate but misleading. The proposed rule prohibits references to membership in organizations

unless the organization 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. The proposed rule prohibits statements that a lawyer is board certified, a specialist, or an expert unless certified by The Florida Bar, another state with similar standards, or an ABA accredited organization. The proposed rule requires a disclaimer for organizations that are accredited by the ABA, but that are not accredited by The Florida Bar. The proposed rule requires that the advertisement include the area of certification and the certifying organization. The proposed rule prohibits advertisements providing fee information that do not disclose the client's responsibility for costs.

12. Proposed rule 4-7.5, Unduly Manipulative or Intrusive Advertisements, prohibits unduly manipulative or intrusive advertisements and sets forth a non-exhaustive list of violations, including: appeals to emotions rather than to a rational evaluation of a lawyer's suitability to represent the prospective client; use of the voice or image of a celebrity (except disc jockeys who are normally used to record advertisements and who are not endorsing the lawyer); and offers of an economic incentive either to become a client or to review the advertisement.

13. Proposed rule 4-7.6, Presumptively Valid Content, sets forth the "safe harbor" information that is presumed to be permissible, if true.

14. Proposed rule 4-7.7, Payment for Advertising and Promotion, prohibits paying for the advertising of a lawyer not in the same firm, prohibits a lawyer from giving anything of value in exchange for referrals (except for paying for reasonable and permissible costs of advertisements, lawyer referral services and lawyer directories), and prohibits a nonlawyer for paying the costs of a lawyer's advertising.

15. Proposed rule 4-7.8, Direct Contact with Prospective Clients, prohibits direct in-person solicitation. Prohibits direct mail advertisements when: the recipient is represented by another lawyer; coercion or duress is involved; the direct mail violates other advertising rules; the lawyer knows or should know the person's emotional state would overcome rational judgment in selecting a lawyer; the direct mail is sent within 30 days of a personal injury or wrongful death matter or before a

violence injunction is filed. The proposed rule requires that the envelope face and every page of the direct mail advertisement be prominently marked “advertisement” in ink contrasting to both the page and other text; if e-mail, the subject line must begin “Advertisement.” The proposed rule requires all direct mail advertisements to include a written statement of the lawyer’s qualifications and experience. The proposed rule requires that direct mail advertisements which enclose a contract to mark the contract “sample” in red ink and type size one size larger than the largest type in the contract and “do not sign” in the signature line. The proposed rule prohibits direct mail advertisements that resemble legal documents or pleadings. The proposed rule requires a disclaimer that the prospective client’s case will be referred to another lawyer where applicable. For targeted direct mail advertisements, the proposed rule requires the first sentence “If you have already retained a lawyer for this matter, please disregard this letter,” and requires disclosure of where the lawyer obtained the information. The proposed rule exempts communications between lawyers, between lawyers and their own family members, and between lawyers and their own current and former clients, from application of the specific requirements for direct mail advertisements set forth in subdivision (b)(2).

16. Proposed rule 4-7.9, Evaluation of Advertisements, requires advertisements to be filed at least 20 days before their first planned use. The proposed rule requires that the bar review advertisements within 15 days of the bar’s receipt of a complete filing. The proposed rule permits request of a preliminary opinion based on a draft or transcript. The proposed rule permits request of an opinion on an advertisement that is exempt from the filing requirement. The proposed rule prohibits filers from requesting an opinion on an entire website, but permits filers to request an opinion on a specific page, provision, statement, illustration, or photograph on a website. The proposed rule limits review to facial review for compliance with specific lawyer advertising rules and imposes a duty on the lawyer to make sure advertisements are factually accurate. The proposed rule makes opinions binding on the bar in grievance proceedings with specific exceptions. The proposed rule prohibits the bar from disciplining lawyers for features of websites that are either potentially misleading or unduly manipulative unless the bar has first notified the lawyer of the noncompliance. The proposed rule requires that the bar notify filers that noncompliance may result in discipline. The proposed rule sets forth the contents of a complete filing, which includes a copy of the advertisement, a transcript of all spoken and on-screen text,

