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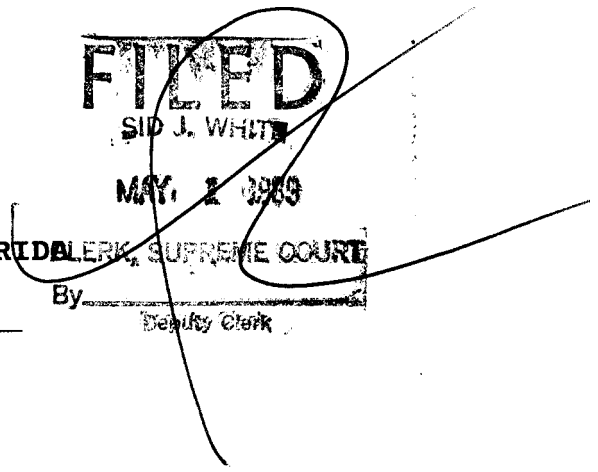

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant,	)	
v.	)	Supreme Court Case No. 69,957
PETER S. HERRICK Respondent.	)	

RESPONDENT'S AMENDED BRIEF

PETI

PETER S. HERRICK
Respondent
2945 South Miami Avenue
Miami, Florida 33129
(305) 285-6891
Florida Bar No. 166790

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11. STATEMENT OF THE CASE

A. Factual Background

This case arises from a letter sent by Respondent on his letterhead which stated:

July 26, 1985

Phillip & Barbara Reichendhol
10950 S.W. 93rd Avenue
Miami, FL 33176

Re: Customs Seizure
FL 7451 EA

Dear Mr. and Mrs. Reichendhol:

Customs seized a 1981 30'2" Formula Thunderbird, FL 7451 EA, and will forfeit the vessel unless a claim and bond for $2,500.00 is given to them by August 15, 1985. Our law firm specializes in Customs laws relating to vessel seizures. If you have any questions, please call.

With kindest personal regards.

Sincerely,

Peter S. Herrick, Esq.

The word "Advertisement" did not appear at the top of the page of the letter. The word "Advertisement" did not appear on the face of the envelope in which the letter was mailed.

The addressees of the letter were not present or former clients of the Respondent, and the letter was unsolicited.

Respondent is not certified or designated in any area of law under the Florida Certification or Designation Plans.

Customs law is not an area of law recognized for certification or designation under the respective plans.

B. The Course of the Proceedings

A complaint against the Respondent was filed by the Complainant, The Florida Bar, on February 2, 1987, alleging violations of the Disciplinary Rules of the Florida Code of Professional Responsibility. Count I alleges a violation of DR 2-104(B)(1). Counts II and III allege violations of DR 2-105.

On February 5, 1987, this court assigned the Honorable Lawrence L. Korda, Circuit Judge, as referee.

Respondent filed a motion to dismiss the complaint raising, among others, the constitutional issues, which was denied.

A hearing was conducted before the referee on April 29, 1987. Respondent filed a Memorandum of Law addressing the issues of the constitutionality of the disciplinary rules which form the basis for the complaint. The State Bar filed its Memorandum of Law, to which Respondent filed a Reply.

A copy of a proposed Report of Referee was served on the Respondent on February 4, 1988.

On July 6, 1988, the Referee, by order, directed the filing of memorandum of law as to the applicability of the U.S. Supreme Court's decision in Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988). Respondent's Memorandum

of Law was filed on July 18, 1988. The State Bar's Memorandum of Law was filed on July 15, 1988.

A Report of Referee dated August 11, 1988, was mailed to Respondent by the referee on December 13, 1988, and received by Respondent on December 17, 1988.

The Report of Referee was filed with this court on December 15, 1988.

On December 21, 1988, Respondent filed his Petition for Review.

On January 4, 1989, The Florida Bar moved to relinquish jurisdiction and remand the proceedings to the Referee for clarification of the Report of Referee. The motion was granted on January 5, 1989.

On January 11, 1989, Respondent file a Request For Findings of Fact and Conclusions of Law.

On February 25, 1989, Respondent received a copy of the Report of Referee (Corrected) dated February 22, 1989.

The Report of Referee (Corrected) was filed with this court on February 27, 1989.

On March 28, 1989, Respondent filed his petition for review.

The Report of Referee (Corrected) made findings of fact as to Counts I, II and 111, but stated no conclusions of law. The Report of Referee recommended that Respondent be found guilty as to all three counts as alleged in the complaint and recommended the imposition of a public reprimand. The Report

of Referee did not specifically address the issue of the constitutionality of the disciplinary rules raised by Respondent.

III. SUMMARY OF ARGUMENT

Disciplinary Rule **2-105,** the basis for Counts II and III of the complaint, as applied in this case, categorically prohibits the truthful and non-deceptive identification to the public of an attorney's area of practice, or limitation of practice, except when the attorney has been certified or designated in a State Bar approved area of law. It is contended that this rule, on its face and as applied to Respondent, violates the First and Fourteenth Amendments to the Constitution as interpreted by the United States Supreme Court.

Disciplinary Rule **2-104(**B)(1)(a) provides that written communications to prospective clients are required to be marked "Advertisement" on the face of the envelope and at the top of each page. It is contended that the State Bar failed to make an adequate showing that at the time of the adoption of the rule the state had established a sufficient interest, a particularized need, for such a restriction and that the regulation advanced the state's interests. Absent an adequate showing of such need, the restriction imposed by the rule is not constitutional under the First and Fourteenth Amendments of the Constitution.

The findings of fact and the recommendations of the Report of Referee are based upon conduct by the Respondent which is protected by the First and Fourteenth Amendment, and are therefore erroneous, unlawful and unjustified.

VI. ARGUMENT

A. DISCIPLINARY RULE 2-105 OF THE FLORIDA RULES OF PROFESSIONAL CONDUCT VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

1. Rule DR 2-105 and its historical development.

Disciplinary Rule 2-105 forms the basis of Counts II and III of the complaint of the Florida Bar. It is necessary, therefore, to determine the conduct prohibited by the rule and whether Respondent's conduct falls within the conduct thus prohibited.

Rule DR 2-105 provided[1]:

> **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 . . . may inform the public and other lawyers of his certified areas of legal practice.
>
> (2) A lawyer who complies with the Florida Designation Plan . . . may inform the public and other lawyers of his designated areas of legal practice.
>
> (3) A lawyer may permit his name to be listed

[1] DR 2-105 was repealed and replaced by Rule 4-7.5, Rules Regulating the Florida Bar, effective January 1, 1987.

in lawyer referral offices according to the fields of law in which he will accept referrals.

