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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 80,701
[TFB Case No. 92-31,167 (09B)]

v.

[redacted]

Respondent.
_____/

ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar".

The transcript of the final hearing held on April 30, 1993, shall be referred to as T., followed by the cited page number.

The report of referee dated May 26, 1993, will be referred to as "ROR", followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____)

The supplemental report of referee dated June 21, 1993 shall be referred to as "SROR", followed by the referenced page number(s) of the Appendix, attached. (SROR-A-___)

The bar's exhibits will be referred to as B-Ex., followed by the exhibit number or letter.

The respondent's exhibits will be referred to as R-Ex., followed by the exhibit number.

STATEMENT OF THE CASE

The Ninth Judicial Circuit Grievance Committee "B" found probable cause on August 18, 1992. The bar filed its complaint on October 30, 1992, and this court appointed the referee on November 18, 1992. Considerable discovery ensued and the final hearing was held on April 30, 1993. The referee issued his report on May 26, 1993. The referee recommended the respondent be found guilty of violating Rules 4-7.2(d) for failing to provide the required disclosure in his advertisement; 4-7.2(p) for failing to submit a copy of the advertisement to the standing committee on advertising; 4-7.5(b) for failing to comply with the filing requirements of the bar's standing committee on advertising; and 4-7.3(f) for providing misleading information in the advertisement. The referee recommended the respondent be found not guilty of violating rules 4-7.1(a) for making a false, misleading, deceptive, or unfair communication about the lawyer or the lawyer's services through an advertisement which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading; and 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The referee made no finding with respect to rule 4-8.4(a) for violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another. On June 21, 1993, the

referee issued a supplemental report setting forth his recommendation that only two-thirds of the bar's costs be taxed against the respondent.

The report of referee and supplemental report were considered by the board of governors of The Florida Bar at its July, 1993, meeting. The board voted not to seek an appeal of the referee's recommendations. The respondent served his petition for review on August 8, 1993. He moved for an extension of time on September 3, 1993, which this court granted on September 13, 1993, allowing him until September 27, 1993, to file his initial brief. The respondent served his brief on September 27, 1993, and petitioned for oral argument.

STATEMENT OF THE FACTS

On December 19, 1991, and December 26, 1991, the respondent ran an article in the West Orange Times newspaper (T. p. 22). The respondent paid the newspaper $189.00 to run each such article (T. p. 29). The final two paragraphs of the article read: "This document is provided as a public service to better educate the public as to their rights. It is not an advertisement of legal services and should not be considered as such" (B-Ex. 1; B-Ex. 2; Appendix p. A-9). At the bottom of the article, in bold letters, was the following language:

"A PUBLIC SERVICE MESSAGE SPONSORED BY:
The law office of [redacted]

(B-Ex. 1; B-Ex. 2; Appendix p. A-9)

The article did not contain the disclosure statement set forth in rule 4-7.2(d) nor did the respondent submit a copy to The Florida Bar's standing committee on advertising (T. pp. 73, 105; B-Ex. 1; B-Ex. 2).

In running the article, the editor of the West Orange Times placed the word "advertisement" above it both times it was published (T. p. 33). The editor testified that the word "advertisement" was added to ensure the paper's readership understood the article was placed and paid for by Mr. [redacted] and not by the newspaper (T. pp. 35, 36, 38). The West Orange Times

is a weekly newspaper (T. p. 27). All items contained therein are classified as either newscopy or advertisements (T. pp. 47, 56). It does not categorize any article as a public service announcement (T. pp. 43, 56). It will sometimes run advertisements without cost if the ad is for a nonprofit organization (T. pp. 41, 42, 44).

At the time the message was published, the respondent's primary area of practice was criminal defense work for individuals charged with driving while under the influence (T. pp. 21, 62). According to the respondent, his purpose in placing such an article was to inform the public of the rights of individuals who are charged with this offense and promote discussions concerning the laws (T. pp. 67-68, 74-75). Although the respondent has a home address and telephone number, he used his law office address and telephone number in the article (T. p. 104). He has not run any similar articles in newspapers subsequent to December 26, 1991 (T. pp. 75-76).

The referee found the respondent did not intentionally seek to mislead the public or make any misrepresentations although the article was potentially misleading (ROR-A-4). The referee found that the respondent's article was not a public service announcement but rather was an advertisement (ROR-A-4). The referee found the article implicitly suggested the respondent was knowledgeable in the area of DUI law, he would vigorously defend

an individual charged with a DUI, he was aware of various possible factual legal defenses to a DUI charge, and he was available to represent individuals charged with DUI (ROR-A-3-4).

The respondent raised the same constitutional arguments before the referee that are set forth in his brief. The referee declined to rule on these affirmative defenses raised by the respondent at the trial level (ROR-A-4-5).

The referee found that the evidence was insufficient to sustain the respondent's argument that he was selectively prosecuted by the bar (ROR-A-5). The referee did question, however, why the bar was not proceeding against certain attorneys running television "public service announcements" which identified the attorneys as personal injury lawyers and did not contain the required disclosure statements (ROR-A-5, R-Ex. 11).

SUMMARY OF THE ARGUMENT

The respondent seeks to challenge the constitutionality of Rules of Professional Conduct, 4-7.2(d), which requires attorney ads to carry a specific disclaimer advising consumers not to base their choice of an attorney on only advertising, Rules 4-7.2(p), and 4-7.5(b) for failing to file his ad with the bar's standing committee on advertising, and 4-7.3(f) for providing misleading information in his advertisement. The bar submits the rules are in full compliance with the dictates of Bates v. State Bar of Arizona 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), and its progeny. The rules are not prohibitionary in nature but rather require an attorney to include additional information and take an additional step in advertising legal services. The wording of the rules, when read in context, are sufficiently clear that a reasonable attorney would understand the requirements. Although the respondent attaches great importance to defining the terms "advertising" and "public service announcement", the bar's rules were drafted with recognition of the fact that labels assigned to items can be misleading. The rules apply to commercial speech, regardless of what it is called by the speaker. The rules then provide certain exemptions for filing and the disclaimer requirement only. Further, the rules are not overbroad because they are narrowly tailored to meet the bar's objective of protecting the public from potentially deceptive promotional tactics. The speech is not prohibited but

merely regulated in a reasonable manner. No "approval" is required to run an advertisement. Filing is required to be contemporaneous with the dissemination of the information.

