

0/a 6-8-87

FILED

IN THE SUPREME COURT OF FLORIDA

SID J. WHITE

JUN 19 1987

In Re: Petition to Amend the Rules
Regulating The Florida Bar
(Rules 4-1.5 and 4-7.3
Regarding Advertising and
Referral Fee Practices)

CLERK, SUPREME COURT

By _____
Deputy Clerk
CASE NO: 70,366

**SUPPLEMENTAL RESPONSE OF THE ACADEMY OF FLORIDA
TRIAL LAWYERS TO PETITION OF THE FLORIDA BAR AND
INQUIRIES OF THE SUPREME COURT AT ORAL ARGUMENT**

The Academy of Florida Trial Lawyers supplements its Response previously filed herein in order to comply with the request of the Court at oral argument for "constructive proposals." In its Response previously filed herein, the Academy suggested a specific change to the Bar's proposal so as to make advertising disclosures applicable to all advertising attorneys, not just those handling contingent fee cases (Response, page 9, footnote 4) and specifically offered to submit proposals for the other rule modifications and briefing on First Amendment issues if the Court were so inclined (Response, page 8, footnote 3). At oral argument, several of the Justices of the Supreme Court asked the Academy for specific language and alternatives. The Academy is hereby complying with such requests. The Academy respectfully submits that the Court should adopt alternative proposals such as submitted herein regarding amendment of Rules 4-1.5 and 4-7.3, or request the Bar and interested parties to submit further proposals so that the rules ultimately adopted will best accomplish the goals intended.

**PROPOSED SUBSTITUTION FOR
FLORIDA PROPOSED RULE 4-1.5(d)(4)d.**

4-1.5(d)(4)d. As to lawyers not in the same firm, a division of any fee within paragraph (f)(4) shall be in proportion to the services and responsibility undertaken by each lawyer. In assessing the reasonableness of the proportionate share of the

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fee received by the respective attorneys who participate in the division of a fee, the following factors shall be considered:

- (a) The relative time devoted to the representation;
- (b) whether the attorney has advanced costs and his proportionate share of costs incurred in behalf of the client;
- (c) the attorney's experience in the field involved in the subject area of the litigation;
- (d) the attorney's previous relationship with the client and whether there is a continuing relationship;
- (e) whether the attorney has or is providing additional services without compensation which are not directly related to the subject representation;
- (f) the attorney's experience in other areas where services may be incidentally or directly required;
- (g) whether because of geographic considerations, the complexity of the litigation or the attorney's expertise or undertaking of a particular aspect of the case, the association facilitates the more convenient, economic or beneficial representation of the client.

1. An attorney who assumes responsibility for a case but does not have primary or lead-counsel responsibility for the litigation shall not receive more than 25% of the fee unless, taking into consideration the above factors, he provides substantial services or responsibilities commensurate with his share of the fee charged.

2. At the time representation is undertaken wherein there is a division of fee under this Rule, if any attorney proposes to receive more than 25% of the fee, such attorney shall advise the client in writing of the foregoing provisions of this Rule; the basis upon which it is believed that a fee greater than 25% of

the total fee is justified; and that the client has the right to talk about the proposed division of fee and if he disagrees with the proposed division of fee, that he has the right to seek another lawyer.

3. Any attorney who does not have primary responsibility for a matter which is the subject of this Rule and who charges a fee in excess of 25% shall forward to The Florida Bar a copy of the contract of employment involving the division of fee. Such counsel shall also keep in a separate file in his office, copies of any and all such contracts. Each contract shall be kept for a period of six years from the date of such contract. Such contracts and records and information regarding representation undertaken with respect to such contracts shall be made available to The Florida Bar upon reasonable request for review to determine whether there has been any violation of this Rule.

Comments to Academy's Proposal regarding Division of Fees:
This rule on "referral fees" is consistent with the philosophy of the rules of professional responsibility by defining generally the attorney's responsibility in regard to the division of fee (it shall be "in proportion to the services and responsibilities undertaken by each lawyer") and puts the responsibility on the attorney to comply with the rule. The Academy's proposal returns to the "old" concept of basing the fee on the value of time and responsibility and provides both definitional and auditing teeth to see that it is followed. The Academy's alternative proposal would allow counsel to charge more than 25% but makes it clear that in excess of that amount would be considered unreasonable unless substantial services or responsibilities of the type outlined are provided. The rule adopts the approach of the recent contingent fee regulations and Client's Bill of Rights of informing the consumer of his or her rights. Also, consistent with our traditional professional regulatory scheme for attorneys, this proposal places responsibility on the lawyer to

act responsibly and on The Florida Bar to monitor and enforce the rule. Any attorney who charges a fee in excess of 25% will be at risk if he does so without justification and there is a meaningful vehicle for The Florida Bar to audit practices and deal with abuses. Most importantly, however, this approach does **not** legitimize the charging of **any** referral fee where it is not justified, as does The Florida Bar's proposal, and cannot be used as a vehicle, as would the Bar's proposal, of legitimizing brokering with no representation for a 25% fee.

