


IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,
vs.


CASE NO: 80,701


Respondent.

REPORT OF REFEREE


I. Summary of Proceedings:

Pursuant to the undersigned being duly appointed ^{By} ~~as a Referee~~ ^{deputy clerk} 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 -  ✓

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, , 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."

FILED

SID J. WHITE

JUN 1 1993

CLERK, SUPREME COURT

By 

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 "news copy" 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

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

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

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

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

DATED this 26th day of May, 1993.



KERRY I. EVANDER
CIRCUIT COURT JUDGE

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

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 3 months the possible jail sentence and 3) eliminates any plea to a lesser charge, e.g. reckless driving.
- Make sure you understand everything the officer says before you decide. **IF YOU BURP OR BELCH** stomach juices into your mouth prior to the test, **TELL THE OFFICERS** since that interferes with the test (higher readings). If you tell the officers, they have to wait until you have stopped burping for 20 minutes before they can test you.
- If your reading is over 0.10% or you refuse, **YOUR LICENSE WILL BE TAKEN AND A 7 DAY TEMPORARY WORK PERMIT ISSUED.** This means little since it expires before you get any hearing. No other work permit licenses will be issued until 30 days have passed.
- **YOU HAVE 10 DAYS FROM THE DATE OF ARREST TO REQUEST A FORMAL HEARING** with the DMV. If you do not, you lose important rights. This requires more explanation, thus it is important to consult with your attorney within the first week after arrest.

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]