The respondent also challenges the referee's findings of fact and recommendations. The findings were based on clear and convincing evidence and are supported by the record. The respondent has failed to show otherwise. The referee found no evidence the respondent was selectively prosecuted. The respondent's advertisement speaks for itself. It provides legal advice but does not provide any insight into the respondent's views on the topic.

The bar further submits the referee was correct in declining to address the constitutionality of the rules. Rule of Discipline 3-7.6(g)(2), as worded at the time of the final hearing in April, 1993, effectively precluded motions to dismiss on constitutional grounds. The referee acts as the fact finder and makes recommendations as to guilt and discipline to this court which acts as the final determiner of the case's outcome. Constitutional issues concerning rules are best left to the decision of this court.

ARGUMENT

POINT I

THE RULES REGARDING FILING ADVERTISEMENTS AND INCLUDING THE REQUIRED DISCLAIMER ARE CONSTITUTIONAL.

At the outset, the bar notes the respondent has failed to meet the burden imposed on all appellants in bar disciplinary proceedings of clearly showing that the referee's findings of fact are not supported by the evidence, The Florida Bar v. Simring, 612 So. 2d 561 (Fla. 1993). The referee found the bar had proved, by clear and convincing evidence, that the respondent's "article" was in fact an advertisement and as such should have included the required disclaimer and been filed with the standing committee on advertising (ROR-A-3-4). Never has the bar's position been that the respondent should not have published an advertisement informing persons about their legal rights, even if the position might be an unpopular one. The content is not an issue except to the extent that an item must be read, viewed, or listened to in order to determine if it is exempt from filing with the standing committee on advertising or if it contains any potentially misleading information. In fact, had the respondent filed his advertisement with the standing committee on advertising and included the disclaimer statement, there is no indication the staff would have recommended any changes other than deleting the phrase "A public service message sponsored by."

In other words, had the respondent complied with the rules, this matter would never had resulted in disciplinary proceedings. It was a member of the public who complained about the subject matter of the respondent's ad, not the bar (B-Ex.4).

All of the Rules Regulating The Florida Bar touch on constitutional rights. The respondent enjoys no greater rights than any other attorney in a disciplinary proceeding. Constitutional rights must always be safeguarded, although because lawyers and judges are members of a privileged profession, obedience to ethical rules may require abstention from what in other circumstances would be constitutionally protective behavior, American Civil Liberties Union of Fla., Inc. v. The Florida Bar, 744 Fed. Supp. 1094, 1097 (N.D. Fla. 1990). The rules are sufficiently clear here to put attorneys on notice that all forms of commercial speech are regulated, regardless of whether they are called advertisements, public service announcements, direct mail solicitation letters, letterheads, business cards, professional announcements, etc. The rules recognize that, as is so aptly demonstrated by the respondent's case, labels can be deceiving.

The rules at issue here are not prohibitionary, except as to communications which are deceptive. Rules of Professional Conduct 4-7.2(n) and 4-7.2(d) are exemptions, not prohibitions. Although the bar submits the respondent's advertisement tended to

mislead because he termed it a public service message, the content itself was not alleged to be false or deceptive. The bar charged him with violating Rule of Professional Conduct 4-7.1 only with respect to the statement which proclaims it to be a public service message and the referee recommended he be found not guilty in this regard (ROR-A-3). When section 4-7 is read in its entirety, it is clear that it applies to all attorney communications concerning services, regardless of how that information is provided or what the dissemination method is called. All such communications must be filed with the standing committee on advertising unless they contain no more information than that listed by Rule of Professional Conduct 4-7.2(n) or fall under the exemptions listed by Rule 4-7.5(c). Therefore, the rules do not prohibit the respondent from disseminating future "articles" similar to the one at issue here, or even disseminating the same article.

The rules merely seek to regulate commercial speech pursuant to Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977). The United States Supreme Court found in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985), that disclosure requirements differed from prohibitionary rules. The court recognized that compulsory speech can, under certain circumstances, violate the first amendment. Although the disclosure requirements by the Ohio Bar operated to require

advertising attorneys to include more information than they might otherwise be inclined to include, this served the interests of the consumers. Because the extension of first amendment rights to commercial speech was principally justified by the value of such speech to consumers, the speaker's first amendment rights in not providing the required disclosure were minimal.

Although the respondent argues that he was merely airing his opinion through his article, a reading of it fails to reveal any statements concerning the respondent's opinions or views. Even if he had expressed his views, such statements in an attorney's advertisement are not commercial speech deserving first amendment protection, Bishop v. Commission of Professional Ethics, Etc., 521 F. Supp. 1219 (S.D. IA 1981). In Bishop, the court found that views are statements of subjective opinions and not verifiable facts. In the context of commercial advertising, they are promotional content with "substantial potential to mislead and to appeal to emotions, prejudices, or likes or dislikes of a person" (at page 1227). Even so, the bar's advertising rules do not seek to govern personal speech. The bar submits the respondent was not attempting to voice his opinion on the subject of DUI laws. His "article", contained in the appendix at page A-9, is clearly not a personal statement. It gives general legal advice concerning the rights of a person who may be charged with DUI and provides the respondent's name, office address and telephone number in bold faced type that is second in size only

to the title. The "article" advises the reader to save it for future reference. The bar submits this "article", regardless of what it is called, is commercial speech and as such is subjected to greater regulation than noncommercial speech. Under Bates, supra, the United States Supreme Court suggested that time, place and manner restrictions are acceptable for commercial speech because such speech is accorded limited first amendment protection. The restrictions, however, must not be content based, must serve a significant governmental interest, and leave open other channels of communication through which to express the information being restricted, Virginia State Board of Pharmecy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). The Rules Regulating The Florida Bar are in full compliance with these standards.

