IN THE SUPREME COURT
STATE OF FLORIDA

[redacted]

Appellant/Respondent

Case No.: 80,701

vs.

The FLORIDA BAR,

Appellee/Complainant.
_____/

ON APPEAL FROM THE FINAL ORDER
OF THE HONORABLE KERRY I. EVANDER ACTING
AS REFEREE IN THE DISCIPLINARY ACTION BY
THE FLORIDA BAR AGAINST THE RESPONDENT

INITIAL BRIEF OF APPELLANT/RESPONDENT

[redacted]

Appellant/Respondent

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PREFATORY STATEMENT

With the permission of this Honorable Court, the parties will be referred to hereinafter as they stood before the Referee. The Appellant, [redacted] was the Respondent and the Appellee, The Florida Bar, was the Complainant.

In this brief, designations to the transcript of the trial before the Referee shall be indicated by "TT." This designation will thereafter be followed by a number which would indicate the page number of the trial transcript where the material immediately preceeding the designation appears.

Designations to Requests for Admissions "RA" followed by the number of the request whereat the material cited appears.

Designations to other documents shall be as listed on the index to the Trial Transcripts. Documents introduced by the Florida Bar shall be designated "FBTE" (standing for Florida Bar Trial Exhibit) followed by the number of the exhibit listed on the index of the trial transcript. Documents introduced by the Respondent shall be designated by "RTE" followed by the number of the exhibit.

Reference to Rules 4-7.1 to 4-7.8 of the Rules Regulating the Florida Bar shall be referred to as the "Rules Regulating Advertising" or simply the "Rules" where appropriate.

SUMMARY OF THE ISSUES

ISSUE I

The Rules Regulating advertising are unconstitutionally vague and ambiguous. They fail to expressly define key terms such as "public service announcement" or "advertisement." The Rules lack the clear, objective and definate standards by which attorneys can judge whether their communications fall within the scope of Rules, and if so, what regulations are applicable.

The Respondent herein wrote his article as a "public service announcement" under Rule 4-7.2(n)(9). There was no indication that the term had any special meaning or limitation. In the absence of articulable, objective, and definate standards, the Bar could capricously and arbitrarily prosecute Respondent based on limitations it asserted applied, even though the limitations were not set forth in the Rules.

The effect of these vague Rules is that attorneys cannot tell what conduct is prohibited, the Bar can arbitrarily enforce the Rules, and the free speech rights of attorneys are chilled for fear of professional punishment. Such rules have been condemned and prohibited by the United States Supreme Court.

ISSUE II

The failure of the Rules to themselves contain articulable, objective standards make these Rules overbroad so as to intrude upon tradionally protected free speech. Since the rules fail to limit or define the scope of said rules, attorneys expressly their protected opinions are still subject to being prosecuted because some Bar staffer "feels" his article might "impliedly"

advertise his services.

The lack of standards allow arbitrary enforcement based on content. The criteria adopted by the Bar merely codifies the impermissible and subject criteria by which the Bar would like to censor the communications of attorneys.

ISSUE III

The Bar capricously and selectively enforced the Rules against Respondent. The Bar did not prosecute other attorneys with similar articles, going so far as to create new categories of non-regulated speech in order to protect from prosecution attorneys who are involved in Bar activities.

The Bar's selective prosecution of Respondent is based not on the merits of the case, but on the Bar's dislike of the content of Respondent's article and the refusal of Respondent to grovel before the Bar - all in violation of Respondent's due process and equal protection rights.

ISSUE IV

The Bar has no right under the Rules Regulating Advertising to adopt subtantive criteria. The Bar did. It violated this Court's exclusive power to amend the Rules. This tainted the prosecution herein and violated Respondent's due process rights.

ISSUE V

The Referee erred in denying the Respondent's Motion for Summary Judgment. As agent for this Court under Rule 3-3.1, the Referee had power to declare a particular Rule unconstitutional.

ISSUE VI

There were insufficent facts herein for the Referee to find that the Respondent violated any Rule.

STATEMENT OF THE CASE AND FACTS

This appeal arises from the final order of a Referee in favor of the Florida Bar in a disciplinary action against Respondent. (Appendix B)

The Respondent is an attorney who practices in Winter Garden, Florida and who has been a member of the Florida Bar since 1981. (TT 20) After working for Michael Maher of Maher, Overchuck, and Langa, p.a. in Orlando, the Respondent went into practice for himself in 1983. (TT 60-61) Since that time, the Respondent has practiced primarily in the area of criminal defense work, including DUI defense. (TT21)

In the fall of 1991, the Respondent saw a public need for persons to know their rights if stopped for DUI. (TT 68) He had seen persons falsely accused of this charge because the persons did not know their rights when stopped by the officer. (TT 68))

The Respondent decided he would publish an article informing the public of their rights in this area. (TT67) Being aware of the Rules Regulating Advertising, the Respondent read them and sought to be in compliance therewith. (TT 69)

When the Respondent read that Rules, he saw Rule 4-7.2(n)(9) which allows an attorney to sponsor a "public service announcement." (TT 69) Looking through the Rules, this term was not used anywhere else, nor was it defined in the Rules. (TT69, 72-74) The Respondent did not know and was not on notice that the Florida Bar or anyone else interpreted this term other than it was commonly used. (TT 104)

The Respondent had seen "public service announcements" by

the law firm of Jacobs & Goodman, p.a., a personal injury firm. (TT 93) He had also seen phamplets put out by the Florida Bar. These phamplets would describe a person legal rights in certain circumstance or how to act in certain legal circumstances. On each phamplet was printed the statement "published as a public service to the consumers of the State of Florida." (TT 70) During discovery the Bar admitted that it had in fact printed a phamplet which specifically advised persons as to their rights when they were arrested. (RA 28) Respondent believed that so informing the public of their rights constituted a public service announcement. (TT 70)

Additionally, the Respondent had seen a lifetime of television announcments in which information helpful to the public, e.g. buckle up, speed kills, was labeled public service announcements or public service messages. (TT 69)

Based on these commonly seen examples of "public service" phamplets and announcements, the Respondent decided to publish his informative article as a public service announcement. (TT 105-106) He so wrote it in the belief that he was complying with the Rules. (TT 72) Evidence that Respondent was so writing his article is the letter to the West Orange Times 4 days after publication and weeks before any grievance was filed, in which he expressly stated he was trying to "comply with the Bar rules on public service announcement. (TT 24, 76, RTE 3)

The unrebutted fact is that the Respondent was not trying to advertise his legal services and did not recieve any business from it. (TT 74) The Respondent testified to this fact (TT 68, 74) and the Bar introduced no direct evidence to the contrary.

Further, the Respondent intentionally did not put into the article any information about his a) qualifications, b) type of expericence, c) length of experience, d) nature of practice, e) fees, f) availibility to accept DUI cases. (TT 72) In fact the Respondent specifically included in his article the following:

> 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 it should not be considered as such. (emphasis added).(TT 72)

The Respondent thus intentionally wrote his article in the form of a public service announcement. (TT 69, 74) He included his name and locational information as permitted under Rule 4-7.2(n)(9) and so that he could communicate with others concerning the ideological content of this article. (TT 75)

Respondent then published it in the West Orange Times, a small weekly paper in West Orange County. (TT 29) On December 19, 1991 and December 26, 1991 the public service announcement was published. (Appendix A) The Respondent does not have a big practice. (TT 62)) Each time he published it, he had to pay approximately $190.00. (TT 23, 29) He could only afford to have it published twice.

Thereafter, Scott Frantel filed a grievance with the Florida Bar. (TT 24) He filed the grievance because he did not like the content. (FBTE 25) He thought it taught people how to be better drunk drivers.

Subsequent thereto, Respondent was contacted by the Florida Bar. After investigation, the Respondent was brought before the Grievance Committee where he was charged by the Bar with:

Rule 3-4.1 Failure to familiarize himself about the Rules;

Rule 3-4.3 Engaging in conduct that is contrary to honesty and Justice;

Rule 4-7.1 Making deceptive statements about himself and his services;

Rule 4-7.2 Failure to file and include disclaimer;

Rule 4-7.3 Running an ad with a potentially misleading statement therein;

Rule 4-7.5 Failing to file copy of article with Bar; and

Rule 4-8.4 Conduct involving dishonesty, fraud and mispresentation.

(Bar's Summary of Allegations to Grievance Committee, RTE 10) The Bar's position was that since the article concerned Respondent's area of practice, "it could not possible be a public service announcement." (TT 136)

Even after the grievance hearing, the Bar tried to pursue a claim of fraud against Respondent based on his having included a copyright symbol therein (which he lawfully could do).

