The Florida Senate

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Committee on Judiciary Senator Daniel Webster, Chair

LAWYER ADVERTISING

SUMMARY

In Florida, lawyer advertising is regulated by both state statute and Rules of the Florida Bar. Statutory authority prohibits and provides a criminal penalty for lawyers who engage in direct solicitation. Regarding state bar rules, Florida Bar Rules are generally considered to be more restrictive than the Model Rules, which have been adopted in the majority of jurisdictions. Though the Florida Bar is proposing amendments to its rules, these changes appear to be primarily technical. Of the more substantive proposals, most notable are an extension of the 30-day ban on direct mail to criminal and traffic infraction actions and a clarification of the safe harbor provision to encourage lawyers to file advertisements in advance of publication. While the court recognizes lawyer advertising as commercial speech worthy of constitutional protection, regulations and restrictions are permissible where they meet the *Central Hudson* test. In 1995, the U.S. Supreme Court upheld the Florida Bar Rule 30-day ban on direct mail in wrongful death and personal injury cases. Studies on public perceptions regarding lawyer advertising reveal that while the public has generally negative views toward lawyer advertising, permitting lawyer advertising is preferable to banning it entirely. However, more invasive forms of advertising, such as direct contact and solicitation, are strongly disfavored.

BACKGROUND

History of Lawyer Advertising

Under English common law, although solicitation was considered poor etiquette, it remained largely unregulated. Informally, the practice was widely shunned within the legal profession, but standards were never codified into law. The American Bar Association (A.B.A.) did, however, codify these standards within the larger context of lawyer ethics, through its publication of the A.B.A. Canons of Professional Ethics of 1908. This was followed by the A.B.A.'s creation of the Committee on Professional Ethics and Grievances, charged with issuing informal opinions, some opposing lawyer advertising.[1] At the state level, the Alabama Bar Association was the first to establish a statewide code of ethics in 1887, some of which the A.B.A. incorporated into its Canons in 1908. The Alabama Bar prohibited solicitation of attorney services, but authorized newspaper and circular advertising, as well as business cards.[2]

The Supreme Court in the 1942 case of *Valentine v. Chrestensen*[3] ruled that commercial speech could be restricted even when combined with political content. Other decisions affirmed this ruling, such as in *Breard v. City of Alexandria*, which reiterated that first amendment freedoms are restricted for commercial speech.[4] The A.B.A. adopted the Model Code of Professional Responsibility in 1969, which specifically addressed and prohibited attorney advertising in the name of the public interest.[5] In 1983, the A.B.A. adopted the Model Rules, which were thought to provide a cleaner set of directives than did the previous system of Canons and Disciplinary Rules found in the Model Code.

Most jurisdictions have adopted the A.B.A.'s Model Rules. Oregon, Nebraska, Ohio, New York, and Rhode Island still follow the Model Code, although Oregon is changing to a Model Rule state. A minority of states, specifically Iowa, Wyoming, Nevada, California, Texas, Kentucky, Maine, Georgia, and Florida, have adopted their own rules.

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[1] Gregory H. Bowers & Otis H. Stephens, Jr., *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 Mem. St. U.L.Rev. 221, 230 (1987).
[2] Jack P. Sahl, *The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment*, 34 STMLJ 795, 830 (2003).
[3] 316 U.S. 52 (1942).
[4] 341 U.S. 622 (1951).
[5] Bowers and Stephens, *supra* note 1, at 232.