**PROPOSED MODIFICATION TO THE FLORIDA BAR
PROPOSED RULE 4-7.3 - LEGAL SERVICE INFORMATION**

4.7.3 - Legal Service Information. 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)~~ shall: [This change would make all persons advertising subject to the Rule and not limit disclosure to contingency fee cases as inexplicably proposed by the Bar].

The following provision should be added to Rule 4-7.3(d) following subsection (1) and (2):

4-7.3(d) (3) - Written communication not involving solicitation as defined in Rule 4-7.4 shall

(a) Prominently contain the statement set forth in the preceding paragraph (d)(1). Such free written information shall only be provided upon request.

(b) State the name and address of the lawyer licensed to practice law in Florida who would be responsible for the performance of the legal service in the area or areas of law advertised or involved in the potential representation and with respect to such lawyer:

(1) Who has been awarded a certificate by The Florida Bar in a relevant area of specialization, state with respect to each area **"Board Certified (area of certification) Lawyer"**.

(2) Who has not been awarded a certificate of specialization in an area advertised or involved in potential representation, and such area is certified by The Florida Bar, state **"Not Certified by The Florida Bar in (area of certification)**.

(3) Who is not Board Certified and does not meet the qualifications for eligibility to become Board Certified in an area certifiable by The Florida Bar which is advertised or involved in the potential representation, state: **"Not qualified to be certified by The Florida Bar in (area of certification)."**

Such statement or statements must be displayed at the top of each page of the written communication in type one size larger than the largest type used in the written communication.

(c) State that the lawyer sending the communication or who is the subject of the communication may not handle the representation or may associate counsel outside his law firm if such lawyer frequently associates other counsel or reasonably believes other counsel may be associated in a matter which is a subject of the written advertisement.

(d) Prominently display in the last paragraph of such communication in a manner that is easily seen or understood by the prospective consumer that:

"This letter is an advertisement. Lawyers are not allowed to write you about a specific matter of representation in which you already have a lawyer. Also, you should not be written by a lawyer if you have made it known to him that you do not want to receive such communications. Any communication from a lawyer

should not cause you duress, embarrassment or undue inconvenience and no lawyer should directly call or speak to you about representation unless requested by you or your representative or unless you have a previous relationship with the lawyer. If you have any objection to this communication or if you have been contacted by a lawyer in a manner you think is improper or infringes on your rights, you should report the matter to The Florida Bar at its toll free number established for this purpose: 1-800-342-8060."

Comments to Academy's Proposed Modifications to Rule 4-7.3:

The Special Commission and The Florida Bar identified the problem they were trying to deal with as "brokering" of cases by attorneys who do not provide actual representation or who thereafter shop the case for the largest referral fee. Yet, The Bar's proposals do nothing to solve this problem and, instead, authorize a 25% fee for this very practice. The Bar's proposal regarding division of fees will only serve to exacerbate the potential abuse of direct mail communication which is now authorized under Rule 4-7.4. The Bar's proposed amendments to Rule 4-7.3 address disclosures for television, radio and display [which we submit are inadequate and tepid within present First Amendment guidelines and so general as to apply to Martindale-Hubbell listings]¹ and include **no** disclosure requirements for

¹ Our Response has been limited to the inquiries made by the Court at oral argument and we have not addressed the inadequacies and problems presented by the Bar's proposed "disclosure" requirements for television, radio and other media advertising. The Bar's approach of requiring advertisers to tell potential consumers about the availability of free information regarding qualifications and experience will very likely serve as a vehicle for follow-up solicitation by means of slick brochures promoting the lawyer. It is respectfully submitted that what is desperately needed is for the Bar to require meaningful disclosures to avoid deception of the public at the point of first contact, i.e. television, radio or display message. This could be accomplished by requiring that the type of disclosures proposed herein for written communications be applicable to all media or display advertisements. In that regard, we would submit that at least the disclosures proposed in the Academy's suggested Rule 4-7.3(d)(3)d-(c) be required for all public advertisements.

"permissible" direct mail solicitation - - which is the most intrusive and potentially abusive means of advertising. [The only required disclosure is it must state "Advertisement." See Rule 4-7.3(b)].

The United States Supreme Court has made it clear that the Bar can constitutionally institute disclosure requirements that "are reasonably related to the State's interest in preventing deception of consumers". Zauder v. Office of Disciplinary Council of the Supreme Court of Ohio, 105 S. Ct. 2265, 2282 (1985). Representing oneself as a trial lawyer to a prospective client when in fact the lawyer will not personally handle the case or, for that matter, may have never even tried a case, certainly constitutes an area involving "the possibility of deception [which is] self-evident" and subject to meaningful disclosure. Zauder, supra at 2283. Furthermore, although some courts have disallowed absolute bans on direct mailing by attorneys, they have recognized it is appropriate to establish procedures for such "in-person solicitations" which minimize the potentially deceptive or intrusive effects. See Adams v. Attorney Registration and Disciplinary Commission, 801 F.2d 968, 973-74 (7th Cir. 1986); See, generally, Ohralik v. Ohio State Bar Ass'n, 98 S.Ct. 1912 (1978).