A four-pronged test has been developed for addressing the constitutionality of a restriction on commercial speech: 1) is the expression protected by the first amendment (is it commercial speech that is not misleading or involves unlawful activity); 2) is the asserted governmental interest substantial; 3) does the regulation directly advance the governmental interest; 4) is the regulation no more extensive that is necessary to serve that interest, Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). The respondent's "article" is clearly commercial speech, which has been defined as an expression related solely to the economic

interests of the speaker and its audience in that it serves the economic interests of the speaker, assists consumers and further societal interests, Bishop, supra, at page 1222. Further, a communication can constitute commercial speech even if it contains discussions of important public issues, Board of Trustees of State Univ. of N.Y., supra.

The respondent's "article" provides legal advice concerning the area of law in which he concentrates his practice. It does not provide his opinion nor does it concern a nonlaw related activity such as "installing smoke detectors". The respondent provides information which would be of particular interest to persons charged with driving while under the influence or persons with a history of such an offense and includes his professional address and telephone number. Nowhere does the respondent discuss his concerns about the constitutionality of the laws or their enforcement.

The bar has a substantial interest in regulating commercial speech by attorneys to ensure protection of the public from deceptive communications. Lawyers act as self-employed businessmen, the trusted agents of their clients, and officers of the court, Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). The bar has a substantial interest in protecting consumers, regulating commercial transactions and maintaining standards among licensed attorneys

given their unique positions as officers of the court, Ohralik, supra.

The bar's rules requiring the inclusion of a disclaimer and filing with the standing committee on advertising advance the bar's regulatory interests and are no more extensive than necessary to achieve the desired objectives. The rules are not prohibitionary in nature but rather require advertising attorneys to include additional information and take an additional step in communicating legal services information to the general public, all of whom are prospective clients. The use of regulations that are not more extensive than necessary does not mean the bar must use the least restrictive means available. The requirement is that the regulation be narrowly tailored, which does not require the elimination of all less restrictive alternatives. What is required is a fit between the government's ends and its means that is reasonable, not perfect, Board of Trustees of State Univ. of N.Y., supra.

The bar submits Rules 4-7.2(d) and 4-7.2(p) satisfy this requirement and therefore are not overbroad. In any event, application of the overbreadth doctrine in commercial speech cases is weak because advertising, being linked to the speaker's commercial well-being, is not susceptible to being crushed by overbroad regulations, Bates, supra.

The respondent makes much of the lack of a definitional section in the rules. The respondent believes the bar should define the terms "advertising" and "public service announcement". According to the respondent, this causes the rules to be so vague and ambiguous as to render them an unconstitutional infringement on his first amendment right to free speech. The bar submits the respondent's argument, given the language of the rules and the language of his "article", is without merit.

In analyzing commercial speech regulations, the United States Supreme Court has followed the "common sense" doctrine to distinguish between commercial and other types of speech, Zauderer, supra. The court recognized that the boundaries between the two are not precise. Further, all statutory language, no matter how precisely worded, is subject to attack on grounds of vagueness because "[w]ords" inevitably contain germs of uncertainty," Broadrick v. Oklahoma, 413 U.S. 600, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). The court found that a statute is not impermissibly vague so long as it is set out in terms that an ordinary person exercising ordinary common sense can sufficiently understand and comply without sacrifice to the public interest. There will always be cases where it will be difficult to make a determination as to which side of the line a particular fact situation falls. This, however, is not sufficient justification to hold the language too vague to define an offense, State v. Dye, 346 So. 2d 538 (Fla. 1977), quoting Roth v. U.S., 354 U.S.

476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (Fla. 1957).

The respondent ignores the fact that part of the rule about which he complains, Rule 4-7.5(b) requires him to file the ad with the advertising department of The Florida Bar in order to get the definition he seeks. He could have appealed any unfavorable recommendation to the standing committee on advertising contemporaneous with publishing the "article".

The standing committee on advertising considered the term "public service announcement" at a March, 1992, meeting (R-Ex. 6). No changes were made to the rule itself. The committee's opinion was for administrative purposes only. The criteria developed by the committee are used by staff attorneys to help pinpoint lawyers who are trying to circumvent the rules. The committee sets policies for its staff attorneys to follow, and did so in this instance. It is analogous to the ethics committee which considers issues referred to it by the ethics department and then interprets the Rules Regulating The Florida Bar in issuing its formal opinions. Opinions of neither committee are binding. They are merely persuasive. However, the policies set forth by such committees are followed by the bar in prosecuting cases. Enforcement is not left up to individual discretion.

Although the respondent makes much of the bar's answers to his interrogatories and requests for admission where the bar stated the term "public service announcement" was undefined and

ambiguous, the respondent takes these answers out of context. The bar's answers were based on the respondent's self-serving use of the term in discovery.

A fundamental principle of statutory construction is that an enactment should be interpreted in favor of its constitutionality, so long as the interpretation is consistent with constitutional rights, Falco v. State, 407 So. 2d 203 (Fla. 1981). The courts also must not vary legislative intent with respect to the meaning of a statute in order to achieve this result, State v. Keaton, 371 So. 2d 86 (Fla. 1979).

The bar submits that Rules of Professional Conduct 4-7.2(d) and 4-7.2(p) should be interpreted in favor of their constitutionality. They do not impede any of the respondent's constitutional rights and are consistent with the intent of this court to regulate attorney advertising in a manner that protects the public from deception while not infringing on the first amendment rights of the advertisers.