Constitutional Issues

Section 3 of Article II of the Florida Constitution, the Separation of Powers clause, provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Section 15 of Article V of the Florida Constitution grants exclusive jurisdiction to the Florida Supreme Court to regulate both admission to the practice of law and the discipline of those admitted to practice. This provision has been interpreted by the courts to have a very narrow application. In *Simms v. State*,[6] the court indicated that the separation of powers clause does not categorize every governmental activity as attaching exclusively to that single branch of government. In *Pace v. State*,[7] the Florida Supreme Court specifically found that an anti-legal solicitation statute passed constitutional muster, as an appropriate subject for the legislature to regulate, under its broad police powers.[8]

The court in *State v. Palmer*[9] similarly ruled that legislating the unlicensed practice of law is not a violation of the separation of powers doctrine. The court reiterated the position that the state constitution grants exclusive jurisdiction to the judiciary only over the admission to practice law, and not over other such areas related to practice.[10]

Case Law on Commercial Speech

In *Bates v. State Bar of Arizona*, the U.S. Supreme Court expressly classified lawyer advertising as commercial speech, serving an informational function, and afforded it significant First Amendment protection for the first time, provided it is truthful.[11] Although the appellant's speech was largely economic and could not be categorized as traditionally protected political speech, the court determined, "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."[12] Here, where the appellant's newspaper advertising referenced services provided by a "legal clinic," offered "very reasonable" prices, and did not specify that a name change can occur without legal assistance, the court held that this commercial content fell within the ambit of constitutionally protected speech.[13]

This protection did not extend to in-person solicitation, however, the court determined in *Ohralik v. Ohio State Bar Association*.[14] This case, involving direct solicitation by an attorney visiting an accident victim's hospital room, constituted impermissible overreaching, and that which could properly be prohibited by the state to prevent public harm. The court drew a clear distinction between the facts in *Bates* and those of the instant case (newspaper advertising versus in-person solicitation) in applying a lower level of scrutiny.[15]

Up to this point, the prevention of public harm was determined by the court to be a justifiable state interest. A state restriction on lawyer advertising based on a more specific perceived invasion of privacy was introduced as a plausible state interest in *In Re Primus* in 1978, which involved solicitation by mail.[16] In this case, an attorney was charged with violating disciplinary rules for sending a woman a letter which specified that the ACLU would provide legal counsel on her behalf, where she was sterilized as a condition of receiving welfare.[17] The court found that a single letter, without subsequent contact, did not constitute overreaching or an "appreciable invasion of privacy."[18]

Central Hudson Gas and Electric Corporation v. Public Service Commission of N.Y. established a four-prong test, applicable to the court's intermediate level scrutiny for commercial speech, which is:

> (1) Whether the speech is false or misleading and if so, it can be prohibited;
> (2) Whether the state has a substantial interest in restricting the speech and if not, the inquiry ends;
> (3) Whether the regulation materially and directly advances the state interest; and
> (4) Whether the restriction is narrowly drawn.[19]

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[6] 641 So.2d 957 (Fla. 3rd DCA 1994).
[7] 368 So.2d 340 (Fla. 1979).
[8] *See* s. 877.02(1), F.S., which prohibits certain forms of legal solicitation.
[9] 791 So.2d 1181 (Fla. 1st DCA 2001).
[10] *See* s. 454.31, F.S., which provides sanctions for disbarred or suspended attorneys who continue to practice law.
[11] 433 U.S. 350 (1977).
[12] *See Bates*, 433 U.S. at 364.
[13] *See Bates*, 433 U.S. at 381.
[14] 436 U.S. 447 (1978).
[15] *See Ohralik*, 436 U.S. at 457.
[16] 436 U.S. 412 (1978).
[17] *Id*.
[18] *Id* at 435.
[19] 447 U.S. 557, 566 (1980).

While recognizing that the constitution grants a lesser protection to commercial speech than to other constitutionally protected speech, the court indicates a special inquiry for regulations that entirely suppress commercial speech, in that the blanket ban could unduly screen an underlying governmental policy from the public eye.[20]

The court in *Zauderer* examined a fact situation that involved a lawyer newspaper advertisement targeted to a specific class of plaintiff, and held that this type of specific advertising, in and of itself, was constitutionally protected.[21] In so doing, the court applied and upheld the *Central Hudson* inquiry.

