

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR –
ADVERTISING RULES

CASE NO. SC05-2194

**THE FLORIDA BAR’S MOTION TO ACCEPT
CONSOLIDATED RESPONSE TO COMMENTS AND
CONSOLIDATED RESPONSE TO COMMENTS**

The Florida Bar (the bar), through its undersigned counsel, respectfully requests that this court accept the bar’s consolidated response to comments filed in response to the bar’s petition to amend the Rules Regulating The Florida Bar in case number SC05-2194. As grounds, the bar states as follows:

I.

The bar filed a petition to amend the Rules Regulating The Florida Bar (Advertising Rules) in case number SC05-2194 on December 14, 2005.

II.

The filing deadline for comments on the proposed amendments was January 31, 2006.

III.

Comments were filed by Florida Bar members Bill Wagner, Timothy P. Chinaris, and William Frederick Ebsary, Jr.

IV.

The bar provides the following response to the comments in rule order:

A. 4-7.1(b) (advertisements disseminated in Florida)

Bar member Chinaris commented that the bar's proposal should not be adopted because Florida Bar members who live and practice out of state will have uncertainty regarding application of the rules to their websites, and that Florida Bar members who reside and practice out of state should not have to comply with Florida's advertising rules absent some specific targeting of Florida residents. Florida Bar members who live and practice in other states can easily avoid application of Florida's lawyer advertising rules by declining to accept representation of clients in Florida matters or by clearly and conspicuously indicating on the website itself that the website is directed at clients located in the other state. If the lawyer does not do either of those things, the website should be subject to Florida's advertising rules. Therefore, the bar stands by its proposed amendment.

B. Rule 4-7.1(e) (communications between lawyers)

Florida Bar member Wagner argues that it is inconsistent to exempt

communications between lawyers, because lawyers may pass along such communications to their clients. The bar believes it is unlikely that lawyers would pass along marketing material of a competitor to clients. The bar assumes that lawyers who do pass along such material would not do so without examining the material first and advising the client regarding the qualifications of the other lawyer. The bar therefore believes that the additional protection of the advertising rules is unnecessary in lawyer to lawyer communications.

C. 4-7.1(g) (communications with current and former clients)

Bar member Wagner also commented that it is inconsistent to apply the lawyer advertising rules to advertisements, but not communications with current and former clients. Florida's advertising rules are based on the protection of consumers. Clients and former clients who are either currently represented by a lawyer or have chosen to be represented by a lawyer in the past have already gone through the selection process and should be aware of the lawyer's qualifications and experience. They therefore do not need the protection of the lawyer advertising rules.

D. 4-7.2(c)(1)(F) (references to past results)

Bar member Chinaris contends that the court should not adopt a "stricter blanket prohibition" against references to a lawyer's past results in advertising. The restriction already exists in the rules; the current rule states that:

A lawyer shall not make or permit to be made a false, misleading, deceptive, or unfair communication about the lawyer or the lawyer's services. A communication violates this rule if it . . . contains any reference to past successes or results obtained or is otherwise likely to create an unjustified expectation about results the lawyer can achieve.
...

The rule is very clear as to past results; the bar's clarification of the rule relates to the phrase "likely to create an unjustified expectation about results the lawyer can achieve." The bar believes that the rule is clarified by separating the prohibition against past successes and results from the prohibition against other statements "likely to create an unjustified expectation about results the lawyer can achieve" and replacing the prohibition against statements "likely to create an unjustified expectation about results the lawyer can achieve" with the more clear prohibition against statements that "promise results." This proposal does not change the current prohibition against advertising "past successes or results obtained."

Because this involves no substantive rule change, the bar respectfully suggests that these issues were well-considered in connection with prior rule amendments and need not be addressed by the court at this time.

E. 4-7.2(c)(1)(J) (testimonials)

Bar member Chinaris argues that testimonials should be permitted with a disclaimer. The bar contends that testimonials are inherently misleading, as indicated by the existing comment to Rule 4-7.2:

The prohibition in subdivision (b)(1)(E) precludes endorsements or testimonials, whether from clients or anyone else, because they are inherently misleading to a person untrained in the law. Potential clients are likely to infer from the testimonial that the lawyer will reach similar results in future cases. Because the lawyer cannot directly make this assertion, the lawyer is not permitted to indirectly make that assertion through the use of testimonials.

The prohibition against testimonials is consistent with the prohibition against advertising past results: consumers are not readily able to distinguish between past results and the lawyer's ability to obtain results in the future. Additionally, results which may seem impressive without examination of the facts of the case may be less impressive than they appear. Finally, the person giving the testimonial may not have the legal knowledge to accurately assess the skills of the lawyer for whom the testimonial is being given. Additionally, there is no substantive change to this subdivision. The bar therefore respectfully suggests that these issues were well-considered in connection with prior rule amendments and need not be addressed by the court at this time. For all these reasons, the bar contends the court should continue the existing prohibition against testimonials.