Although the respondent compares his "article" to informational pamphlets published by the bar and Greater Orlando Area Legal Services (GOALS), the comparison is incorrect. The respondent cited these pamphlets as examples of public service announcements, even though neither the bar nor GOALS has ever described them as such. They are merely informational pamphlets

provided by nonprofit organizations. The bar is an arm of this court and GOALS is a federally funded legal aid organization. To compare pamphlets published by these groups to an "article" published by a practicing attorney who represents clients in the area of law addressed by the "article" and who includes his professional address and telephone number is misguided. Further, the respondent's article invites the reader to consult with an attorney. Obviously, the reader may choose to consult with the respondent. His article does not tell the reader not to do so. It is doubtful the respondent would decline to represent a prospective client because the contact was initiated by the respondent's "article". In fact, the respondent urges the reader to save the article for future reference. That the respondent denied intent to advertise his legal services is not dispositive of the issue. Intent is not a necessary element here. In The Florida Bar v. Doe, 550 So. 2d 1111 (Fla. 1989), an attorney was privately reprimanded for including an improper discharge clause in a contingency fee contract and then filing a lien against the client for the amount owed despite knowing the contract's discharge clause might not be ethically enforceable. The referee found the attorney did not intend to violate any rules and yet this court found it appropriate to discipline the attorney anyway.

Had the respondent actually wanted to address what he sees as inequities in the current DUI laws and their enforcement, he

had available to him the editorial pages of the local newspapers. He has never pursued this route, even though presumably he feels the issue still needs to be addressed. Such an avenue would allow him to air his personal and professional opinions without costs. A true editorial written by an attorney would also not be considered advertising. See for example the editorial written by attorney Roy B. Dalton, Jr., appended hereto (R-Ex. 14; Appendix p. A-10). Although the respondent compares his advertisement to Mr. Dalton's editorial, a reading of the two clearly shows they are not similar in any way, other than the fact that they were authored by attorneys. Of course, the respondent has the constitutional right to pay to publish another "public service announcement" as long as he complies with the Rules Regulating The Florida Bar. The difference between the two is obvious. The former serves the public's interest in receiving accurate information. The latter serves the attorney's interest in making money by generating information about his or her law practice.

POINT II

THE RESPONDENT FAILED TO DEMONSTRATE THE FLORIDA BAR HAS SELECTIVELY PROSECUTED HIM IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

At the outset, the bar would note that contrary to the respondent's contention in issue number three of his brief, the bar did not prosecute the respondent because he published an advertisement. The bar prosecuted the respondent because he failed to comply with the Rules Regulating The Florida Bar even after notification that his advertisement did not appear to be in full compliance with the rules. The referee considered the respondent's argument and evidence on the issue of whether or not the respondent was selectively prosecuted at the final hearing and found it to be without support (ROR-A-5). The referee sits as the trier of fact and therefore is in the best position to weigh the credibility of the evidence and testimony, Simring, supra.

Because the rules relating to advertising were fairly new at the time the respondent ran his ad, the bar's primary focus was on bringing noncompliant ads to the attention of the advertising attorney so that the ad could be brought into compliance. The respondent, however, refused to acknowledge that adherence to the rules was required. It was for this reason the respondent's case was referred to the grievance committee and not because of the content.

It is noted the respondent brought a number of ads to the bar's attention during these proceedings. Files were opened and each allegation was thoroughly investigated.

Further, the respondent is not entitled to violate the rules just because "everyone else is doing it." For example, in The Florida Bar v. Farinas, 608 So. 2d 22 (Fla. 1992), an attorney was disciplined for requesting his employee, who was a notary, to illegally notarize a document. Mr. Farinas' argument that notaries routinely notarize documents without witnessing the signatures at the request of attorneys was found to be without merit. Similarly, in The Florida Bar v. Levin, 570 So. 2d 917 (Fla. 1990), an attorney argued, without success, that he did not deserve a public reprimand for illegally betting on football games because other attorneys who had engaged in the same misconduct and who had been investigated by the same grievance committee as he either had received private reprimands or no discipline at all.

As a member of the bar, the respondent has a duty to abide by the rules regulating his profession. If it should be discovered that he has violated a rule, he cannot urge that other attorneys have committed the same transgression but have not been caught and prosecuted. This is analogous to a motorist exceeding the speed limit on a highway and who, when caught by a police officer, argues that all the other motorists are also speeding

and he or she should not have been singled out. This argument will not dissuade the officer from issuing the ticket nor the court from upholding the officer's actions. This court has held that an attorney's attitude toward the underlying misconduct has a bearing on the level of discipline being imposed, see The Florida Bar v. Thompson, 500 So. 2d 1335 (Fla. 1986). The respondent's attitude is that he has done nothing wrong. The bar submits this attitude is what sets him apart from the other attorneys who have not been disciplined.

POINT III

THE REFEREE WAS CORRECT IN DECLINING TO RULE ON THE ISSUE OF THE ADVERTISING RULES' CONSTITUTIONALITY.

The referee is the finder of fact and makes recommendations to this court as to guilt and discipline. It is this court which makes all final determinations in bar disciplinary proceedings, The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989). It was not error for the referee to decline to rule on the motion because Rule of Discipline 3-7.6(g)(2) did not empower him to make such a final determination. The wording of the rule at that time effectively precluded motions to dismiss on constitutional grounds. The bar submits that the rules do not empower a referee to usurp this court's role as a final determiner of a case's disposition. Further, this court found the rules to be constitutional in its opinion issued on December 21, 1991, amending the Rules Regulating The Florida Bar. See The Florida Bar: Petition to Amend Rules, 571 So. 2d 451, 458-459 (Fla. 1990). The referee does not have the power to overrule this court.

In discussing his reasoning for declining to rule on the constitutionality issue, the referee stated that it was his job to make findings of fact and recommendations to this court (T. pp. 10-11). The bar submits the referee's conclusion was well reasoned.

POINT IV

THERE IS CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE REFEREE'S FINDINGS OF FACT.

The respondent's "article" speaks for itself (Appendix p. A-9; B-Ex. 1; B-Ex. 2). Nowhere does it express the respondent's views. It gives advice as to what precautions a person should take to avoid being charged with DUI, urges the reader to consult with their attorney of choice, and save the "article" for future reference. The respondent includes the address and telephone number of his law office. To rephrase an old saying, an ad by any other name is still an ad.