The *Bates* court's more liberal approach toward finding lawyer advertising constitutionally protected was explicitly abandoned in *Florida Bar v. Went For It, Inc*.[22] The U.S. Supreme Court upheld a Florida Bar ban on plaintiff attorneys sending direct mail to victims or their relatives for 30 days after an accident or disaster. In applying the *Central Hudson* test, the court held that the state properly had a substantial interest in protecting citizens from intrusive and invasive attorney solicitation, and that the 30-day ban was reasonably drawn. As pertains specifically to Florida, the court noted, lawyer solicitation is granted a wide berth, through authorization to advertise on prime-time television, radio, newspapers and other media, rent billboards, send unsolicited mail to the general population, and take out telephone directory ads.[23]

The *Florida Bar v. Went For It, Inc.* case is the last case, to date, that involved U.S. Supreme Court review of restrictions on lawyer advertising. Other cases that apply to non-legal types of advertising have cited *Florida Bar*, however. The Fourth Circuit Federal Court in *Ficker v. Curran* refused to apply the approach in *Florida Bar*, citing that the polling data that the court relied on as proof of public harm was not examined for accuracy, and that this case differed by virtue of involving a criminal defendant, not a grieving accident victim.[24] Other cases have cited the *Florida Bar* case as good law, but have distinguished the fact scenario, such as in *Beckwith v. Department of Business and Professional Regulation*.[25] Therefore, it remains to be seen whether courts are moving toward a more restrictive approach to lawyer advertising.

METHODOLOGY

Committee staff attended the 2004 Florida Bar Task Force on Advertising meetings by phone conference and reviewed meeting summaries. Staff also researched Florida Bar Rules and compared them to proposed changes. Additionally, staff studied surveys on public perception toward lawyer advertising. Finally, staff compared Florida Bar rules to other jurisdictions.

FINDINGS

Florida Bar Rules

In 1989, the Florida Bar finalized 2 years of research on the effects of lawyer advertising on public opinion. The Bar invited comment at public hearings, commissioned surveys, and reviewed other forms of public commentary. Acting on these findings, the Bar proposed a major overhaul of its rules, which was subsequently adopted by the Florida Supreme Court in 1990.[26] The rules have not been substantially revised to date. Key rules are summarized below.

General Rules

In general, Florida Bar Rules authorize a broad range of forms of advertising, including print media, billboard, radio, and television and computer communication.[27] Lawyers are expressly precluded from making false, misleading, deceptive or unfair statements.[28] Testimonials are prohibited.[29] Lawyers advertising fees must honor them for 1 year after publication for yellow page ads, or at least 90 days unless otherwise specified in the ad.[30] Required language must be no smaller than one-fourth of the largest type in the ad.[31] Certain images are permitted, including the scales of justice, Lady Justice, a gavel, or a photograph of the head and shoulders of the lawyer or lawyers who are members of or employed by the firm against a plain, solid color background or a plain unadorned set of law books.[32]

Except for lawyer referral service advertisements, all ads must include the following disclosure:

[20] *Central Hudson*, 447 U.S. at 566.
[21] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).
[22] 515 U.S. 618 (1995).
[23] 515 U.S. 618, 633-634 (1995).
[24] 119 F.3d 1150 (4th Cir. 1997).
[25] 667 So.2d 450 (Fla. 1st DCA 1996).
[26] *See Florida Bar v. Went For It, Inc.*, 515 U.S. at 620.
[27] R. Regulating Fla. Bar, 4-7.1(a).
[28] R. Regulating Fla. Bar, 4-7.2(b).
[29] *Id.*
[30] R. Regulating Fla. Bar, 4-7.2(c)(5).
[31] R. Regulating Fla. Bar 4-7.2(c)(11).
[32] R. Regulating Fla. Bar 4-7.2(c)(11)(K).