The Grievance Committee found the Respondent not guilty of violating Rules 3-4.1 and 3-4.3. The Committee did find probable cause on the issues of not filing, not including a disclosure and that the "public service statement" could be misleading, Rules 4-7.2, Rule 4-7.3 and Rule 4-7.5.

Also, despite the fact that there was no evidence of any intentional misconduct, the Committee found probable cause on the intention fraud, and conduct involving dishonesty, fraud or misrepresentation. Rules 4-7.1, Rule 4-8.4.

At pre-trial hearings before the Referee, Bar counsel finally confessed the Bar had no evidence of fraulent conduct, and that the only true charge it could make was that the

article's statements about "public service announcement" would be impliedly misleading if the article were found to be an advertisement. (See Order dated January 3, 1993)

The Respondent subsequently filed a Motion for Summary Judgment asking the Referee in his capacity as agent for the Supreme Court to rule on the issue of vagueness. The Referee refused based on his alleged lack of authority to find a Rule promulgated by this Court to be unconstitutional.

The case went to trial before the Referee. The Bar conceded that a "public service announcement" under the Rules did not have to be filed or contain a disclosure therein. (TT 142) The Respondent and editor of the West Orange Times testified Respondent's wrote, paid for and published the articles herein. Additionally, the editor testified his papers' practice was to put "advertisement" on articles, not based on content, but to show the article had been paid for and not inserted by the paper as news or editorial. (TT 36)

In the instant case, the newspaper had done so to Respondent's article without his knowledge or permission. (TT 33-34) The Respondent had written to the paper immediately to complain, but the articles had already run. (FBTE 3)

Also testifying was Irl Marcus, a member of the Bar and former Assistant State Attorney. (TT 108-109) He felt the article served the public's interest. (TT 114-115) Mr. Marcus testified that he knew Respondent and that the publication of such an article for the public good would be "typical [redacted]." (TT116-117) Mr. Marcus testified that if Mr. [redacted]

believed in something, he would take action, while lots of attorneys would talk, but take no actions. (TT 116-117)

Mr. Marcus then detailed how he and Mr. [redacted] had been one of the initial persons to file a grievance against the Honorable Danial Perry, County Judge Orange County Florida for putting people (not Mr. [redacted] clients) in jail improperly. (TT 111) (Most charges made by Mr. [redacted] have been substantiated by the J.Q.C. and are now pending before this Court for its review and imposition of punishment.)

Mr. [redacted] testified, and Mr. Marcus confirmed that Respondent did not now accept cases in front of Judge Perry because of this JQC grievance and that it cost the Respondent over $12,,000.00 to do so (TT 63), in addition to the hundreds of hours Respondent spent investigating for the J.Q.C. (TT112).

Further, Mr. [redacted] testified that he had acted on behalf of the City of Winter Garden in trying to prevent a reduction in the leval of legal services to the citizens of West Orange County. (TT 63) The Respondent testified that he had contributed his time for free to the City in order to help the citizens of West Orange and that he received no compensation for time or office expenses from the City. (TT 63-64)

After trial, the Referee found that the Respondent was guilty of failing to file his article, failing to include a disclosure therein, and that the reference to "public service annoucement" was impliedly misleading. (Appendix B) The order was based on the Referee's finding that the article could "impliedly" be interpreted to be an advertisement. From this, the Respondent timely appealed.

ISSUE I

WHETHER THE RULES REGULATING ADVERTISING ARE VAGUE AND AMBIGUOUS SO AS TO INFRINGE UPON ATTORNEYS' SECTION 4 AND FIRST AMENDMENT RIGHTS

"Judges shall accept no income, except where _____." Such a Rule would certainly be vague and leave both judges and the J.Q.C. guessing as to the type of income properly accepted. Yet, at least the presence of a blank gives notice to judges that there could be a problem with this Rule.

In contrast, the Rules Regulating Advertising are much worse. They do not contain blanks, but undefined terms which are equally vague. Thus, what appears to be a safe harbor in the Rules, is in fact a trap for the innocent attorney who seeks to comply therewith. That is what happened here.

The unrefuted evidence is that Respondent did not intend to advertise his legal services but sought merely to inform people of their rights if stopped for DUI. (TT 68) The Respondent carefully reviewed the Rules and correctly determined that a "public service announcement" under Rule 4-7.2(n)(9) would be exempt from the filing and disclosure requirements applicable to advertisements. The Florida Bar conceded at trial that was a correct interpretation of Rule 4-7.2(n)(9). (TT 142)

Thus, there is no dispute that the Rules Regulating Advertising exempt from filing and disclosure requirements a catagory of communications from attorneys to the public called "public service announcements." Respondent would then be entitled under Rule 4-7.2(n)(9) to list himself and georgraphic information as the "sponsor" thereof. Unquestionably,

Respondent sought to comply with this Rule relating to public service announcements as evidenced by the letter to the West Orange Times four days after publication, and weeks before any grievance was filed, in which Respondent expressly stated he was trying to do so. (FBTE 3)

What is a "public service announcement" under Rule 4-7.2(n)(9)? The Bar admits that even though it used this term, there is no express definition thereof in the Rules. (RA 2) While the Bar now claims that an attorney cannot write a public service announcement in the "area of his practice," or if it involves his "legal expertise" and that an attorney cannot "pay for" its publication, there is not one word in the Rules about any such limitation on the nature or dissemination of a public service announcement permitted under this Rule. There is nothing in the Rules to put Respondent on notice that this term had any meaning or limitation other than that commonly applied.

Thus, when Respondent looked to the Rules for guidance (as he is constitutionally permitted to do), all he found was the undefined and undelineated term "public service announcement." Respondent reasonably believed that this term meant the type of communications he had seen for years where information which could be of interest is presented to the public and called a public service message.

Additionally, the Respondent had seen phamplets produced by the Florida Bar. The Bar produces a series of phamplets informing the persons of their legal rights. (RA 23) On each appears the statement that this phamplet is printed as a "public service for consumers." (RA 25) [The Bar herein has even

confessed that it has published a "public service" phamplet which gives legal advice to readers concerning their rights if arrested. (RA 28)]

Since the Bar chose not to define "public service announcement" in the Rules, there was nothing to put Respondent on notice that "public service" phamplets of the nature disseminated by the Bar were not in fact "public service announcements" or that Respondent's attempt to duplicate same would not be a "public service announcement" under the Rules. To so interprete "public service announcement" certainly is consistent with common sense and with the many "public service messages" appearing on television which give advice to the general public.

If the Bar or this Court intended that "public service announcement" have any special limitation or meaning, they should have specifically, expressly and objectively defined that term in the Rules. The failure to do so, made the Rule vague and ambiguous. Hence, Respondent was mislead into publishing his article as a public service announcement under the belief it was a safe harbor, exempt from these requirements and prosecution.

Such sandbagging and prosecuting of persons after the fact is one danger of vague laws. A person does what the law apparently allows only to be prosecuted after the fact on criteria not even part of the rules, thus making persons guess as to whether their conduct is lawful.

The vagueness of the term "public service announcement" is best shown by the Bar's problems in determining what that term

meant. The Bar's very own staff (who would presumably be knowledgeable because they regularly deal with advertising) had to ask the Standing Committee on Advertising for "guidance:"

> Staff has recently received several filings that purport to be public service announcements; examples will be shown at the meeting. Guidance is needed from the Committee as to the criteria it wishes staff to utilize in making the initial determination whether a particular ad is a public service announcement.

(RTE 5, see Appendix C)

The Standing Committee on advertising thus found it necessary to adopt criteria defining what "public service announcement" meant some 14 months after the enactment of the Rules because even its own staff could not determine the definition of "public service announcement" from the Rules. See Committee minutes of March 4, 1992. (RTE 6, Appendix D)

The necessity of adopting criteria proves that with regard to the term "public service announcements" and these Rules:

a) That even the Standing Committee on Advertising found it necessary to supplement the language of the Rules to add criteria for the sake of clarity;

b) That at the time it wrote these Rules and chose to use the term "public service announcement," the Florida Bar did not itself have a clear and concise definition thereof even in mind, much less put it in the language of the Rules. (Otherwise, it would not have to be necessary to go back over a year later and vote on what that term meant and what criteria applied); and

c) That even the Florida Bar with all its resources and expertise could not find a commonly accepted meaning for the term it chose, and took over a year after the Rules went into effect to figure out what it meant when it wrote "public service announcement" in the Rules. (And the Bar wants to punish attorneys for not complying?)

Moreover, in answers to interrogatories and requests for admissions the Florida Bar stated over 30 times that the term

"public service announcement" is "undefined" or "undefined and ambiguous." The Florida Bar now claims it could not even respond to simply discovery because this undefined term was used by Respondent therein, yet it conversely claims that the same undefined term when used in the Rules is sufficiently definate to pass constitutional requirements. Are they kidding? If the term "public service announcement" is ambiguous to the Bar which wrote the Rules, that term is certainly ambiguous to the poor attorneys who are saddled with trying to abide by these Rules.