The referee's report clearly shows he considered and weighed all the evidence. He concluded the respondent's "article" was an advertisement and as such had to comply with the rules (ROR-A-3-4). A referee's findings of fact are presumed to be correct and will be upheld unless clearly erroneous or without support in the record, The Florida Bar v. Carswell, 18 Fla. L. Weekly S507 (Fla. Sept. 23, 1993). The party seeking review must carry the burden of proving the findings are without support in the record. See Simring, supra. As previously stated, the bar submits the respondent has failed to carry this burden.

Although the respondent states in his brief that it is an unrebutted fact that he did not try to advertise his legal

services, the bar submits the referee's findings obviously show the bar did successfully rebut this argument. Further, case law and the Florida Standards for Imposing Lawyer Sanctions support the referee's findings and recommendations as to guilt and discipline.

In The Florida Bar v. Herrick, 571 So. 2d 1303 (Fla. 1990), an attorney sent a direct mail solicitation letter without marking either it or the envelope with "advertisement" in red letters. The attorney also stated in the letter that his law firm specialized in customs laws relating to vessel seizures. The attorney was not certified or designated in any area of law. Because the date the misconduct occurred was prior to implementation of the Rules of Professional Conduct, the attorney was charged with violating provisions of the former Code of Professional Responsibility. Therefore, the current rules were not at issue. The court upheld the constitutionality of the rules regulating direct mail solicitation letters and prohibiting an attorney from holding himself out as a specialist without being certified or designated in the area of law in which he claims to have special expertise. This was true even though the bar did not recognize customs and forfeiture law under either the designation or certification plans. The court stated that the attorney was not prevented from advertising he practiced in the area of customs laws. He was merely prohibited from stating he was a specialist in customs law. In this manner, the state's

interest in preventing the public from being misled could be protected. The attorney was publically reprimanded.

Also prosecuted under the former Code of Professional Responsibility was The Florida Bar v. Pascoe, 526 So. 2d 912 (Fla. 1988). The attorney was found guilty of placing an ethically improper advertisement as well as other violations including pleading no contest to misdemeanor marijuana possession, denigrating the judicial system and neglecting a criminal appeal. The attorney received a public reprimand and a three year period of probation. With respect to the advertising violation, the ad was placed in a local newspaper and related to dissolution of marriage services. The bar found the ad to be ethically improper and the attorney withdrew it when he was so notified. It is interesting to note that in this case, despite bringing himself into compliance with the rules upon notification, the attorney received discipline anyway. This is because the rules under which he was prosecuted had been in effect for a number of years as opposed to the current rules which had recently been amended at the time the respondent's and Mr. Shader's respective advertisements appeared. Mr. Pascoe ran his advertisement only once. He did object to the bar's position regarding the propriety of the advertisement. Justice Barkett, in a specially concurring opinion, cautioned that Mr. Pascoe's punishment should be for his conduct and not for exercising the first amendment right to express an opinion which may differ from

the bar's or the court's views.

In The Florida Bar v. Budish, 421 So. 2d 501 (Fla. 1982), an attorney was publically reprimanded for utilizing advertisements that were found to be false and misleading. He was further ordered to make restitution and take and pass the ethics portion of The Florida Bar examination within one year of the court's opinion. The attorney advertised in a local newspaper that his clinic would charge a set rate to perform a name change and that for other matters an initial consultation would be free. Several prospective clients responded to these advertisements only to find that the name change cost more than advertised and they were billed for their initial consultations. The attorney also did business under a corporate name. His corporation improperly employed a nonlawyer as president.

The Florida Bar v. Perlmutter, 582 So. 2d 616 (Fla. 1991), concerned an attorney's first amendment rights to free speech. The attorney threatened certain citizens with multiple lawsuits, retaliation if they filed complaints with The Florida Bar, indulged in vituperative correspondence on behalf of a client, entered into an agreement for payment of an excessive referral fee and entered into an agreement for payment of legal fees to a nonlawyer. For this, the attorney entered into a consent judgment for a public reprimand. Of interest is the imposition of discipline on the attorney for engaging in vituperative

correspondence. The attorney was charged with violating both the Rules of Professional Conduct and the oath of admission.

The Florida Standards for Imposing Lawyer Sanctions support the referee's recommendation as to discipline. Standard 7.0 provides that sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services. The referee recommended the respondent be admonished pursuant to Rule of Discipline 3-5.1(a). An admonishment is the lowest form of discipline available and is appropriate in cases involving minor misconduct. Standard 7.4 provides that an admonishment is appropriate when a lawyer is negligent in determining whether his or her conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

The bar submits an admonishment would serve the purposes of lawyer discipline as most recently set forth in Carswell, supra. The judgment must be fair to society, must be fair to the attorney, and must sufficiently deter other attorneys from similar misconduct. The rules were amended for the purpose of protecting the public. The respondent's violation was technical in nature and done without the intent to mislead. Because this case is based on a probable cause finding by the grievance committee, it is a matter of public record. Although the referee has recommended an admonishment, this issue may still be brought

to the attention of the bar's membership by publication of an opinion which does not include the respondent's identity.

CONCLUSION

WHEREFORE, The Florida Bar requests this Honorable Court to approve the referee's findings of fact and recommendations as to guilt and discipline, uphold the constitutionality of the Rules Regulating The Florida Bar, and impose the appropriate discipline by admonishing the respondent and taxing costs against him now totalling $1,126.00.

Respectfully submitted,

JOHN F. HARKNESS, JR.
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ATTORNEY NO. 123390

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ATTORNEY NO. 217395

AND

JAN WICHROWSKI
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 381586

By: Jan Wichrowski
JAN WICHROWSKI
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing answer brief and appendix have been furnished by Airborne Express mail to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by certified mail No. P 744 722 588, return receipt requested, to Mr. [redacted] respondent, at [redacted] and a copy of the foregoing has been furnished by regular U. S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 18th day of October, 1993.

Jan Wichrowski

JAN K. WICHROWSKI
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 80,701
[TFB Case No. 92-31,167 (09B)]

v.

