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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

RESPONDENT'S REPLY BRIEF

PETER S. HERRICK
 Respondent
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I. ARGUMENT

A. Disciplinary Rule 2-104(B)(1)(a) of the Florida Rules of Professional Conduct is Not Constitutional

In support of the constitutionality of this rule, Complainant identifies as a substantial State interest the invasion of privacy of the recipient. The Supreme Court in *Shapiro v. Kentucky Bar Association*, 108 S.Ct. 1916 (1988), stated:

A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation [printed advertising and a letter] 'convey information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney.' Zauderer [v. Office of Disciplinary Counsel], 471 U.S. 616 (1985)], at 642. Nor does a targeted letter invade the recipient's privacy any more than does a substantially identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Potential invasion of privacy by a targeted letter is not a sufficiently substantial interest to support this rule. Whether labelled or not, a targeted letter does not invade the privacy of the recipient and does not have the potential for coercive abuses found in in-person solicitations. See Zauderer, 471 U.S. 616 (1985).

The Complainant further identifies as a substantial interest that "a personalized letter is 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." Answer Brief. 3.

In the context of the letter at issue here, which provided the addressees with information concerning action to be taken as the result of a seizure by Customs of a vessel, the information conveyed was primarily and substantially informational. Whether or not marked as an "advertisement", the recipient always had an unfettered option to read or not read the letter. "Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the 'reader of an advertisement . . . can 'effectively avoid further bombardment of [his] sensibilities simply by averting his eyes, '" Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 465 (1978), (quoting Cohen v. California, 403 U.S. 15, 21 (1971)). The State does not, we submit, have an substantial interest in directing, controlling or influencing the reading habits or choices of the recipient of a letter.

The final substantial interest identified is an increased risk of deception, which "could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly

suggest that the recipient's legal problem is more dire than it really is. Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advise." Shapero, supra, at 1923.

This interest concerns the contents of a letter; its substance, not its form. The rule here, however, requires a particular form for the communication; the labelling requirement does not address or control the contents of the communication, which is the interest identified by the State in support of the rule. Identifying a letter as an "advertisement" in no way protects the recipient against erroneous legal advise, or an overestimate or misperception of the lawyer's familiarity with the legal problem, or the extent of the legal problems of the recipient. Labelling does not advance this interest or prevent the potential for the abuses identified.

The State further asserts that the rule requires a disclosure of the nature of the letter. The difficulty, as in this case, is determining whether the nature of the letter is a solicitation or informational. Only a written solicitation is required to be labelled; an informational letter need not be labelled. Yet even a targeted non-solicitation letter is subject to the same potential abuses asserted by the Complainant. But, the rule is not supported by the interests the State has asserted in requiring

disclosure by labelling. The labelling requirement fails to advance any of the interests asserted by the State.

The Supreme Court in Shapero found that the most obvious means of regulating opportunities for isolated abuses or mistakes is through the less means of requiring the lawyer to file any solicitation letter with a state agency, thus giving the state an opportunity to supervise mailings and penalize abuses. Shapero, supra. Labelling does not achieve that end, nor does the specific requirements of size and placement of labels. Labelling does not distinguish "the truthful from the false, the helpful from the misleading, and the harmless from the harmful." Shapero, quoting Zauderer, at 646.

The dangers recognized by the Court in Shapero in targeted advertising are directed to potential abuses in the content of the communication. This is a substantial state interest which the State may address through narrowly tailored regulations provided that the regulations directly advance the interest asserted and are no more extensive than necessary to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980). The labelling requirement of this rule does not directly advance and serve that interest. Thus unsupported, the rule is not constitutional.

B. Disciplinary Rule 2-105 of the Florida Rules of Professional Conduct is Not Constitutional

The Florida Bar asserts that "people who see the word 'specializes' could very well assume some type of Bar supervision or approval where none in fact exists." Complainant's Answer Brief, at 4. The Florida Bar acknowledges, however, that the word "'specialize' may not contain a representation that the attorney using it is certified or designated under the Florida Plans," and that "the public is generally uninformed about these plans." *Id.*, at 5.

Nevertheless, the Florida Bar asserts that "the statement that an attorney or firm specializes in a particular area of law is misleading to the general public." *Id.*, at 4. It is this rationalization which is asserted in support of the rule, and which the Bar finally admits is the basis of its disciplinary proceedings in this case. Yet, we must reiterate that Respondent is not charged with making a false or misleading statement which is specifically and precisely prohibited by Disciplinary Rule 2-101 of Professional Conduct, nor did the referee find that Respondent's statement was false or misleading.

