O/a 2-17-86

SUPREME COURT OF FLORIDA

CASE NO: 67,784

THE FLORIDA BAR :

RE: AMENDMENT TO THE BYLAWS :
UNDER THE INTEGRATION RULE :

(FLORIDA CERTIFICATION PLAN) :

BRIEF IN OPPOSITION TO PROPOSED FLORIDA STANDARDS FOR CRIMINAL LAW CERTIFICATION

PAUL M. RASHKIND, ESQUIRE
Office at Bay Point
4770 Biscayne Boulevard
Suite 950
Miami, Florida 33137
Telephone: (305) 573-4400

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STATEMENT OF CASE AND FACTS

Paul M. Rashkind is an attorney licensed to practice law in Florida, New York, and the District of Columbia. He is also admitted to practice before the United States Supreme Court and numerous federal district and circuit courts. He was admitted to the Florida Bar in 1975.

Mr. Rashkind designates Criminal Law in accordance with the Florida Designation Plan.

In 1983, Mr. Rashkind applied to the National Board of Trial Advocacy for certification as a criminal trial lawyer. He satisfied their trial experience requirements and satisfactorily completed a full-day written examination, testing knowledge of criminal law and evidence. The particulars of the NBTA requirements are contained in Exhibit A of the Appendix to this Brief. Thus, in September, 1983, Mr. Rashkind was granted Board Certification as a Criminal Trial Advocate by the National Board of Trial Advocacy.

The current and proposed standards relating to certification of criminal lawyers, have a direct impact on Mr. Rashkind. The current and proposed standards, when read together with the Code of Professional Responsibility, Integration Rule and Bylaws, would prevent Mr. Rashkind and ten other

Florida lawyers from communicating to the public the truthful fact of their board certification by NBTA.

Mr. Rashkind desires that his office letterhead and business cards include words to the following effect:

> Board Certified, Criminal Trial Law,
> National Board of Trial Advocacy

Although Mr. Rashkind has never formally advertised, if he chooses to do so in the future, he would desire to include similar references in telephone directories and other advertising media which otherwise satisfy ethical precepts. Because of ethical precepts and the current and proposed certification standards, Mr. Rashkind fears disciplinary reprisal if he communicates the fact of his board certification. Thus, the public does not know of this credential. Mr. Rashkind's First Amendment rights have been and will continue to be chilled by the current and proposed standards unless revision is made to the overall regulatory scheme. A proposed revision is included in this Brief.

The heart and soul of this Brief have been borrowed, with permission, from an amicus curiae brief which was prepared and filed by the National Board of Trial Advocacy in similar litigation in another state. Due to shortages of funding and

manpower, NBTA is unable to prepare a similar brief in its own name for this proceeding. However, Mr. Rashkind is advised that NBTA intends to join his position in this litigation.

SUMMARY OF ARGUMENT

Under recent decisions of the United States Supreme Court, a state can not prohibit publication of truthful statements by lawyers about their qualifications to practice law, such as admission to the bar of other jurisdictions. Under the reasoning of these cases, the First Amendment prohibits a state from suppressing truthful publications by lawyers whose qualifications include certification by other states or by a bona fide organization, such as the National Board of Trial Advocacy.

The state regulatory scheme in Florida develops from an interaction between the Code of Professional Responsibility [DR 2-101(B)(4) and DR 2-105], the Florida Integration Rule [Article XXI], the Florida Certification Plan [Article XIX of the Bylaws Under the Integration Rule], and the Proposed Standards for Certification of Board Certified Criminal Lawyers. The interaction of these three sets of rules creates a state regulatory scheme which prohibits free speech guaranteed by the First Amendment of the United States Constitution and Article I, Section 4, of the Florida Constitution. This is so because the state regulatory scheme prohibits lawyers from publishing truthful information about

board certification granted by bona fide organizations other than the Florida Bar. Specifically, it prevents a lawyer who is board certified in Criminal Trial Law by the National Board of Trial Advocacy from publishing that truthful fact in any way.

There is nothing inherently unethical about a Florida lawyer's truthful statement that he or she is certified as a Criminal Trial Lawyer by the National Board of Trial Advocacy. A truthful statement that a lawyer has obtained a particular credential is only unethical, and may only be proscribed by the Code of Professional Responsibility, if it is false, deceptive or misleading, i.e., if the credential is spurious so that publishing it would tend to mislead members of the public. Certification by a bona fide organization, such as NBTA is a verifiable fact of obvious utility to potential consumers of legal services, and the publication of such information to the public should be encouraged, not, as it is now, prohibited by the interaction of DR 2-101(B)(4), DR 2-105 and the existing and proposed certification standards.