[redacted]

Respondent.
_____/

APPENDIX TO COMPLAINANT'S ANSWER BRIEF

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INDEX

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

CASE NO: 80,701

[redacted]
Respondent.
_____/

REPORT OF REFEREE

I. Summary of Proceedings:

Pursuant to the undersigned being duly appointed as a referee to conduct disciplinary proceedings herein according to the Rules of Discipline, a hearing was held on April 30, 1993. The following attorneys appeared as counsel for the parties:

For the Florida Bar - Jan K. Wichrowski
For the Respondent - [redacted]

II. Findings of Fact as to Each Item of Misconduct on Which the Respondent is Charged:

After considering all of the pleadings and evidence before it, pertinent portions of which are commented upon below, this Referee finds:

1. Respondent, [redacted] is, and at all times relevant hereto was, a member of the Florida Bar. (Transcript, p. 20)

2. On December 19, 1991 and December 26, 1991, the Respondent ran an article in the West Orange Times newspaper. A copy of such article is attached hereto and incorporated into these findings of fact. (Tr. 22; Bar Exhibit 1) The Respondent paid the newspaper $189.00 to run each such article. (Tr. 29)

3. The final two paragraphs of the article read:

"This document is provided as a public service to better educate the public as to their rights. It is not an advertisement of legal services and should not be considered as such.

Neither is this document intended to give legal advice as to a specific case or situation. Your situation may differ and you should consult the attorney of your choice for more information."

In running this article, the editor of the West Orange Times placed the word "Advertisement" above the article. (Tr. 33) The editor testified that the word "Advertisement" was added to ensure that its readership understood the article was placed (and paid for) by Mr. [redacted] and not by the newspaper. (Tr. 35 - 36)

4. The West Orange Times is a weekly newspaper. (Tr. 27) All of its "articles" are classified as either "newscopy" or "advertisements." (Tr. 47) The newspaper will sometimes run "advertisements" without cost if the advertisement is for a non-profit organization. (Tr. 41) The West Orange Times does not categorize any article as a "public service announcement." (Tr. 43)

5. The article does not contain the disclosure statement set forth in Rule 4-7.2(d), Rules Regulating the Florida Bar. Furthermore, Respondent did not submit a copy of the article to the Florida Bar Standing Committee on Advertising. (Tr. 105)

6. At all times material hereto, Respondent's primary area of practice was criminal defense work for individuals charged with D.U.I. (Tr. 21)

7. Respondent testified that his purposes in placing such article in the West Orange Times was to inform the public of the rights of individuals charged with D.U.I., to help prevent wrongful convictions of D.U.I. defendants, and to promote dialogue about the methods of enforcement of D.U.I. laws. (Tr. 67-69, 74-75) Respondent further testified that the purposes of the articles was not to obtain legal business but to provide a public service. (Tr. 68, 72-73) Respondent noted that the article did not mention:

a. Respondent's availability to defend individuals charged with D.U.I.;

b. Respondent's legal background and qualifications; or

c. That Respondent's primary area of practice was D.U.I. defense. (Tr. 72)

8. At the bottom of the article, in bold letters, was the following language:

"A PUBLIC SERVICE MESSAGE SPONSORED BY:
The Law Office of [redacted]

9. Respondent testified that his address and telephone number were placed in the article so as to encourage communication from any individual who wished to continue the dialogue on the subject of enforcement of D.U.I. laws. (Tr. 75) Respondent further contended that his occupation was placed on the bottom of the

article so as to advise the reader of the writer's credibility. (Tr. 145)

10. The Respondent has run no similar articles in newspapers subsequent to December 26, 1991. (Tr. 75-76)

11. On March 4, 1992, the Florida Bar's Standing Committee on Advertising adopted staff recommendation that the criteria to be employed in determining whether a particular article was to be considered advertising or a public service announcement were:

a. Whether the attorney paid to have such article run; and

b. Whether the content of the message appears to serve the interest of the sponsoring lawyer as much as or more than the interest of the public in receiving the message. (Resp. Exhibit 6)

III. Recommendation as to Whether or Not the Respondent Should be Found Guilty:

As to each count of the Complaint, this Referee makes the following recommendations as to guilt or innocence:

1. Alleged violation of Rule 4-7.1(a)

The Referee recommends that Respondent be found not guilty as to this alleged violation in that the subject article does not contain a false, misleading, deceptive, or unfair communication "about the lawyer or the lawyer's services." Indeed, the article contains no statements about the availability of Respondent's services or his legal background and experience.

2. Alleged violation of Rule 4-7.2(d)

The Referee recommends that Respondent be found guilty as to this alleged violation in that the subject article is an advertisement which does not contain the required disclosure statements. Although Respondent contends that he never intended the article to be an advertisement, the article implicitly suggests:

a. That Respondent is knowledgeable in the area of D.U.I. law;

b. That Respondent would vigorously defend an individual charged with a D.U.I.;

c. That Respondent is aware of various possible factual and legal defenses to a D.U.I. charge;

d. That Respondent is available to represent individuals

charged with D.U.I. (as indicated by the listing of Respondent's occupation, address, and phone number.)

Certainly, Respondent's article would tend to lead members of the general public to believe that Respondent was advertising the availability of his services to represent individuals charged with D.U.I.

3. Alleged violation of Rule 4-7.2(p) and 4-7.5(b)

The Referee recommends that Respondent be found guilty as to these alleged violations in that Respondent did not submit the subject article to the Florida Bar Standing Committee on Advertising.

4. Alleged violation of Rule 4-7.3(f)

The Referee recommends that Respondent be found guilty as to this alleged violation in that the subject article is potentially false or misleading in stating:

"This is not an advertisement of legal service and should not be considered as such."

5. Alleged violation of Rule 4-8.4(c)

The Referee recommends that Respondent be found not guilty as to this alleged violation. Although the subject article was misleading, the Referee finds that the evidence was insufficient to show that Respondent intended to make a misrepresentation.

