

O/a 6-8-87

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

In Re: Petition to Amend the  
Rules Regulating The  
Florida Bar

Case No. 70,366

FILED  
SD J. WHITE  
APR 24 1987  
CLERK, SUPREME COURT  
By: [Signature]  
Deputy Clerk

RESPONSE TO PETITION OF THE FLORIDA BAR  
TO AMEND RULE 4-1.5 AND RULE 4-7.3 OF THE  
RULES REGULATING THE FLORIDA BAR

COMES NOW, BILL WAGNER, Attorney at Law, (Attorney  
Number 083998), and files this Response to certain portions of  
the Petition of The Florida Bar to the Supreme Court of Florida  
to amend the Rules Regulating The Florida Bar.

RESPONDENT'S INTEREST

Respondent is a member of the Special Commission to  
Study Contingency Fees and Referral Practices, however, this  
Response is filed by Respondent solely in his capacity as a  
member of The Florida Bar.

I) OBJECTION TO PERCENTAGE LIMITATIONS ON SHARING FEES

Respondent objects to the adoption of proposed Rule  
4-1.5(f)(4)d establishing special limitations on sharing of fees  
between lawyers on claims for personal injury, which limitations  
are different from and substantially more restrictive than the  
limitations for the sharing of fees between lawyers in other  
cases. Such proposed rule unfairly limits and restricts the  
right of an injured person to employ the attorney of choice and  
further impairs the right of an injured person to contract upon  
reasonable terms with such attorneys and such number of attorneys  
and under such terms and conditions as he or she may choose.  
The proposed rule unfairly discriminates against injured persons  
by placing restrictions upon their right of contract and their  
right to employ attorneys of their choice upon terms and conditions  
of their choosing which do not exist upon the right of other  
persons and corporations to employ attorneys.

Respondent, as a member of the Special Commission to  
Study Contingency Fees and Referral Practices, opposed such proposed  
rule while on the Commission and the records of the Commission  
will reflect that Respondent was joined by other members of the  
Commission in objecting to the rule.

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Respondent filed a "Partial Dissent" to the Commission's report which has been made a part of the report of the Special Commission which is included in the bound copy of the report of the Special Commission made a part of these proceedings.

Respondent respectfully requests that the Court consider Respondent's arguments and opinions as set forth in such Partial Dissent in considering the Bar's Petition.

II) OBJECTION TO BOARD OF GOVERNORS' MODIFICATION  
OF COMMISSION'S RECOMMENDATION ON LAWYER DISCLOSURE

The Board of Governors' modifications to proposed Rule 4-7.3, Legal Service Information, should be rejected and the recommendations of the Commission should be accepted.

The Special Commission to Study Contingency Fees and Referral Practices overwhelmingly recommended that the Court adopt rules requiring that lawyers provide information concerning the lawyer's background, training, and experience to prospective clients upon request. If a lawyer claimed special experience in handling certain matters or publicly limits the lawyer's practice to certain kinds of cases, the Commission proposed that such rule should require that lawyers provide factual details concerning such special experience to prospective clients in order to assist them in making their initial selection of a lawyer to represent them. The Commission further recommended that the availability of written information concerning lawyers be made known by all advertising lawyers in all advertising. Finally the Commission recommended that representations by a lawyer to a prospective client of willingness to represent the client in a particular matter be presumed to be misleading if at the time such representations are made the lawyer knows that he intends to refer or associate other counsel to act as primary attorneys in the case, rather than personally handle the matter.

Finally the Commission recommended that the rule specifically provide that information furnished to clients shall not be directly false or misleading, impliedly false or misleading, fail to disclose material information, or be unsubstantiated in fact or unfair.

### The Board of Governors' Modifications

The Bar's proposed rule makes the requirement for providing information to clients and the restrictions on advertising applicable only to lawyers who are involved "in an action or claim for personal injury or for property damage or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof ...".

The Bar's modification further provides that such statements in advertising need only comply with the provisions of Rule 4-7.1.

Both of the Bar's modifications should be rejected and the proposed rule submitted by the Commission should be accepted.