> The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.[33]

Direct Mailings

Other than with family members or those with whom a prior professional relationship existed, lawyers are precluded from having direct contact with prospective clients.[34] Lawyers are also prohibited from sending direct, targeted mailings to those involved in a personal injury or wrongful death action, until 30 days have passed since the accident or disaster.[35] Written communications are subject to other provisions regarding required information and prohibited statements.[36] A copy of each direct mailing is required to be filed with the Bar's standing committee on advertising before or concurrent to the mailing.[37] Additionally, the lawyer must retain a copy of each communication for 3 years.[38]

Electronic Advertisements

All electronic advertisements except for computer based ads are subject to the provisions on required information and prohibited statements.[39] Television and radio ads are precluded from containing deceptive, misleading, manipulative, or confusing information.[40] Recognizable spokespersons are prohibited from appearing in electronic ads.[41] If a spokesperson is used, a disclosure must appear identifying the person as a spokesperson.[42] Regarding computer communications, email communications are restricted, subject to the same requirements as for that of direct print mailings.[43]

Review of Advertisements

All advertisements, whether through public media, direct mail, or email, are subject to review by the standing committee on advertising.[44] A lawyer is required to file a copy of each ad with the committee prior to or concurrent with its first dissemination.[45] To receive an advisory opinion by the committee, the copy must be filed at least 15 days before dissemination.[46] The committee will respond within 15 days to indicate approval or to communicate that additional time is needed; otherwise, the ad is deemed approved.[47] If the committee determines that the ad does not comply with Bar Rules, it is required to advise the lawyer that dissemination or continued dissemination may result in professional discipline.[48] Lawyers are required to maintain copies of all ads for 3 years after their final dissemination.[49] Certain ads are exempt from filing and review, including public service announcements as well as "Any advertisement in any of the public media, including the yellow pages of telephone directories, that contains neither illustrations nor information other than permissible content of advertisements set forth elsewhere in this subchapter."[50]

Public's Perception of Lawyer Advertising

Studies have been commissioned to measure public perception toward lawyer advertising.

Florida Magid Study (1987)

One study cited in *Florida Bar v. Went For It, Inc*. involved a survey sent to a random sample of Floridians. Fifty-four percent of those queried considered contacting persons after accidents or other tragic events a violation of privacy. Among actual recipients of direct-mail advertising from lawyers, 45 percent believed direct-mail solicitation to be invasive of privacy.[51] As noted above, the studies that the court relied upon have been questioned by the court in *Ficker*, as well as in a 1997 law review article, which specifically challenges the validity of the studies based on a lack of information regarding sample size or selection.[52]

Iowa Yellow Pages Study (1988)

The Iowa Bar Association commissioned a study on lawyer advertising in the yellow pages. The survey of about 100 participants yielded the following:

- Respondents felt that legal ads were not useful or informative.
- Respondents ranked more favorably ads that

[33] R. Regulating Fla. Bar 4-7.3(b).
[34] R. Regulating Fla. Bar 4-7.4(a).
[35] R. Regulating Fla. Bar 4-7.4(b)(1)(A).
[36] R. Regulating Fla. Bar 4-7.4(b)(2)(A).
[37] R. Regulating Fla. Bar 4-7.4(b)(2)(C).
[38] *Id.*
[39] R. Regulating Fla. Bar 4-7.5(a).
[40] R. Regulating Fla. Bar 4-7.5(b)(1)(A).
[41] R. Regulating Fla. Bar 4-7.5(b)(1)(B).
[42] R. Regulating Fla. Bar 4-7.5(b)(2)(B).
[43] R. Regulating Fla. Bar 4-7.6(c).
[44] R. Regulating Fla. Bar 4-7.7(a).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] R. Regulating Fla. Bar 4-7.7(e).
[49] R. Regulating Fla. Bar 4-7.7(h).
[50] R. Regulating Fla. Bar 4-7.8(a) and (b).
[51] Magid Associates, Inc., *Attitudes & Opinions Toward Direct Mail Advertising by Attorneys* (Dec. 1987).
[52] Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc.*, 49 Ark. L.Rev. 703, 728 (1997).