F. 4-7.2(c)(3) (portrayals and illustrations that are likely to confuse)

Bar member Chinaris commented that “the bar proposes to add a provision banning visual or verbal descriptions, depictions, illustrations, and portrayals that are ‘likely to confuse the viewer.’” The amendment is not an addition; it is the

result of combining two subdivisions of the rule that contained overlapping prohibitions. Current rule 4-7.2(b)(4) applies to “visual or verbal descriptions, depictions, or portrayals of persons, things, or events” and prohibits “deceptive, misleading, or manipulative” information. Current rule 4-7.2(c)(1) applies to only illustrations, and prohibits “features that are likely to deceive, mislead or confuse the viewer.” The bar recommends combining all of those requirements into a single rule provision, which does not change the essential requirements of these two rule provisions, but combines them into one subdivision and applies them equally to illustrations and “visual or verbal descriptions, depictions, or portrayals of persons, things, or events.”

G. 4-7.2(c)(3) (portrayals and illustrations that are manipulative)

Bar members Chinaris and Wagner contend that the prohibition against manipulative illustrations and portrayals should be eliminated. This court recently disciplined two lawyers for violations of this rule, in their use of a pit bull in their logo and as their telephone number (1-800-PITBULL). *The Florida Bar v. Pape & Chandler*, 918 So.2d 240 (Fla. 2005). As the court eloquently stated in finding that the telephone number and logo were both misleading and manipulative, “permitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice.” It is precisely this type of harmful advertisement that the rule is designed to prohibit.

H. 4-7.5(b)(2)(B) (nonlawyer spokesperson)

Florida Bar member Chinaris argues that the court should retain the current requirement that a nonlawyer spokesperson in a television or radio advertisement give an oral disclosure that the person is not a lawyer and is a spokesperson, contending that the requirement is not unduly burdensome to bar members. The purpose of the rule is to prevent the public from being misled that the nonlawyer spokesperson is a lawyer who is a member of the advertising law firm. In advertisements where it is obvious that the nonlawyer is merely a spokesperson, the bar believes it is unduly burdensome for Florida Bar members to include an oral disclosure, particularly when many radio and television advertisements are very short in duration (often ranging from 10 to 45 seconds). If it is obvious from the advertisement that the person is a nonlawyer spokesperson, the public is not misled. As an example, a recent filing of a television used a cartoon figure as the spokesperson, who was clearly not a member of the firm. The proposed change does require a disclosure if it is unclear from the advertisement that a nonlawyer spokesperson is being used.

I. 4-7.6(b) (websites)

Two bar members who filed comments objected to the bar's proposal regarding regulation of websites. Contrary to suggestions by those bar members, the bar has been regulating the Internet for many years, explicitly through Rule 4-

7.6, adopted by this court in 1999. *1999 Amendments To Rules Regulating The Florida Bar - Advertising Rules*, 762 So.2d 392 (Fla. 1999). The proposed amendments do not constitute additional regulation. In its petition, the bar indicated that the proposal for regulation of websites maintains the status quo while a newly appointed special committee continues to review the regulation of websites. Because other rules have changed, amendments to Rule 4-7.6 are necessary to maintain the status quo, which is that websites are subject to the same regulations as other forms of advertising media with three exceptions: 1) they are not required to be filed for review; 2) they are not subject to the prohibition against statements that characterize the quality of legal services; and 3) they are not subject to the prohibition against statements regarding past results of the advertising lawyer. The special committee expects to make a report and recommendations to the bar's Board of Governors this June. The bar suggests that the court adopt its interim proposal maintaining the status quo while the bar continues to study this issue.

J. 4-7.7(a)(1)(A) (prior review of television and radio advertisements)

Florida Bar member Chinaris opposes prior review of television and radio advertisements. As support for his contention, he points the court to the bar's statistics indicating that direct mail has a high rate of noncompliance, yet the bar did not request that the court adopt prior review of direct mail. This proposed

amendment was discussed extensively in the bar's petition. As indicated in the bar's petition, the bar chose to focus its resources on the area that potentially affects the largest number of consumers: television and radio. The fact that advertisements in other media fail to comply with Florida's advertising rules does not obviate the need for prior review in the broadcast media.

WHEREFORE, The Florida Bar requests that this court enter an order accepting The Florida Bar's response to comments and enter an order amending the Rules Regulating The Florida Bar in the manner sought in its petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following this 20th day of March, 2006.

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CERTIFICATE OF TYPE SIZE AND STYLE

THE FLORIDA BAR HEREBY CERTIFIES that this petition is typed in 14 point Times New Roman Regular type.

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