#### Why Should Disclosure Apply Only To Personal Injury Lawyers?

The Commission's proposals to require lawyers to provide in writing, factual accurate information concerning their capabilities is vitally important. This Court and the Supreme Court of the United States has recognized that we live in a vastly different day and age from that when our society was much less complex and the consumers of legal services were far fewer. In that less complex society with fewer laws, fewer lawyers, and less specialization in the legal practice, it may have in some circumstances been realistic to expect a prospective client to make a reasonable selection of a competent attorney by personal inquiry into the attorney's general qualifications. If such an age ever did exist, it most certainly no longer exists in the complex urban society of Florida today. Telephone books no longer list 10 or 15 lawyers or law firms. They list many hundreds of law firms and lawyers under a variety of confusing and complex categories. The most current Tampa telephone directory yellow pages is comprised of 65 pages of attorney listings. In addition to the general category of "attorneys" which stretches on for 40 pages, there are approximately 26 additional pages of specialty categories. A prospective client must, without

legal training, determine if their legal problem is one best handled by lawyers listed in 24 separate categories of legal specialty ranging from "Administrative and Government Law" through "Workers Compensation". The client is expected to make the initial decision as to whether or not their problem is one of "Admiralty", "Corporation and Business Law", "General Practice", "Entertainment and Sports Law", "Franchise Law", "Insurance Law", "Trial Practice - General", "Trial Practice - Personal Injury and Wrongful Death", or perhaps a combination of one or more of these or other categories. They may select from lawyers who are listed only by name, listed in extra large black letters, or by name with fields of experience in black letters, or by names with small display ads, or by names with small display ads in red letters, or by names and large display ads.

If they are not fortunate enough to know someone who has genuine valid experience dealing with attorneys to help them make their selection, they must rely upon the happenstance of getting a valid recommendation from someone else who likely first made their selection of an attorney in an equally haphazard manner. Failing this, they may rely upon the representations of the attorneys in their large display ads, some of which list 11 or 12 different categories of legal services offered by the firm involved. These ads urge clients to seek advice if their legal problems involve "Debtor Payback Plan", "Florida Will Probate", "Adoptions", "Divorce, Custody and Child Support", "Name Change", "Incorporation", "Real Estate", "Injuries from Animals (pitbulls, and so forth)", "Insurance Claims", "Marital and Family Law", "DUI", "DWI", "Traffic", and "Bankruptcy". (All quotes are from current Tampa yellow pages).

The consumer of legal services must now either determine which of these many attorneys are to be selected by individual telephone calls or by individual visits to the attorney's offices. Either method produces a situation in which the consumer is in a dramatically unfair, potentially pressured confrontation with the attorney.

The Commission and the Bar are both right when they urge the Supreme Court of Florida to give the consumer at least the minimal additional help of being able to obtain factual information in written form from a prospective attorney to assist them in making an intelligent decision in the initial selection of an attorney. By requiring the information to be in writing, by requiring that copies be available to a client by minimal client effort, and by requiring such written information to be retained and available for examination by the Bar, the Court will greatly increase the probability that the information received and understood by the client will be accurate and complete. Requiring accurate written information is far superior to the present method of communicating such information through display advertising containing limited information and through limited oral communication between the client and the lawyer.

But the Bar's grave error is to say that the only lawyers who must provide this information to prospective clients are those lawyers providing information to clients who have personal injury or wrongful death matters and only if the lawyer will represent the client on a contingent fee basis.

If the citizens of this State are entitled to this Court's protection in initially contracting with lawyers in personal injury and wrongful death matters, they most certainly are entitled likewise to the same protection if they are initially selecting lawyers during the stressful times involved in personal bankruptcy, family dissolution, and defense of criminal charges.

If the personal injury lawyer advertising his availability must include in his advertisement a statement that "free written information concerning qualifications and experience available on request", why should not the lawyer seeking clients who need help in divorce, adoption, bankruptcy, change of name, immigration, naturalization, or otherwise. Should not all citizens seeking protection from this Court in dealing with lawyers be equally protected.