list prior experience and expertise.
- Respondents ranked lawyers who advertise much lower, less experienced and less competent than those who do not.
- Respondents tended to report that they would be prejudiced as jurors if they knew that a party in a trial chose counsel based on advertising.[53]

Oklahoma Task Force Study (1994)
A study conducted by the Oklahoma Bar Association's Task Force on Lawyer Advertising and Solicitation yielded a different result than the Iowa study. Namely, the 400 respondents queried indicated overwhelmingly (92 percent) that if they were to serve as jurors knowing that a lawyer had advertised, this information would have no negative impact. Other findings include:

- On whether public confidence in the law profession is eroded by lawyer advertising, 52 percent of respondents agreed, while 42 percent disagreed.
- 41 percent approved of lawyer advertising in the yellow pages, compared to 24 percent who did not approve.
- 59 percent disapproved of television ads.
- 54 percent disliked billboard advertising.
- 86 percent disapproved of direct mail advertising.
- 80 percent disapproved of advertising by direct personal contact.
- 85 percent believed lawyers should be allowed to advertise.[54]

Florida Penn + Schoen Study (1995)
The Florida Bar commissioned a study in 1995 to examine public perceptions of attorneys. In addition to forming focus groups, researchers also identified a group of 400 Floridians who had had contact with attorneys in the past year. The research proceeded in two phases. First, those who responded both favorably and unfavorably toward attorneys were removed from the sample. The 28 percent remaining who had responded that they were ambivalent toward attorneys became the key sample of the study. Of these, 43 percent responded that advertising has negatively impacted their impressions of attorneys. Further, although only 26 percent said that they would choose a lawyer who advertises, a full 77 percent believed that lawyers should still be allowed to advertise.[55]

Lawyer Advertising at the Crossroads (1995)
Throughout 1994, the A.B.A. Commission on Advertising held hearings and requested written comment on lawyer advertising. In its final report, the commission expressed concern with wide disparities in previous studies. Surveys consistently explored perceptions toward advertising in general, but did not distinguish the ads by content and style. Additionally, when asked open-ended questions about lawyer image, very few faulted lawyer advertising. The commission conducted its own study through interviews and surveys in a shopping mall setting. Unlike prior research, this study incorporated a content-based analysis. After completing questionnaires rating lawyer image based on honesty, dignity, and ethics, respondents were shown different television commercials. Some commercials had won awards for dignity. Others showed a lawyer simply talking about a client's needs, known as the "talking heads" format. The last group of commercials was humorous and sensational. Researchers found the following:

- The public ranks lawyers higher on qualities such as intelligence and professional demeanor than for honesty, care, and greed.
- Lawyers who advertise in ways that are more stylish than sensational are ranked more favorably.
- A correlation exists between how invasive an advertisement is and how well it is received by the public.[56]

North Carolina Survey (1996)
In 1996, the North Carolina State Bar commissioned a telephone survey on attitudes toward lawyer advertising. Out of 647 randomly-selected participants, about one-third had received direct-mail solicitations from lawyers. Findings included the following:

- More participants responded negatively than positively to queries about attorneys who use direct-mail advertising (39 to 32 percent ratio);
- 53 percent considered unsolicited letters to be invasive of privacy; and
- More respondents considered direct mail contact with those involved in serious traffic

[53] Magid Associates, Inc., *Consumer Attitudes Toward Yellow Pages Advertising*, May 1988.
[54] *Preliminary Report Of Task Force On LawyerAdvertising*, Oklahoma Bar Association, November 1994.
[55] Penn + Schoen Associates, *Perceptions of Lawyers: The Client's View, A Study For The Florida Bar* (June 1995).
[56] American Bar Association Commission On Advertising, *The Impact Of Advertising On The Image Of Lawyers, A Mall Intercept Study*, 1995.