The governmental interest advanced by the Florida regulatory scheme is to protect the public from unreliable claims of special competence. A bona fide program of certification, such as the NBTA

program, fulfills the objectives of the regulatory scheme. Therefore, although there is a state interest in protecting the public from misleading or deceptive publication of information, the State of Florida, in its effort to protect the public from misleading or deceptive claims of special competence, has actually defeated its own purpose by establishing an overbroad regulatory scheme.

This Court currently has before it proposed standards for certification of criminal lawyers. It is now opportune for the Court to modify the regulatory scheme to achieve legitimate ends through legitimate regulations which do not chill protected speech. It is submitted that unless the Court allows publication of truthful information about criminal trial law certification granted by bona fide organizations, such as NBTA, the interaction of the proposed standards within the regulatory scheme will violate First Amendment freedoms.

This Court can remedy the constitutional infirmity within the regulatory scheme by amending DR 2-105 to read:

> A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as follows:
>
> (1) A lawyer who complies with the Florida Certification Plan as set

forth in Article XXI of the Integration Rule and Article XIX of the Bylaws of the Florida Bar, or is currently certified or otherwise recognized as a specialist by a bona fide board or other entity which recognizes specialists, may inform the public and other lawyers of his certified areas of legal practice. In order to be considered bona fide, a board or other entity must grant certification or recognize specialists on the basis of published standards and procedures that do not discriminate against any lawyer properly qualified for such recognition, that provide reasonable basis for the representation that the lawyer possesses special competence, and that require redetermination of special competence of recognized specialists after a period of not more than five years.

ISSUES PRESENTED

I.

THE FLORIDA REGULATORY SCHEME, INCLUDING THE PROPOSED STANDARDS FOR CERTIFICATION OF BOARD CERTIFIED CRIMINAL LAWYERS, DEPRIVES LAWYERS AND THE PUBLIC OF THE RIGHT TO FREE SPEECH.

II.

THE TRUTHFUL FACT OF BOARD CERTIFICATION OF A CRIMINAL LAWYER BY THE NATIONAL BOARD OF TRIAL ADVOCACY IS A BONA FIDE RECOGNITION OF LEGAL ABILITY AND IS NOT FALSE, FRAUDULENT, MISLEADING OR DECEPTIVE.

III.

FLORIDA SHOULD IMPOSE ONLY MINIMAL RESTRICTIONS ON THE FREE FLOW OF CONSTITUTIONALLY PROTECTED COMMERCIAL SPEECH WHILE PROTECTING THE PUBLIC FROM COMMERCIAL SPEECH THAT IS FALSE, FRAUDULENT, DECEPTIVE OR MISLEADING.

ARGUMENT

I.

THE FLORIDA REGULATORY SCHEME, INCLUDING THE PROPOSED STANDARDS FOR CERTIFICATION OF BOARD CERTIFIED CRIMINAL LAWYERS, DEPRIVES LAWYERS AND THE PUBLIC OF THE RIGHT TO FREE SPEECH.

A. Truthful Publication By Lawyers Of Their Qualifications To Render Legal Services Constitutes Constitutionally Protected Speech.

1. Bates v. State Bar of Arizona

State restrictions on advertising by lawyers were successfully challenged in the landmark decision of Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (hereafter Bates). The United States Supreme Court revolutionized the field of lawyer advertising by invalidating sweeping state prohibitions. The Court held that lawyer advertising was indeed a form of commercial speech protected by the First Amendment, and that, "[a]dvertising by attorneys may not be subjected to blanket suppression." Bates, 433 U.S. at 383.

In Bates, the Court had considered the question of whether price advertising was misleading in the context of commercial First Amendment speech and decided that the sort of price advertising in Bates was not "inherently" misleading, and therefore

could not be prohibited on that basis alone. In deciding this elemental question of advertising by lawyers, the Bates court relied on its earlier decision in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), which held that commercial speech was entitled to certain protection[1] under the First Amendment:

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[1] It is important to emphasize that commercial speech in general, including attorney advertisements, has been held to be solidly protected by the First Amendment. See Neuborne, A Rationale for Protecting and Regulating Commercial Speech, 46 Brooklyn L. Rev. 437 (1980); Murdock & Linenberger, Legal Advertising and Solicitation, 16 Land & Water L. Rev. 627 (1981); Barrett, The Uncharted Area-Commercial Speech and the First Amendment, 13 U.C. Davis L. Rev. 175 (Spring 1980); Farber, Commercial Speech and First Amendment Theory, 74 Northwestern L. Rev. 372 (1979). Commercial speech as entitled to First Amendment protection may be traced historically through Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (four members of court suggesting that commercial speech is protected); Bigelow v. Virginia, 421 U.S. 809 (1975) (commercial advertisement of abortion clinic protected); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (price advertising by pharmacists protected); Carey v. Population Services, Int'l, Inc., 431 U.S. 678 (1977) (advertising of contraceptives protected); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (for-sale signs of real property protected); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (price and service advertising by lawyers protected); Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) (promotional advertising by electric utility protected). See also recent cases of City of Lakewood v. Colfax Unlimited Association, 634 P.2d 52