IV. Affirmative Defenses Raised by the Respondent:

1. Respondent contended that the subject article was a public service announcement and not an advertisement. (As acknowledged by the Florida Bar, the Disclosure Statement Requirements of Rule 4-7.2(d) and the filing requirements of Rule 4-7.5 are not applicable to a public service announcement.) (Tr. 142) This Referee rejects Respondent's arguments for the reasons set forth in paragraph III (2), supra.

2. Respondent further argues that subject rules defining advertising are unconstitutionally vague, ambiguous, and overbroad in that such rules improperly infringe on an attorney's right to publicly voice his opinions on various legal matters. Respondent further complains that the Rules fail to give adequate notice of the distinction between an advertisement and a public service announcement. This Referee declined to rule on such argument, finding that any such ruling would be beyond the authority delegated to a referee. However, this Referee would respectfully suggest that the Florida Supreme Court address Respondent's arguments and consider enacting rules setting forth criteria to be

used in distinguishing between an advertisement and a public service announcement. Among criteria which the Court may consider are:

a. Whether the attorney paid to have such article published;

b. Whether the content of the message appears to serve the interest of the sponsoring attorney as much as or more than the interest of the public in receiving the message;

c. Whether the article contains legal advice;

d. Whether the article concerns a legal subject matter;

e. Whether the article contains information regarding the "sponsoring" attorney's areas of practice, or legal background and experience.

3. Respondent further argued that The Florida Bar has singled out Respondent for punishment because of the "unpopular" contents of his article. However, insufficient evidence was submitted by Respondent to justify such a conclusion.[1]

V. Recommendation as to Disciplinary Measures to Be Applied:

This Referee recommends that Respondent be admonished as provided in Rule 3-5.1(a), Rules of Discipline. It is further recommended that the admonishment be administered by the Ninth Judicial Circuit Grievance Committee.

VI. Personal History and Past Disciplinary Record:

After finding Respondent guilty, but prior to making a recommendation as to suggested disciplinary action, this Referee considered the following personal history and prior disciplinary record of Respondent to-wit:

Date Admitted to the Bar: 1981

Prior Disciplinary Convictions and Disciplinary Measures Imposed Therein: None

Other personal data: Respondent has previously provided

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[1]However, this Referee would question why the Florida Bar would proceed against Respondent and not against those attorneys running television "public service announcements" which identify the attorneys as personal injury lawyers but similarly do not contain the required disclosure statements. See e.g. Respondent's Exhibit 11.

hundreds of hours of legal service without enumeration, on matters involving public service. (Tr. 62-66, 110-113)

VII. Statement of Costs and Manner in Which Costs Should Be Taxed:

This Referee finds that costs were or may be incurred by the Florida Bar. It is recommended that all such costs and expenses be charged to the Respondent. A supplemental report will be issued recommending the amount of costs to be charged to Respondent.

DATED this 26th day of May, 1993.

KERRY I. EVANDER
CIRCUIT COURT JUDGE

cc: The Florida Bar
c/o Jan Wichroski
Herbert H. Hall, Jr.

KNOW YOUR RIGHTS

Around every holiday, people are mistakenly accused of drunk driving (DUI). No one can guarantee they will not be falsely accused of this crime. Knowing your rights and what to expect can make the difference between going free and being arrested for DUI.

Your license and freedom are important. Do your part to protect them. Clip and save these tips.

HELPFUL TIPS IF YOU ARE STOPPED:

- INSPECT YOUR CAR - a broken light is an invitation to be stopped. OBEY THE TRAFFIC LAWS - don't speed, roll through stop signs, or frequently change lanes.
- HAVE BREATH MINTS or chewing gum in your car. Upon seeing the police lights TAKE A BREATH MINT and pull completely off the road.
- TELL YOUR PASSENGERS TO PAY ATTENTION to your movements and conversation with the officer. They may be your witnesses later.
- HAVE YOUR DRIVER'S LICENSE, REGISTRATION AND INSURANCE CARD IN HAND BEFORE THE OFFICER COMES TO YOUR CAR. This eliminates any assertion that you were fumbling through your wallet for them. Better yet, keep them handy while you drive - clipped to visor, etc.
- ASK THE OFFICER WHY HE PULLED YOU OVER (listen - don't argue). Be polite - show respect.
- DON'T TALK MORE THAN NECESSARY. Keep your statements short and don't discuss your drinking. The officer listens for guilty statements and slurred speech, as well as smelling for the odor of alcohol. The more you speak, the more you may incriminate yourself.
- If requested, GET OUT BUT DO SO WITHOUT LEANING ON THE CAR for support. Stand up *straight* - avoid shuffling your feet or swaying.
- Politely REFUSE TO TAKE ANY FIELD SOBRIETY TESTS (finger to nose, walk the line) unless you are positive you can pass them. Usually though, they are the basis for your arrest. YOU ARE NOT REQUIRED BY LAW TO TAKE THEM. Unlike the breath test, there is no penalty for refusing the field sobriety tests.
- Once arrested, you will be taken to a testing area and videotaped. Politely DECLINE TO TAKE ANY FIELD SOBRIETY TEST. You are not required to take these tests on camera and you will not be penalized for refusing.
- You will be asked to take a breath test. Refusing to take the breath test will result in the loss of your license. Taking the test, however, can result in loss of license anyway and more severe penalties and an easy conviction. YOU SHOULD DECIDE BEFORE DRIVING WHETHER TO TAKE THE BREATH TEST.
- Your license will IMMEDIATELY be taken if 1) you refuse to submit to a breath, urine or blood test, or 2) your blood alcohol reading is over the legal limit of 0.10%. THUS, YOU SHOULD NOT TAKE THE BREATH TEST SIMPLY TO AVOID THE IMMEDIATE LOSS OF YOUR LICENSE BECAUSE A HIGH READING WILL RESULT IN ITS IMMEDIATE LOSS ANYWAY. The officer will take your license unless your reading is less than the legal limit - 0.10%.
- FIRST OFFENDERS PROBABLY SHOULD TAKE THE BREATH TEST, if they drank little and do not plan to fight the charge. In contrast, one who faces stiff jail time, long license suspension or who plans to fight the ticket, such as MULTIPLE DUI OFFENDERS, SHOULD NOT TAKE THE BREATH TEST if at all in doubt as to ability to pass it.
- ALSO ANYONE DRINKING HEAVILY SHOULD NOT TAKE THE BREATH TEST since a 0.20% reading 1) doubles the fine, 2) extends by 3 months the possible jail sentence and 3) eliminates any plea to a lesser charge, e.g. reckless driving.
- Make sure you understand everything the officer says before you decide. IF YOU BURP OR BELCH stomach juices into your mouth prior to the test, TELL THE OFFICERS since that interferes with the test (higher readings). If you tell the officers, they have to wait until you have stopped burping for 20 minutes before they can test you.
- If your reading is over 0.10% or you refuse, YOUR LICENSE WILL BE TAKEN AND A 7 DAY TEMPORARY WORK PERMIT ISSUED. This means little since it expires before you get any hearing. No other work permit licenses will be issued until 30 days have passed.
- YOU HAVE 10 DAYS FROM THE DATE OF ARREST TO REQUEST A FORMAL HEARING with the DMV. If you do not, you lose important rights. This requires more explanation, thus it is important to consult with your attorney within the first week after arrest.