> offenses and financial situations to be invasive of privacy than direct mail contact with those involved in an accident.[57]

The State Bar concluded that its study resulted in similar findings to the Magid survey.

Arkansas Study (1996)

The Arkansas Bar Association commissioned a study of 600 respondents contacted by telephone. Results yielded the following:

- 25 percent supported prohibition of lawyer advertising.
- 66 percent believed it is proper for lawyers to advertise.
- Yellow page ads are the most acceptable, and direct mail the least, particularly when initiated by the occurrence of an accident.
- 75 percent responded that lawyer advertising helps people find legal assistance when they need it.[58]

Florida Bar Rules Compared to Other States

It is difficult to rank Florida with other states in terms of the restrictiveness of its Bar Rules. The majority of state bars base their lawyer advertising rules on the Model Rules of Professional Conduct, drafted by the A.B.A.[59] As Florida Bar Rules are considered more restrictive than the Model Rules, Florida is generally thought to have some of the most restrictive rules in the country. Rules that set it apart include its 30-day wait for direct mail in personal injury and wrongful death cases, labeling requirement, and stringent filing and screening review process.[60] Another noted feature is that the Florida Bar Rules "severely limit creative executional devices (such as dramatizations, testimonials, music, sound effects, etc.), in an effort to ensure informational as opposed to emotional advertising messages."[61]

Iowa Bar Rules

The Iowa Bar limits most ads to the format commonly known as tombstone advertising,[62] so Iowa may in fact be more restrictive than Florida, though Florida appears to follow as a close second.[63] Emotional appeals are prohibited.[64] Advertising in print media must be no smaller than a certain font, and the rules encourage informational, rather than promotional advertising. Informational language includes the lawyer's name, address, telephone number, fields of practice, birth information, bar admission information, schools attended, offices held, military service, legal authorships, legal teaching positions, memberships in bar associations and legal societies, and technical and professional licenses.[65] This is considered to be a "safe harbor" provision, and ads containing only these items are granted a presumption of approval.

Solicitation is discouraged, as is compensation for recommendations.[66] In fact, the Rules provide a blanket prohibition on in-person solicitation.[67] Iowa requires prior review and approval of direct mail solicitations,[68] and these must be clearly labeled as advertisements.[69] Specific to electronic media, narration is allowed through a single, non-dramatic voice without background sound. For television, no visual display other than that already authorized in print is allowed.[70]

Regardless of its form, all communications must be accompanied by the following disclosure:

> The determination of the need for legal services and the choice of a lawyer are

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[57] Noel Dunivant, *North Carolinian's Attitudes Toward Advertising By Lawyers*, North Carolina State Bar (Fall 1996).
[58] Miller Research Group, *Public Attitudes Toward Lawyer Advertising*, Arkansas Bar Association, April 1996.
[59] Phone Conference with Will Hornsby, Staff Counsel with the American Bar Association Division for Legal Services, on August 19, 2004.
[60] *Id.*
[61] Dr. Cathy J. Cobb-Walgren and Dr. Kenneth L. Bernhardt, *Consumer Reactions To Legal Services Advertising In The State Of Georgia*, The State Bar Of Georgia, October 1995, 7.
[62] A tombstone format generally means a display of truthful, factual information in plain type, without adornment and unaccompanied by color, opinion, artwork, or logos.
[63] "The Iowa State Bar Association imposes the most stringent restrictions on lawyer advertising and solicitation. Iowa imposes labeling, copying, recordkeeping, support and disclaimer restrictions. It strictly enforces advertising by establishing a committee on professional ethics which reviews all advertisements before they are disseminated. The committee also decides whether advertisements are in any way false or misleading. The Florida Bar follows a close second on lawyer advertising and solicitation restrictions. Florida's bar also imposes restrictions on labeling, copying, recordkeeping, providing support and disclaimers on advertising. Florida's greatest restriction comes in the form of a direct mail restriction which imposes a thirty (30) day waiting period on direct mail advertisements to accident victims," Oklahoma Bar Association, *Preliminary Report Of Task Force On Lawyer Advertising And Solicitation*, November 1994.
[64] R. Regulating Iowa Bar DR 2-101(A).
[65] R. Regulating Iowa Bar DR 2-101(B)(2) and (C).
[66] R. Regulating Iowa Bar EC 2-9.
[67] R. Regulating Iowa Bar DR 2-101(4)(a).
[68] R. Regulating Iowa Bar DR 2-101(4)(b).
[69] R. Regulating Iowa Bar DR 2-101(4)(d).
[70] R. Regulating Iowa Bar DR 2-101(5).

extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise.[71]

Texas Bar Rules

The Texas Bar prohibits the following:

- False or misleading communications, including statements that compare the lawyer's services with other lawyer services, unless the comparison can be verified;[72]
- Advertisements that discuss results or contain client endorsements;[73]
- In-person or telephone solicitation for pecuniary gain;[74]
- Advertisements that indicate that the lawyer is a specialist;[75] and
- Advertisements that contain actors depicting lawyers or narrators that are not actually lawyers with the firm.[76]

Moreover, an attorney is required to keep a copy of an ad for 4 years after its last dissemination.[77] A written solicitation is required to be labeled as an advertisement.[78] Attorneys are generally required to file a copy of an ad intended for public media or written solicitation with the State Bar concurrent to its distribution.[79] Filing is not required for tombstone advertisements, including such items as firm identification and contact information, office hours, dates and admission to bars, credit card acceptance, fees, fields of practice, and firm charitable sponsorships.[80] Submission for an advance review is authorized.[81] The Lawyer Advertising and Solicitation Review Committee is required to complete its review within 25 days, or the ad is considered approved.[82]

Texas Bar Rules are considered to be on a fairly even par with those of Florida.[83]

New York Bar Rules

Although New York follows the Model Code, and is generally considered to be moderate in restrictions, its bar rules on lawyer advertising address fees in a very comprehensive manner. The following mention of fees is authorized in advertising:

- Fees for initial consultation;
- Contingent fee rates in civil matters when accompanied by a statement disclosing whether percentages are computed before or after deduction of costs, disbursements and other litigation expenses, and that where there is no recovery, the client remains liable for litigation expenses, including court costs and disbursements;
- Range of fees for legal and non-legal services, provided that the public has access free of charge to a written statement clearly describing the scope of each advertised service, hourly rates and fixed fees for specified legal and non-legal services.[84]

In general, if a lawyer or law firm advertises a range of fees or an hourly rate, no more than the fee advertised may be charged.[85] For print published more than monthly, the lawyer must honor the fee represented for at least 30 days after publication. If there is no set date for republication, the lawyer must honor the fee represented for at least 90 days. For any other types of fee advertising, the lawyer is bound by that representation for 30 days.[86]

Indiana Bar Rules

Indiana authorizes advertising as long as it is done in a "dignified" manner.[87]

Florida Bar Proposed Amendments to the Rules

During the summer and fall of 2004, the Florida Bar Advertising Task Force held a series of meetings to consider changes to the Florida Bar Rules. Key recommendations include the following:

- Clarifies that direct solicitation provisions do not apply to communications between lawyers, between a lawyer and the lawyer's own family members or current and former clients, or to communications provided pursuant to a prospective client's request;
- Adds that the general prohibition against conduct involving dishonesty or