(4) A lawyer available to act as a consultant to or an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers or publish in local legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience, except as permitted under DR 2-105(1) or (2) above. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in local legal journals. (Emphasis added.)

Historically, DR 2-105, adopted in 1973, was amended in October, 1975, 319 So.2d 1, eliminating provisions for attorneys admitted before the United States Patent Office to use the designation of Patent or Trademark attorney, and for attorneys actively engaged in admiralty practice to use the designation Admiralty, on letterheads and office signs. Substituted therefor was a provision that a lawyer who complies with the Florida Designation Plan may inform the public of his designated areas of legal practice.

DR 2-105 was further amended effective July 1, 1982, 414 So.2d 490, to the form cited above, to provide for attorneys who comply with the newly created Florida Certification Plan, and eliminating a provision for attorneys certified as specialist by other state authorities. This opinion, dated May 20, 1982, does not expressly refer to or discuss the implications of the prior decision of the U.S. Supreme Court in In re R.M.J., 455 U.S. 191 (1982), decided January 25, 1982.

DR **2-105,** between **1973** and **1982,** through amendments, became increasingly more restrictive, eliminating even the public identification of the traditional areas of patent and admiralty law as areas of practice unless the lawyer was certified or designated under the Florida Plans in those areas.

2. Legal Standard Of Review To Be Applied.

The U.S. Supreme Court has adopted a four-part analysis in determining commercial speech cases:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, **447** U.S., at **566.**

The referee did not find that the Respondent's statement in the letter, "Our firm specializes in Customs laws relating to vessel seizures," was untrue, false, fraudulent, misleading or deceptive. The statement, in fact, was true as established by the evidence.

The referee found in Section 11, Findings as to Count 11, Paragraph **2,** that Respondent's statement constituted a representation that Respondent and/or his firm are

specialists, having competence or experience in a particular area of law. He further found as to Count 111, Paragraph 4, that the publicly holding out that respondent practices in an area of law not recognized for certification or designation under the Florida Plans was improper.

It was not alleged in the complaint, nor did the referee find, that respondent stated that he was certified or designated, or that Customs law was recognized by the Florida Plans. Respondent made no such statement.

Respondent presented evidence at the hearing before the referee of his experience as an attorney with the United States Customs Service and as a private practitioner in the area of Customs law over the past twenty years. Respondent established that he has competence and experience in Customs law and that he practices in the area of Customs law. The Florida Bar presented no evidence to controvert this evidence.

There is no question that respondent is not certified or designated in any area of the law under the Florida Certification or Designation Plans. There is also no question that Customs Law is not an area of law recognized for certification or designation under the respective Plans.

3. DR 2-105 is a categorical prohibition of all forms of public communication of areas of practice, and limitations of practice, except in the limited circumstances provided.

(a) Conduct Prohibited by the Rule.

DR 2-105, on its face, only permits attorneys who have been certified or designated[2] under the Florida Plans to publicly identify their area of practice, or to limit their area of practice; and then only as to those areas in which they are certified.

Every other lawyer, not certified, is categorically prohibited by this rule, on its face and as applied, from publicly identifying any area of practice, or publicly limiting his area of practice.

The scope of the prohibition of Rule DR 2-105 is revealed by reference to the whole body of the Disciplinary Rules in pari materia. Under the Disciplinary Rules then in force, the only provisions permitting a non-certified attorney to identify the fields of law in which he practices were embodied in Rules DR 2-105(3) and (4).

Rule DR 2-105(3) permitted an attorney to list in lawyer referral offices according to fields of law in which he will accept referrals.

Rule 2-105(4) permitted an attorney available as a consultant to or associate of other lawyers in a particular field to distribute to other lawyers or publish in local legal journals an announcement of availability.

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[2] Hereinafter the term "certified" will be used to mean "certified or designated" under the Florida Certification or Designation Plans to improve readability and comprehension. Conversely, "non-certified" will be used to mean "non-certified and non-designated" for the same reason.

Announcements were limited to one annually, but publication in local legal journals could be periodic.

Except for the non-public means provided, the sweep of DR 2-105 was complete: For non-certified attorneys, all forms of public communications of areas, or limitations, of practice were forbidden.

(b) Violation of Rule 2-105 is not depended solely upon the use of the word "Specialist"; Common Meanings of "Specialize" and "Specialist."

Respondent used the word "specialize", not "specialist", in his letter. At first blush, one could assume they convey essentially identical meanings.

The referee found as to Count 11, the representation that respondent "specializes" means that respondent is a "specialist, having competence or experience in a particular area of law."

This, however, is not the ordinary, common meaning of the word used by Respondent.

Webster's New World Dictionary, Second College Edition (1976) defines "specialist" as "a person who specializes in a particular field of study, professional work, etc." Webster's New Collegiate Dictionary (1974) defines "specialist" as meaning "one who devotes himself to a special occupation or branch of learning." By these definitions, the word does not mean "having competence or experience in a particular field" as the Referee found.

"Specialize", the word used by respondent, means "to make particular mention of: particularize; to apply or direct to a specific end or use; to concentrate ones efforts in a special activity or field,"[3] Webster's New College Dictionary (1974); "to direct toward or concentrate on a specific end," Webster's New World Dictionary, supra. It does not mean "having competence in a particular field" as the Referee found.

The finding of the referee as to the meaning of "specialist" is inconsistent with the common, ordinary and dictionary definition of the word.

Also, the referee found a significantly different meaning in the word "specialize" than is conveyed by its common, ordinary usage. The referee concluded that "specialize" equals "specialist" which equals "having competence or experience in a particular area of law"; therefore "specialize", he concluded, means "having competence in a particular area of law," a meaning quite other than this word's ordinary, common meaning and usage, the meaning used by Respondent.

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3 Burton's Legal Thesaurus (1980) provides the following synonyms for "specialize": address oneself to, apply oneself, bound, concentrate on, concern oneself with, dedicate oneself to, devote oneself to, focus attention on, give attention to, limit, narrow, practice exclusively, pursue, quality, restrict, select, take up, train.

By this process of logic, the ordinary, common meaning of the word actually used by respondent, that he concentrated in a particular area of law, is altered by the referee to mean that he represented that he has competence and experience in a particular area of law: a meaning substantially different than what the Respondent intended to convey.

However, the word "specialize" was not found by the referee to have a meaning which implies certification or designation under the Florida Plans. The referee, in his findings, did not extent by implication the meaning of the word "specialize" so far as to constitute an implied or express representation of certification under the Florida Plans; he limited his meaning of "specialize" to a representation of "competence and experience."

