IN THE SUPREME COURT OF FLORIDA

74,987

IN RE: THE FLORIDA BAR,

RE: AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR -- ADVERTISING ISSUES

CASE NO.:

VERIFIED RESPONSE OF JON H. GUTMACHER IN OPPOSITION TO CERTAIN PORTIONS OF THE PROPOSED ADVERTISING RULE AMENDMENTS

COMES NOW Jon H. Gutmacher, Attorney at Law, and responds to the Proposed Advertising Rule Amendments submitted by The Florida Bar by stating his opposition to certain portions thereof as hereinafter stated. In support of this response your Respondent submits the following:

A. FACTUAL BACKGROUND

1) Respondent is an attorney in good standing in this State since **1972**, and served as an Assistant State Attorney in Broward County, Florida from 1973 through **1978**. Nine months were served as a misdemeanor division prosecutor, three months as a juvenile division prosecutor, one and a half years as chief of the appellate section, and the balance as felony division prosecutor.

2) For the past six years your Respondent has "specialized" in the area of DUI defense, and approximately eighty-five (85%) percent of his practice is devoted solely to this unique area of criminal law; the balance of the practice being in the criminal felony and misdemeanor area. Respondent handles a minimum of 100 - 200 DUI cases per year.

3) Respondent has achieved recognition as a "specialist" in the area of DUI with his peers and the Judges of Broward County. Your Respondent was Chairman of the Traffic Court Rules Committee of The Florida Bar for two terms, and continues serving as a Vice-chairman.

4) Respondent authored a section of a recent CLE lecture given in January, **1989** and lectured on; "The Scientific Attacks on Blood and Breath Tests, besides

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in D. A.

serving as coordinating chairman for the lecture series.

5) The area of DUI is the heaviest part of the criminal portion of the County Court's docket in Broward County, with more than 5,000 DUI arrests in Broward County per year.

6) Respondent has deliberately not chosen to designate or be certified in the area of criminal law because he believes that this would portray a FALSE or MISLEADING expertise to the public by suggesting that The Florida Bar had determined him better qualified than nondesignated/-noncertified attorneys. In actuality, it is this attorney's belief that certification/designation is like preparing for or taking any other test - and has no bearing on the attorney's actual ability to ~~achieve results~~ for a client.

Moreover, DUI is a "specialty of its own," and an attorney designated or certified in criminal law can easily be (and many times is) unfamiliar with this specific area. Of course, DUI is not a recognized area of designation or certification.

7) Respondent has formulated a direct mail advertisement which has been substantially unchanged for over two years. Respondent does direct mail advertising ~~only~~ on DUI cases. Such was necessitated by other firm's doing such and cutting into Respondent's DUI business by over seventy-five (75%) percent until Respondent also began direct mail advertising. A copy of the advertising material sent out by your Respondent is attached hereto as ~~Exhibit #1~~ and is incorporated by reference.

8) Respondent has been informed that at least 15 other attorneys and/or law firms practicing in Broward County are presently doing direct mail solicitation of DUI clients. While your undersigned feels that some of these advertisements are unprofessional, the great variety of information provided gives a DUI arrestee a ~~unique opportunity~~ to compare between attorneys and services which is not otherwise afforded in other types of criminal cases (where referrals

are largely from bondsmen to "favorite" attorneys).

9) Your Respondent feels that his direct mail advertisement is professional, truthful, and genuinely informative (both as to his qualifications and as to the nature of DUI cases, proceedings and defenses). Your undersigned feels that from a personal and Constitutional standpoint - no more or less should be required - and that certain regulations supported by The Florida Bar would diminish that professionalism, improperly censor content and styling, and take away the unique creativity of the format of the particular advertisement that your Respondent is presently using. The challenged portions of amendments proposed by The Florida Bar are as follows:

B. CHALLENGED PORTIONS

10) Rule 4-7.2, Line 80:

This Rule states that only a "single voice" can appear in a radio or television advertisement. This unfairly restricts the effective structuring of any such ad.
The State has no legitimate interest in restricting the number of "voices" if the advertisement otherwise complies with the other "content" rules proposed.