The unanswered question is why on earth did the Bar use this term in the Rules without defining it, if it intended the term to have a special meaning or limitations. Absent that, neither the Bar nor this Court should be punishing attorneys for failing to abide by rules containing such vague terms.

In regulating other subject matter, the Bar may get away with ad hoc interpretations which fill in the missing requirements of poorly drafted rules, but that cannot be tolerated here. The Bar has now wandered into an area of regulation in which attorneys have rights and rules must be clearly, objectively, and narrowly drawn. The Florida Constitution, as well as the federal constitution, require strict compliance by the Bar and this Court with the constitutional safeguards therein.

An attorney has a constitutional right to "speak, write and publish his sentiments on all subjects." Section 4, Article 1, Constitution of the State of Florida. See also the First Amendment to the United States Constitution. Attorneys do not lose these rights simply because they join the Florida Bar.

There is a broad spectrum of communications between attorneys and the public ranging from pure commercial speech (hire me) to communications involving opinions, ideology, and political expression. While bar associations have historically appeared inclined to regulate all speech, even at the expense of attorneys' rights, now even commercial speech may not be subject to "blanket suppression." Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed.2d 810, 97 S.Ct. 2691 (1977)

Thus, while bar associations may have some authority to regulate commercial speech, they certainly have no authority to regulate speech at the ideological end of the spectrum. As regulations move closer to impairing such traditional First Amendment expression, the regulations are subjected to an ever increasing level of scrutiny. American Civil Liberties Union v. Florida Bar, 744 F. Supp. 1094 (N.D. Fla. 1990) The burden is on the state to show "that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id. at 1097.

Hence, if the Florida Bar desires to regulate the unfettered rights of attorneys to disseminate information to the public, it must do so by clear, articulable and reasonable regulations. The Fourteenth Amendment's due process clause requires specific and articulable standards:

> It is a basic principle of due process that an enactment is void for vagueness if the prohibition is not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable

> opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 at 226 (1972) Broad propholactic rules which could cover a multitude of acts or expressions are not favored in the area of First Amendment rights.

This Court has itself held that where speech is regulated, the requirement that the statute be sufficiently explicit to inform persons what conduct is prohibited takes on particular importance. See Spears v. State, 337 So.2d 977 at 980 (Fla. 1976) wherein this Court found that the statute did "not succeed in articulating a boundary between expression which is protected and expression which is not" and hence was unconstitutional.

Specificity and definiteness are also essential because vague regulations "chill" First Amendment rights, in that attorneys will limit their public expressions for fear of professional punishment. It is to prevent such "chilling" of rights that the United States Supreme Court requires in the regulation of First Amendment rights, that there exist a BRIGHT LINE between prohibited and permitted speech and activities:

> If the line drawn between the permitted and prohibited activities . . . is an ambigious one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. (cites omitted.
>
> * * *
>
> These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as actual

> applicaton of sanctions. (cites omitted) Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. (emphasis added)

N.A.A.C.P. vs. Button, 371 U.S. 415, 9 L.Ed.2d 405 at 418, 83 S.CT. 328 (1962) The Court at page 421 further stated "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

The Rules herein lack this "bright line" standard. In its absence, it is impossible to determine whether an article is "advertising" (commercial speech) subject to regulation or whether it is outside the regulatory scope thereof. Without objective, specific and express standards, an attorney is simply left to guess what speech the Rules govern.

The Bar in its "Response to Respondent's Motion for Summary Judgment" admits there are at least three different kinds of communications between a lawyer and the public:

> 1) Advertising subject to Bar regulation and review;
>
> 2) Communications exempt from the Rules because they contain only information set forth in Rule 4-7.2(n) and 4-7.5(c); and
>
> 3) The airing of personal opinions to which the Rules do not even apply. (A catogory which is not even mentioned much less defined in the Rules.)

Yet, despite these different catagories of communications, the Rules fail to set forth any definitions or standards by which an attorney can determine into which catogory his message falls.

The fundamental problem is the Rule's failure to clearly articulate and define the type of communications included within the term "advertisement." Where on the spectrum of communication from clear commercial speech to the expression of

one's ideological opinions, is the "bright line" which separates regulated commercial speech from unregulated communications. There is no answer to that in the these Rules.

Even the Bar admits that this key term "advertisement" has no express definition in the Rules Regulating Advertisements. (R/A #3) Although "advertisements" is thus the subject matter of these regulations, for some unknown reason no attempt was made to expressly define that term in the Rules.

The Bar's current assertion that the Rules govern all "communications about a lawyers services" likewise does not meet constitutional requirements. That phrase is not defined and is certainly vague. This is especially true since the phrase contains no requirement as to whether a "communication about services" can be implied or must be expressly stated.

Such poor drafting has allowed is the Bar's current assertion that even an "implied" or "subjective" communication about services can be subject to regulation. Thus enforcement becomes arbitrary and capricious since it is based on whether some Florida Bar staffer or grievance committee member "feels" it is a communication about services - no objective standard, just a subjective opinion as to what that person feels the public will think. How much more arbitrary does it get? A lawyer does not even have to "expressly" communicate his about services; It is enough if someone "feels" it was impliedly done.

In the instant case, the Respondent's public service message contains no express solicitation statements or other attempts to obtain remuneration. No where does it state a)

Respondent's qualifications, b) nature of Respondent's practice, c) fees charged by Respondent, d) availability of Respondent to perform legal services, or e) language soliciting employment.

In fact, the Respondent's article goes to great lengths to tell the reader "to consult with your attorney" and to "consult with the attorney of your choice - for more information." These statements assume that the reader has an attorney already or that they will consult with an attorney other than Respondent. This public service announcement even expressly states:

> 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 it should not be considered as such. (emphasis added)

What clearer language could be used to indicate that NO solicitation of legal business or communication about services was occurring?

Yet, the Referee's determination that Respondent's article herein was an advertisement (and not a "public service announcement") was not based on any express statements, but on the Referee's subjective opinion that the public might "imply" from the article it was an advertisement. That is not a standard, only a subjective opinion which may, and probably will, vary from person to person, and be affected in large part by the editorial content of the article.

It is this type of ambiguity which unconstitutionally chills First Amendment rights and which the U.S. Supreme Court has condemned. In N.A.A.C.P. vs. Button, supra, the State of Virginia had passed a statute regulating "solicitation" by attorneys. Because it was vague as to what acts "solicitation"

actually included, the United State Supreme Court found the law unconstitutional because it conceivable could be used to prevent N.A.A.C.P. attorneys from advising minorities as to their rights. If these lawyers advised about their rights, persons who later sought the services of the NAACP, these lawyers "could" then be subject to professional punishment. The mere threat of such penalties, whether or not imposed, violated the attorney's constitutional rights, i.e. "It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes" for it to be unconstitutional.

Further, the United State Supreme Court did so even though Virginia claimed that the NAACP could continue certain activities without punishment. The Supreme Court stated:

> If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protecton of First Amendment Rights. Broad prophylactic rules in the area of free expression are suspect.

9 L.Ed.2d at 421. Thus, broad or ambiguous rules are not constitutional, simply because a bar association promises to narrowly or constitutionally enforce them.

Likewise, the Supreme Court rejected Virginia's defense based on its alleged interest in regulating the legal profession. "For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." id. at 421. It was simply not enough that the State wanted to protect the public by regulating the bar's activity. Regulatory measures, no matter how sophisticated, cannot be

employed which in purpose or in effect stifle, penalize or curb the exercise of First Amendment Rights. Id.

The Rules, herein, are certainly "vague" as that term has been defined in Florida:

> A statute which does not give people of ordinary intelligence fair notice of what constitutes forbidden conduct is vague. (cites omitted) The language of a statute must provide a definite warning of what conduct is required or prohibited measured by common understanding and practice.

Warren v. State, 572 So.2d 1376 at 1377 (Fla. 1991) See also Severson v. Duff, 322 F. Supp. 4 at 6. (S.D. Fla. 1970):

> In order to comport with fundamental concepts of fairness, a statute or a charge must be phrased in terms sufficiently definite so that men of common intelligence will not have to guess at its meaning and application.

The rules herein leave attorneys guessing as to whether regulations apply to them and their protected speech. Certainly, due process and equal justice requires that this Court grant to the attorneys it regulates the same constitutional standard of protection as that given criminals.

Further, vague statutes leave enforcement officials to guess at what conduct violates the law thereby permitting arbitrary and capicious enforcement of such regulations:

> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply then. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendent dangers of arbitray and discriminatory application.