The subtle distinctions between the meaning of the verb "specialize" and the noun "specialist" should not be summarily discarded. To say, "I specialize", by its ordinary, common meaning, is to say that one concentrates ones efforts in a special activity or field, special being unique. This word, in conjunction with an area of law such as Customs law, conveys the meaning, as intended by the respondent, that **he concentrates his efforts in customs law: it is an identification of an area of practice, not a representation of expertise.** "Specialize" does not, per se, in its ordinary, common meaning, convey a representation of

competence or experience. Despite having a common root, the two words do have different meanings.

Moreover, to construe the meaning of "specialize", in light of its common, ordinary usage, to equal "specialist", which equals "a representation of competence and experience", which then equates to a representation of certification, and therefore "specialize" implies or represents one is certified, it too great a leap of logic.

Also, the use of the word "specialize", as used here, addressed to a layman, should be construed as a layman would understand the meaning of the word, by its common, ordinary meaning; it does not infer to the layman any professional certification, but identifies an area of practice. The finding of the referee as to the meaning of the statement made by respondent as being a representation of competence and experience does not imply a representation of professional certification, and he did not make such a finding.

(c) Meaning of "Specialist" as Employed in the Rule.

The word "specialist" is not defined in the Disciplinary Rules.

In DR 2-105, the word "specialist" is stated in the context of the phrase "specialist or as limiting his practice."

If the intent of the rule is to prohibit the use of the word "specialist", this intent is negated by the use of the word disjunctively with "or as limiting his practice." The categorical prohibition of publicly "limiting his practice" is not constrained to, and does not require, the use of the word "specialist" in stating a limitation of practice. Any words of limitation will violate the rule. (E.g., "I do not accept bankruptcy cases; I do not practice admiralty law.")

Similarly, in the context of this rule, the identification of an area of practice by a non-certified attorney also is not dependent solely upon the use of the word "specialist"; any other words are likewise prohibited by this rule. The mere public identification of an area of practice, whether or not implying competence and experience in that area, is a violation of this rule. And, the rule is applied here with respect to Count 111.

If the intent of the rule is to prohibit lawyers from representing that they have experience or competence in an area of law, except when certified, the rule fails to make this intent clear. If that was the intent, "specialist" should have been so defined, or the rule should have explicitly stated that a lawyer may not represent that he has experience or competence in a field of law; but it does not.

Had the word "specialist" been used without the disjunctive phrase following it, the rule may have had a

narrow application limited to use of the specific word. However, the disjunctive phrase, which is operative without the use of this specific word, derogates any limited meaning of "specialist."

Public identification of areas of practice is an implied limitation of practice; areas not identified as areas of practice are impliedly excluded. Limitation of practice and the prohibition preceding it are so bound together that the regulation only makes sense by giving "specialist" a very broad meaning.

The regulation becomes one regulating the identification of areas of practice generally notwithstanding the use of the word "specialist," and not one limited solely to abuses relating to misstatements concerning certification. Further, there was no disciplinary rule which stated that lawyers are permitted to publicly identify their areas of practice as is stated in a subsequent amendment to the rule.

Therefore, the word "specialist" in DR 2-105 has a different, and broader, meaning than that found by the referee. It is not the literal use of the word which is prohibited, although its use is encompassed in the rule's prohibition. All public identification of fields, or limitations of practice, is prohibited to non-certified lawyers.

The broader meaning attributable the word "specialist" as used in this rule is confirmed by the exceptions to the

general rule provided in DR 2-105(3) and (4) which authorize the identification of areas of practice, or limitations of practice, by non-certified lawyers to the means provided there. These exceptions permit identification of areas of practice in limited circumstances and clearly infer that any other form of communication of an area of practice, or limitation of practice, to the public or to other lawyers is banned by the general rule. The prohibition against holding out publicly as a specialist or as limiting the area of practice except as provided forbids every non-certified lawyer from public communicating his area of practice, or limitation of practice; therefore "specialist", in the context here, encompasses any form of public communication of area of practice, whether or not connected with a representation of competence or experience, and whether or not connected with the use of the specific word. In short, there is no magic in the word "specialist" in DR 2-105; any other word would suffice if it serves to identify or limit an area of practice in a public communication.

This broad meaning is further supported by the subsequent amendment to the rule, amended and re-adopted as Rule 4-7.5, Rules Regulating the Florida Bar, effective January 1, 1987, 494 So.2d 977. Rule 4-7.5 now states: **"A lawyer may communicate the fact that the lawyer does or does not practice in a particular area of law."**

This amendment confirms that the former rule prohibited such conduct and that such conduct was encompassed within the former ban on publicly communicating that a non-certified lawyer is a "specialist," especially since no other disciplinary rule authorized such conduct.

The broad connotation of the DR 2-105 as prohibiting all forms of public communication of areas of practice is also made clear in Count III of the Complaint and the referee's findings relating thereto. The Florida Bar charged, and the referee found, that respondent's statement "is improper in that it holds Respondent out publicly as practicing **in an area of law** not recognized by either the Florida Certification Plan or the Florida Designation Plan." (Emphasis added.)

This application clearly demonstrates that it is not simply the use of the word "specialist" which is prohibited by DR 2-105; the rule, on its face and particularly as applied here, prohibited a non-certified lawyer from publicly holding out as practicing any area of law.

To read DR 2-105 as permitting non-certified lawyers to publicly identify areas of practice by use of words other than "specialist", while at the same time categorically prohibiting in the same sentence public limitations of practice, is illogical since limitations of practice do not require the use of the word "specialist."

Additionally, such an interpretation, perforce, would ignore the effect of sections **(3)** and (4), which prescribe the means by which non-certified lawyers may communicate fields or limitations of practice to other lawyers, but not publicly. If this rule does permit public identification of areas or limitations of practice by non-certified lawyers, Sections **(3)** and **(4)** are nullities. But specific sections such as these are not adopted without reason: the reason here was that since the general rule of DR 2-105 categorically forbids all public communications of areas, or limitations, of legal practice by non-certified lawyers, these exceptions were necessary to permit non-certified lawyers to communicate areas or limitations of practice to other lawyers.

(d) "Specialize" Not Inherently Deceptive, False or Misleading.

It is important to observe that Respondent is not charged by the Florida Bar of a violation of Rule DR 2-101(A), making false and misleading statements; nor is Respondent charged with a violation of Rule DR 2-101(B)(4), stating or implying that he is certified or recognized specialist when he is not. He is charged with publicly identifying his field of practice, one which is not approved by the Florida Bar.

