REPORT AND RECOMMENDATIONS TO THE FLORIDA BAR BOARD OF GOVERNORS BY THE ADVERTISING TASK FORCE 2004

Respectfully submitted by the Advertising Task Force 2004

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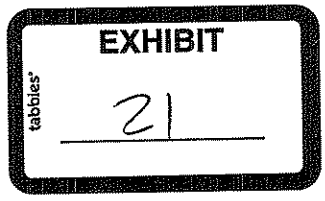

To better organize subdivision (b)(2) and delete confusing repetition, the task force recommends consolidating and deleting redundant information in the prohibition against misleading information; the proposed subdivision is numbered (c)(1).

The task force recommends deleting the term "unfair" throughout the rules because it believes the term is unclear, overbroad, and unenforceable, deleting references to "unfair" advertising in subdivision (b)(2)(E) and the comment to rule 4-7.2.

At the request of the board, the task force carefully examined subdivision (b)(1)(B), prohibiting statements that are "likely to create an unjustified expectation about results the lawyer can achieve." Bar staff reported to the task force that interpretation of this rule is one of the most difficult areas of the attorney advertising rules. The board disagrees with Standing Committee on Advertising interpretation of this rule provision more often than any other rule provision. The task force initially discussed defining "likely to create an unjustified expectation" in either the rule or the comment. The task force found the term to be unclear and incapable of adequate definition to provide guidance to Bar members. The task force ultimately determined to recommend that the rule provision be deleted and replaced with a prohibition against statements that "guarantee results" in proposed subdivision (c)(1)(H).

To better organize this rule, the task force also recommends consolidating the prohibitions against misleading illustrations and misleading visual and verbal portrayals in proposed subdivision (c)(3) [existing subdivisions (b)(3) and (c)(1)].

The task force recommends deleting the prohibition against advertising for cases in an area of practice that the lawyer does not currently practice in subdivision (b)(5). A majority of the task force believes that, although the rationale behind the rule is to address the "brokering" of cases, the regulation is overbroad and not evident from the language of the rule itself.

MEMO TO: Board of Governors of the Florida Bar

FROM: Bill Wagner, Member
Advertising Task Force, 2004

DATE: January 26, 2005

SUBJECT: **DISSENT FROM FINAL REPORT OF TASK FORCE**

THE TASK FORCE PROPOSAL SHOULD BE ADOPTED

The members of the Task Force labored long and hard to bring to the Board well considered amendments to the current Rules Regulating the Florida Bar (Rules). Overwhelmingly the proposals improve the existing Rules. While individual members of the Task Force may have preferred different results as applied to any particular proposed change, and may have preferred more or less modification of the existing rules, the final consensus reached dramatically improves on what exists today.

WHAT THIS DISSENT IS NOT

The author has participated in debate and numerous votes on issues presented to the Task Force since its first meeting on March 9, 2004. For the most part these decisions had to do with revision to specific currently existing Rules or proposals for additional Rules. Some proposals were personally favored. Some were personally opposed. On some issues, I voted on the prevailing side. On some I voted on the losing side. By far the majority of decisions were made by consensus. This dissent is not for the purpose of seeking to reverse any of those decisions now encompassed in the final report by the Task Force to the Board of Governors.

DISSENT FROM TASK FORCE POLICY FAVORING PIECEMEAL AMENDMENT OF EXISTING RULES RATHER THAN FULL REVIEW OF VIABILITY OF CURRENT RULES FORMAT AND BASIC GOVERNING POLICIES

The first basis of this dissent is from the policy adopted by the Task Force, with apparent approval of the Board and leadership, to presume that the basic concept of the need for regulation of certain advertising, the method of providing such regulation, and the goals to be accomplished by such regulation are fundamentally the same as when the Special Commission on Advertising and Solicitation (on which I served) proposed the initial Rules regulating advertising and solicitation to the Florida Supreme Court. That Court adopted the original Rules by opinion on December 21, 1990.

The Special Commission, in 1989 and 1990, took extensive testimony from many sources, gathered professional surveys and studies from many sources, and commissioned a survey of the public and a separate survey of the judiciary. The purpose was to determine to what extent advertising and solicitation should be prohibited or regulated in

order to protect the public and the justice system. The findings were influential in the decisions made in writing those first Rules and were important in sustaining the constitutional validly of those Rules in later litigation.

It would appear to a casual observer that "advertising" by lawyers is entirely different today than it was in 1990. Such was the broad conclusion of the ABA in its extensive survey of lawyer advertising. This has driven proposed amendments to the ABA Rules as late as the year 2000 and to the Florida Rules as late as last year. There has been an explosion of television and radio advertising since 1990. Yellow Page advertising has grown to the level that in many cities pages devoted to lawyers exceed one hundred. While there are vast differences of opinion about the impact of such advertising on the public and the public's perception of lawyers and the legal system, the Task Force made no effort to obtain empirical evidence either to support retention of our present system of the regulation of advertising or to support acceptance or rejection of any proposed changes. Instead the Task Force relied almost exclusively upon the unsupported opinions of the individual Task Force members. Those opinions, of necessity, were influenced to a great deal by preconceived opinions regarding advertising itself. Those favoring advertising tended to sense reasons to eliminate or reduce regulation. Those who opposed advertising tended to sense that the need existed for more regulation.

This Task Force should have, once again, sought broader empirical input about the current status of lawyer advertising and should have obtained detailed information as to the effect of advertising in other states with no regulation or substantially less advertising. In my opinion, the Florida Bar is left with little to guide its decisions except, again, the individual Board members sense of what proposed regulation might accomplish. The Florida Supreme Court will therefore potentially be left with insufficient information to make informed decisions on the Boards recommendation if there is disagreement within the Court, and there may well be an insufficient record to defend the final Rules if they are challenged in litigation.

DISSENT BASED ON FAILURE TO ESTABLISH GUIDELINES OR STANDARDS AGAINST WHICH LAWYER ADVERTISING CAN BE TESTED

Although there were frequent references in debate about our obligation to "protect the public," a lawyers "right to commercial free speech," and the need to "avoid bringing disrespect upon the bar or the court system," these phrases were usually used in argument to support or reject a proposed regulation, or, with some frequency, as an excuse to support argument that a current regulation might be retained or rejected. While several members of the Task Force urged development of guidelines before a review of existing Rules, the Task Force instead broke into sub-committees, with each sub-committee studying assigned sections of the current Rules to suggest changes. The ultimate success or failure of a proposal was not dictated by actions taken at the sub-committees level. The practical result was that many proposals for change were heard in depth only by a sub-committee and were often not even mentioned at the full committee level. Each members of the sub-committee brought a different and often varied to sub-committee meetings. Later discussions of controversial sub-committee proposals at sub-committee and full