Grayned v. City of Rockford, supra at 227. See Severson v. Duff,

supra at page 6:

> Such vagueness is unconstitutional not only because it fails to warn a person that his behavior may be criminal, but also because it compels enforcement officers, as well, to guess at what violates the law, thus either setting the stage for arbitrary police action, or, if police and prosecutors evolve their own rational standard of enforcement, constituting an inapprorpriate delegation of criminal lawmaking authority.

see also Hillsboro News Company v. City of Tampa, 451 F.Supp. 952 at 954 (M.D. Fla. 1978) wherein the court stated:

> The vagueness of the ordinance in question makes it impossible to judge what type of [expression] is within the coverage of the ordinance. Out of this vagueness and ambiguity flows self-censorship, the chilling effect of which restricts the free flow of protected expression. (cite omitted) This vagueness and ambiguity also allows censorship by individual policemen without uniformity or direction; this uncertainty did and would restrict the free flow of protected expression.

Since enforcement of the Rules is the responsibility of local grievance committees, and not the Standing Committee on Advertising, the vagueness and overbreadth of the Rules herein leaves attorneys subject to arbitrary and capricious enforcement on an ad hoc basis, by local grievance committees lacking uniformity or direction.

THE DANGER

That Respondent can be so punished certainly shows the danger of vague laws in this area, to wit: chilling First Amendment speech. When an attorney tries to write a public service announcement, intentionally omits everything about his qualifications, his experience, and his services (and in fact, expressly says it is not an advertisement), yet WHAM, he is

still dragged before a grievance committee, is forced to undergo a trial before a referee, and is forced to spend significant time and money to defend himself - all because the Bar subjectively feels the article "implies" the Respondent was advertising his services - that certainly can chill one's inclination to publish a "public service announcement."

After this experience, how can the Respondent ever write a public service announcement expressing his views knowing he can be prosecuted simply based on someone at the Bar "feeling" Respondent's article impliedly advertises his services. That is the result when there is no definate standard upon which Respondent can rely and say to himself -Yes, this is a public service announcement which does not have to be filed.

There are serious problems with these portions of the Rules this Court adopted governing advertising. The Rules allow public service announcements but set forth no clear, articulable or objective standards. EVERY DANGER ASSOCIATED WITH VAGUE STATUTES EXISTS IN THESE RULES. Attorneys cannot tell what is permitted or prohibited; the Florida Bar is free to arbitrarily enforce these rules if it "feels" that the public service announcement advertises services; and thus, attorneys' right of free speech is chilled for fear some Florida Bar staffer might "feel" their article, public service announcement or other public expression of their opinion about the law constitutes advertising. That certainly is not the American way nor is it in compliance with the law. The Rules need to be changed.

ISSUE II

WHETHER THE RULES REGULATING ADVERTISING ARE OVERBROAD IN VIOLATION OF THE CONSTITUTION

The Rules are also overbroad in that they reach constitutionally protected expressions which are beyond proper Bar regulation. A statute is overbroad when it punishes "legal as well as illegal activity and has a chilling effect on first amendment freedoms." K.L.J. v. State, 581 So.2d 920 at 921 (Fla. 1st DCA 1991). Rosenberg v. Dept. of Professional Regulation, 488 So.2d 153 (Fla. 3d DCA 1986) In State v. Keaton, 371 So.2d 86 (Fla. 1979) the Court discussed the danger of such statutes:

> However, the danger of an overbroad statute lies in its possible chilling effect upon the exercise of a precious first amendment right by those who read its provisions.

The court then quoted its prior decision in Spears v. State 337 So.2d 977 (Fla. 1976):

> Overbroad statutes create the danger that a citizen will be punished as a criminal for exercising his right of free speech. If this possiblity were the only evil of overbroad statutes, it might suffice to reveiw convictions on a case by case basis. But the mere existance of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious, and the circumspect, the very persons whose advice we seem generally to be most in need of. (emphasis added)

337 at 980. Vagueness and overbreadth thus work together to leave persons guessing as to whether regulations apply to them and their protected speech.

Even if the regulation in its enforcement is precisely

applied, that does not cure the overbroad defect. Severson v. Duff, 322 F. Supp. 4 (M.D. Fla. 1970) The statute must itself contain express limitations on it scope so that it does not intrude upon protected speech. It is the "chilling" effect of such overbroad regulations that create the violation.

Thus, the constitution requires that any limitations on speech must be narrowly drawn, the means reasonable related to the ends, and the scope of the restrictions proportionate to the interest served. Fane v. Edenfield, 945 F.2d 1514 (11 Cir. 1991) Restrictions must be "narrowly tailored to achieve the desired result." Id at 1518. In finding that limitations on CPA solicitations banned more speech than necessary in light of the justification for the restriction, the Fane court defined "narrowly tailored" to mean:

> A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy.

Id. at 1518. The mere possibility of isolated abuses or mistakes does not warrant overly restrictive regulations:

> The Court has made clear in Bates and subsequent cases that regulation - and imposition of discipline - are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. (emphasis added)
>
> * * *
>
> [R]estrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

Matter of RMJ, 455 U.S. 191, 102 S.Ct. 929 at 937, 71 L.Ed.2d 64 (1982) Thus, the vague Rules herein have impermissible allowed

the Florida Bar to intrude into areas of protected first amendment speech when there has been no showing that fraud, undue influence, intimidation, overreaching or other improper conduct is occurring through "public service announcemnts."

Public service announcements, such as Respondent's, certainly are not inherently misleading. This is particularly true since this Court itself in Rule 4-7.2(n)(9) has declared them to be "non-misleading" and the Bar has even stiplated that there is nothing misleading in the Respondent's article other than its representation as a public service announcement. Attorneys as trusted professionals are presumed not to be dishonest or inclined to violate the rules.

Likewise, the Bar in discovery only produced one example in which the attorney claimed it was a public service announcement. Certainly on these facts, the Bar cannot establish that "experience has proven in fact" public service announcements are subject to being abused. Matter of RMJ, supra.

In assessing the regulations, "we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest." McCall v. State, 354 So.2d 869 at 871 (Fla. 1978) The closer the regulations are to limiting or impairing core first amendment values or speech, the more strict the level of scrutiny. American Civil Liberties Union v. The Florida Bar, 744 F.Supp.1094 (N.D. Fla. 1990) Thus when the Florida Bar through its Code of Judicial conduct sought to limit judicial candidates' ability to comment on the issues in their campaign,

the Courts struck down those regulations. The court, strictly scrutinizing the regulation, required the state to bear the burden of proving both a "compelling state interest" and that the regulation was so narrowly drafted and strictly applied as to not infringe upon first amendment rights.

Herein, these regulations were not narrowly drawn. Public service messages serve important functions in providing an outlet for ideological or political expression. Even the public service message herein, clearly contains opinions, expressions of legal rights and information as to desired conduct - content clearly within the ambit of traditional ideological First Amendment speech.

As described above, however, the limitations applied by the Florida Bar far exceed state interest or any "evil" sought to be remedied. Fane v Edenfield, supra. Because regulations must be narrowly drawn to reflect the legitimate issue at stake, the state is not allowed to select more restrictive limitations then necessary:

> And if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose less drastic means.

Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960) cited with approval Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978)

Yet, the Bar has so broadly interpreted "communcations regarding services" that actual express language about a lawyer's service is not even before a communication falls within

the scope of the Rules. Under the Bar's interpretation, it is enough for a lawyer to simply "give detailed legal advice requiring expertise" in an area of law to be deemed to have written about his services (RA # 68-71) or for the Bar to otherwise "feel" the article impliedly advertises his services.

Thus without saying one word about experience, availability or prior experience, the lawyer who desires to express his opinion about the law must either submit his article to Bar review or risk the possiblity of penalties if the Bar decides his statement or article is about a legal issue "requiring expertise" in the law. Could any attorney, anywhere, make a statement about the law in any public forum and not be subject to the possibility of falling within the Bar's overbroad and undefined interpretation of "communication about services."

Further, the Bar refuses to accept or even acknowledge that language of disclaimer is effective. The statement in the Respondent's article that this was "not an advertisement and should not be considered as such" was treated by the Bar, not as a basis for finding the article was a public service announcement but as, the basis for piling on one more miconduct charge against Respondent. Thus, no matter how many disclaimers an attorney puts on his article, the Bar asserts it can prosecute the lawyer anyway. Certainly a chilling effect on First Amendment Rights.