The use of the word "specialize" by respondent here was not deceptive, false or misleading. It truthfully conveyed

that respondent concentrates his practice in Customs law; further, he has experience in Customs law acquired over a twenty-year period as an attorney as the evidence in this case established. To the extent "specialize" may be construed as conveying a representation of expertise, any such representation by Respondent was true in this case.

The public identification of any area of practice by a lawyer reasonably may be viewed as implying that he has some experience or competency in that area of law. Any implied representation of experience or competence by identifying an area of practice, however, does not per se constitute an implied representation of certification in that area of law or that the area of law is recognized for certification under the Florida Plans.

The conduct prohibited by this rule is clear. The conduct prohibited is not dependent upon the use of a specific word.[4] DR 2-105, on its face and as applied in this case, operates as a categorical prohibition by the State of the constitutionally protected right of the respondent to truthfully identify publicly Customs law as an area of his practice. Bates v. State Bar of Arizona, 344 U.S. 350 (1977); In re R.M.J., 455 U.S. 191 (1982); Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988).

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4 See, however, the discussion regarding the use and meaning of the word "specialist" in Rule 4-7.5, ante.

This rule also limits public identification of areas of practice to those which are recognized for certification under the Florida plans, further limiting such public identification to those attorneys who are certified, and then only to the particular areas in which they are in fact certified.

Like the Missouri rule held invalid in In re R.M.J., **455 U.S. 191** (1982), this rule sweeps too broadly to be sustained consistent with the First and Fourteenth Amendments; it is squarely in conflict with the decisions of the Supreme Court in Shapero v. Kentucky Bar Association, **108** S.Ct. **1916 (1988);** Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, **471** U.S. **626 (1985);** In re R.M. J., **455** U.S. 191, **71** L.Ed.2d **64, 102** S.Ct. **929 (1982);** and Bates v. State Bar of Arizona, **433** U.S. **350 (1977).**

In In re R.M.J., **455** U.S. **191** (1982), the Court invalidated a Missouri rule which, unlike DR **2-105,** expressly permitted attorneys to publicly identify areas of practice, but which (like DR **2-105)** limited such identification to a specific list and then permitted no deviation from the phraseology prescribed in the rule. The Missouri rule, like DR **2-105,** also prohibited an attorney from limiting his practice. Id., at **195.**

The Court stated:

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is

> entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. **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 can also may be presented in a way that is not deceptive. . . .** 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.
>
> . . . .
>
> . . . . Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest. . . . . (Emphasis added.)

Id., at 203.

The Court further stated:

> But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. **The absolute prohibition on appellant's speech [listing areas of practice], in the absence of a finding that his speech was misleading, does not meet these requirements.** (Emphasis added.)

Id., at 207.

Rule DR 2-105, as has been shown, is far more restrictive than the Missouri rule found unconstitutional in In re R.M.J. in prohibiting all public communications of fields of practice to non-certified lawyers. Like the Missouri rule, it limits public identification only to those areas approved for certification or designation by the

Florida Bar. See, Schedule A, 414 So.2d 490, 503-504 (Fla. 1982).

Respondent does not challenge the right of the State to prohibit him from representing that he is certified, when he is not; nor does he challenge the right of the State to prohibit him from representing Customs law as recognized as a certified area of law practice, when it is not. Such conduct was specifically prohibited by Rule DR 2-101(A) and (B)(4).

Respondent does, and has consistently challenged the right of the State through Rule DR 2-105 to constitutionally prohibit him, absolutely and categorically, from truthfully stating publicly in a targeted letter or otherwise that he practices in the area of Customs law so long as he does not represent that he is certified in Customs law.

That Respondent was constitutionally permitted to send an unsolicited targeted letter to persons known to have need of legal services has been affirmed by the Supreme Court in Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988).

Respondent did not represent in his letter that he was certified, or that Customs Law was a certified area of practice, and, significantly, the Referee may no finding that he did so. Had Respondent done so, he would have violated Rules DR 2-101(A) and/or (B)(4) which specifically prohibit such representations.

Moreover, respondent's statement was true; it was not false, misleading or deceptive, and the referee made no such finding. The respondent, in fact, does have competence and experience in Customs law as the evidence before the referee supports. The referee found that Respondent's statement constituted a representation that the respondent has competence or experience in a particular area of law, not that he represented that he, and the area of law, were certified.

It is clear that respondent's right to publicly communicate his area of practice in a targeted, unsolicited letter is protected by the First Amendment. In re R.M. J., supra; Shapero v. Kentucky Bar Association, supra. DR 2-105, however, categorically prohibits such public communications and prohibits protected speech.

Respondent also has a First Amendment right to publicly state that he is competent and experience in an area of practice of the law so long as that representation is true, as it is in this case. To the extent that respondent's statement may be construed to imply such a representation, it is equally protected speech under the First Amendment and may not be prohibited so long as the statement is not false or misleading.

4. The speech concerned is lawful and not misleading.

The Supreme Court found that a prohibition of the public listing of areas of practice, **in the absence of a finding that the speech was misleading,** was unconstitutional. In re R.M.J., at **207.**

In this case, the respondent was not charged with making a false or misleading statement. The referee made no findings that the statement was false or misleading. The uncontroverted evidence in the case adduced before the referee is that the statement was true: the respondent has twenty years of experience in the area of customs law and does practice in that area.

Neither the public identification of an area of practice, nor any implied representation of competence or experience in that area, is inherently misleading. See In re R.M.J., **455** U.S., at **207-208.**

The answer to the question of whether the commercial speech in this case was lawful and not misleading must be in the affirmative, particularly in the absence of a finding by the Referee to the contrary. See Central Hudson Gas & Electric Corp. v. Public Service Comm'n, **447** U.S., at **566.**

5. Scope of the State's Interest To Limit Speech.

In In re R.M.J., **455** U.S. **191** (1982), the listing of areas of practice was not found to be inherently misleading and entitled to protection under the First Amendment. Id., at **207-208.**

The Supreme Court found that no substantial State interest was promoted by the prohibitions in the Missouri rule. Id., at 205. The same is true with respect to Florida's DR 2-105.

(a) Lack of Substantial State Interest and Breadth of Regulation.

While the State's interest in prohibiting false or untruthful representations that an attorney is certified, when he is not, is clear, there is no showing here that the State has a substantial interest in prohibiting all other public statements identifying, or limiting, areas of practice so long as the statements are true and not misleading. In re R.M.J., 455 U.S., at 203. It stretches the imagination to find a truthful statement, as made here, as misleading.

The authority of the State to interfere with commercial speech is greatest when the speech is false and misleading. See In re R.M.J., supra. The State, by DR 2-101(A), had appropriately and effectively banned all forms of public communications by lawyers which are false, fraudulent, misleading and deceptive. See Bates v. State Bar, 344 U.S. 350 (1977); In re R.M.J., 455 U.S. 191 (1982).