The Academy submits that the very real spectre of injured consumers being inundated with written solicitations from lawyers is offensive to the public and the profession. If this practice cannot be prohibited, the Bar certainly has a public obligation to closely monitor such practices to assure they are not unduly intrusive or deceptive. The proposed disclosures for direct mail communications would avoid misleading or disceptive advertising by attorneys who intend to "broker" cases; would require disclosure of the qualifications of the attorney who will actually handle the business; would provide basic information to the consumer at the point of first contact regarding his rights vis-a-vis the advertising lawyer; and would advise the consumer

of his right to communicate with the Bar in order that the Bar can carry out its responsibility of policing such activities and making a record for future reference in reviewing and regulating such practices.

CONCLUSION

The Academy takes no pride of authorship in these alternative proposals and recognizes that further modifications and additional provisions may be appropriate. Indeed, the Academy would urge a further review of the rules regulating advertising and that the Bar employ all the tools permissible within the parameters of the First Amendment to assure the public purposes supposedly served by attorney advertising are maximized and abuses curtailed. It is respectfully submitted that these alternative proposals are more consistent with the historic philosophy of the rules of professional conduct for attorneys and better serve the notion that lawyers are officers of the Court and that the Bar, not the trial courts, should serve as the Court's arm to assure good faith compliance with the Court's rules. We also believe that rules along these lines will help solve, not exacerbate, the real problems we are facing.

Respectfully Submitted,

**THE ACADEMY OF FLORIDA TRIAL
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Joseph J. Reiter, President, The Florida Bar, 2000 Palm Beach Lakes Blvd., Suite 800, West Palm Beach, Florida 33409; Ray Ferrero, Jr., President-elect, The Florida Bar, P. O. Box 14604, Ft. Lauderdale, Florida 33302; Ben L. Bryan, Jr., Chairman, Rules and Bylaws Committee, P. O. Box 1000, Ft. Pierce, Florida 33454; George A. Dietz, Chairman, Disciplinary Procedures Committee, 1550 Ringling Blvd., Sarasota, Florida 33577; John R. Beranek, Chairman, Contingent Fees & Referral Practices Commission, 501 S. Flagler Drive, Suite 503, West Palm Beach, Florida 33401; John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida 32301; John A. Boggs, Director of Lawyer Regulation, The Florida Bar, Tallahassee, Florida 32301; Sidney A. Stubbs, Jr., Chairman, Committee to Review, P. O. Drawer E, West Palm Beach, Florida 33402; Thomas M. Ervin, Jr., Esquire, 305 S. Gadsden Street, Tallahassee, Florida 32301; Marcia K. Cypen, Attorney, 7900 N. W. 27th Avenue, Suite 210, Miami, Florida 33122; Bill Wagner, Esquire, Wagner, Cunningham, Vaughan & McLaughlin, 708 Jackson Street, Tampa, Florida 33602; Larry D. Beltz, Esquire and Steven C. Ruth, Esquire, P. O. Box 16008, St. Petersburg, Florida 33733; Henry P. Trawick, Jr., Esquire, P. O. Box 4019, Sarasota, Florida 33578; Joseph D. Magri, First Assistant United States Attorney, P. O. Box 600, Jacksonville, Florida 32201; Lawrence H. Sharf, Special Counsel, Executive Division, United States Attorney's Office, Southern District, 155 S. Miami Avenue, Suite 700, Miami, Florida 33130; Mary Ellen Bateman, UPL Counsel, The Florida Bar, Tallahassee, Florida 32301; Patricia S. Etkin, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Miami, Florida 33131; George dePozsgay, Co-Bar Counsel, The Florida Bar, Suite 210, 2950 S.W. 27th Avenue, Miami, Florida 33133; John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301; Rhea P. Grossman, Attorney, 2710 Douglas Road, Miami, Florida 33125; Michael E. Allen, Public

Defender, P. O. Box 671; Tallahassee, Florida 32302; Steven L. Bolotin, Assistant Public Defender, P. O. Box 1640, Bartow, Florida 33830; Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32301; Norma J. Mungenast, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; Peter J. Hurtgen, Esquire, Claudia B. Dubocq, Attorney, 3200 Miami Center, Miami, Florida 33131; Charles F. McClamma, Esquire, Koger Executive Center, Turner Building, Room 100, 2586 Seagate Drive, Tallahassee, Florida 32399-2171; Robert D. Klausner, Esquire, Pelzner, Schwedock, Finkelstein & Klausner, 1922 Tyler Street, Hollywood, Florida 33020, by U. S. mail, this 18th day of June, 1987.


Attorney