an English translation where appropriate, a fee of \$150 for each timely filing and a fee of \$250 for each late filing. The proposed rule requires re-filing of advertisements if the advertiser experiences a change in circumstances, with an additional fee not to exceed \$100. The proposed rule requires that the filer maintain a copy of each advertisement for 3 years after its last use. For direct mail advertisements, requires that the filer maintain a copy of each direct mail advertisement together with a list of addresses to whom the direct mail advertisement was sent.

17. Proposed rule 4-7.10, Exemptions from the Filing and Review Requirement, exempts the following from the filing requirement: advertisements in the public media limited to the safe harbor information set forth in Rule 4-7.6; public service announcements as defined in this proposed rule; listings in a law list or bar publication; communications mailed only to current and former clients and other lawyers; information sent at the request of a prospective client; professional announcement cards sent only to other lawyers, relatives, close personal friends, and existing or former clients; and information on the lawyer's website(s).

18. Proposed rule 4-7.11, Firm Names and Letterhead, prohibits a law firm name or letterhead that violates the advertising rules. The proposed rule permits use of non-misleading trade names, but requires that a lawyer who advertises under a trade name practice under that trade name. The proposed rule permits use of the same name for an interstate law firm, but requires the listing of jurisdictional limitations of named lawyers. The proposed rule prohibits a firm name from indicating partnership when not true. The proposed rule sets forth requirements for lawyers employed by an insurance company who practice under the name of their supervisory lawyer.

19. Proposed rule 4-7.12, Lawyer Referral Services, prohibits accepting referrals from a lawyer referral service unless the lawyer referral service: uses only advertisements that comply with the lawyer advertising rules; engages in no fee-splitting with the lawyer; refers clients only to persons who are authorized to provide legal services; carries or requires participating lawyers to carry malpractice insurance of at least \$100,000; provides the bar with quarterly reports of participating lawyers and the names of those authorized to act for the service; responds in writing within 15 days to any official bar inquiry; does not state or imply that it is endorsed by The Florida Bar; uses only its legal or registered

fictitious name in communications with the public; and affirmatively states in communications with the public that it is a lawyer referral service and that lawyers pay to participate. The proposed rule also makes lawyers who accept referrals responsible for advertisements on behalf of the service and defines lawyer referral service.

20. Proposed rule 4-7.13, Lawyer Directory, defines lawyer directory, excluding certain local and voluntary bar associations and traditional telephone directories. The proposed rule prohibits lawyers from advertising in a directory unless the directory: disseminates only advertisements that comply with the lawyer advertising rules; does not engage in fee-splitting with the lawyer; lists only persons who are authorized to provide legal services; responds in writing within 15 days to any official bar inquiry; does not state or imply that it is endorsed by The Florida Bar; uses its legal or registered fictitious name in communications with the public; and affirmatively states in communications with the public that it is a directory.

V. Justification

21. The board believes that these proposed amendments are necessary to encourage the free flow of information to the public that is necessary for the selection of a lawyer. These proposed rules seek to provide simplicity, clarity, consistency, and defensibility of the lawyer advertising rules. In proposing these amendments, the board has taken into account U.S. Supreme Court rulings on lawyer advertising and free speech, other federal court rulings, this Court's rulings on advertising, input from numerous attorneys and others with comments, a bar-sponsored survey on public attitudes about lawyer advertising, and suggestions from the bar's Citizens Forum.

