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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
v.
PETER S. HERRICK,
Respondent.

Supreme Court
Case No. 69,957
(TFB No. 86-17961(11C))

COMPLAINANT'S ANSWER BRIEF

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I. Factual Background

The Complainant agrees with the statement of the Factual Background at page one of the Respondent's Amended Brief but would restate the findings and recommendations of the referee. As to Count I, the referee recommended that the Respondent be found guilty of violating DR 2-104(B)(1)(a) for mailing an unsolicited letter to prospective clients for the purpose of obtaining professional employment without marking the letter and envelope as "Advertisement." As to Count II, the referee recommended that the Respondent be found guilty of DR 2-105 for stating in his letter that he specializes in customs law and thereby representing that he is a specialist having competence or experience in a particular area of law. As to Count III, the referee recommended that the Respondent be found guilty of violating DR 2-105 for improperly holding himself out as practicing in an area of law which is not recognized by the Florida Certification Plan or the Florida Designation Plan. The Respondent is not certified or designated in any area.

II. The Course of the Proceedings

The Complainant agrees with the statement of the Course of the Proceedings at page two of the Respondent's Amended Brief.

III. Summary of Argument

Certain types of commercial speech, including attorney advertising, are constitutionally protected. However, advertising by attorneys is subject to some restriction. The Complainant has a substantial interest in requiring that mailed advertisements from an attorney be *so* marked. This disclosure requirement is reasonably related to the Complainant's interest in protecting the recipients of attorney advertisement letters and does not run afoul of the Constitution.

False, deceptive, and misleading advertising is also subject to restraint. The statement that an attorney or firm specializes in a particular area of the law is misleading because the common ordinary meaning of the word "specialize" contains a representation of expertise and experience and because the word may tend to confuse the general public. The Complainant has a substantial interest in prohibiting such misleading statements. The rule in question directly advances this interest and is no more restrictive than necessary.

The referee's findings of fact and recommendations are presumed correct and should be upheld unless they are clearly erroneous or lacking in evidentiary support. The Respondent has failed to meet this burden.

IV. Argument

A. Disciplinary Rule 2-104(B)(1)(a) of the Florida Rules of Professional Conduct is Constitutional and Applies to the Respondent

Certain types of commercial speech are entitled to the protection of the First Amendment, and such speech should not be unprotected simply because it proposes a mundane commercial transaction. Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976). More specifically, ''advertisingby attorneys may not be subjected to blanket suppression." Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977). However, the Supreme Court has not precluded all regulation of attorney advertising. In order to assure that consumers are not misled, some limited supplementation may be required, and there may be reasonable restrictions on the time, place, and manner of advertising. Id., at 384. In affirming a prohibition on in-person solicitation of clients, the Supreme Court stated that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the state's proper sphere of economic and professional regulation. While entitled to some

constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 459 (1978) (citation omitted). States may impose appropriate restrictions on advertising that is inherently misleading or subject to abuse. In re R.M.J., 455 U.S. 191, 203 (1982). Advertising by lawyers may be regulated as long as the restrictions are narrowly drawn and only to the extent that they further a substantial interest of the state. Id., at 204. And this authority to regulate exists even when the communication is not misleading. Central Hudson Gas v. Public Service Com'n of N.Y., 447 U.S. 557, 563-64 (1980).

The Complainant in this proceeding does have a substantial interest in requiring that target-mail advertisements by attorneys be so marked. One such interest is in protecting the privacy of the recipient of such advertisements. The receipt of a personalized letter from an attorney is very likely to arouse concern on the part of the recipient and to cause the recipient to feel compelled to read the entire letter very carefully. A letter marked "Advertisement" would not engender such concerns and would allow the recipient to decide for himself whether or not to read further. Many of the dangers created by mailed advertising by attorneys were recognized in Shapero v. Kentucky Bar Assoc., 108 S.Ct. 1916 (1988). These dangers include presenting an increased risk of deception, causing the recipient to over estimate the lawyer's familiarity with the case, suggesting that the recipient's legal problem is more dire than it really is, causing the recipient to believe that he has a legal problem that he does not actually have, and offering erroneous legal advice. Id., at 1923. The Supreme Court held that these dangers did not justify a total ban on mailed advertisements by attorneys. Id. However, the Complainant here is not imposing a total ban, but is merely requiring disclosure of the nature of the letter.

The material differences between disclosure requirements and outright prohibitions on speech have been recognized by the Supreme Court. Zauderer v. Office of Disciplinary Counsel of Supreme Court

of Ohio, 471 U.S. 626 (1985). There, the Supreme Court upheld a requirement that an attorney give more complete information regarding his contingent fee in a newspaper advertisement. The constitutionally protected interest of an advertiser in not providing any particular factual information in his advertisement is minimal, and his rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest. Id., at 651. As in Zauderer, the Complainant is not attempting to prevent attorneys from conveying information to the public, but is merely requiring that they provide more information.