The State, however, proceeded further through DR 2-105, to foreclose every other avenue of public communication by non-certified lawyers of areas and limitations of practice, leaving available only restricted, non-public communications directed to other lawyers.

The overall regulatory scheme also limits public access to information regarding fields of legal practice to only those areas approved by the Florida Bar for certification or designation. See, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Public identification of and access to practitioners in other areas of practice, such as Customs law, is effectively eliminated by the State's regulatory scheme.

No substantial State interest has been shown by the State in limiting non-certified attorneys solely to non-public identification of areas and limitations of practice in listings with legal referral offices and announcements to other attorneys, while, at the same time, permitting certified attorneys to publicly identify their certified areas of practice; nor has the State shown that DR 2-105 is narrowly drawn and in proportion to any such interest, if it exists. In Re R.M.J., at 203; Central Hudson Gas & Electric, at 563-564.

> The value of commercial speech lies in its informational value to society. This concern focuses on the societal benefits to be derived from a communication. The greater the social utility and interest in communication, the lesser the State's ability to regulate it. See, Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

The Florida Bar v. Schreiber, 407 So.2d 595, 597 (Fla. 1981), reversed, 420 So.2d 599 (Fla. 1982), in light of In re R.M.J., 455 U.S. 191 (1982).

The right of the State to limit the public communication of areas of practice, or limitation of practice, is the control of that which is false, deceptive or misleading. In re R.M.J., 455 U.S. 191 (1982); Bates v. State Bar, 433 U.S. 350 (1977).

> Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.

Zauderer, supra, at 638, citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980).

> 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 in proportion to the interest served. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 US 557, 563-64, 65 L Ed 2d 340, 100 S Ct 2343 (1980). Restrictions must be narrowly drawn, and the State may lawfully regulate only to the extent regulation furthers the State's substantial interest.

In re R.M.J., supra, at 203.

> But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. **The absolute prohibition on appellant's speech [listing of areas of practice], in the absence of a finding that his speech was misleading, does not meet these requirements.**

Id., at 207. (Emphasis added.)

The State has not sought to narrowly taylor DR 2-105 to prohibit false or misleading representations of certification under the Florida Plans. Such misconduct was specifically

and effectively prohibited by DR 2-101(A) and (B)(4). The purpose of DR 2-105, as has been shown, was to foreclose and categorically prohibit non-certified attorneys from publicly communicating fields and limitations of practice. Having regulated all that the State may constitutionally regulate, false and misleading public communications by DR 2-101, the State then additionally prohibited all other forms of public communications by non-certified lawyers, communications found to be protected speech under the First and Fourteenth Amendments. See In re R.M.J., supra. No only the lawyer's right to communicate is prohibited, the public's right to know is prohibited.

As the Supreme Court has noted in Shapero v. Kentucky Bar Association, supra, "Our lawyer advertising cases have never distinguished among various modes of written advertising to the general public." Only in in-person solicitations has the Supreme Court affirmed the right of the State to categorically ban the activity. Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978).

The categorical ban of non-certified attorneys from publicly and truthfully identifying, or limiting, their areas of practice as embodied in Rule DR 2-105 is a prohibition of speech which the Supreme Court has determined to be constitutionally protected speech under the First and Fourteenth Amendments. In re R.M.J., supra. The State's

interest in banning this activity in this manner through DR 2-105 has not been established.

Moveover, there is an overriding societal need for public access to information identifying a wide range of fields of legal practice, and to identify practitioners in those fields, to enable the general public to obtain appropriate legal representation and advise with regard to specific legal problems. **See**, e.g., In re R.M.J., supra, and Virginia Pharmacy Board, supra.

The lack of a substantial State interest in categorically banning the protected activity of publicly communicating areas or limitations of practice is also revealed by the subsequent amendments of the rules.

The Disciplinary Rules, together with other rules, were consolidated and amended on July 17, 1986, effective January 1, 1987, 494 So.2d 977 (Fla. 1986). Former DR 2-105 became Rule 4-7.5, Rules Regulating the Florida Bar, and was significantly amended to provide:

> **4-7.5 Communication of Fields of Practice**
>
> **A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.** A lawyer may not state or imply that the lawyer is a specialist except as follows:
>
> (a) A lawyer admitted to engage in patent practice before the United States patent and trademark office may use the designation "patent attorney" or a substantially similar designation;
>
> (b) A lawyer engaged in admiralty practice may use the designation "admiralty", "proctor in admiralty," or a substantially similar designation;

> (c) A lawyer who complies with the Florida Certification Plan . . . ., or who is certified by a national group . . . . may inform the public and other lawyers of his or her certified areas of legal practice; and
>
> (d) A lawyer who complies with the Florida Designation Plan . . . may inform the public and other lawyers of his or her designated areas of legal practice. (Emphasis added.)

Rule **4-7.5** is a **180** degree reversal of the former rule, DR **2-105,** with respect to non-certified attorneys. Non-certified attorneys may now publicly communicate fields of practice, and are no longer limited to the two non-public means previously prescribed by DR **2-105.** Without certification, lawyers admitted before the United States Patent and Trademark Office, and lawyers practicing in admiralty, are once again permitted to publicly identify their specialties.

The prohibition of communicating false or misleading information implying certification, formerly DR **2-1O1(B)(4),** is now incorporated into Rule **4-7.5.**

The effect of Rule **4-7.5,** however, unlike DR **2-105,** is to impress the word "specialist" with a narrow, secondary meaning. Stating or implying that a lawyer is a certified or recognized specialist is no longer defined as a false or misleading communication by the terms of Rule **4-7.1,** as formerly expressed in DR **2-1O1(B)(4);** prohibition of the use of the specific word "specialist" now is expressly prohibited by Rule **4-7.5** except in limited circumstances.

Rule **4-7.5,** after permitting a lawyer to publicly communicate his fields or limitations of practice, then prohibits a lawyer from stating or implying that he is a specialist except when admitted as a patent attorney, engaged in admiralty practice, or certified or designated under the Florida Plans.