22. The current rules have been criticized as being unduly vague, inconsistent in their terminology and application, and inconsistent with U.S. Supreme Court jurisprudence. Over the past ten years, the number of cases involving challenges to advertising rules comprised approximately 15% of the bar's total litigation, but over 30% of the average annual litigation cost. The higher cost of defending advertising cases arises largely from the fact that federal courts, which is where most challenges are filed, tend to devote more time and scrutiny to advertising challenges than other types of cases. The bar believes that this is the result of the complexity and occasional ambiguity of the current rules and the fact

that, as currently organized, the rules require unnecessary explanation to illustrate how they relate to those constitutional justifications for regulation recognized by the U.S. Supreme Court. The proposed amendments are designed to make the rules more cohesive, easier for advertising lawyers to understand and the Standing Committee on Advertising to apply, and easier and less costly to defend.

23. This Court's December 2007 order addressing the bar's petition to amend the attorney advertising rules requested that the bar "undertake an additional and contemporary study of lawyer advertising, which shall include public evaluation and comments about lawyer advertising, as recommended by Mr. Bill Wagner in his written and oral comments to the Court." *In re: Amendments to the Rules Regulating the Florida Bar - Advertising*, 971 So. 2d 763 (Fla. 2007 Case No. SC05-2194).

24. As part of this process, the board approved the following BRC-recommended goals regarding the regulation of lawyer advertising at its December 11, 2009 meeting:

The primary purpose of lawyer advertising should be to benefit the public by providing information about the need for and availability of legal services.

Primary goals of advertising regulation are:

- Protection of the public from false, misleading, or deceptive information by lawyers for the purpose of obtaining representation of prospective clients;
- Promotion of advertising that provides information that will assist a prospective client in making an informed and meaningful decision about the prospective client's need for legal services and about which lawyer can best fulfill those needs (protecting public access to knowledge about reasonably priced quality legal services);
- Protection of the public from advertising that contributes to disrespect for the judicial system, including disrespect for the judiciary;
- Protection of the public from advertising that causes the public to have an inaccurate view of the legal system, of lawyers in general, or of the legal

profession in general;

- Enforcement that will not have an unreasonable economic impact on lawyers who provide information about legal services by methods that do not require expenditure of significant funds as compared to those who provide information about legal services by more expensive means; and
- Provision of clear and simple guidelines and, to the greatest extent practicable, establishment of “bright line” standards, violation of which will likely be clear so that violation will justify the conclusion that violation was either intentional or the result of gross incompetence, thereby allowing imposition of a harsh penalty.

25. After reviewing extensive materials, including extensive input from numerous bar members, a bar-sponsored survey on public attitudes about lawyer advertising, suggestions from the bar’s Citizens Forum and hearing from the bar’s outside counsel, the board believes that the existing lawyer advertising rules must be entirely re-structured, focusing primarily on preventing the dissemination of misleading and unduly manipulative information.

26. In developing the proposed amendments, the bar was guided by the leading U.S. Supreme Court cases on attorney advertising, which provide clear guidelines as to the parameters of advertising regulation. Those parameters can be summarized as follows:

- Advertisements that are deceptive or inherently misleading and in-person solicitation can be prohibited. *In re R.M.J.*, 455 U.S. 191 (1982); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (1978).
- Advertisements that are truthful but potentially misleading can be reasonably regulated to ensure that they do not mislead, including requiring submission of advertisements for screening and documentation of facts, and appropriate disclaimers, but cannot be prohibited entirely. *Peel v. Attorney Registration and Disciplinary Comm’n*, 496 U.S. 91 (1990); *Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, *supra*.

- All other regulations must be based upon a reasonable showing that the state has a substantial interest to be served, that the regulation directly and materially serves the interest, and that the regulation is narrowly tailored. The state's burden in this regard is not satisfied by mere speculation or conjecture. The state must demonstrate that the harms it recites are real and will be materially alleviated by the restriction. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

27. The proposed amendments categorize the rules that restrict advertising into the three foregoing areas in which the U.S. Supreme Court has recognized that advertising may be constitutionally justified. In each instance, the proposed rules first state the general restriction followed by more particularized, nonexclusive restrictions that reflect the most common problem areas based upon the bar's experience, and that are designed to provide additional guidance to advertising lawyers and the bar. The prohibitions are set forth in proposed rules 4-7.3 through 4-7.5 in the following categories: inherently misleading or deceptive advertising; potentially misleading advertising; and unduly intrusive or manipulative advertising.