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A PUBLIC SERVICE MESSAGE SPONSORED BY:

The Law Office of [redacted]

[redacted]

1991©

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

CASE NO: 80,701

[redacted]

Respondent.
_____/

SUPPLEMENTAL REPORT OF REFEREE

Referee hereby files this Supplemental Report, recommending that two thirds (2/3) of the below referenced costs and expenses be charged to the Respondent:

Grievance Committee Transcript Costs	$ 322.50
Grievance Committee Investigative Member Costs	4.88
Referee Level Transcript Costs	744.65
Bar Counsel's Travel Costs	5.64
Administrative Costs	500.00
Investigative/Paralegal Expenses	160.00
TOTAL:	$ 1,688.99
Two Thirds (2/3) of Total Costs	$ 1,126.00

In recommending that only $1,126.00 be charged to the Respondent, this Referee would note that a recommendation of "not guilty" was made as to those counts in which Respondent was charged with intentionally misleading and/or deceptive conduct. The prosecution of such counts by the Florida Bar did result in additional expenses which would not have been incurred had the Bar only prosecuted those counts on which Respondent was found guilty. Florida Bar v. Davis, 419 So. 2d. 325 (Fla 1982).

DATED this 21st day of June, 1993.

Kerry I. Evander
KERRY I. EVANDER
CIRCUIT COURT JUDGE

cc: The Florida Bar

[redacted]

6/27/93 jbl

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A PUBLIC SERVICE MESSAGE SPONSORED BY:

The Law Office of [redacted]

[redacted]

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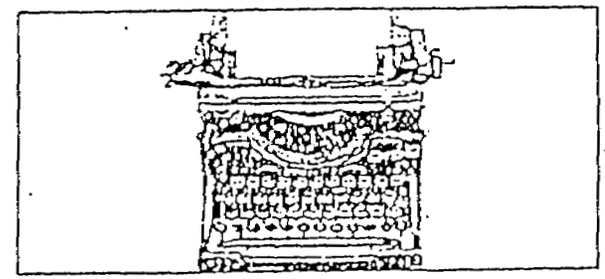
Lawyer: If I were docto: I'd have shown compassion



My Word

ROY B. DALTON JR.

Just as the priest and temple's assistant who passed by the man beaten and left for dead on the road from Jerusalem to Jericho determined that helping the injured bystander was "too costly," so too has Dr. Ronald S. Hoffman.

In his My Word column that was published on Wednesday, "If you were the doctor, what would you do?," the physician claims he was forced to forego giving aid to an injured bicyclist because of his irrational fear of a malpractice suit.

The physician misses the whole point of this opportunity for compassion.

Hoffman attempts to evoke our sympathy for his plight by crying that "The lawyers made me pass him by."

What he fails to realize is that lawyers don't judge his conduct in the judicial system.

You see, his fellow citizens sitting as jurors do that.

Hoffman is worried that his fellow citizens might determine that he "failed to use reasonable care under the circumstances" by stopping to render aid to an injured child on a bicycle.

This worry so overwhelms him that he passes up an opportunity to live up to his Hippocratic Oath despite the existence of a statute, the so-called good Samaritan law, that specifically insulates him from liability for rendering care in an emergency situation.

A physician is obligated to exercise reasonable care under the circumstances — no more and no less — just as a lawyer, accountant, engineer, veterinarian, financial planner and so on are required to exercise reasonable care under the circumstances with respect to the discharge of their respective professional duties.

If your fellow citizens, sitting as jurors, determine that you failed to use reasonable care and by that failure caused harm to another, then you may be required to compensate the injured for your carelessness.

This standard is not unique to physicians, but applies to all professionals.

As to Hoffman's failure to stop and render aid, just like the priest and temple assistant of long ago, judgment of that conduct will not come from his fellow man, but from a much higher authority.

Perhaps Hoffman will get another chance in his lifetime to use his skills compassionately on behalf of his neighbor.

If so, I hope next time he'll realize that nothing has changed since biblical times.

There is still some risk associated with reaching out to help another — the same risk that caused the priest to cross over to the other side of the road — but the reward for reaching out is truly great indeed..

Roy B. Dalton Jr. is a trial lawyer in Orlando.

A-10

So you want to be an editorial cartoonist?

Attention, aspiring editorial cartoonists. Here's your chance. Send us your best effort at editorial cartooning. The *Sentinel* will publish a handful of the best entries at the end of the year.

The topics? Take your pick, but we're particularly interested

Getting rich off MIA-

WASHINGTON — The phone rings after dinner to tell a horrendous story of treachery: According to information from a Senate committee, up to 650 American servicemen are still being held prisoner in Vietnam.

"This betrayal must stop," the caller says. But because the craven U.S. government has turned its back on our forgotten heroes in Vietnam — won't even acknowledge their existence — a patriotic band of Americans is going to rescue them. But they need