Rule **4-7.5** specifically carves an exception out of the broad right to publicly communicate particular fields or limitations of practice by expressly limiting the use of the specific word "specialist", and a narrow, secondary meaning of the word therefore arises in this context. "Specialist", in Rule **4-7.5,** is used in a different context than in Rule DR **2-105.** "Specialist" under Rule **4-7.5** is now a word of art, having a narrow, but specific meaning which implies admission to the Patent Office, practice in admiralty, or certification or designation under the Florida Plans. It no longer has the broad meaning used in DR **2-105.**

Rule **4-7.5** is also **a** recognition that the former rule, DR **2-105,** prohibiting all public communication of fields or limitations of practice by non-certified lawyers, was not supported by a substantial State interest and was excessively restrictive in view of the growing development of the law relating to lawyer advertising, including identification of fields of practice. If a sufficient State interest had existed to support the previous more-restrictive regulation, DR **2-105,** this interest would have been asserted to maintain

such restrictions in the amended rule. The new Rule, 4-7.5, however, squares with the holdings in the cases cited supra.

That there exists a substantial State interest in forbidding false and misleading statements is clear. See Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985); In re R.M.J., 455 U.S. 191, 71 L.Ed.2d 64, 102 S.Ct. 929 (1982); and Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

That there existed no substantial State interest in prohibiting all forms of public communications by non-certified lawyers of areas, or limitations, of practice is also clear. See In re R.M.J., supra; Virginia Pharmacy Board, supra.

(b) Overbreadth of Regulation.

If a substantial State interest is found sufficient to justify restricting public communications by non-certified lawyers beyond those which are misleading or false[5], the State failed to regulate only to the extent necessary to further that interest; rather, the State categorically prohibited all forms of public communications by non-certified lawyers, including those communications held protected by the First and Fourteenth Amendments. This rule is not in proportion to the interest to be served. The

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5. Conduct which was specifically prohibited by DR 2-101.

excessive scope of the rule, if a substantial State interest is found, renders it unconstitutional. In re R.M.J., at **203:** Hudson Gas & Electric, at **563-564.**

(c) DR 2-105, as applied in Count 111, limits public identification of areas of practice only to those areas recognized by The Florida Plans.

Count III specifically alleged, and the referee found, that it was improper for respondent to publicly state that he is practicing an area of law which is not recognized by the plans. It was not alleged, or found, that respondent stated that the area of practice was a recognized area; and respondent did not do so.

In Count 111, DR **2-105** is applied to limit public communications of areas of practice to a discreet list of fields of practice, i.e., only those recognized by the Florida Plans for certification or designation. See, Schedule A, **414 So.2d 490, 503** (Fla. **1982).** Applying DR **2-105** in this manner presents an issue substantially identical to that presented in In re R.M.J., **455** U.S. **191 (1982).** As previously noted, the Missouri rule held unconstitutional limited public listings of fields of practice to a prescribed list and prohibited no deviation from the phraseology as used in the rule.

The listing of areas of practice other than those provided in the rule, or other than as provided in the rule, was found by the Court not to be inherently misleading, and

in the absence of a finding that such speech was misleading, the absolute prohibition on such speech was invalid. In re R.M.J., at 206-207.

The application of DR 2-105 to Respondent in Count III in this case, factually, is squarely within the parameters of the holding in In re R.M.J., and constitutionally invalid as violating the First and Fourteenth Amendments.

Respondent may not be subjected to discipline for the exercise of constitutionally protected speech, the identification of customs law as his area of practice. The findings and conclusion of the referee with respect to Count III are therefore erroneous, unlawful and unjustified, and can not stand in the light of In re R.M.J., 455 U.S. 191 (1982).

B. DISCIPLINARY RULE 2-104(B)(1)(a) OF THE FLORIDA RULES OF PROFESSIONAL CONDUCT, ON ITS FACE AND AS APPLIED TO RESPONDENT, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Disciplinary Rule 2-104(B)(1)(a) provided:

> (B) Written Communication.
>
> (1) Written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:
>
> (a) Such written communications shall be plainly marked "Advertisement" on the face of the envelope and at the top of each page of the written communication in type no smaller than the largest type used in the written communication.6

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6. Effective January 1, 1984, 438 So.2d 371 (1983).

The disciplinary rule is to be applied in the light of Ethical Consideration 2-3, which stated:

> EC 2-3. Whether a lawyer acts properly is volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advise is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights and obligations. Hence, advise is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not personally contact a nonclient for the purpose of being retained to represent him for compensation except as provided in DR 2-104.

Whether the State by rule can constitutionally require the marking of a communication as an "Advertisement" has not been directly addressed or decided by the United States Supreme Court.

The marking of a communication as "Advertisement" has been referred to in dicta by that court in Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977); In re R.M. J., 455 U.S. 191, at 206, n. 20 (1982); Shapero v. Kentucky Bar Association, U.S. ____, 108 S.Ct. 1916 (1988).

This rule was adopted at a time when it was perceived that a targeted written solicitation was not constitutionally protected activity, although "advertising" by lawyers had been recognized as protected speech. Bates v. State Bar, supra.

In Shapero v. Kentucky Bar Assoc., supra, the Court affirmed that

> . . . [T]he First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business. '[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive,' unless the State 'assert[s] a substantial interest' that such a restriction would directly advance. In re R.M.J., **455** U.S., at **203.** Nor may a State impose a more particularized restriction without a similar showing.

The issue here is whether the State, when this rule was adopted, asserted a substantial interest in requiring such written communications to be marked "Advertisement" on the envelope and top of each page, and that the requirement of this rule advanced that substantial State interest.

The sole support The Florida Bar has offered in this matter in support of a substantial State interest to regulate in this manner was the commentary to current Rule **4-7.3** of the Rules of Discipline adopted after these events. The Florida Bar's Memorandum of Law, **4-5,** dated May **6, 1987.** The Florida Bar adduced no evidence of the State's interest to regulate in this manner at the time of the adoption of this regulation or to establish that this manner of regulation was no more extensive than reasonably necessary to further that interest if it existed. See, In re R.M.J., supra, at **206, 207.** Only the post hoc rationalization supporting a subsequent regulation was offered.

Although the Supreme Court has in dictum suggested that such a requirement may be a permissible restrictive alternative to absolute prohibit of the conduct, nevertheless it is the burden of the State to establish a substantial interest in regulating and that its regulation is drawn with care and in a manner no more extensive than reasonably necessary to further its established interest. Id., 206, 207.

There is no bright line distinguishing public communications which are advertising and those which are informational. The requirement of marking a communication as an "Advertisement" is dependent upon the intent of the writer of the communication to obtain professional employment. However, there is no requirement that informational communications be marked as an advertisement.

EC 2-2 states that "the legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed."

EC 2-8 comments that "selection of a lawyer by a layman should be made on an informed basis . . . Advertisements and public communications should be formulated to convey information that is necessary to make an appropriate selection. Information that may be helpful in some situations would include: . . . (3) description of one or more fields of law in which the lawyer or law firm practices; . . . ."