The failure of the Rules to contain clear definitions and limitations on their applications, leaves the local grievance committees, as enforcers thereof, free to arbitrarily interprete terms such as "advertisements", "public services announcements"

and "services" so as to apply them to clearly protected speech (N.A.A.C.P. attorneys advising minorities of their rights, an environmental lawyers describing the need for environmental laws, or a state attorney writing about particular legal issues.) It could even go so far as to extend to political campaign speech as for instance in the case of judges or State Attorneys who seek obtain or keep their employment in the legal field and could be found to impliedly "advertise" their experience and availability for employment during elections.

The overbreath of the Rules violates First Amendment Rights and the right of free speech under Article one, section 4 of the Florida Constitution. It has a chilling effect because an attorney cannot speak out on issues about which he has legal knowledge without fear that the Bar may interprete that to be a "communications about his services" and thus subject him to Bar harrassment and presecution under the guise of regulating "advertisements."

CRITERIA ADOPTED BY THE BAR DOES NOT SAVE THE RULES

The Standing Committee on Advertising was forced to adopt two additional criteria to deterimine if an article is a "public service announcment." (Appendix D) It had to do so because the Rules were so vague even Bar staff did not know what the Rules meant by the term "public service announcement." (Appendix C) Yet, these criteria instead of solving the overbreath problem, increased the effects thereof as follows:

PAYMENT TO DISSEMINATE ONE'S OPINIONS

Florida citizens have the right to "publish" their

sentiments under Article I, section 4 of the Florida Constitution (as well as a similar right under the First Amendment.) Yet, the Bar's criteria that payment by an attorney to publish his article can be considered in deciding whether it is an advertisement, effectively precludes attorneys from spending their own resouces to directly express their sentiments to the public.

In Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976) the Federal Election Commission sought to limit the amount of personal money a candidate could spend on an election. In holding that limitation unconstitutional, the Court stated:

> The ceiling on personal expenditures by candidates on their own behalf ... imposes a substantial restraint on the ability of persons to engage in protected First Amendment speech. The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates.
>
> * * *
>
> [U]nlike a person's contribution to a candidate, a candidates's expenditure of his personal funds directly facilitates his own political speech.

96 S.Ct. at 707. That same rational would apply, herein, where the Bar's criteria precludes any attorney from directly paying to have his opinions published.

That payment criteria further discriminates against attorneys based on their affiliations and the "political correctness" of their beliefs in violation of First Amendment rights of association and free speech. If an attorney is a member of an organization or has wealthy friends of similar

beliefs, he can use his associations therewith as a means of paying to have his sentiments published. In contrast, an attorney without such associations is shut out from "publishing his sentiments" because his paying to do so would make the public service announcement into an advertisement with its accompanying regulatory burdens and costs.

Likewise, by adopting this "can't pay" rule, the Bar has made editors and media personnel the gatekeepers of attorneys' First Amendment rights based on content. If the newspaper or other media persons share the attorneys beliefs, it may be published for free. If the attorney has sentiments on controversial subjects or a minority viewpoint, those sentiments will not be published free. Yet, it is for the protection of minority viewpoints that the First Amendment exists:

> The right of persons to express themselves freely is not limited to statements of views that are acceptable to the majority of the people. If it were to be held that freedom of expression applies only to views that the national, state, or local community finds to be within the range of reasonable discourse, the First Amendment would have little meaning or purpose. Democratic governments seldom seek to suppress speech that the community finds acceptable. Where the majority rules, there is usually no need for constitutional protection of the right to express views that are considered proper and reasonable by the majority. The real purpose of the First Amendment is to protect also the expression of sentiment that the majority finds unacceptable or even unthinkable. (emphasis added)

Dept. of Education v. Lewis, 416 So.2d 455 at 461 (Fla. 1982).

Moreover, the United States Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), held that

"speech does not lose it First Amendment protection because money is spent to project it." Thus, Respondent has a constitutional right to pay for public service messages to convey his sentiments and messages. That right is protected by the First Amendment and the Florida Constitution and is a necessary corollary thereof. See Buckley v. Valeo, 424 U.S.1, 46 L.ED.2d 659, 96 S.Ct. 612 (1976) - "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise."

CONTENT OF PUBLIC SERVICE ANNOUNCEMENT

The Bar's second criteria and which was recommended by the Referee is equally unconstitutional and violative of Section 4 and First Amendment rights:

> Whether the content of the communication appears to serve the pecuniary interest of the sponsoring lawyer of law firm as much or more than the interest of the public in receiving the message.

Regulations must be "content-neutral." Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982)

To determine whether a regulation is content neutral, the focus must be on "the operation of the [regulation] in relation to the status of the speech without regard to the identity of the speaker. Baugh v. Judicia Inquiry and Review, 907 F.2d 440 at 444 (4th Cir. 1990) IF CONTENT IS AN ISSUE, THE REGULATION IS PRESUMPTIVELY VIOLATIVE OF THE FIRST AMENDMENT. Renton v. Playtime Theatres, Inc. 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) The regulation is then tested against the most "exacting scrutiny." Texas v. Johnson, ____ U.S. ___, 109 S.Ct.

2533, 105 L.Ed.2d 342 (1989).

The Florida Bar therefore has no right to review the Respondent's public service announcement to determine whether it "serves the public interest." The article can at most be reviewed solely to determine whether it contains any "express" solicitation statements therein. But the Bar and grievance committees impermissible do not so limit themselves. Both John Griffin, head of the Committee on Advertising, and Bar Counsel herein, have confessed that they consider "content" in determining whether an article is a public service announcement. (RA 95, 96)

This second criteria is clearly a weighing of subjective evaluations - not the application of objective standards. Even if the article serves the pecuniary interest of a lawyer, it is still a public service announcement if the public's interest in receiving the message is GREATER THAN that pecuniary interest. If the public's interest is less than that, however, the article is an advertisement.

This "public interest" factor, however, is clearly a subjective determination made on the moral, philospophical and personal beliefs of the reader, e.g. Pro-life and Pro-choice advocates may have widely divergent views as to the "public's interest" in receiving a particular message. Thus, even if everyone could agree as to the amount of pecuniary interest an attorney may have in an article, determination of the other factor as to whether it serves the "public's interest" still comes down to the mere subjective opinion of the reader.

That is no articulable standard, and certainly could give

rise to blatant censorship based on whether the Bar or local grievance committee likes one's message. It is the same rationale Communist Chinese leaders applied to communications by students in Tinamen Square - the public had no interest in hearing what they said.

The result of the vague rules can be seen herein where the Bar has obviously found that the "public interest" of potential DUI defendants in learning their rights is less then the pecuniary interest the Respondent received. This contrasts sharply with the fact that the politically correct "Don't Drink and Drive" public service message of Jacobs and Goodman, P.A. has been repeatedly broadcast yet the Bar has neither advertising files thereon nor began grievances against them. (R/A 30, 31, 32) (This is so, even though that firm's public service messages on drunk driving has been the focus of an article in the Florida Bar Journal, January 1, 1993. - RTE 8)

It would be reasonable to conclude that grievance committees which enforce the Rules would find a lot of "public interest" in public service announcements whose content they like, and very little in those whose content they dislike. This makes enforcement arbitrary and subjective. Two attorney with different public service announcements having the same pecuniary interest would be subject to disparate treatment based simply on the grievance committee liking the content of one (great public interest) and disliking the other (little public interest). See Appendix E attached hereto.

Such discretion violates the constitution because it is

based on how the Bar or grievance committee thinks the "content" serves the public. In Department of Education v. Lewis, supra, the Florida Supreme court set forth that "content" based regulations would not be tolerated even in commercial speech, much less in protected speech:

> Regulations must not be based upon the content of the speech. They must be content-neutral.
>
> * * *
>
> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. ...

416 So.2d at 462-463.

Since the Rules and the Florida Bar have allowed and exempted some public service announcments, it is prohibited from repressing other public service messages based on its decision as to how much "public interest" the editorial content serves. Content must be a non-issue and cannot be considered even under the guise of determining what is in the "public's interest."

This consideration of "public interest" content and discretion given to the Bar and grievance committees, violates the "bright line" test required of all attorney First Amendment regulation. The Florida Bar cannot hide behind labels to conceal violations of lawyers' first amendment rights - "a state cannot foreclose the exercise of constitutional rights by mere labels." NAACP v. Button, supra at 416. The inherent, chilling danger is that the Florida Bar will more readily classify as "advertisements" those public service announcements which it opposes or which engender public controversy. Thus, holders of

certain ideological beliefs are denied equal protection and access to publish their opinions, in that they would be subject to more restrictive or burdensome Bar regulations than others similarly situated.

Moreover, the United States Supreme Court in the Virginia Pharmacy Board case supra, found that the recepients of the information had First Amendment rights also that were violated by the rules therein:

> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases.