11) ~~Rule 4-7.2(d), Lines 99-102~~:

This rule sets forth a requirement that all advertisements contain a verbatim statement that:

> "The hiring of an attorney . . . should not be based solely on advertisements. Before you decide ask us to send you free written information . . . "

This statement is improper. If a potential client wants to base his/her opinion on an advertisement -- that is their privilege. It is not up to the Florida Bar to dictate to a potential client how they should evaluate someone, and what they should or should not ask for. Moreover, it is illogical to believe that potential clients do not know that other attorneys exist.

My advertisement (See, Exhibit #1, infra) sets

forth detailed information about myself, my experience, and the crime of DUI. It tells the potential client that they should personally evaluate me free of charge, and without any obligation so that they can:

> "Have an opportunity of meeting me face-to-face and deciding whether or not I measure up to the quality representation you expect."

In essence, the letter asks them to compare and make a personal evaluation after meeting me. Must this be censored by the "required language" of the Florida Bar, or must the advertisement be so written as to be redundant in order to retain the personal and creative element that I have put into the letter?

The Florida Bar seeks to impose ~~CONTENT BASED~~ CENSORSHIP! My letter is a personal statement. I believe I have the right to express my statements under the Constitutional guarantee of Free Speech, and ~~Freedom from Government~~ Intrusion (Privacy) where I am otherwise truthful and professional. ~~"Content alteration"~~ infringes on those rights.

12) ~~Rule 4-7.2(i), Lines 134-139~~:

This Section states that a lawyer shall not make statements that "describe or characterize the quality of a lawyer's services . . ." This seems vague and overbroad. Any statement as to experience or training reflects on the attorney's "quality." Any indication as to how the office handles a particular case also "describes" the service. If a lawyer can't "describe" his services - he can't advertise.

The fact that I am a one-man office, and I handle each case "personally" - cannot be revealed to the client under this Rule. Many clients hire me primarily on the basis that their case will not be handled by an associate, but will be done totally by me. How can the proposed Rule constitutionally prevent this important and truthful information from being disseminated?

13) Rule 4-7.4(c)(1)(a), Lines 477-487:

a) This Rule requires that the word "advertise-

ment" be printed in the color red on the envelope. This makes the envelope look garish and unprofessional. It is an INSULT to the attorney sending the advertisement, and is much akin to the Nazi requirement of Jews having to wear a yellow star during World War 11. Moreover, the cost of two-color printing nearly doubles because of this requirement. ($32.00 to **$57.00** for 500 envelopes).

There is no evidence that a professionally printed envelope in bold black or blue lettering with the word **"ADVERTISEMENT"** would be ignored. Moreover, the proposed Rule doesn't even carry a size requirement! Surely, size is more important than color. Could the Florida Bar have picked any color it wanted? (Green, purple, yellow) Could it make the envelopes a certain color? Obviously, the purpose of the Rule is to inform the recipient (in a professional manner) that the envelope contains an advertisement -- not that it contains **"garbage."** Color is not a proper consideration.

b) It is also submitted that requiring every page of an advertisement to have printed the word **"advertisement"** is deliberately ~~discriminatory~~ and unprofessional. The Florida Bar seeks to demean attorneys who advertise without regard to content or qualifications. There is a point where regulations become pure OVERKILL. If the envelope and first page are clearly marked - any reasonable person will have long figured out that it is an advertisement!

14) Rule **4-7.4(g), Lines 519-521:**

This Rule requires that every letter begin by stating that if the prospective client has already hired an attorney they should then "disregard this letter."

Why? Is there a law that says a client can't switch attorneys? Is there a law that says a client should not have a second opinion? Obviously, that is what the wording implies. Such is false and misleading. If a person wants to shop after they've hired an attorney - that is their option. It is not the function of the Florida Bar to enforce

the status quo.

Perhaps an additional consultation will enable a client to realize that he/she is in real trouble because of the present attorney's action/inaction. On the other hand, it may allow the client to realize that he is being competently represented.