EC 2-7 recognizes the "increasingly complex and specialized" nature of the practice of law and that laymen would have difficulty in determining the competence of lawyers to render different types of legal services.

Customs law is a discrete area of federal law, governed by federal statutes and extensive regulations. 19 U.S.C. and 19 C.F.R. It embodies extensive administrative procedures and practices peculiar to that area of law. In addition to published case law in the area, practice in this area requires access to and familiarity with an extensive body of published rulings of the Treasury Department and the Customs Service as well as a large body of private letter rulings of the Customs Service. While Treasury Department Decisions (T.D.) and Customs Service Decisions (C.S.D) are published in the Federal Register, the private letter rulings are available in microfiche form from the Customs Service and are not generally available in law libraries.

Customs law is not a subject taught in law school. Few attorneys have sufficient familiarity with this area of law to competently undertake to represent clients in case involving Customs law. An inexperienced lawyer undertaking such a case may violate ethical responsibilities to his client and expose himself to a claim for malpractice as well.

For these reasons, it is important that a free flow of information to laymen facing legal problems relating to Customs law be permitted without unnecessary restrictions.

A communication, such as the one here, which contains information concerning the action the recipient must take within a limited time period to protect his rights, if marked "advertisement," is quite likely to be discarded by the addressee as junk mail.

This communication not only informed the addressee that respondent practices in the area of Customs law, but also altered the addressee to the need to obtain the services of an attorney experienced in that area of law.

It must be noted that the rules of the Florida Bar limited listings of areas of practice in the yellow pages of the telephone directories to those areas approved by the Bar, while at the same time prohibiting lawyers from identifying publicly the practice of areas of law not approved by the Bar.

A layman with a legal problem concerning Customs law, an area not approved by the Bar, was effectively precluded from conveniently locating a lawyer having experience in that field notwithstanding the duties imposed under the Ethical Canons of the Bar to inform and assist laymen to obtain competent legal representation. The duties imposed by the Ethical Canons were particularly compelling with regard to legal problems, such as Customs law, which are outside the mainstream of general legal expertise. The more esoteric the legal problem, the more compelling the need for qualified

lawyers to reach out and offer laymen assistance and advise, albeit it unsolicited.

The requirement of marking communications as "Advertisements" on the envelope and letter poses a substantial probability that the communication may be discarded by the recipient unopened and unread, defeating the ethical obligation to inform laymen of their legal problems.

Moreover, this rule burdens every attorney with the need to constantly review every outgoing written communication to a non-client to determine, at his peril, whether it must be labelled or not. When there may be a close question of whether the written communication is informational or, in hindsight, will be construed as a solicitation which requires labelling has a substantial chilling effect upon the exercise of the flow of speech protected by the First and Fourteenth Amendments. Every lawyer is forced to second guess the potential interpretation of each communication he sends.

As the Court observed in Shapero v. Kentucky Bar Association, **108** S.Ct. **1916** (1988), "The only reason to disseminate an advertisement of particular legal services . . . is to reach individuals who actually 'need legal services of the kind provided . . . by the lawyer." "A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." The same is equally true of a letter intended to

inform whether or not it may also be construed as a solicitation for employment.

The rule in question not only requires labelling, but is specific concerning the placement of the labels on the face of the envelope and top of each page, and the size of the type required. The rule in question goes beyond the mere labelling requirement referred to in dictum by the Supreme Court, as noted supra. The rule at issue here imposes a prior restraint on the exercise of speech by requiring a particularized placement of labels, content of the labels, and type size; requirements which may have nothing to do with the content of the communication. This rule does not regulate the content of a letter - false or misleading statements which are substantial interests of the State - it regulates the form in which it is transmitted by requiring particularized labelling.

Placement of a label on the back of an envelope instead of the face is a violation of the rule, although most people would turn an envelope over to open it. Any notice requirement would be as equally served by placement of a label on the reverse. Likewise, a label at the side of a letter, or at the bottom, may as equally identify the letter as an advertisement as the same information placed at the top of the letter, yet misplacement of the label would be a violation of the rule. Arguably the use of the word "advertising" in lieu of "Advertisement" constitutes a

violation of the rule, yet serves the identical purpose of notice.

Omission of the label, as here, is a violation only if the communication is intended to solicit employment. Where the communication is intended to be informational, the omission may not be a violation, but is subject to claims, as here, that the intent was otherwise, resulting in a trap for the unwary attorney without addressing the substantial interest of preventing false and misleading communications.

In the absence of proof of a substantial State interest requiring this regulation, and supporting the scope and content of this regulation, this rule stands as an unconstitutional abridgement of protected speech under the First and Fourteenth Amendments. As the Supreme Court stated in Shapero, supra, "so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient."

There is no evidence that Respondent's letter is overreaching, and therefore unworthy of First Amendment protection.

The Supreme Court's "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." Shapero, supra. This rule does not serve to address those concerns.

C. THE REFEREE'S FINDINGS OF FACT, SECTION 11, COUNT I, PARAGRAPH 4, ARE ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

Respondent testified that his intent was to inform the addressees of the seizure, the need to take appropriate action within a specific time limit, and to identify the need to retain counsel, if they desired, who had experience in the area of law involved. He identified his practice in that area of law and indicated his willingness to answer any questions the addressee may have if the recipient wished to ask. Other than the letter itself, The Florida Bar introduced no evidence of the intent of the letter.

The Referee found that the letter was sent to prospective clients for the purpose of obtaining professional employment.

The question of the intent of the communication points out the difficulty of the application of the rule by attorneys. Without a bright line to adhere to, a communication intended by the writer as one thing subsequently may be construed as intending something else.

The purpose for which the letter was sent in this case is best established by the testimony of the Respondent, and the evidence to the contrary adduced by the Bar is not

sufficient to support the Referee's finding. The Referee's finding is erroneous and unjustified by the evidence in this case.

D. THE REFEREE'S FINDINGS OF FACT, SECTION 11, COUNT 11, PARAGRAPH 2, AND COUNT 111, PARAGRAPH 4, ARE ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

The findings of fact and recommendations as to guilt by the referee as to Counts II and III are predicated upon violation of a rule which is not constitutional. The rule is particularly being applied in a manner which is unconstitutional, prohibiting and punishing for use of protected speech. Respondent may not be found guilty and punished for a violation of this rule as his speech was constitutionally protected.

1. Count II

The finding of the Referee as to Count 11, Paragraph 2, as discussed above, imparts a meaning to "specialize", as used by respondent, significantly different than the ordinary, common meaning of the word, or as intended by the writer in this case. The meaning found by the referee is so strained by application of a defective process of logic that it substitutes another word for the one used by the respondent, thus materially altering the meaning of respondent's statement. And it is upon this substituted word, or meaning, that the recommendation of guilt is founded.