B. Disciplinary Rule 2-105 of the Florida Rules of Professional Conduct is Constitutional and Applies to the Respondent

One type of advertising which is clearly subject to restraint is advertising that is "false, deceptive or misleading." Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977). "In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Id., at 383. The statement that an attorney or firm specializes in a particular area of the law is misleading to the general public. The Respondent attempts to make a distinction between the words "specialize" and "specialist" by comparing their dictionary meanings, but the Complainant would suggest that the general public does not make such minute and close comparison when determining the meaning of a word. Even if such comparisons were routinely made, the meaning determined would depend on the dictionary used. Webster's New International Dictionary, Second Edition (1961) gives a definition of "specialize" as "to apply to a specific use; to make special or specific" and defines "special" as "distinguished by some unusual quality; uncommon; noteworthy" and as "relating to a single thing or class of things; having an individual character or trait." Thus, the word "specialize" used in Respondent's letter could reasonably be interpreted to mean that the Respondent has competence or experience in a particular area of law.

This meaning is not inconsistent with the common, ordinary meaning of the word. The plain meaning of both the word and the rule is clear, and the Respondent's distinctions are distinctions without a difference. An attorney who states that he specializes in a particular area is holding himself out to be a specialist in violation of Rule 2-105.

The word "specialize" is also misleading in another way. Although the word may not contain a representation that the attorney using it is certified or designated under the Florida plans, the public is generally uninformed about these plans and could easily be confused and mislead as to the differences between certified, designated, and specialized. It is important to note here that the Respondent did not merely state that he practices in the area of customs law; rather, he emphasized that he specializes in customs law. People who see the word "specializes" could very well assume some type of Bar supervision or approval where none in fact exists. The Complainant has a substantial interest in preventing this type of confusion and misinformation. The rule in issue here directly advances this interest, is in proportion to the interest, and is no more restrictive than necessary to promote the interest.

The case of ~~In re~~ R.M.J., 455 U.S. 191 (1982), upon which the Respondent bases his argument, is not controlling in the instant case. In that case, an attorney was reprimanded for not adhering to the precise listing of areas of practice. The Supreme Court found the restriction invalid because the attorney's listing had not been shown to be misleading and because the restriction promoted no substantial interest. Neither one of these rationales exists in the instant case. Shapero v. Kentucky Bar Assoc., 108 S.Ct. 1916 (1988), is not controlling here either. The Supreme Court in Shapero discussed and struck down categorical prohibitions on direct mail advertising where the advertisements were not misleading. Here the Respondent was not prohibited from mailing his advertisements altogether; he was merely prohibited from using certain misleading words in those advertisements.

The Respondent also attempts to persuade this Court that the meaning of the word "specialist" changed between the time it was used in DR **2-105** and the time it was used in Rule **4-7.5.** There is absolutely no indication of such a change in meaning. Rule 2-105 constitutionally prohibits the Respondent from stating in his advertisements that he specializes in a particular area of law. He violated that rule and should be disciplined accordingly.

C. The Referee's Findings Are Not Clearly Erroneous Nor Are They Lacking in Evidentiary Support and Therefore the Findings Must Be Upheld

A Referee's findings of fact and recommendations in an attorney disciplinary proceeding are presumed correct. The Florida Bar v. Neely, **502** So.2d **1237** (Fla. **1987);** The Florida Bar v. Vannier, **498** So.2d **896** (Fla. **1986).** These findings will be upheld unless it can be shown that the findings are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Golden, 502 So.2d **891** (Fla. **1987);** The Florida Bar v. Hooper, **507** So.2d **1078** (Fla. **1987).** An application of these standards to the instant case clearly indicates that the Respondent has failed to meet his burden and therefore that his appeal should be denied.

In essence, the Respondent, in paragraphs C through H, at pages **43-49** of the Respondent's Amended Brief, would like this Court to reevaluate the facts of this case. However, for this Court to do so would be to give the Respondent a trial de novo. This Court has stated that the Supreme Court of Florida will not conduct a trial de novo of a disciplinary matter. The Florida Bar v. Hooper, **509** So.2d **289** (Fla. **1987).**

The record reflects that the Respondent violated Disciplinary Rule 2-104 of the Code of Professional Responsibility by mailing an unsolicited letter to prospective clients for the purpose of obtaining professional employment without marking the letter and envelope "Advertisement."

The record reflects that the Respondent violated Disciplinary Rule 2-105 of the Code of Professional Responsibility by stating in his letter that he specializes in customs law and thereby representing that he is a specialist having competence or experience in a particular area of law and by improperly holding himself out publicly as practicing in an area of law which is not recognized by the Florida Certification Plan or the Florida Designation Plan.

V. Conclusion

Advertising by attorneys is subject to restriction. Disciplinary Rule 2-104(B)(1)(a) promotes the Complainant's substantial interest in protecting the recipients of mailed attorney advertising, is no more restrictive than necessary, and is constitutional. The Respondent's advertising is misleading. The Complainant has a substantial interest in preventing such misleading advertising. Disciplinary Rule 2-105 promotes this interest without being unduly restrictive. The rules are constitutional; the Respondent violated them, and he should be disciplined. The Referee's Report should be upheld and Respondent disciplined as recommended.

Respectfully submitted,

John A. Boggs for
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail/hand delivery upon Peter S. Herrick, Respondent, **2945** South Miami Avenue, Miami, Florida **33129**, this 22nd day of May, **1989**.

John A. Boggs for
Bar Counsel