The Bar and this Court have both struggled with the issue of advertising in the context of many types of law practice. Cases involving advertising in immigration and naturalization law, cases involving the right of a law firm to solicit representation

of condominium associations and cases involving advertising of family law specialization are well known to the Bar. Why should not the lawyers seeking to establish a relationship with a prospective client in those situations not also be required to furnish factual information to their prospective clients.

While recent high level publicity has focused attention upon personal injury lawyers, the polls seem to clearly indicate that distrust of lawyers is not nearly so specialized. This Court's protection of prospective clients should not be so limited and selective as that requested by The Florida Bar.

#### Is It Unfair?

The Commission's original proposal contained a paragraph (e) which read as follows:

(e) Any factual statement contained in any advertisement or any information furnished to a prospective client under this rule shall not be:

- (1) Directly false or misleading.
- (2) Impliedly false or misleading.
- (3) Fail to disclose material information.
- (4) Unsubstantiated in fact.
- (5) Unfair.

The Bar's proposal strikes this paragraph and substitutes instead a requirement that information furnished shall not violate Rule 4-7.1 which reads:

4-7.1 Communications concerning a lawyer's services. A lawyer shall not make or permit to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated. (emphasis supplied)

Both the Commission and the Bar, of course, recommend that Rule 4-7.1 be retained as applying in all communications between a lawyer and a client.

Debate before the Board of Governors focused frequently upon concern at the inability to enforce the restriction against "unfair" statements. Attached as Exhibit A to this Response is this Respondent's letter containing arguments seeking to have the provision reinstated after the first meeting of the Board.

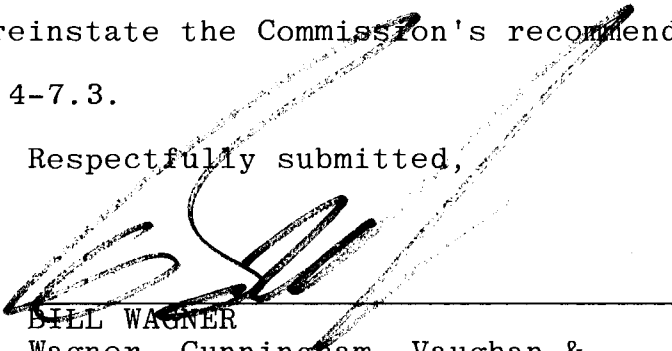
This Respondent requests that the Court consider these arguments and Law Review article referred to therein in reviewing this matter, but will not further argue the matter.

It is, however, respectfully suggested that if the term "unfair" is deemed by this Court to be too vague or indefinite for enforcement it nevertheless should be included to send a message that in the area of advertising and solicitation of clients the highest level of fairness to a client is deemed important. Any misrepresentation (not just material misrepresentation) should be condemned. If the term "unfair" is deemed too vague or indefinite for even that purpose, paragraph (e) should be reinstated without the inclusion of subparagraph (5) containing the "unfair" language.

### III) CONCLUSION

It is respectfully submitted that the Court should adopt the Bar's proposals with the exception of proposed Rule 4-1.5(f)(4)d, and should reinstate the Commission's recommendation for the amendment to Rule 4-7.3.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE DO HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by United States Mail to The Florida Bar, by serving John F. Harkness, Jr., Executive Director, Tallahassee, FL 32301; Marsha K. Cypen, 7900 Northwest 27th Avenue, Suite 210, Miami, FL 33147; Charles R. Stepter, Jr., P.O. Box 3189, Orlando, FL 32802; Thomas A. Pobjecky, General Counsel, Florida Board of Bar Examiners, 1300 East Park Avenue, Tallahassee, FL 32301; Henry P. Trawick, Jr., P.O. Box 4019, Sarasota, FL 33578; Rufus Pennington, 222 East Forsythe Street, Jacksonville, FL 32202; and Larry D. Beltz, P.O. Box 16008, St. Petersburg, FL 33733; this 21<sup>st</sup> day of April, 1987.



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