> Untruthful speech, commercial or otherwise, has never been protected for its own sake . . . . Obviously, much commercial speech is not provable false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.

Virginia Pharmacy, 425 U.S. at 771-72.

In Bates, the Court did not give unbridled discretion to attorneys to advertise at will. Rather, the Court emphasized that false, deceptive, or misleading advertising remains subject to restraint by the states. "In holding that advertising by attorneys may not be subjected to blanket suppression . . . we, of course, do not hold that advertising

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1 (cont'd)

(Colo. 1981) (zoning ordinance regulating commercial advertising sign violates First Amendment); H & H Operations, Inc. v. City of Peachtree City, 283 S.E.2d 876 (Ga. 1981) (sign ordinance regulating posting of prices violates First Amendment); Ill. Ass'n of Realtors v. Village of Bellwood, 516 F.Supp. 1067 (N.D. Ill. 1981) (municipal ordinance regulating real estate agents' solicitation of listings is prior restraint and unconstitutionally overbroad and vague). But see Friedman v. Rogers, 440 U.S. 1 (1979) (use of trade names by optometrists not protected); Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) (face-to-face solicitation of client properly regulated).

by attorneys may not be regulated in any way . . . Advertising that is false, deceptive, or misleading of course is subject to restraint." Bates, 433 U.S. at 383.

2. In the Matter of R.M.J.

The United States Supreme Court again had the occasion to address the question of a State's power to regulate lawyer advertising in commercial speech in the case of In the Matter of R.M.J., 455 U.S. 191 (1982) (hereinafter RMJ). Like Bates, the Supreme Court's decision in RMJ further outlines the parameters of the State's ability to restrain commercial speech through lawyer advertising.

The Appellant in RMJ graduated from law school in 1973 and was admitted to the State Bars of Missouri and Illinois. Upon his move to Missouri to begin practice, he placed advertisements containing information that was not expressly permited by Rule 4 of the Supreme Court of Missouri. His advertisements (1) included information that the Appellant was licensed in Missouri and Illinois; (2) contained the statement that the Appellant was "Admitted to practice before the United States Supreme Court"; (3) used a listing of areas of practice that deviated from precise language allowed by the Advisory Committee

of the State Bar, e.g., the Appellant had used the term "personal injury" instead of the term "tort law" and used the term "real estate" instead of the term "property law"; (4) specified areas of law which are not included in the list of areas prepared by the Advisory Committee, e.g., the terms "contract", "zoning and land use", "communication", and "pension and profit sharing plans".

In reaching its decision, the Court summarized the commercial speech doctrine applicable in the context of advertising of professional services:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions.
>
> Misleading advertisements may be prohibited entirely. <u>But the states may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive</u> . . . The remedy in the first instance is not necessarily a prohibition, but preferably a requirement of disclaimers of explanation. (Citations omitted). Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

> Even when a communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served. (Citations omitted). Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest. (emphasis added)

RMJ, 455 U.S. at 203.

Applying the above principles to the facts in the case, the Court held that the Missouri Supreme Court rule unconstitutionally infringed upon First Amendment rights by (1) specifying the precise language to be used in advertising areas of practice; (2) prohibiting mailing of professional announcement cards to persons other than "lawyers, clients, friends and relatives"; and (3) prohibiting attorneys from advertising which courts have admitted them to practice. The Court noted that the Missouri Supreme Court had not identified any substantial interest in prohibiting a lawyer from identifying the jurisdiction in which he is licensed to practice nor was such information misleading on its face. This type of information was characterized as factual and highly relevant information. Also the Court ruled that advertising one's admission to practice

before the United States Supreme Court bar was not inherently misleading nor had the Missouri Supreme Court found that it was misleading information in fact.

Therefore, under the reasoning of RMJ, a state may not prohibit truthful advertising of a lawyer's qualifications to render legal services unless that information is inherently misleading or misleading in fact. RMJ stands for the proposition that the public interest lies in being informed in a way that will assist people in locating and choosing a lawyer, and anything that informs the potential consumer about lawyers' qualifications has to rank high in what the public wants and is entitled to know. Shadur, The Impact of Advertising and Specialization on Professional Responsibility, 61-6 Chicago Bar Record 324, 328 (1980).