28. Comments to the proposed rules set forth only information that explains how a rule will be interpreted, including specific examples of both permissible and impermissible advertising. Because of the focus on prohibiting only that which is misleading or unduly intrusive or manipulative, the bar's considered opinion is that all advertising media should be subject to the same substantive rules, with the exception of direct mail, a permissible form of solicitation. In the case of direct mail and direct e-mail advertisements, not only do these prohibitions apply, but there are additional requirements because direct mail is the most intrusive form of advertising, is a form of permissible solicitation, and is the only non-public advertising medium.

29. In developing these rules, the board heard a report from Professor Jay Rayburn of Florida State University, an expert on marketing and advertising, on the difference between advertising and marketing. Briefly, advertising technically includes only paid spot advertising, such as a television commercial or a paid print advertisement. Advertising is merely a tool that organizations use in marketing. Marketing is a broader concept meaning "the activity, set of institutions, and

processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large.”

30. After extensive review and consideration, the bar’s opinion is that no distinction need be made between advertising and marketing for purposes of the lawyer advertising rules. As the focus in regulation moves to misleading and unduly intrusive or manipulative techniques, there is no reason to exclude from regulation those communications that are technically considered “marketing” as opposed to “advertising.” This especially became clear after Professor Rayburn’s categorization of common advertising and marketing techniques used by lawyers indicated that many items could fit into both categories or did not neatly fit into either category.

31. Throughout the process, the bar received comments from bar members and others regarding various aspects of current and proposed lawyer advertising rules. A notion prevalent among many who commented was a request to treat websites differently than other advertising media. One defined websites as a “pull” medium, in which the public searches out information, as opposed to a more traditional “push” medium such as radio, television and print advertising, where the information is pushed out to the public. Several also expressed a preference for retaining the “information on request” model set forth in the current lawyer advertising rules. The “information on request” model is an artificial construct designed to ameliorate problems caused by the existing lawyer advertising rules. In the existing lawyer advertising rules, common advertising techniques such as past results, testimonials, and statements characterizing the quality of services are prohibited. However, if a specific prospective client asked for such information, it would be extremely difficult and constitutionally suspect for the bar to prohibit a lawyer from providing such information in response if truthful. Therefore, the current lawyer advertising rules employ the “information on request” model to exempt information provided by a lawyer at the request of a prospective client from application of the lawyer advertising rules. The bar believes that current prohibitions on references to past results, testimonials, and characterizations of quality of legal services, would be unlikely to meet the *Central Hudson* test unless they were deceptive, inherently misleading, or not objectively verifiable. Consequently, the proposed rules limit prohibitions to past results, testimonials, and statements characterizing the quality of legal services to those that fall into the above categories. In light of the proposed amendments to restrictions on past

results, testimonials, and statements characterizing the quality of legal services, the “information on request” concept is no longer necessary. The focus of the proposed rules is on deceptive, misleading, and unduly manipulative advertising, and there is no reason why any communications seeking legal employment should be treated differently based upon the medium of the advertising or whether the person requested the information.

32. These proposed rules therefore are based on the rationale that no lawyer should be permitted to mislead the public or unduly manipulate a consumer, regardless of the medium used, whether the information is sought by the prospective client, or whether the communication meets a technical definition of advertising. The proposed rules therefore include a definition of “advertising” that encompasses all communications seeking legal employment, regardless of medium and regardless of whether they are paid “spots.” This definition, in rule 4-7.1(a), sets forth a non-exhaustive list of types of media that are covered by the lawyer advertising rules when the lawyer is offering legal services. The list is non-exhaustive because the lawyer advertising rules will never include all current modes of communication due to the speed with which technology develops. The mode of communication is not as important as the content of communication.