48 L.Ed.2d at 355. The Supreme Court therefore ruled that RECEIPIENT'S First Amendment rights were violated by improper regulations, even though they could have obtained the information in some other way. Thus, the Florida Bar's assertion it know best what is in the "public interest" denies members of the public their constitutional right to receive public service messages, some of which will never be published for fear of professional punishment.

If the Bar's criteria is approved by this Court, it will have set the Florida Bar up as the "all-knowing, guardian of public good and interest." The criteria sets forth no articulable, specific standards, safeguards or limitations. It does not state what constitutes the serving of the lawyer's interest, nor does it set forth any standards as to what is the public's interest. It is an open invitation to the Florida Bar to blatantly review and regulate the statements of attorneys in

the belief that the Bar knows best what is in the public's interest - the basic foundation for all censorship.

This is particularly dangerous to free speech in that the ambiguity of the Rules leave the Bar free to interprete any article or statement it dislikes as being an "advertisement" and hence subject to its regulation and approval. If a Florida civil rights lawyer in 1965 had published an article telling minorities they had certain civil rights (and if these rules were then in effect), the Bar under its interpretation could declare that to be an advertisement and demand the right to review and regulate same. Would that political message of informing the people of their rights ever be the same? One would think not. The Bar could use the Rules to censor, chill and delay the dissemination of what we now clearly accept as protected speech.

The same is true today. We must never forget when the Bar talks about filing advertisements, it is really talking about the exercise of its power to force modifications, limitations and changes on a filed article under threat of professional prosecution and punishment of the attorney. This is not merely "filing," but in fact "filing and approval" by the Bar under threat of discipline, if one does not comply with the Bar's suggested changes to the submitted article.

A system of vague and ambiguous Rules, which seeks to regulate communications on the undefined basis of whether it "serves the public's interest," is by its nature unconstitutional and subject to being improperly used to chill the dissemination of clearly protected speech.

ISSUE III

WHETHER THE FLORIDA BAR SELECTIVELY PROSECUTED RESPONDENT SO AS TO VIOLATE DUE PROCESS AND EQUAL PROTECTION RIGHTS

The Florida Bar claimed it prosecuted the Respondent because he published an article which it deemed to be an advertisement. The Bar asserted because the article was in the Respondent's area of practice, it could not be a "public service announcement" as Respondent claimed and had to be filed.

Yet, when the Respondent challeged the Bar for its failure to punish Roy Dalton, head of the Grievance Committee below, for publishing an article in the Orlando Sentinal which admittedly "discussed the law as it relates to the liability of doctors giving care to injured parties" (R/A #41 and exhibt B to the Requests) - THE RULES SUDDENLY CHANGED. Despite the fact Mr. Dalton's article was about a legal area in which he practices, the Bar suddenly <u>discovered</u> a new category of unregulated attorney communication. What a lucky coincidence. Certainly politics and favoritism played no part in that "discovery."

The Bar called Mr. Dalton's self-serving article "an editorial article expressing his personal opinion." (R/A #44) Yet, <u>not one word</u> in the Rules say such a category even exists.

This demonstrates the evil and danger of vague rules when it comes to enforcement. When some person politically connected to the Bar writes such an article, the Bar will place the article in a non-regulated category <u>even if</u> that requires <u>discovery</u> of a new, unregulated category not mentioned in the Rules. This is possible because the Rules do not constrain

arbitrary enforcement through express or strict guidelines, but instead use vague and subjective wording. The Bar is therefore able to skirt enforcement of the rules against its favored persons through "subjective" findings.

Thus, if the Bar like you or your message, it is neither regulated nor punished. In contrast, a sole practioner who is not politically or financially connected to the Bar, will find himself before a grievance committee defending his article against subjective assertions it is an advertisement.

If an "editorial article expressing of personal opinion" was in fact a bona fide category, why isn't it even mentioned in the Rules, much less defined. If there does exist this entire type of attorney communication outside the Rules, where is the "bright line" defining the type of communications which fall within its scope? What clear, articulable and objective standards apply? How can the Respondent even now tell whether a future public communication of his falls within the scope of this non-regulated category or will be subjectively placed in the category of advertising?

Perhaps, Respondent would have written and choosen to publish his "editorial expression of personal opinion" on the issue of DUI arrests, if the Rules had made even the slightest mention of it. Since Respondent did not even know he had this option, he was deprived of this opportunity which was both wrong and a denial of Respondent's and equal protection rights. All Bar members must be governed by the same Rules - without special privileges being "discovered" to protect the privileged few.

Thus, the Referee erred in not finding that the Bar had

selectively enforced the Rules against Respondent. While the Referee claimed that there was insufficient evidence, this came about because the Referee by Order arising out of a hearing on March 17, 1993 required Respondent to make a "showing of likelihood of materiality and relevance" before deposition of Florida Bar agents could be taken concerning prosecution decisions. The Referee thus prevented the Respondent from taking depostions necessary to discover this evidence.

Yet, even the evidence Respondent obtained through his own investigation demonstrates that enforcement by the Florida Bar in Orange County is inconsistent and selective. The law firm of Jacobs and Goodman, P.A. run "public service announcements" in which they express state they are personal injury attorneys. (RTE #2) An attorney, Gary Shader, published a column which even contained information on his legal background. (RTE 13) Other attorneys put their names, address, and telephone numbers as sponsors of little league fields. (RTE A, B, C and D). Yet, none of these attorneys were prosecuted or punished for their past acts, not even Jacobs and Goodman, which continues to run such "public service announcements" saying they are personal injury attorneys.

In contrast, Respondent publishes his article twice and months later, the Bar pursues a grievance and seeks punishment for his past acts. This appears to be based on two factors:

a) The Bar does not like the content of Respondent's message telling possible DUI offenders about their rights. The Bar counsel herein admits she told Respondent the Bar could

consider whether the content of Respondent's article serves the public interest. (RA 101) That certainly appears to violate the case law saying regulations must be content neutral. Department of Education v. Lewis, supra.

b) Second, the Bar is seeking to punish Respondent for not knuckling under to the Bar's self-preceived imperial authority. The Florida Bar counsel at trial stated:

> [W]e're here because Mr. Hall requested that we be here today. At any time during these proceedings, if Mr. Hall had acknowledged his wrongdoings, said "Hey, I didn't understand this; this is confusing; these are New Rules," he, as in the case provided to you with the other attorney, Gary Shader, the case would have resulted in dismissal. Instead he's chosen to elect this forum, and for that, discipline is warranted.

(TT 127-128) The Respondent is thus being prosecuted not because his acts warrent punishment, but for his current belief that the Rules here are vague and overbroad.

That Bar statement exemplifies the chilling effect on First Amendment and section 4 protected speech which can occur if the Bar is allowed to selectively enforce vague and ambiguous Rules. Attorneys can be prosecuted by the Bar based not on their acts or the merit of their defense, but on whether they will snivel and grovel at the feet of the Bar. Thus, an attorney who publishes an unpopular article must like a communist Chinese peasant either stand in the city square and denounce his acts while praising the government, or face being hauled away to be punished for his beliefs. That chills free speech rights.

There is something fundamentally wrong with an agency which seeks to discipline, not on the merits of the conduct, but for a

person's refusal to renounce his interpretation of a Rule. In this case, Respondent's conduct did not warrant disciplinary action as evidenced by no punishment being imposed for identical, if not worse behavior, in the case of Gary Shader. (RTE 14) How can Respondent be punished when even the Bar admits the Rules offer little guidance to attorneys. (TT 14)

Yet, the Bar piled on every possible charge and accusation including fraud - even though there was no evidence of any intentional misconduct. Would not any attorney be fearful if the Bar falsely and maliciously without evidence accused him of intentional, fraudelent acts? Clearly these additional serious fraud charges of misconduct were meant to intimidate Respondent. Even if Respondent had made a technical violation, which he did not, no evidence exists which would warrant or support the type of piling on of charges that the Bar did herein.

Such selective, heavy-handed, enforcement clearly chills attorneys in the exercise of their constitutional rights, and violates the due process and equal protection rights of attorneys such as Respondent. This Court has given the Bar a whip to control the public communications of lawyers. This Court has the duty to make sure there are strict, objective guidelines to prevent its misuse.

ISSUE IV

WHETHER THE BAR IMPROPERLY ADOPTED SUBSTANTIVE CRITERIA USED TO PROSECUTE RESPONDENT AND WHICH TAINTED HIS PROSECUTION IN VIOLATION OF HIS DUE PROCESS RIGHTS.