Thus, from Bates to RMJ, the Supreme Court of the United States has opened doors to a range of commercial advertising by attorneys.

The Supreme Court of Minnesota, relying on RMJ, very recently ruled on issues which are very similar to those in this case. In In Re Johnson, 341 N.W.2d 282 (Minn. 1983) (hereafter Johnson), the plaintiff had been admonished for advertising

his certification as a Civil Trial Specialist by NBTA. The Court declared that Minnesota's disciplinary rule, which is similar to the rules at issue in Florida, had a valid state interest in preventing the public from being misled by claims of specialization. However, in that the Minnesota rule "imposed a blanket prohibition on all commercial speech regarding specialization," the Court held the rule to be too restrictive and, as such, unconstitutional.

And most recently, in Zauderer v. Office of Disciplinary Counsel, ____U.S____, 105 S.Ct. 2265 (1985), the Supreme Court re-affirmed the First Amendment protection which lawyers enjoy. In Zauderer, involving advertising issues not implicated herein, the Court noted that the truthful commercial speech of lawyers may only be curtailed "in the service of a substantial government interest, and only through means that directly advance that interest." At 2275. The Court reminded us of R.M.J.:

> Indeed, in In re R.M.J. we went so far as to state that "the States may not place an absolute prohibition on certain types of potentially misleading information . . . . if the information also may be presented in a way that is not deceptive.

At 2278. The Court went on to say:

> Our recent decisions involving commercial speech have been grounded

> in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

At 2280. Thus the Court concluded that a lawyer could not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information.

B. The Florida Regulatory Scheme Impermissibly Curtails Free Speech.

The Florida regulatory scheme develops from an interaction between Disciplinary Rules 2-101(B)(4) and 2-105 of the Code of Professional Responsibility; Article XXI, "Florida Specialization Regulation", of the Florida Integration Rule; Article XIX, "Florida Certification Plan," of the Bylaws Under the Integration Rule; and the Proposed Standards for Certification of Board Certified Criminal Lawyers. When read together, as they must be, the interaction of these rules creates a regulatory scheme which prohibits a lawyer from stating or implying that he is certified or a specialist unless board certified by the Florida Bar. Indeed, unless board certified by the Florida Bar, it is "false", "fraudulent", "misleading" and "deceptive" if a lawyer "states

or implies" the truthful fact of his board certification by a bona fide organization, such as the National Board of Trial Advocacy. Since the prohibition affects "any form of communication", this restriction goes beyond references in advertising; it includes references to certification on business cards, stationery, in Martindale-Hubbell, in conversation, and probably prohibits an NBTA certified lawyer from hanging the board certification certificate on the wall of his office.

By defining "false, fraudulent, misleading or deceptive" in a perverse way, the Florida regulatory scheme makes truth a lie and impermissibly curtails the free flow of commercial speech, which is protected by the First Amendment and Article I, Section 4 of the Florida Constituion.

The decision and reasoning of In Re Johnson, supra, is very much to the point in Florida. Minnesota found the regulatory scheme emanating from DR 2-105(B) to be "too restrictive". In part because of the "overbreadth of the rule", and because publication of the fact of bona fide board certification is not misleading or deceptive, that Court declared DR 2-105(B) unconstitutional on its face and as applied. At 285.

The Supreme Court and other lower courts have clearly held that attorney advertising is constitutionally protected commercial speech and in the absence of a specific finding that the speech is misleading, either inherently or in practice, states cannot impose overbroad, blanket prohibitions on this fundamental right of freedom of speech. Cases obviously demonstrate that advertising one's certification is "lawful activity," and is not inherently misleading. It is thus unconstitutional for a regulatory scheme to prevent lawyers from publishing the fact of bona fide board certifications.

II.

THE TRUTHFUL FACT OF BOARD CERTIFICATION OF A CRIMINAL LAWYER BY THE NATIONAL BOARD OF TRIAL ADVOCACY IS A BONA FIDE RECOGNITION OF LEGAL ABILITY AND IS NOT FALSE, FRAUDULENT, MISLEADING OR DECEPTIVE.

As a direct result of the Roscoe Pound-American Trial Lawyers Foundation Conference on Trial Specialty held in 1976, the Academy of Trial Lawyers established the National Board of Trial Advocacy ("NBTA") in 1977 as a national certification organization composed of an independent board of 44 distinguished leaders in the legal profession. Following the creation of NBTA, six additional national professional bar associations agreed to support and sponsor NBTA. These organizations are: the International Academy of Trial Lawyers, the International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys and the National District Attorneys Association. A more detailed description of these organizations is contained in Appendix C, an excerpt of an amicus curiae brief filed in a similar proceeding in another state.