[71] R. Regulating Iowa Bar DR 2-101(A).
[72] R. Regulating Texas Bar 7.02(3).
[73] R. Regulating Texas Bar 7.02, Comment.
[74] R. Regulating Texas Bar 7.03(a).
[75] R. Regulating Texas Bar 7.04(a).
[76] R. Regulating Texas Bar 7.04(g).
[77] R. Regulating Texas Bar 7.04(f).
[78] R. Regulating Texas Bar 7.05(b).
[79] R. Regulating Texas Bar 7.07(a) and (b).
[80] R. Regulating Texas Bar 7.07(d).
[81] R. Regulating Texas Bar 7.07(c).
[82] R. Regulating Texas Bar 7.07, Comment.
[83] Phone Conference with Will Hornsby, *supra* note 59.
[84] R. Regulating N.Y. Bar DR 2-101.
[85] R. Regulating N.Y. Bar DR 2-101(G).
[86] R. Regulating N.Y. Bar DR 2-101.
[87] R. Regulating Indiana Bar 7.1(b).

misrepresentation applies to all communications by a lawyer;
- Deletes requirement that qualifying language appear with a local telephone number where the lawyer does not have a local bona fide office;
- Adds to permissible content of advertisements military service, punctuation marks and common typographical marks, statue of liberty, the American flag or eagle, the State of Florida flag, a courthouse, columns and a diploma;
- Deletes the prohibition against advertising for cases in an area of practice that the lawyer does not currently practice in;
- Deletes requirement that required information appear in type size proportional to the largest type and leaves in the requirement that all required information be clearly legible;
- Deletes prohibition against unfair statements or claims;
- Proposes expanding the current prohibition on direct mail for 30 days to criminal cases or to both criminal cases and civil traffic infractions;
- Adds that examples of computer-accessed communications include pop-ups and banner ads;
- Adds that filings must be made to the Florida Bar address; and
- Adds commentary regarding a safe harbor to encourage lawyers to file their ads and receive approval in advance of using the ads.

Additionally, the Board of Governors requested that the Task Force draft rules on prior review. Two options were proposed, which would require:

- All television and radio advertisements to be filed for review at least 15 days prior to dissemination; or
- All advertisements intended to be sent unsolicited to prospective clients to be filed for review at least 15 days prior to dissemination.

As is currently the case, the Florida Bar will contact the filer within 15 days to indicate approval or to communicate that additional time is needed; otherwise, the ad is deemed approved.[88]

Florida Statute on Anti-Solicitation
Section 877.02(1), F.S., provides:

> It shall be unlawful for any person or her or his agent, employee or any person acting on her or his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, or to make it a business to solicit or procure such business, retainers or agreements; provided, however, that nothing herein shall prohibit or be applicable to banks, trust companies, lawyer reference services, legal aid associations, lay collection agencies, railroad companies, insurance companies and agencies, and real estate companies and agencies, in the conduct of their lawful businesses, and in connection therewith and incidental thereto forwarding legal matters to attorneys at law when such forwarding is authorized by the customers or clients of said businesses and is done pursuant to the canons of legal ethics as pronounced by the Supreme Court of Florida.

A violation constitutes a first-degree misdemeanor, punishable by up to 1 year in jail and a $1,000 fine.[89]

RECOMMENDATIONS

Advertising does appear to be linked to a negative lawyer image. Still, most studies conclude that the public prefers to allow lawyer advertising over disallowing it. This is particularly so with more minimally invasive forms of advertising. State statute already criminalizes direct solicitation, and the Florida Bar restricts direct mailings, both through requiring a 30-day wait in wrongful death and personal injury cases, as well as requiring a specific disclosure. The Florida Bar does not have mandatory prior review in place as does Utah. However, as lawyers are subject to disciplinary action for failing to comply with Bar rules, lawyers have a strong incentive to submit advertisements prior to publication. Short of implementing a complete ban on lawyer advertising, which would likely be constitutionally suspect, it appears that lawyers are considerably regulated in comparison to other jurisdictions, both statutorily and by the state bar.

[88] The Task Force has rejected these prior review proposals; however, the Board of Governors may still approve them. The Task Force expects that a final report will be made to the Florida Bar Board of Governors in the spring of 2005.

[89] Sections 877.02(3), 775.082, and 775.083, F.S.