33. Aside from the complete restructuring of the lawyer advertising rules, some changes are worth noting separately. First, some rules were the subject of relatively minor amendments other than reorganization. Those rules include: required content (proposed rule 4-7.2); presumptively valid content of advertisements (proposed rule 4-7.6); direct contact with prospective clients (proposed rule 4-7.8); exemptions from the filing requirement (proposed rule 4-7.10); and firm names and letterhead (proposed rule 4-7.11).

Past Results

34. Proposed rule 4-7.3(b)(2) would permit a lawyer to advertise past results as long as the advertised information is objectively verifiable and the lawyer does not omit material information relating to the result. The U.S. Supreme Court has generally struck down regulations restricting advertising truthful information. *Central Hudson, supra; Peel, supra; and Zauderer, supra*. The U.S. Supreme Court has approved disclaimers as an alternative to prohibition in *Zauderer, Peel* and *Central Hudson, supra*, and has actually suggested the use of disclaimers in

Zauderer and *Central Hudson, supra*. Of those responding to the survey on public perception of lawyer advertising, 74 % indicate that past results are an important attribute in choosing a lawyer. It is clear that the public wants this information available to them. Most of those Florida Bar members who provided written and oral comments also noted that the lawyer advertising rules should not prohibit truthful statements regarding past results.

Testimonials

35. Rule 4-7.3(b)(8) would permit a lawyer to include testimonials from clients and others regarding the lawyer. A complete prohibition against testimonials would be unlikely to meet the *Central Hudson* test when the person giving the testimonial has the qualifications and experience regarding the subject of the testimonial, and there are no circumstances that would reasonably suggest that the testimonial might not be genuine. The results of the survey on public perception indicate that 61% of those responding believe that client endorsements are an important attribute to consider when choosing a lawyer. The Citizens Forum likewise indicated that the public generally finds testimonials valuable and useful in the selection of a lawyer. One of the most frequent and reliable sources from which lay persons identify lawyers is references from other lawyers. It is difficult to justify a prohibition on testimonials in advertising when the same testimonials are permitted in private communications. Additionally, many of the Florida Bar members who provided written and oral comments stated that the lawyer advertising rules should permit truthful testimonials. Consequently, the proposed rule would prohibit testimonials only where the person giving the testimonial is not qualified to evaluate the lawyer, the testimonial does not accurately depict the person's experience with the lawyer, the testimonial is not representative of what clients of the advertising lawyer generally experience, the advertising lawyer has drafted the testimonial, or the advertising lawyer has given something of value in exchange for the testimonial. The proposed rule also would require that the advertisement include a disclaimer that a prospective client may not obtain the same or similar results. These requirements are similar to those promulgated in FTC guidelines regarding testimonials that were reviewed by the bar in developing this rule.

Electronic Media

36. The U.S. Supreme Court's consistent application of the *Central Hudson* test to lawyer advertising regulations without consideration of the medium leaves little reason to conclude that the same test would not be applied to electronic media. Consequently, the bar believes there is no reason to retain a separate rule for electronic media such as television or radio. Moreover, it would be conceptually easier to defend the application of the rules to electronic advertising if they are codified under the categories recognized as constitutionally permissible by the U.S. Supreme Court. Current rule 4-7.5(b)(1)(C) prohibits any background sound other than instrumental music. The bar believes this ban on background sounds would be unlikely to meet the *Central Hudson* test. Proposed rule 4-7.5, which prohibits unduly manipulative or intrusive advertising, prohibits "use of an image, sound, video or dramatization in a manner that is designed to solicit legal employment by appealing to a prospective client's emotions rather than to a rational evaluation of a lawyer's suitability to represent the prospective client." The bar believes that prudent application of the proposed rule would meet the *Central Hudson* test.