NBTA and its program were patterned after

the model of national certification boards of the medical profession. NBTA issues certificates in Civil Trial Advocacy and Criminal Trial Advocacy to lawyers who demonstrate their competence in those fields by meeting the Standards for Civil and Criminal Trial Advocates, developed and administered by the board. Those Standards include requirements for participation in continuing legal education, peer review by confidential Statements of Reference, and a six-hour written examination.

NBTA is now in its seventh year of operation and has certified over 600 lawyers as trial advocates. It is the only national specialization certification board in the legal profession. Moreover, NBTA is supported and sponsored by seven organizations which exist for purposes other than recognizing specialization. The members of the board of NBTA have not appointed themselves as arbiters of competency in trial advocacy; they have been named to the board by the seven sponsoring organizations.

A copy of the Directory of NBTA, as of March 1983, is submitted herewith in the Appendix to this Brief and marked Exhibit A. That Directory includes a short description of NBTA, brief biographical sketches of members of the board, a

listing of lawyers certified by NBTA and the text of the NBTA Standards.

As the Directory shows, NBTA has an independent board composed of outstanding lawyers, judges, and legal educators. Members of the board include four federal district court judges; two of whom are former state supreme court justices, as well as the Chief Justice of the United States Court of Appeals for the Eighth Circuit and the Chief Justice of the Minnesota Supreme Court, the Chief Justice of the Connecticut Supreme Court, and the Chief Justice of the Colorado Supreme Court. Another member of the board is the former Dean of the National Judicial College, who was a state trial judge for many years.

The non-judicial members of the board include two deans of accredited law schools, one of whom previously directed the National Institute for Trial Advocacy. Several other members are part-time law school instructors, including the Dean of the National College for Criminal Defense, and one is a full-time law school instructor whose teaching is concentrated in trial practice subjects. Several are Fellows of the American Law Institute. Many have served as presidents of the board's sponsoring associations or of the trial lawyers associations of their home

states; and three are members of the House of Delegates of the American Bar Association.

The foregoing description demonstrates that the board of NBTA constitutes an independent, broadly experienced group of outstanding national leaders of the legal profession who understand that a rigorous certification program of trial advocate specialists is necessary, both in the interests of the public and the trial bar. By requiring recertification every five years in accordance with similar rigorous standards, NBTA's program is more stringent than comparable medical specialization plans.

The entire application process by which NBTA certifies Civil and Criminal Trial Advocates is submitted herewith in the Appendix to this Brief and marked as Exhibit B. This entire process may be summarized in one sentence; no lawyer is certified who has not passed NBTA's six-hour examination [2] in

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2 The only exception to this requirement would be applicants from the State of Florida who have passed the Florida written examination and been certified by the Florida Board of Certification, Designation, and Advertising.

the relevant specialty (Civil or Criminal Trial Advocacy), and no lawyer is admitted to an examination until NBTA determines that he or she possesses the requisite qualifications. Applicants for examination have been rejected in NBTA's five years of operation for the following reasons: (1) not enough experience in the trial of major civil cases in the court as lead counsel; (2) insufficient rating on peer review by confidential Statements of Reference; (3) insufficient participation in continuing legal education, including law teaching, authorship of legal articles and books, or bar committee work related to civil trial law; and (4) insufficient quality of legal memoranda filed in trial courts which were submitted to NBTA. Of the over 615 lawyers[3] who have taken the written examination, over 22 have failed. Examinations are graded on the basis of an absolute scale, not on a sliding scale or a "bell curve" that would ensure a particular percentage of either passing or failing grades.

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[3] The discrepency between the number of applicants who have passed the NBTA Examination minus the number of applicants who have failed the NBTA Examination versus the total number of NBTA certified lawyers is explained by the fact that Florida Applicants do not take the NBTA Examination in order to become certified by NBTA, since they take written examinations under the Florida Certification Plan. Of course, since Florida has had no procedures for certifying criminal lawyers, they have been required to pass the NBTA written criminal examination.

In summary, NBTA neither allows all applicants to take its certification examinations, nor does admission to an NBTA exam ensure a passing grade. Certification by NBTA is far from automatic.

NBTA gives no preference to members, or to officers or governors, of its sponsoring organizations. Association affiliations are not a prerequisite to certification, nor do the application forms inquire into such matters. Examinations are graded anonymously; answers are identified only by number. Board members are ineligible to seek certification while they are on the board. The board's certification process is clearly objective and meaningful in order to ensure special competency in trial law.