In Count 111, and as the Florida Bar has asserted, Answer Brief, at 7, it is alleged that Respondent has violated the rule 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." *Id.*, at 7. This allegation has nothing to do with

the question of whether Respondent used the word "specializes" or not. It is the identification of an area of practice not recognized by the Florida Bar which is the crux of the complaint. This activity is constitutionally protected by the First and Fourteenth Amendments. In re R.M.J., 455 U.S. 191 (1982), is clear and controlling on this issue. The State has failed to establish a substantial interest in limiting the identification of areas of practice solely to those recognized by the Florida Plans.

Given the definitions of "specialize" and "special" cited by Complainant, Answer Brief, at 4, to interpret Respondent's letter to mean that Respondent represented that he has competence or experience in a particular area of law is strained. His statement on its face meant "to apply to a specific use", Webster's New International Dictionary, Second Edition (1961); this is an identification of an area of practice, not a representation of competence or experience.

The State has shown no substantial interest in preventing an attorney from representing that he has competence or experience in an area of law if that statement is true and is presented in a manner which is not misleading. In re R.M.J., at 203. The use of the word "specializes", or even "specialist", does not inherently represent certification under the Florida Plans as the Complainant has acknowledged. The use of these words are not misleading if

the statement is true. The record of this case establishes that Respondent has competence and is experienced in Customs law. His statement was not misleading since it was true.

There was no representation of certification or designation by the Respondent as the Complainant has acknowledged. Answer Brief, at 4.

Since the public is "uninformed" about the Plans, it is unlikely that the public would be confused and misled as to the differences between certified, designated, and specialized, or as implying Bar supervision or approval. The Bar has acknowledged that "specialize" does not impliedly represent either certification or designation. Given the uninformed status of the public concerning these plans, it is more probable the public is unaware that these programs exist and the use of the word "specialize" would have no connotation to the public beyond the identification of an area of practice.

The term "specialist" is a common term used in the medical field and one well known and familiar to the general public. There is no reason to believe that the same or similar terms applied in the legal field would have a different meaning to the public or would be misleading to the public. "Specialization" in medicine does not inherently infer Board Certification any more than specialization in law infers certification or designation under the Florida Plans.

An again, no allegation or finding has been made that Respondent's statement was misleading or untrue. If the crux of the Florida Bar's complaint as to Count II is that the statement was untrue, false and misleading, Respondent should have been charged with a violation of the specific rules (DR 2-101) so as to give him proper notice of the charge and to enable him to defend accordingly.

The rule, on its face and as applied here, prohibits constitutionally protected speech and there is no substantial State interest to support the restriction. In re R.M.J., 455 U.S. 191 (1982). Disciplinary Rule 2-105 is unconstitutional.

C. The Referee's Findings Are Erroneous, Unlawful and Unjustified

The findings of the Referee turn in large measure upon the constitutionality of the rules.

However, the finding of the Referee as to Count 111, Paragraph 4, that Respondent's statement was "improper" is, we submit, a conclusion of law, not a finding of fact, and therefore subject to review.

Additionally, the finding of the Referee as to Count 11, paragraph 2, depends upon the meaning to be given to the word "specialize" as compared to "specialist." It is submitted that this Court must determine whether "specialize" means, as the Respondent contends, an identification of an area of practice which is constitutionally protected, or whether it

means, as the referee found, a representation of experience or competence. If found to be a representation of experience or competence in an area of law, the Court is called upon to determine whether a representation of experience or competence can constitutionally be prohibited by this rule if the representation is not false or misleading.

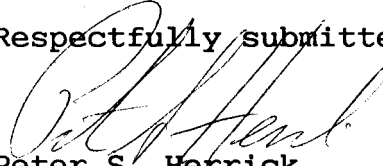
11. CONCLUSION

For the reasons stated above, Disciplinary Rule 2-104(B)(1)(a) is unconstitutional as unsupported by a substantial state interest, and the interests identified and asserted by the State are not advanced by this rule.

Disciplinary Rule 2-105, on its face and as applied to Respondent, prohibits the truthful public identification of areas of practice by non-certified attorneys. It does not prohibit only misleading statements (which are precisely and effectively proscribed by other Disciplinary Rules), but is applied to punish for the public identification of any area of practice not recognized by the Bar Plans. The public identification of areas of practice, if truthful and not misleading, is constitutionally protected speech and this rule is unconstitutional.

The Referee's Report should not be upheld, and no discipline should be imposed on Respondent.

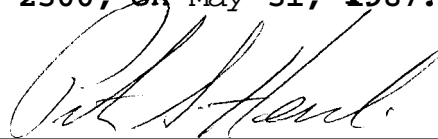
Respectfully submitted,



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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, and Stephen Tabano, Bar Counsel, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on May 31, 1987.



Peter S. Herrick