Websites

37. The history of website regulation has been long and convoluted. This Court, at the board's request, has stayed the effective date of its order in *In Re: Amendments to Rules Regulating The Florida Bar - Rule 4-7.6, Computer Accessed Communications*, corrected opinion, 24 So.3d 172 (Fla. 2009), in which this Court directed that websites be subject to the general lawyer advertising regulations, pending completion of this report and filing of a petition to further amend the lawyer advertising rules. The public believes that websites are merely another form of advertising, as evidenced by the public survey commissioned by the board, in which a large majority (81%) of all respondents believe lawyer websites are a form of advertising, compared to just 9% who believe they are not. Because these proposed rules focus on prohibiting only content that is misleading or unduly intrusive or manipulative, the bar recommends in its proposal that websites be subject to the same substantive regulations as any other media, as noted in proposed rule 4-7.1(a). The bar recognizes the difficulty of treating websites the same as other forms of advertising media for purposes of review by the bar. Websites can be extremely voluminous, and some literally are comprised of thousands of pages. Therefore, the bar recommends continuing the exemption for websites from the

filing requirement in proposed rule 4-7.10(g). For the same reason, proposed rule 4-7.9(d) prohibits a lawyer from receiving an opinion on an entire website by filing the entire website with one filing fee. Instead, the proposed rule permits a lawyer to submit a single feature of the website for review, such as a particular page, provision, statement, illustration or photograph contained on a particular website. Because a lawyer cannot submit an entire website for review and receive an opinion from the bar, proposed rule 4-7.9(f)(5) provides that a lawyer cannot be disciplined for potentially misleading or unduly manipulative or intrusive features of a website unless the bar has first informed the lawyer that the website violates the lawyer advertising rules, and the lawyer has an opportunity to amend the website. This “take down” provision applies only to websites, and it applies solely because lawyers cannot obtain an opinion regarding an entire website. This “take down” provision does not apply to information that is inherently misleading, for which a lawyer may be disciplined without prior notice by the bar.

Quality of Legal Services

38. Current lawyer advertising rules prohibit statements characterizing the quality of legal services. Such a prophylactic bar would be unlikely to meet the *Central Hudson* test. The bar therefore recommends adoption of rule 4-7.3(b)(3), which prohibits characterizations of skills, experience, reputation, or record unless they are objectively verifiable. Although the proposal is significantly less restrictive than the current rule, the bar believes the change is necessary to encourage the free flow of truthful information to the public that is necessary for the selection of a lawyer.

Filing and Evaluation Requirement

39. Finally, the bar recommends that the rule regarding bar review of advertisements be amended. Current rules require prior filing of television and radio advertisements only. Proposed rule 4-7.9 extends prior filing of all advertisements that are subject to the filing requirement. The bar finds no compelling argument to distinguish among advertisements for filing purposes. Prior filing will protect the public from misleading advertising, which is even more essential if the lawyer advertising rules become less restrictive.

VI. Official Notice of Amendments

40. Pursuant to R. Regulating Fla. Bar 1-12.1(g), formal notice of intent to file all the proposals in this petition was published in the June 15, 2011 issue of the bar *News*. A photocopy of that published notice, printed from the Internet version of that bar *News* issue is included with this petition, in Appendix C. This notice can also be found at:

<http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/C08A8983D468CD7852578A7004489CD>.

41. The final report of the BRC and the 2-column version of the proposed rules amendments were published on the bar's website on May 31, 2011.

VII. Editorial Corrections and Request for Waiver of Rules Procedures

42. During the preparation of the official notice and this petition, the bar detected minor editorial errors within proposals approved by the board. These editorial errors were not reviewed by the board, but were made under the authority granted to bar staff to correct errors in this Court's administrative order AOSC06-14, dated June 14, 2006. The June 15, 2011 official notice correctly reflects the correction of some, but not all, of these minor editorial errors.