Since NBTA began its program and certified the first group of attorneys in 1980, the program has gained widespread support from the bench, the trial bar, as well as national and state organizations.

In 1982, Florida's newly created Board of Designation, Advertising and Certification, recognized NBTA and announced that Florida lawyers who had obtained NBTA certification and who applied for Florida Board certification would not be required to take the Florida certification written examination. See Exhibit D of the Appendix to this Brief. That initial recognition of the NBTA program was the first

step in a continuing pattern of cooperation between these two certifying agencies.

When Florida administered its first certification examination in March 1983, NBTA determined that the Florida examination, patterned very closely after the NBTA examination, would be acceptable in satisfying the NBTA examination requirement and the Florida applicants for NBTA certification who had passed the Florida examination would not be required to take the NBTA examination.

Also in 1982, the U.S. District Court for the Southern District of Florida decided to recognize the NBTA program. The Court had enacted Rules for Admission to its Trial Bar, and had determined that NBTA certification meant that a lawyer applying for admission to the Court's trial bar qualified under the experience requirement. The Florida District Court's experience requirement was four units (i.e., trials) and all NBTA Civil Trial Diplomates must document their participation as lead counsel in at least 15 trials to completion and 40 additional contested matters; NBTA Criminal Trial Diplomates must document that they appeared as lead counsel in not less than 10 jury trials to verdict, in which an offense charged might have resulted in imprisonment

for five years or more.

Connecticut, one of the most recent states to adopt a specialty recognition plan, has recognized the constitutional necessity to eliminate the limitations inherent in the Disciplinary Rules of the Code of Professional Responsibility and has established a system involving an accreditation committee to which NBTA made application and was accredited as a bona fide specialty program. Thus, Connecticut lawyers who are certified by NBTA may hold themselves out as specialists.

The Connecticut approach apparently is based on that state's recognition that the value of any specialty certfication, or of any other credential a lawyer may seek to publicize, depends on the integrity of the credential. If the source of the credential is a state agency, that should theoretically guarantee its integrity, but the state is surely not the only possible source of valid credentials. This has been demonstrated in the medical profession where doctors are licensed to practice by the state, as are lawyers, but medical specialty certificates are conferred by independent boards like NBTA. Those boards derive their legitimacy from the fact that they are not self-appointed but

draw their members from the national associations of specialists (including specialized sections of the AMA) in their respective fields.

In addition, following the decision in RMJ, the state of Virginia amended its Code of Professional Responsibility to allow advertisements of certification in Virginia. That state's Ethics Committee issued an opinion that, in view of the decision in RMJ, it is not improper for attorneys certified by NBTA to publish that fact on their firm's letterhead. Virginia Bar News, LE-10 #618. The Virginia Code of Professional Responsibility was thereafter amended to provide as follows:

> A lawyer who is certified as a specialist in a particular field of law or law practice as otherwise permitted by the Code of Professional Responsibility may hold himself out as such specialist in accordance with DR 2-101, DR 2-102, and DR 2-104(A)(2). Virginia Rules of Court, 220 Va. 616, 629 (1982).

As late as 1979, a Florida lawyer was ethically prohibited from listing on his letterhead that he was admitted to practice law in another jurisdiction. See Florida Ethics Opinions 79-6 and 80-2. Until RMJ in 1982, some states also prohibited lawyers from advertising one's admission to the United

States Supreme Court or listing areas of practice except as specifically designated by the state bar. Such prohibitions on commercial speech have now been abolished by the courts and bar associations and lawyers today are held to enjoy the same First Amendment freedoms shared by their clients.

It is not false, fraudulent, misleading or deceptive to advise the public of admission to the Bar of the United States Supreme Court or other jurisdictions. This is information which the public can utilize to make a wise choice of counsel. Similarly, the fact of bona fide board certification in a given field of law provides valuable information to the public.

Of course, a blanket permission for lawyers to claim certification or special competence might lead to abuse. Claims of certification from sham entities might occur. Thus, some need for regulation is acknowledged. This problem and its resolution are addressed in the following issue.

III.

FLORIDA SHOULD IMPOSE ONLY MINIMAL RESTRICTIONS ON THE FREE FLOW OF CONSTITUTIONALLY PROTECTED COMMERCIAL SPEECH WHILE PROTECTING THE PUBLIC FROM COMMERCIAL SPEECH THAT IS FALSE, FRAUDULENT, DECEPTIVE OR MISLEADING.

