

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE
RULES REGULATING THE FLORIDA BAR -
RULE 4-7.6, COMPUTER ACCESSED
COMMUNICATIONS

CASE NO. SC08-1181

**MOTION TO FURTHER AMEND RULES REGULATING THE FLORIDA
BAR - RULE 4-7.6, COMPUTER ACCESSED COMMUNICATIONS**

The Florida Bar (the bar), through its undersigned counsel, respectfully submits its request to amend rule 4-7.6, R. Regulating Fla. Bar, pursuant to R. Regulating Fla. Bar 1-12.1 and in response to this Court's order dated March 31, 2010, in which this Court reopened this case on a limited basis. As grounds, the bar states as follows:

I.

The bar filed a petition to amend the Rules Regulating The Florida Bar (Rule 4-7.6, Computer Accessed Communications) in case number SC08-1181 on February 26, 2008.

II.

This Court issued an opinion in this case on February 27, 2009.

III.

The bar filed a motion for rehearing and clarification on March 13, 2009. This Court granted the bar's motion for rehearing and clarification and issued a new opinion in this case on November 19, 2009.

IV.

The bar submitted a letter to this Court on February 26, 2010, to inform this Court of guidelines adopted by the Standing Committee on Advertising regarding making a portion of a lawyer or law firm website information "at the request of the prospective client" under rule 4-7.1(f), R. Regulating Fla. Bar, and therefore not subject to the lawyer advertising rules set forth in subchapter 4-7, R. Regulating Fla. Bar. Under the guidelines, a lawyer would be permitted to have truthful

information, including testimonials¹ and past results, if accessible to a viewer only by going through a disclaimer page that requires the viewer to read and acknowledge receipt of specific disclaimers about the information posted on the page. A copy of the letter and its attachments is attached in Appendix D, at pp.2-9.

V.

This Court responded to the bar's letter by rejecting the guidelines and issuing an order reopening this case for the limited purpose of permitting the bar to move to amend rule 4-7.6(b) consistent with the guidelines described in paragraph 4 above on March 31, 2010. A copy of the order is attached in Appendix D, at pp. 10-11.

VI.

The bar published an official notice in the April 15, 2010 issue of the Florida Bar *News* of the bar's intent to consider adopting amendments to Rule 4-7.6(b) and comment consistent with this Court's request. This official notice is attached in Appendix D, at pp. 12.

¹This Court has asked the bar to propose an amendment defining testimonials in its February 27, 2009 order in this case and via letter dated November 29, 2009. The letter is attached in Appendix D, at pp. 15-16. The bar has referred this issue to a Board of Governors committee for review and recommendation, and will file a proposed amendment in a separate petition after that committee's work is completed.

Additionally, the Federal Trade Commission (FTC) has recently amended guidelines specifically on testimonials. The new guidelines are more restrictive than the stance the FTC previously took regarding testimonials. The new guidelines, which apply to both goods and services, cover both testimonials and endorsements. One significant change is that the FTC has indicated that a disclaimer such as "results not typical," used when the person giving the testimonial or endorsement states an experience or result that is not typical of those generally using the same product or service, may not be effective. The FTC guidelines indicate that the advertiser "must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements. . . ."

The guidelines do not have the force and effect of law, but provide guidance to advertisers and consumers on how the FTC interprets law. The burden to prove an advertisement is misleading would fall on the FTC in an enforcement action against specific advertisements. Generally, the FTC regulations tend to be less restrictive than Florida's lawyer advertising rules. (For example, under the R. Regulating Fla. Bar 4-7.2(c)(1)(J), testimonials are prohibited in advertisements in the general media and unsolicited direct mail.) Additionally, the new FTC guidelines seem to have been directed mainly at products, particularly dietary supplements and weight loss products, as opposed to professional services. The examples given in the guidelines, with the exception of one example relating to a medical procedure, all involve products, not services. Finally, it is much more difficult to quantify professional services in the same way as a product. Therefore, determining whether results actually are typical, when the facts and circumstances of each case may be very different, is much more difficult than in the case of a manufactured product. Nevertheless, should this Court wish to adopt a rule consistent with the FTC guidelines, amendments consistent with the FTC guidelines are provided in Appendix D, at pp. 17-22. These amendments were not published for comment. The FTC guidelines, which were effective December 2009, are also attached in Appendix D, at pp. 23-34.

VII.

The full text of the proposed amendments was published in the May 1, 2010 issue of the Florida Bar *News* together with an official notice of the bar's intent to file a request with this Court on or about June 1, 2010. The official *News* notice is attached as Appendix C. The full text of the proposed amendments in legislative format is attached as Appendix A. Appendix B contains extracted text with the proposed amendments and rationale for the amendments in 2 column format. All amendments are in legislative format from rule 4-7.6 as amended by this Court pursuant to its November 19, 2009 order (not in legislative format from the rule in its current form). The amendments would permit a lawyer to create a portion of a lawyer or law firm website that is considered information "at the request of the prospective client" under rule 4-7.1(f), R. Regulating Fla. Bar, and therefore not subject to the lawyer advertising rules set forth in subchapter 4-7, R. Regulating Fla. Bar. The amendments, set forth in subdivision (b) and the comment, would allow a lawyer to have truthful information, including testimonials and past results, if accessible to a viewer only by going through a disclaimer page that requires the viewer to read and acknowledge receipt of specific disclaimers about the information posted on the page.

VIII.

No comments were received in response to either publication. If comments are filed in response to this motion, the bar requests leave to file one consolidated reply to all comments no later than 20 days after the 30-day period for comment has expired pursuant to R. Regulating Fla. Bar 1-12.1(g).

IX.

All requested amendments in this motion were promulgated in full compliance with applicable rules and policies. The Rules Committee approved the amendments under both substantive and procedural review by electronic mail ballot on May 4, 2010. The Budget Committee reviewed the amendments for fiscal impact and approved the amendments by electronic ballot on May 10, 2010. The Program Evaluation Committee reviewed the amendments for consistency with the bar's strategic plan and approved the amendments by voice vote on May 27, 2010. The Florida Bar Board of Governors approved the amendments on voice vote after a two-thirds vote to waive second reading of the amendments on May 28, 2010.

X.

One other filing approved by the board of governors and seeking separate amendments to the Rules Regulating The Florida Bar has already been file with

this court: *In re: Amendments to the Rules Regulating The Florida Bar, Rule 4-7.1 Lawyer to Lawyer and Lawyer to Client Communications*, No. SC09-394 (Fla. Jan. 27, 2009). The proposed amendments in this motion are unrelated to this different rules matter and may be considered independent of it.

XI.

The bar does not seek oral argument regarding these amendments, unless this Court orders oral argument or comments are filed in the interim that may require additional response or appearance by the bar.

The bar requests that this Court issue an order adopting the amendments proposed by the bar in this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed to the following this 1st day of June, 2010 to:

Timothy P. Chinaris
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Elizabeth Clark Tarbert
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CERTIFICATE OF TYPE SIZE AND STYLE

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

Elizabeth Clark Tarbert
Ethics Counsel
Florida Bar Number 861294

CERTIFICATE OF READ-AGAINST

I certify that the Rules Regulating The Florida Bar set forth within this petition have been read against the most recent copy of *West's Florida Rules of Court 2010* by Rebecca S. Burke, Rules Administrative Coordinator.

Elizabeth Clark Tarbert
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Florida Bar Number 861294