

IN THE SUPREME COURT OF FLORIDA

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

JUN 4 1987 C
CLERK SUPREME COURT
By _____
CASE NO. 070, 366 pl

RESPONSE TO PETITION OF THE
FLORIDA BAR TO AMEND RULES
REGULATING THE FLORIDA BAR

COMES NOW EVAN I. FETTERMAN, attorney at law (Attorney No. 155710), 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 filing this Response in his capacity as a member of the Florida Bar. The Response is directed to the proposed adoption of Rule 4-7.3 of the Rules Regulating the Florida Bar.

STATEMENT OF FACTS

The Board of Governors, Florida Bar, are proposing to amend Rule 4-7.3, Rules Regulating the Florida Bar. This Amendment will require each lawyer or law firm advertising its services or availability to represent clients in actions, claims or cases under Rule 4-1.5(D)(4) to have available in written form for delivery to any potential client a factual statement detailing the background, training and experience of that lawyer or law firm, and whenever a potential client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm, the lawyer or law firm shall promptly furnish (by mail if requested) this written information. It further requires, among other things, if the lawyer or law firm advertises its services, that the advertising shall prominently display or announce: "free written information concerning qualifications and experience available on request."

The reasons given for this proposed Amendment to the Rules are:

"Consumers and potential clients seeking to retain a lawyer to represent them as a result of a personal injury or wrongful death to them or a member of their family are often under a great deal of personal and emotional pressure. They are faced with a wide variety of lawyers advertising their availability to handle such legal matters. Those consumers have a right to receive factual, objective information from those lawyers who are advertising their availability to handle these legal matters. The rule provides potential clients may request such information and be given an opportunity to review that information without being required to come to a lawyers office to first obtain that information. Selection of appropriate counsel is based upon a number of factors. However, selection can be enhanced by potential clients having factual information at their disposal for review and comparison."

ARGUMENT

The purpose of the proposed Rule 4-7.3 is supposedly to enhance the process of selection of lawyers by potential clients having personal injury cases. At first blush, this seems to be a laudatory objective, but is it reasonable? It has long been the rule that clients should receive competent representation (present Rule 4-1.1 and the previous Canon 6 of the Code of Professional Responsibility). The proposed rule would create classes of lawyers based upon brochures (e.g., Harvard graduates vs. Stetson graduates; million dollar awards vs. no record of million dollar awards; expensive layout and printing vs. simple typing). There is much more to the selection of a competent lawyer than selecting the most impressive brochure. As a basic example, the rapport between a client and lawyer and the ability of the client and lawyer to communicate are of great importance. A requirement to provide this written material will not really enhance the selection of lawyers; and it surely will not ensure the delivery of competent legal services. A Harvard graduate is not necessarily more likely to provide competent representation in a particular case than a Stetson graduate; an attorney who has obtained a number of million dollar awards will likely pass a ten

thousand dollar case to a young associate; and expensive layouts and printing of brochures are no guarantee of better representation. Hence, the proposed rule will not achieve the stated goal of enhancing the selection of lawyers by potential clients; much less will it assure the provision of competent legal representation.

The proposed Amendment is directed only toward lawyers or law firms who enter into contingent fee agreements in personal injury matters. The reason given is that potential clients seeking to retain a lawyer as a result of personal injury or wrongful death are often under a great deal of personal and emotional pressure and they are faced with a wide variety of lawyers advertising their availability. We respectfully suggest that, with the exception of some seasoned businessmen, the majority of individuals seeking legal counsel are motivated at least in part by emotional pressure. If one looks at the yellow pages, one can see that there are large numbers of lawyers advertising their availability to handle all types of legal matters. It is arbitrary and unreasonable to single out only those lawyers who advertise in the personal injury field and to require just those lawyers to undergo the additional expenses of preparing, having available, and mailing written materials as required by the proposed Amendment. If the Florida Bar finds the free distribution of the required information to be so beneficial to the public, then one must wonder why all lawyers and law firms are not required to provide such material to every requestor.