All relevant case law demonstrates that although truthful advertising related to lawful activities has all of the protections of the First Amendment, states retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. Johnson, 341 N.W.2d 282 (Minn. 1983); RMJ, 455 U.S. 191 (1982); Zauderer, supra.

However, restrictions on truthful lawyer advertising must be narrowly drawn and "no broader than reasonably necessary to prevent the deception." RMJ, 455 U.S. at 203.

A. State Interest Is To Protect The Public From Unreliable Claims Of Special Competence.

The basic state interest, and a valid one, in DR 2-101(B)(4) and DR 2-105 is to protect the public from unreliable claims of special competence. However, the regulatory scheme as written and proposed effectively bars the public from access to truthful, useful, and reliable information as applied to

advertising the qualifications of certified specialists and are far broader than reasonably necessary to prevent the deception.

The ethical underpinnings of DR 2-101(B)(4) and DR 2-105, and the governmental interest sought to be advanced may be summarized as follows: (1) The legal needs of members of the public are met only if the public is able to obtain the services of acceptable legal counsel and the bar must facilitate the process of intelligent selection of lawyers; (2) Since the law has become increasingly complex and specialized, the public may have difficulty in determining the competence of lawyers, and unless they have information as to the qualifications of competent counsel, they may not seek legal help; (3) The selection of lawyers should be on an informed basis as to lawyer's qualifications. Advertisements to render legal services are an acceptable method of informing the public if the information contained in the advertisement is factual, relevant, truthful, accurate, reliable and not misleading or self-laudatory; (4) Since lawyers' advertisements are calculated and not spontaneous, regulation of lawyers' advertising to foster compliance with appropriate standards serves the public interest without impeding

the flow of useful and meaningful information to the public; (5) A lawyer may advertise areas or fields of practice, but advertisements of special competence may constitute misleading information and are prohibited in the absence of state controls to ensure the existence of special competence.

The above ethical aspirations may be easily interpreted to mean that verifiable, truthful, and reliable statements of a lawyer's qualifications are relevant and highly useful information which should be conveyed to members of the public through advertisements so that they may make an informed and intelligent choice of competent counsel. The state should take affirmative steps of verification to ensure the truthfulness and reliability of special competence to avoid misleading the public as to an advertised specialist's expertise. In short, the state's only interest would appear to be protecting members of the public from subjective (unverifiable) and unwarranted (unreliable) claims of expertise.

As explained above, NBTA is a bona fide independent national certification board, the only national specialization certification board in the legal profession, with standards and procedures that

are objective, meaningful, and rigorous. The organization is comprised of a highly respected national board of leaders in the legal profession who verify the integrity of the certification and its standards. Certification is certainly not automatic, but is gained through an intense, difficult competency-testing process.

Upon examination of the NBTA program, this Court must conclude that there is nothing inherently unethical about a Florida lawyer's truthful statement that he or she is certified by NBTA as a Civil or Criminal Trial Specialist. A truthful statement that a lawyer has obtained a particular credential is only unethical, and should only be proscribed by the Code of Professional Responsibility if it is false, misleading, or deceptive, i.e., if the credential is spurious, so that publicizing it would mislead members of the public. Certification by a bona fide national board such as NBTA is a verifiable fact of obvious utility to potential consumers of legal services. The publication of such information to the public must be allowed as it fulfills the objectives set forth by DR 2-101(B)(4) and DR 2-105.

B. The First Amendment Allows Only Narrowly Drawn Restrictions And The Rules At Issue, As Blanket Bars, Are Unconstitutional.

Although there is a decided state interest in protecting the public from misleading and/or deceptive advertising, the state has no interest in totally disallowing the publication to the consumer of important and verifiable information, the fact of certification as a Criminal Trial Specialist from NBTA. Bates held that "[a]dvertising by attorneys may not be subjected to blanket suppression." RMJ added that even in the context of professional advertising, "restrictions must be narrowly drawn." Zauderer re-affirmed those principles.

The State of Florida, in its effort to protect the public from misleading claims of special competence, has actually thwarted its own purposes, and established what is now an unconstitutional scheme. By broadly stating that a lawyer shall not state or imply in any communicative form that he is certified or a recognized specialist, unless so designated by the Florida Bar Certification Plan, the state deprives the public of important and useful information concerning lawyers in their own community. By broadly

disallowing the public's right to know about bona fide special certification and skills of individual lawyers, the public as consumer is blindfolded in its attempt to select the most appropriate legal counsel. In the increasingly complex and specialized field of criminal law, barring the flow of information concerning a lawyer's qualifications, special interest, or expertise, prevents the public from making an educated selection of counsel.