At its meeting on March 3, 1992, the Standing Committee on Advertising adopted two criteria as to what constituted a public service announcement (RTE 6, Appendix D):

a) Whether the attorney paid for the publication of the announcement; and

b) Whether the content of the communication appears to serve the pecuniary interest of the sponsoring lawyer or law firm as much or more than the interest of the public in receiving the message. (emphasis added)

The Bar's adoption of these additional criteria, however, was improper and unauthorized. Under Rule 4-7.5(e) the Bar's only responsibility is the "evaluation" of advertisments. Under Rule 15-1.1 the Bar's duty is the "enforcing" of advertising rules. Under Rule 15-2.2 the duty of the Standing Committe on Advertising is to "evaluate all advertisements," "develope a handbook" and "recommend . . . from time to time such amendments to the [Rules] as the committee may deem advisable."

Not a single one of those rules give the Florida Bar or the Committee the power to adopt substantive criteria or make any changes in the Rules. That is a power which this Court holds exclusiverly under Rule 1-12.1(a) Regulating the Florida Bar.

The Bar, however, was not interpreting the Rules when it adopted the above-quoted criteria. The Bar effectively amended the Rules by adopting criteria for which there is no "regulatory basis" in the language of these Rules.

The Bar asserts that payment by an attorney to publish an article is a factor which makes it an advertisement and not a public service message. (That certainly is a substantive criteria.) Yet, the Rules do not even mention payment for public service announcements, much less that such payments can change public service messages into advertisements. The act of the Bar in adopting this criteria therefor intruded upon the sole power of this Court to amend the Rules or adopt different criteria.

In Brown v. State, 358 So.2d 16 (Fla. 1978), this Court held a profanity (fighting words) statute unconstitutional because there was " no statutory language to support judicial restructuring." Thus, the Court could not simply make the statute constitutional by limiting its effect to only face-to-fact confrontations:

> Because this Court in Mayhew attempted to limit the scope of [the statute] to spoken words addressed to a particular person which would cause that person to fight without any statutory language to support such a limitation, we are now constrained to find the statute in question violative of Article I, section 4, Florida Constitution and consequently incapable of redemption. This is so because men of common understanding upon reading the statute would reasonably conclude that mere utterance of the proscribed language, without more, could subject them to prosecution. The impermissible chilling effect upon constitutionally protected speech is apparent. (emphasis added)

358 So.2d at 19. If the Florida Supeme Court cannot constitutionally add factors not mentioned in statutes, then this Court cannot allow the Florida Bar to add criteria about which no mention is made in the Rules.

The same is true of the second criteria adopted by the Bar and the Bar's companion assertions that one cannot publish a "public service announcement" in the area of one's practice. Those criteria have no basis in the Rules and hence constitute an improper and unauthorized taking of this Court's exclusive authority to amend these Rules.

This violation of the Rules by the Bar certainly prejudiced Defendant and violated his due process rights. The Bar used the criteria it improperly adopted in its prosecution of Respondent. It did so even though these criteria were not even mentioned in the Rules, and were not even in existance at the time Respondent published his article. (The Bar did not even adopt these criteria until 2 months after Respondent's publication of his article herein.)

These unauthorized criteria obviously had an effect upon the Referee since he made reference thereto in his final order. But for these improper criteria, the final judgement herein would have been different since there would have been no standards by which to judge if this were a "public service announcement," and hence the Respondent could not have been found guilty of any violation.

ISSUE V

WHETHER THE REFEREE SHOULD HAVE GRANTED A SUMMARY JUDGMENT ON THE ISSUE OF VAGUE OVERBROAD, AND UNCONSTITUTIONAL RULES

The Referee herein held that he had no authority to determine whether the Rules herein were constitutional. (FO page 3) As a result, the Referee would not rule on Respondent's Summary Judgment Motion, although the Referee raised questions concerning the clarity of the Rules in his Final Order.

Historically, judges acting in their constitutional capacities under Article V of the Florida Constitution, certainly had no authority to determine whether a rule of court promulgated by the Supreme Court was constitutional. That duty was left to the Florida Supreme Court itself.

However, the Referee in the instant case, although a circuit court judge, was not acting in his capacity under Article V at the time of this hearing. Said Referee was acting under Rule 3-3.1 Rules Regulating the Florida Bar:

> The following entities are hereby designated as agencies of the Supreme Court of Florida for [the purpose of disciplinary actions] and with the following responsibilities, jurisdiction, and powers. ... [R]eferee shall have such jurisdiction and powers as are necessary to conduct the proper and speedy disposition of any investigation or cause.... (emphasis added).

Thus, the Referee was acting as the "agent" of the Florida Supreme Court.

Respondent would respectfully submit that as the agent of the Florida Supreme Court the Referee has authority to decide any issue, although subject to review, approval or disapproval

by this Court. This would appear both to be proper and further judicial economy.

Herein, there were no disputed facts. From day one, Respondent admitted he wrote, paid for, and had the article published. He admitted that he practiced in the area of DUI and was knowledgeable about that area. The defense of Respondent throughout has been that the Rules herein are vague, overbroad, and unconstitutonal.

Thus, over half a day of trial before a Referee would have been avoided if a decision on that issue could have been made. The ability of a Referee to so rule is particularly important in the area of free speech where the issue revolve around which standard is applicable and does it pass constitutional muster. The absence of any summary procedure requires an attorney whose First Amendment rights are violated to bear the cost and burden of the entire grievance procedure simply to make it to the Florida Supreme Court for ultimate resolution.

As agent for this Court, the Referee had the authority to decide legal issues including the consitutionality of the applicable rules. His finding that he did not have such authority was incorrect and should be reversed.

ISSUE VI

WHETHER THERE WAS SUFFICIENT FACTS TO SUPPORT THE REFEREE'S FINDING OF GUILT HEREIN

The Referee found the Respondent guilty of three counts of misconduct:

a) failing to file his article with the Standing Committee on Advertising;

b) Failing to include the required disclosures; and

c) Including the statement "this is not an advertisement" which may be misleading.

The basis for each of these findings of guilt is that the article herein was an advertisement under the Rules. This was not based on any express statement within the article, but on the subjective opinion of the Referee that the public might interprete this to be an advertisement.

There is insufficient facts herein to support this judgement. There was no testimony that this would be considered an advertisement by the public. Even the testimony of the editor of the West Orange Times was simply that the paper put the term "advertisement" on all articles which were paid to be published (including a weekly religious column). (TT 48) The West Orange Times apparently split its contents into two categories: "advertisement and editorial" based on post office mailing and billing requirements. (TT55) The use of this term by the paper was thus not based on any general understanding of what constituted an "advertisement" or "public service announcement" but on postal requirements. The newspaper in fact never uses the term "public service announcement." (TT 55) Thus any finding that the Respondent's article is not a public

service announcement was unsupported by the facts herein.

If the article is not an advertisement, Respondent is guilty of nothing. The Florida Bar never meet its burden of proving this article was an advertisement, and that it was not a "public service announcement" as claimed. Since the Florida Bar attorney at trial conceded public service announcements are not subject to the filing and disclosure requirements, as a matter of law, Respondent could not be guilty of violating same. Likewise, there could be no misstatement, since the article would indeed not be a advertisement.) Accordingly, the findings of guilt should be reversed.

CONCLUSION

The tyranny we face today is not that all our rights will suddenly be taken from us. The danger is that bit-by-bit, piece-by-piece our rights will incrementally erode.

The vague and overbroad rules herein allow the Bar to take our free speech rights away. Certainly we expect environmental lawyers to speak on the environment; civil rights lawyer to speak on discrimination. But, in doing so, they risk professional punishment because the Bar might "feel" that the content "impliedly" advertises their legal services.

Without definate, and objective Rules, the Bar is free to do exactly that to messages it dislikes. That certainly chills attorneys' exercise of their rights, if not actual censors them.

But like censors everywhere, the Bar says all one really needs to do is "file" it and put a "disclosure" therein. Yet, "filing" is not just sending it in, but getting Bar approval under threat of punishment. While this siren song is strong, attorneys should not have to clear their opinions with the Bar.

In the great scheme of things, what this Court does to the Respondent matters little. But it does matter a great deal what this Court does about protecting the free speech rights of attorneys. If this Court does not adopt clear, objective, and definate rules, the Florida Bar will go on punishing attorneys for the content of their communications under the guise that the Bar "feels" the communication is impliedly an advertisement.

If that is allowed to continue, this Court will have failed - failed in its duty to attorneys and to the public. For that, this Court will be responsible.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been served upon the Florida Bar, Jan Wichrowski, Bar Counsel, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801 this 27th day of September, 1993.

Respectfully submitted,

Herbert H. Hall, Jr.

Herbert H. Hall, Jr.
P.O. Box 771277
Winter Garden, Florida 34777
(407) 656-1576
Fla. Bar No. 315370

APPENDIX A

RESPONDENT'S PUBLIC SERVICE ANNOUNCEMENT

STOPPED FOR DRUNK DRIVING 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 six 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.