Prior to the advent of advertising by lawyers, it was accepted practice for attorneys who generally limited their practice to actions involving personal injury and wrongful death to cultivate attorneys in general practice for the purpose of obtaining referrals from them. In return for referral, there was generally a split of fees, usually the amount of one third (1/3) of the contingency fee was paid to the referring attorney. This referral practice frequently provided the greater percentage of the cases handled by law firms engaged in personal injury and

wrongful death practice. The advent of advertising by lawyers has undoubtedly reduced the numbers of referrals achieved by the old method; therefore, there is a body of attorneys who are for this reason strongly opposed to advertising. As can be seen from the Academy of Florida Trial Lawyers' response to the instant petition, there is a body of lawyers who wish to retain the old system of referral fees and referrals, and at the same time, reduce the effectiveness of advertising by attorneys. Quite obviously, the discriminatory nature of the proposed Rule 4-7.3 reflects the opinions of this body of lawyers.

Numerous briefs have been filed in regard to the proposed amendment. Consequently, it will serve little or no purpose to burden the Court with additional citations of legal authority. The Court is well aware of the legal precedents relating to the approval or rejection of this amendment. Since the United States Supreme Court decision in the Bates case approving advertising by lawyers, the traditional organized Bar has generally sought to do everything it can to limit the manner in which lawyers who choose to advertise do so. To say that there has been a heated emotional battle between the advertising and nonadvertising attorney members of the Bar is the epitome of understatement. As a firm that has seen fit to advertise with regularity since the lifting of the prohibition on advertising by the United States Supreme Court, we are indeed no stranger to the displeasures of the organized Bar insofar as lawyer advertising. While the Bar's proposed amendment is cloaked under "laudatory purposes," it is respectfully submitted that this amendment is simply another attempt to protect the traditional Bar against the "evils of advertising" as they see it. The proposed Amendment in no way serves to protect clientele or the general public. Were the general public the actual target, then the traditional Bar would be interested in furnishing information about all lawyers, whether they advertise or not.

It is indeed interesting that one segment of the

organized Bar, the AFTL, seeks to preserve the system of referral fees, based on the charade of an equal division of the work involved. Nevertheless, the AFTL now represents that it is against the brokering of personal injury cases, but only because those they claim to be brokering receive cases as a result of advertising. Previous means of brokering (the entertaining of general practitioners; the dangling of ever increasing referral fees) are ignored. Nevertheless, the Bar, and surely this Court, must realize that advertising does not create brokering, the referral fee system does. There are advertising firms that have the capability to and do handle personal injury and other matters with dignity, competence, and success. In short, there are firms comprised of good attorneys who advertise, just as there are firms who do not advertise that are comprised of good attorneys. And there are poor attorneys on both sides. The proposed Amendment in no way serves to benefit the clientele of these attorneys or the general public. It simply attempts to single out those attorneys who advertise to suggest that they are in some manner irresponsible or inferior and the client had better check up on them. The proposed rule simply attempts to create a category of second class members of The Bar. The rule is discriminatory and has no valid purpose. If this rule is passed, it is suggested The Bar will continue to seek the imposition of further restrictions on the second class group the rule will create. Perhaps the Bar will next propose that advertising lawyers submit to mandatory testing for competence on a regular basis. It is suggested that the passage of this rule is not only improper and discriminatory but opens the door to a plethora of further abuses.

The proposed Amendment to Rule 4-7.3 should not be passed because it is arbitrary and capricious and is not reasonably related to a valid government interest. It will neither achieve its stated objective nor will it contribute to that which has long been the rule, namely, that clients should receive competent representation.

CONCLUSION

The proposed Amendment is arbitrary and unreasonable. It fails to meet the test of whether there is a matter touching the public interest which merits instant correction at the hands of the authorities and, if so, that the remedy adopted by the rule-making authorities is reasonably calculated to correct the matter. It certainly will not achieve the objective to provide competent counsel which has long been the rule. The rules already contain provisions to achieve that objective. The proposed Amendment should therefore be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the FLORIDA BAR, by serving JOHN F. HARKNESS, JR., Executive Director, Tallahassee, FL 32301; MARSHA K. CYPEN, 7900 N.W. 27th Avenue, Suite 210, Miami, FL 33147; CHARLES R. STEPTOR, 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; WILLIAM C. GENTRY, 6 East Bay Street, Suite 400, Jacksonville, FL 32202; C. RUFUS PENNINGTOHN, III, 222 East Forsyth Street, Jacksonville, FL 32202; BILL WAGNER, 708 Jackson Street, Tampa, FL 33602, and LARRY D. BELTZ, ESQ., L. D. Beltz & Associates, P.O. Box 16008, St. Petersburg, FL 33733, this 26th day of May, 1987.

EVAN I. FETTERMAN

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