43. The bar submits that these deviations from the requirements of R. Regulating Fla. Bar 1-12.1 are minimal. The bar therefore requests that these additional revised proposals be accepted by this Court, and that this Court waive approval by the board and publication of official notice in the bar *News* as to all these minor edits, pursuant to R. Regulating Fla. Bar 1-12.1(i).

44. R. Regulating Fla. Bar 1-12.1 and standing board policies require that official notice of the bar's intent to file this petition be published in the bar *News* at least 30 days before filing it with this Court. Because the board's approval was at its meeting on May 27, 2011, the bar could not meet the publication deadline for the June 1, 2011 issue of the bar *News*. The official notice was therefore published in the June 15, 2011 issue of the bar *News*, which is 20 days in advance of the filing date of July 5, 2011. The filing date of July 5, 2011 was ordered by this Court in cases SC10-437 and SC10-1014 on February 28, 2011. However, the BRC report and a full copy of the lawyer advertising rules in legislative format were published

on the bar's website on May 31, 2011, more than 30 days before this petition was filed. The board voted unanimously at its May 27, 2011 meeting to request that this Court waive any requirements of the standing board policies and R. Regulating Fla. Bar 1-12.1 that could not be met by the bar because of this Court's direction that the petition be filed no later than July 5, 2011. The bar therefore requests that this Court waive this and any other technical requirement of the standing board policies and R. Regulating Fla. Bar 1-12.1.

VIII. Other Pending Amendments

45. Six other filings seeking separate amendments to the Rules Regulating The Florida Bar are pending before this Court:

(a) SC08-1181 and SC10-1014, – *In re: Amendments to the Rules Regulating The Florida Bar, Rule 4-7.6, Computer-Accessed Communications*. This Court granted the bar's motion to stay the effective date of amendments to rule 4-7.6 in SC08-1181 in light of the bar filing further amendments to R. Regulating Fla. Bar 4-7.6 regarding websites, which was assigned a new case number, SC10-1014. A motion to stay was entered by this Court in SC10-1014 on February 28, 2011.

(b) SC10-437 *Rules Regulating The Florida Bar, Rule 4-7.1 and 4-7.2, Use of Title "Judge" by Former or Retired Judges* . This Court, on its own motion, directed that an official notice be published in the bar *News* of this Court's intent to adopt amendments to R. Regulating Fla. Bar 4-7.1 and 4-7.2, addressing the use of the title "judge" by former or retired judges. A copy of the official notice was published in the April 15, 2010 issue of the bar *News*. This Court entered a stay in this case on February 28, 2011.

(c) SC10-1967 *Petition to Amend the Rules Regulating The Florida Bar – Biannual Filing 2010* and SC10-1968 *Petition to Amend the Rules Regulating The Florida Bar – Biannual Filing Housekeeping 2010*. These petitions comprise the biannual rules amendments package and the biannual housekeeping amendments which were filed in October 2010. Both were accepted by this Court without oral argument, although comments were filed in SC10-1967. Neither contains amendments to the subchapter 4-7, the lawyer advertising rules.

(d) SC11-649 *Petition to Amend The Rules Regulating The Florida Bar -- Rule 10-9.1 (Procedure for Issuance of Advisory Opinions on the Unlicensed Practice of Law)*. This petition requests amendments to R. Regulating Fla. Bar 10-9.1 regarding procedures for issuing advisory opinions on the unlicensed practice of law and is pending before this Court. This petition does not request amendments to subchapter 4-7, the lawyer advertising rules.

46. The proposed amendments within this filing are proposed in lieu of the amendments in the filings on lawyer advertising rules in cases SC08-1181, SC10-1014 and SC10-437. Under the proposed rules in this petition, lawyer and law firm websites are subject to the same substantive lawyer advertising rules as any other advertising medium, and are exempt solely from the filing requirement. Application of the lawyer advertising rules to websites is addressed in proposed rule 4-7.1(a) and the comment. The exemption from the filing requirement for websites appears in proposed rule 4-7.10(g). A special provision permitting lawyers to file a portion of their websites appears in proposed rule 4-7.9(d), and the related provision for disciplinary action involving websites appears in proposed rule 4-7.9(f)(5). Restrictions on the use of titles by former judges appear in proposed rule 4-7.3(b)(10) and its comment.