The Referee found in paragraph 2, Count 11, that "the statement contained in Respondent's letter referred to in Paragraph 2 [sic], above, constitutes a representation that Respondent and/or his firm are specialists, having competence or experience in a particular area of law."

This finding has been discussed extensively supra, both as to the proper meaning of the words "specialize" versa "specialist." Also, the referee did not find the statement to be false or misleading. More specifically, the evidence establishes that the statement is true.

For the reasons previously presented, a truthful statement by a lawyer that he concentrates in a particular field is constitutionally protected speech. In re R.M.J., 455 U.S. 191 **(1982).**

Even if the equation that "specialize" means "specialist" which means "competence or experience" in a particular field is accepted, in view of the evidence that the statement is true, and was not found false or misleading, the statement is nevertheless constitutionally protected speech and may not be prohibited by the State for the reasons presented above.

The findings of the Referee are erroneous, unlawful and unjustified.

2. count **III**

The Referee found in paragraph **4**, Count 111, "The representation contained in Respondent's letter concerning

specializing in customs law relating to vessel seizures is improper in that it holds Respondent out publicly as practicing in an area of law which is not recognized by either the Florida Certification Plan or Florida Designation Plan." (Emphasis added.)

Finding that Respondent's statement is "improper" since it was not limited to the discrete list of areas of practice approved by the Bar is, for the reasons fully discussed supra, in direct conflict with the decision in In re R.M.J., 455 U.S. 191 (1982), and finds as "improper" constitutionally protected speech.

The referee did not find that the statement constituted a representation that Respondent was certified or designated in the area of Customs law, nor did he find that the statement constituted a representation that the area was an approved field of practice for certification or designation.

For the reasons set forth in Section A, above, the finding of the Referee is erroneous, unlawful and unjustified, and in conflict with the holding in In re R.M.J.

E. THE REFEREE'S RECOMMENDATION AS TO WHETHER RESPONDENT SHOULD BE FOUND GUILTY, SECTION III, IS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

The recommendations as to Counts II and 111, alleged violations of Rule 2-105, as state in paragraphs 2 and 3, are recommendations which are erroneous, unlawful and unjustified as the speech involved was the exercise of constitutionally

protected speech and the rule, facially and as applied, violates the First and Fourteenth Amendments of the Constitution. In re R.M.J., 455 U.S. 191 (1982).

The recommendation as to Count **I**, an alleged violation of Rule DR 2-104(B)(1)(a), is, for the reasons set forth in Section B above, constitutionally invalid, and therefore erroneous, unlawful and unjustified.

F. THE REFEREE'S RECOMMENDATION AS TO DISCIPLINE TO BE APPLIED, SECTION IV, IS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

The recommendation of a public reprimand as to Counts II and **III** is constitutionally prohibited for the reasons previously discussed, Section A above.

As to Count **I**, if the court finds that the provisions of Rule 2-104(B)(1)(a) are constitutionally valid, and were violated in this case, it is respectfully submitted that the violation was a technical violation in a single instance, occurred nearly four years ago, occurred in respect to a communication which was substantially informative to the recipients, and involved a communication which was not false or misleading. A recommendation for public reprimand in this case is excessively severe under the circumstances, and a private reprimand would be a more appropriate disciplinary measure to apply in this case.

If, as have been argued, the provisions of this rule are found invalid, no discipline should be imposed.

G. THE REFEREE'S FAILURE TO STATE ADDITIONAL FINDING OF FACT AND CONCLUSIONS OF LAW WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

Respondent requested the Referee to make additional findings of fact and conclusions of law based upon the evidence adduced in the case before the Referee in his corrected report. The failure of the Referee to make the additional findings of fact on critical issues leaves open and unresolved issues which may or may not be underpinnings of the violations alleged in Counts II and 111. Respondent, perforce, has been required to address these issues in his brief unaided by specific and adequate findings of the referee.

As to Count 11, there is no finding that Respondent's statement is false or misleading. There is no finding that the statement represented, expressly or by inference, that Respondent was certified or designated. In the absence of such findings, it should not be inferred that the Referee impliedly made such findings. To the contrary, if any inference is applied, it should be that the statement was not misleading or false, and that Respondent did not expressly or by inference represent that he was certified or designated.

However, if the findings made by the Referee as to Count II are construed as inferring that the Referee determined that the statement was false or misleading, or constituted a representation that Respondent was certified or designated,

Respondent is entitled to specific findings on that issue in order to appropriately address the issue on review.

In like manner as to Count 111, the Referee did not find that Respondent's statement constituted a representation that Customs law is recognized as an area of law for certification or designation by the Florida Bar. To the extent that the Referee's findings as to Count III may be construed as inferring that he determined that such representations were made, Respondent is entitled to specific findings on the issue in order to obtain appropriate review.

The failure to make specific finds on factual issues which are critical in this case leaves the basis for the discipline recommended illusive and ill defined, and the failure to make findings with regard to the issues was erroneous and unjustified.

H. THE REFEREE'S FAILURE TO ADDRESS IN HIS REPORT THE CONSTITUTIONAL ISSUES RAISED BY THE RESPONDENT TO THE DISCIPLINARY RULES WAS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

It is clear from the record of the proceedings below conducted before the Referee that Respondent has consistently challenged the constitutionality of the Disciplinary Rules at issue here. There is nothing explicit in the findings of the Referee as to his determination of those issues. It must be assumed, therefore, that he found the disciplinary rules to be constitutional facially and as applied in this case. For the reasons discussed above, the Referee's determination was, it is submitted, erroneous, unlawful and unjustified.

V. CONCLUSIONS

For the foregoing reasons, the Report of the Referee should be rejected, and Respondent should be found to have committed no violations of any valid disciplinary rule and not subject to disciplinary action for his conduct. He should also be found not liable for payment of costs as recommended by the Referee in Section V of his Report.

Respectfully submitted,

Peter S. Herrick
Respondent
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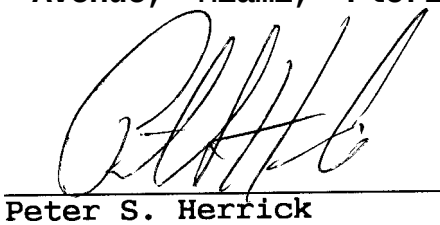
(305) 285-6891

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail, postage pre-paid, upon The Florida Bar, Patricia S. Etkin, Assistant Staff Counsel, Suite 211, 444 Brickell Avenue, Miami, Florida 33131, on April 27, 1989.



Peter S. Herrick