

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. SC11-1327

THE FLORIDA BAR'S RESPONSE TO 1-800-411-PAIN'S COMMENTS

The Florida Bar (the bar) files this response to comments of 1-800-411-Pain (411-Pain) pursuant to this Court's official notice, published in the April 1, 2012 *bar News*, which permits the bar to file a response to comments by May 22, 2012. 411-Pain argues that the bar has failed to produce evidence to document the existence of a substantial interest in regulating the use of actors endorsing attorneys while dressed as judges or law enforcement officers. At the time the proposed rule was submitted to this Court, the bar was aware of the existence of studies showing that consumer decisions are materially and subconsciously influenced by indicia of authority. The bar was in the process of engaging an expert to review and summarize those studies. However, a report was not completed on time to be included with the bar's recommendation. The report has since been completed and is filed with this response (Bickman report). The report was prepared by Dr. Leonard Bickman, the author of one of the key studies discussed in the report. Dr. Bickman's biography is also enclosed.

The report makes the following findings in support of the proposed rule:

- Studies have consistently demonstrated that a significantly higher percentage of test subjects will respond to instructions from a person in uniform than to a non-uniformed person. The percentages remain substantially the same even when the nature of the uniform is not apparent and when the test subject has no reason to believe that the uniformed person is in a real position of authority.
- Separate studies have revealed that the tendency of people to follow instructions from a uniformed person was contrary to the

behavior that the test subjects predicted for themselves and others.

- Studies have indicated that a substantial percentage of test subjects perceive law enforcement officers and judges as being more honest and ethical than lawyers in general.
- Studies indicate that consumers are generally not aware of the extent to which their behavior is influenced by subconscious advertising factors such as the presence of a uniform.
- Disclaimers and warnings have little impact upon behavior.

Thus, existing scientific data indicates that the use of indicia of law enforcement or judicial authority in attorney advertising can have the effect of unduly manipulating and/or misleading consumers by influencing them to select a lawyer without regard to a rational basis for such selection.

411-Pain cites *Public Citizen, Inc. v. La. Atty. Disciplinary Bd.*, 632 F. 3d 212 (5th Cir. 2011) and *Alexander v. Cahill*, 598 F. 3d 79 (2nd Cir. 2010), both of which struck bar disciplinary rules that prohibited the portrayal of a judge in an advertisement. The rules in both cases were materially distinguishable from the proposed rule because they prohibited all images of judges in attorney advertising. The proposed rule, on the other hand, prohibits only endorsements of attorneys by actors portraying judges or law enforcement authorities. The portrayal of a judge presiding over a courtroom or a law enforcement officer investigating an accident would not violate the proposed rule. The bar recognizes that portrayal of a courtroom scene communicates to the consumer that the attorney handles courtroom work and the portrayal of a police officer investigating an accident communicates that the attorney handles motor vehicle accident litigation. That usage is constitutionally protected and is not prohibited by the rule. An advertisement violates the rule only when the actor portrays a judge or law enforcement officer endorsing a particular lawyer or law firm. Such an advertisement communicates no accurate information to the consumer. To the contrary, it portrays judges and law enforcement officers doing something that they are not permitted by law to do, and serves no purpose except to take advantage of the very thing that the bar is legitimately concerned about – the psychological influence on consumer decisions of the indicia of authority.

The proposed rule leaves attorneys ample opportunity to advertise the availability of their services, to include non-deceptive information regarding those services, and to utilize attention-getting sound and images. The existence of such alternative avenues of commercial solicitation is a significant factor in determining

whether a rule is unduly restrictive. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995).

411-Pain argues that the bar's concern can be alleviated with the use of a disclaimer rather than a prohibition. The Bickman report states that studies generally have concluded that disclaimers have limited effect with respect to consumer behavior. This Court has approved rules requiring disclaimers when the purpose of such disclaimers is to supply missing information, the absence of which renders the advertisement misleading. In this case, the problem is not the absence of information, but the inclusion of images that have a subconscious effect on consumers. In this instance, there is particularly strong reason to conclude that a disclaimer would do little to overcome the bar's concerns. As the Bickman report illustrates, consumers are generally unaware of the influence of authority indicia on their behavior. It would be illogical to assume that a written disclaimer would overcome the effect of influences that the consumer is not even aware of.

411-Pain argues that proposed new rule 4-7.5, which prohibits "unduly manipulative or intrusive advertisements," is unconstitutionally vague. In support of its argument, 411-Pain cites the decision after remand of the United States District Court in *Harrell v. Florida Bar*, 608 F.3d 1241 (11th Cir. 2010). The *Harrell* court was addressing current rule 4-7.2, which prohibits pictures, sound, or language that is "manipulative." The current rule provides no guidance with respect to the meaning of "manipulative," and the federal court noted that all advertising is designed to be manipulative to some extent. The *Harrell* court also found that inconsistent interpretations by the bar's Standing Committee on Advertising were an indication that the rule is too vague.

The proposed rule is designed to overcome these objections. New proposed rule 4-7.5 follows the general pattern of the proposed rules by first setting forth the prohibition of unduly manipulative advertising, then defining the phrase "unduly manipulative," then providing several specific examples of advertising that would be considered unduly manipulative, and finally including commentary that further explains application of the rule and provides additional examples of advertising that would be considered both unduly manipulative and non-manipulative. It would not be feasible to contemplate and specifically define every type of advertisement that would violate each rule and no court has held that such specificity is constitutionally required. The proposed rule is sufficient to meet constitutional requirements by providing adequate guidance to advertising lawyers the bar's Standing Committee on Advertising.

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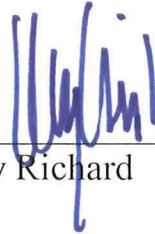
CERTIFICATE OF TYPE SIZE AND STYLE

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

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been sent by United States mail to the following individuals on this 22nd day of May, 2012.



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