15) Rule 4.7-4(i), Lines **3531-534**:

This Rule requires that the attorney disclose how he obtained the information prompting the communication. Why is this a requirement? While a potential client might be curious as to the source of the attorney's information, he/she may just as likely not be interested. It is just another "surplus requirement" thrown in by The Florida Bar to annoy advertising attorneys and make the process more burdensome.

On the other hand, if the client or prospective client requested this information - then I think that they have a right to know. However, as written, I think the Rule is unnecessary, overbroad, and constitutes content based censorship (censorship requiring unnecessary language and formatting), and is irrelevant to the interests the State may constitutionally infringe upon.

16) Rule **4-7.56, Lines 731-732**:

This Rule restricts a lawyer from implying, even truthfully, that he specializes in a particular area unless he is certified or designated in that area. Such a rule would forbid an attorney, such as myself, from stating what my practice is limited to, and what my experience is all about, even though I am totally truthful, and equally or better qualified than other attorneys, even those who may be certified/designated in criminal law. Such denies my right to Free Speech under the Florida and Federal Constitutions, as applied, and creates an UNTRUTHFUL PRESUMPTION that:

a) I am not a specialist; and/or

b) I am not as qualified as persons designated or certified in the area.

Moreover, permitting someone designated in criminal law to claim an expertise in DUI has no substantial basis in fact. Many attorneys experienced in felony work have absolutely no idea how to properly handle a DUI, especially in relationship to the scientific defenses. They are unfamiliar with unique applications of case law, sentencing, jury selection, and expected testimony from police witnesses and expert witnesses. So too, the practitioner in DUI is generally a subscriber to a weekly publication, the Drinking/Driving Law Letter, and is familiar with a host of other scientific and legal publications in this special area. Yet, the area of DUI is not a recognized specialty for designation or certification.

In essence, if an attorney can support the fact that he has an expertise in a special area - he should have a constitutional right to disseminate that information (so long as it is done truthfully and professionally). To hold otherwise would give less qualified people an improper advantage over a person with more expertise, ability and experience. It seeming offends Article I, Section 2, Fla. Const., as such a restriction certainly is not a "reward for industry."

C. CONCLUSION

It should be obvious that your Respondent is somewhat an opinionated nonconformist. That, to me, is the essence of being an American citizen. I love my country, I love the Constitution, and while I am willing to comply with those regulations necessary to promote truth, fair dealing and professionalism -- I am offended and upset with regulations that are unwarranted, discriminatory, or just plain surplus.

I believe we live in a changing world. Fortunately or unfortunately, advertising is here to stay -- and for those of us not fortunate enough to be in large firms or be "well connected" -- advertising is a necessity of life. Without it

-- we starve.

Personally, I cannot conduct my business without it. That's probably because of my personality. I don't like to "kiss up" to anyone, I tend to say what I think, and my social circle is limited to only a very few people who I enjoy being with.

To me, the answer has always been to advertise. It hasn't made me rich - but it's paid the bills. I have always done my own design and "copy" - I think this is a matter of pride and professionalism, and I am PROUD of my advertising. I think it provides a "standard," and provides useful information to anyone who reads it - whether they choose to hire me or not.

I, like most attorneys, can "live with" most of the proposed regulations - even though I truly believe we are being "singled out" by nonadvertisers. What I protest is the unnecessary, the discriminatory, the regulations that bear no real relationship to the legal end the regulations are supposed to serve; the ones that embarrass me and offend my dignity. Hopefully, this Court will take the time to consider the arguments I have set forth.

VERIFICATION

CAME BEFORE ME the person of Jon H. Gutmacher, Attorney at Law, and after being first duly sworn did depose and state that the foregoing is true and correct to the best of his knowledge and belief.

JON H. GUTMACHER

SWORN TO AND SUBSCRIBED before me this 11th day of December, 1989.

NOTARY PUBLIC
My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
MY COMMISSION EXPIRES APRIL 30, 1991.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 11 day of December, 1989.

JON H. GUTMACHER
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Ft. Lauderdale, FL 33304
Telephone: (305) 760-7505