47. The proposed amendments within this filing are unrelated to the amendments proposed in cases SC10-1967, SC10-1968 and SC11-649 and may be considered independent of them.

IX. Contents of Appendices

48. The complete text of all proposals is included in Appendix A to this petition, in legislative format (*i.e.*, deleted language struck through, shown first, followed by new language underlined).

49. A separate two-column presentation follows in Appendix B, which includes extracted text of affected rules with proposed amendments in legislative format and an abbreviated recitation of the reasons for the changes.

50. The notice of intent to file this petition is provided in Appendix C.

51. The BRC's report, comments received on the proposed amendments received after the BRC proposals approved on April 20, 2011, relevant correspondence, and articles from the bar *News* related to the advertising rules and this filing are provided in Appendix D.

52. The BRC's first proposed amendments which were published for comment on the bar's website in December 2010 and comments received in response to those proposals, as well as correspondence of note received during the review process are provided in Appendix E.

53. Comments filed after the board's approval of the amendments on May 27, 2011 are provided in Appendix F.

X. Comments in Response to Amendments

54. During the rules development process, the bar received and considered bar member comments indicating disagreement with some of the bar's proposals. These comments can be found in Appendix E, pp. 40-304. This review and consideration led to revisions to the original proposed rules which were approved by the BRC in March 2011 and reported to the board at its March 25, 2011 meeting.

55. After these revisions were published on the bar's website, the bar received more comments from bar members indicating their disagreement with some of the bar's proposals. Some changes were made in response to the comments received. The comments were provided to the board for its consideration prior to its vote approving the amendments at final reading on May 27, 2011. These comments were all received prior to the official notice of intent to file this petition and appear in Appendix D, pp. 249-303.

56. Since the official notice of intent to file this petition, 1 Florida Bar member's comments have been received by the bar and appear in Appendix F.

57. If additional comments are filed in response to this filing, the bar requests leave to file one consolidated reply to all such commentary, no later than 20 days after the 30-day period for comment in response to this petition has expired pursuant to R. Regulating Fla. Bar 1-12.1(g).

XI. Oral Argument Request

59. The bar seeks oral argument regarding these amendments.

XII. Effective Date Request

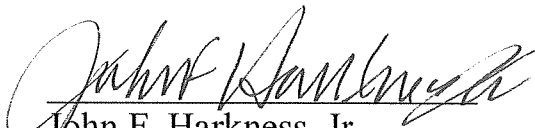
60. As to all amendments sought in this filing, the bar requests that any changes be made effective no sooner than 90 days from the date of this Court's order so that the bar can educate its members regarding any amendments.

XIII. Read Against *West's Florida Rules of Court 2010*

61. The bar did not perform a read against the most recent copy of *West's Florida Rules of Court 2010* because the bar's proposal involves a complete deletion and re-write of existing subchapter 4-7.

The bar requests that this Court enter an order amending the Rules Regulating The Florida Bar as requested in this petition.

Respectfully submitted,


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Florida Bar Number 123390

Mayanne Downs
President 2010-11
Florida Bar Number 754900

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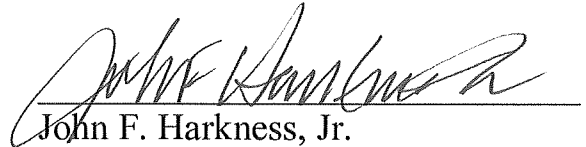
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July 5, 2011

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Times New Roman Regular type.

A handwritten signature in cursive script, appearing to read "John F. Harkness, Jr.", is written over a horizontal line.

John F. Harkness, Jr.

Executive Director

Florida Bar Number 123390

July 5, 2011