Such a blanket prohibition will serve to render both the public and the lawyer helpless in sharing truthful, objective, relevant and reliable information, such as certification.

Clearly, this blanket suppression is unconstitutional and this Court must not allow further enforcement of these rules, nor should it allow them to continue under a plan of criminal law certification.

In declaring the current provisions of DR 2-101(B)(4) and DR 2-105 unconstitutional, it is suggested that this Court consider the following proposal which incorporates the basic criteria necessary to ensure that the public can be protected. This proposed amendment will achieve the legitimate ends of the rules while avoiding the chilling effect of a blanket prohibition on protected speech that

it now entails.

> DR 2-105 Limitation of Practice.
>
> A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as follows:
>
> (1) A lawyer who complies with the Florida Certification Plan as set forth in Article XXI of the Integration Rule and Article XIX of the Bylaws of the Florida Bar, or is currently certified or otherwise recognized as a specialist by a bona fide board or other entity which recognizes specialists, may inform the public and other lawyers of his certified areas of legal practice. In order to be deemed bona fide, a board or other entity must grant certification or recognize specialists on the basis of published standards and procedures that do not discriminate against any lawyer properly qualified for such recognition, that provide reasonable basis for the representation that the lawyer possesses special competence and that require redetermination of special competence of recognized specialists after a period of not more than five years.

The criteria underlying this proposal are as follows:

> (1) Certification as a specialist must have been conferred by "a bona fide board or other entity." The meaning of bona fide is defined by the subsequent criteria.
>
> (2) Recognition must be based on published standards and procedures. This will ensure that the bona fides of the "entity" can be verified.

(3) The standards and procedures, as published "do not discriminate against any lawyer properly qualified." This should prevent both "grandfathering" and other forms of overt discrimination.

(4) The standards and procedures must "provide a reasonable basis for the representation" of "special competence" inherent in the act of certification or other recognition. This is obviously the primary criterion.

(5) The standards and procedures must require redetermination of special qualifications after a period of not more than five years. Five years appears to be the reasonable maximum term to ensure current, rather than past, competence.

(6) A specialy recognition that has lapsed cannot be publicized. This reinforces the preceding criterion.

(7) The recognition may not be stated in a manner contrary to its terms. This criterion would proscribe, for example, saying "Certified by the National Board of Trial Advocacy" without the qualifying phrase, "as a Civil [and/or Criminal] Trial Advocate or Specialist".

This proposal will accomplish the two objectives of (1) imposing only minimal restrictions on the free flow of constitutionally protected commercial speech, and (2) protecting the public from commercial speech that is false, deceptive, or misleading. It seems not open to question that the current provisions of DR 2-101(B)(4) and DR 2-105 fail to achieve this balance between freedom of speech

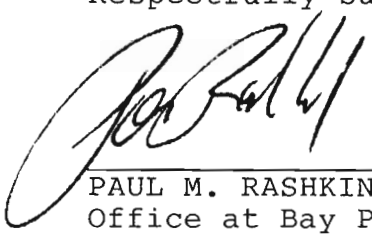
and permissible state regulation and that DR 2-105 should therefore be amended.

CONCLUSION

For the reasons set forth above, this Court should remove the constitutional infirmities of the Florida regulatory scheme before adopting the Proposed Standards for Certification of Board Certified Criminal Lawyers. If the proposed Standards are adopted without otherwise modifying the regulatory scheme, Florida's Certification Plan will be an unconstitutional infringement on the First Amendment Rights of lawyers and the general public.

Florida can honor freedom of speech while continuing to protect its citizens from misleading claims of special competence. This Honorable Court should take this opportunity to bring Florida's regulatory scheme into compliance with constitutional protections rather than allow an infirmed scheme to continue.

Respectfully submitted,



PAUL M. RASHKIND, ESQUIRE
Office at Bay Point
4770 Biscayne Boulevard
Suite 950
Miami, Florida 33137
Telephone: (305) 573-4400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief, was mailed to DAWNA G. FINLAW, Director of Certification, The Florida Bar, 600 Apalachee Parkway, Tallahassee, Florida 32301; to STEPHEN A RAPPENECKER, Chairman, BCDA, 2251 N.W. 41st Street, Suite B, Gainesville, Florida; to The Honorable STAN R. MORRIS, Chairman, Criminal Law Section, Alachua County Courthouse, Room 131, 201 E. University Avenue, Gainesville, Florida; to J. CHENEY MASON, 127 North Magnolia Avenue, Orlando, Florida; and to JOHN F. HARKNESS, Jr., Executive Director, the Florida Bar, 600 Apalachee Parkway, Tallahassee, Florida 32301 this 14th day of January, 1986.