LAWYER TALK:

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.

A PUBLIC SERVICE MESSAGE SPONSORED BY:

The Law Office of [redacted]

[redacted]

APPENDIX B

FINAL ORDER OF REFEREE

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

KERRY I. EVANDER
CIRCUIT COURT JUDGE

cc: The Florida Bar
c/o Jan Wichroski
[redacted]

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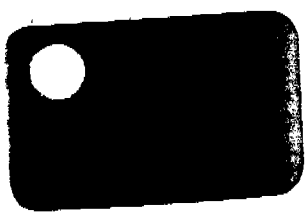
Neither is this document intended to give legal advice as to a specific case or situation. Your situation may differ and you should consult the attorney of your choice for more information.



A PUBLIC SERVICE MESSAGE SPONSORED BY:

The Law Office of [redacted]

[redacted]

APPENDIX C

MEMORANDUM FROM FLORIDA BAR STAFF SEEKING "GUIDANCE" AS TO WHAT CONSTITUTES A "PUBLIC SERVICE ANNOUNCEMENT" BECAUSE THE RULES DO NOT DEFINE THAT TERM OR "OTHERWISE SPECIFY WHAT FACTORS SHOULD BE USED IN DETERMINING WHAT IS A PUBLIC SERVICE ANNOUNCEMENT"

*** PLEASE NOTE THAT THE MEMORANDUM IS IN ERROR WHEN IT STATES THAT THE "RULES DO NOT USE THE TERM 'PUBLIC SERVICE ANNOUNCEMENT'" SINCE THAT EXACT TERM IS EXPLICITELY USED IN RULE 4-7.2(N)(9)

PUBLIC SERVICE ANNOUNCEMENTS

The staff has consistently taken the position that the provisions of subchapter 4-7 governing lawyer advertising were not intended to apply to public service announcements underwritten by lawyers or law firms. Staff's position relies on two factors. First, by their nature the rules govern advertising of legal services, which presumably would not be involved in a public service announcement. Second, Rule 4-7.5(c)(2) specifically provides that a brief announcement of a lawyer or law firm's contribution to or sponsorship of a ". . . community or public interest program, activity or event . . ." is exempt from review by the Committee as long as the announcement contains no information other than the name of the lawyer or firm, the city where the law offices are located, and the fact of sponsorship or contribution. Other than the language in 4-7.5(c)(2), the rules do not use the term "public service announcement" and do not define or otherwise specify what factors should be used in determining what is a public service announcement.

The Committee briefly discussed the issue of what constitutes a public service announcement at its initial meeting in March 1991. No decision was reached as to what criteria would be utilized in determining whether a particular announcement would be considered advertising or a public service spot. Staff was requested to research the area.

Staff has studied the issue, including contacting numerous media representatives as well as the Florida Association of Broadcasters in an attempt to determine if the industry utilizes recognized criteria in deciding if a particular announcement is to be considered a public service announcement.

The responses received indicates that a uniform set of criteria does not apparently exist in the industry, and that the decision on whether to run a spot as a public service announcement is made by the particular station or publisher. A variety of factors or criteria were cited as weighing in the decision. Included among the factors are whether the sponsor has or plans to pay for time or space to run the same spot in another media, and whether the content of the spot appears to serve the interest of the sponsor as much or more than the interest of public in receiving the message.

Staff has recently received several filings that purport to be public service announcements; examples will be shown at the meeting. Guidance is needed from the Committee as to the criteria it wishes staff to utilize in making the initial determination of whether a particular ad is a public service announcement.

APPENDIX D

MINUTES FROM THE STANDING COMMITTEE ON ADVERTISING FINALLY SETTING FORTH AT LEAST SOME CRITERIA (ALTHOUGH VAGUE) AS TO WHAT CONSTITUTES A "PUBLIC SERVICE ANNOUNCEMENT" FOURTEEN MONTHS AFTER THE RULES WERE IN EFFECT AND TO ADOPT CRITERIA 14 MONTHS AFTER ENACTMENT OVER TWO MONTHS AFTER RESPONDENT PUBLISHED HIS ARTICLE

SCA mtg.

3. content and format of the individual ads are identical to ads in print media, such as newspapers and magazines; and

4. distributed to large number of occupants (thousands), in fashion similar to local magazine or newspaper, such that concern about misrepresentations being made to individuals outside of public view is not present.

CRITERIA TO DETERMINE IF ANNOUNCEMENT IS TO BE CONSIDERED ADVERTISING OR PUBLIC SERVICE ANNOUNCEMENT

John Griffin briefed the SCA on its past discussions on this issue and staff's attempts to obtain criteria, formal or informal, used by broadcasters in determining whether a particular announcement would be considered advertising or a public service spot.

The SCA briefly discussed the issue and voted 5-0 to adopt staff's recommendation that the criteria to be employed are whether the attorney pays the broadcaster to air the spot and 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. However, neither criteria, standing alone, is determinative.

CELEBRITY VOICE UNDER RULE 4-7.2(b)

This issue was tabled for discussion at a future meeting.

REFERRAL OF ADVERTISEMENTS AND DIRECT WRITTEN COMMUNICATIONS TO LAWYER REGULATION

John Griffin explained the existing referral policy of the SCA under which staff is permitted to make a referral only if the advertisement or direct mail has been brought to the SCA and the SCA itself directs that the matter be referred. This policy is premised on the SCA's recognition that its primary role is that of advice and education, and that this role should not be undercut by acting as a regular source of grievance complaints.

Following discussion, the SCA voted 5-0 to permit staff to refer certain types of correspondence to Lawyer Regulation without first bringing the material to the SCA. The type of correspondence which staff referral authority is granted is limited to the following factors:

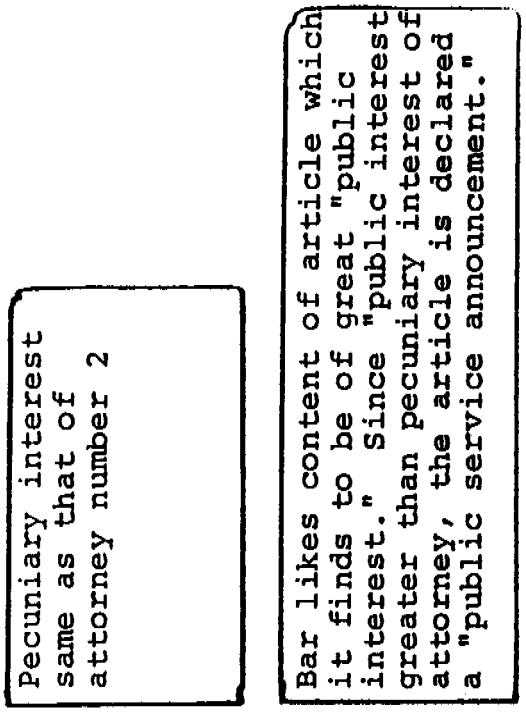
1. concerns a direct written communication to a prospective client; and

APPENDIX E

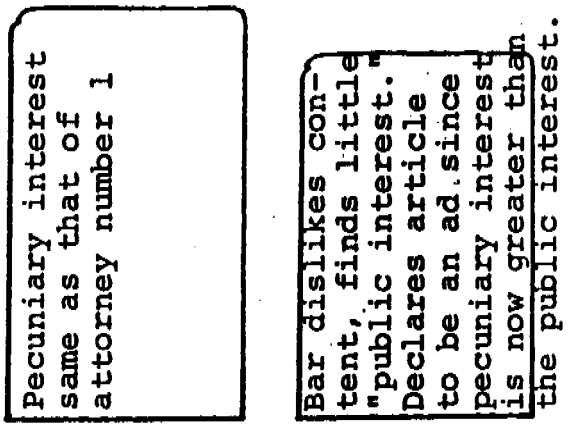
EXAMPLE AND DESCRIPTION OF THE TYPE OF DISPARATE TREATMENT THAT CAN OCCUR BETWEEN ATTORNEYS BASED ON WHETHER THE BAR LIKES ONE'S ARTICLE

less than the pecuniary interest and the article will be deemed an advertisement subject to all of the burdens, costs and limitations thereon.

ATTORNEY ONE



ATTORNEY TWO



There thus is no objective standard at all. The result varies based on the extent that the Bar subjectively determines that the article serves its definition of "public interest."

In the instant case, would the Bar be as quick to condemn the article as an advertisement if the article talked about the dangers of drinking and driving. One would think not. The Bar would probably find much more "public interest" in that message.

That is the essence of censorship and the "chilling" of first amendment rights. If your ability to communicate varies based on the subjective opinion of some other person as to whether they think your expression is in the "public interest," then at their whim you are subject to being silenced, regulated or punished. That is why we have First Amendment protection.