IN THE SUPREME COURT OF FLORIDA

Case No: SC04-1661

THE FLORIDA BAR,

Complainant,

v.

MARK STEPHEN GOLD,

Respondent.

RESPONDENT MARK STEPHEN GOLD'S ANSWER BRIEF

Francesca Russo-Di Staulo
Miami Center, Suite 1700
201 South Biscayne Boulevard
Kluger, Peretz, Kaplan & Berlin, P.L.
Miami, Florida 33131

Counsel for Mark Stephen Gold

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

RULES

STATEMENT OF THE CASE AND OF THE FACTS

A. Introductory Statement

The Respondent, Mark Stephen Gold is also the Respondent below. The Complainant, The Florida Bar, is also the Complainant below. References to documents in the Appendix filed by Complainant, The Florida Bar shall be designated herein by the letter "A" and will include the Appendix Tab and the page number (A- Tab #, p. #). References to documents in the Supplemental Appendix filed by Respondent, Mark Stephen Gold, shall be designated herein by the letters "SA" and will include the Supplemental Appendix Tab and the page number (SA- Tab #, p. #). For the Court's convenience, Complainant, The Florida Bar will be referred to as the " Florida Bar," and the Respondent Mark Stephen Gold will be referred to as "Gold."

B. Statement of Case and of the Facts

The Florida Bar's statement of the case and of the facts is incomplete and glosses over important facts. Accordingly, Gold provides this statement of the case for the Court.

1. Introduction

The Florida Bar has appealed from the Referee's June 9, 2005 Order (the "Order") granting summary judgment in Gold's favor on the Florida Bar's

allegations that Gold violated Rules 4-7.2(b)(1)(B), 4-7.2(b)(3), 4-7.4(b)(1)(E) and 4-7.4(b)(2)(K) of the Rules Regulating the Florida Bar ("Rules").

The Florida Bar argues that the Referee erred in finding that: (1) the independently written newspaper articles in Gold's advertisement were not misleading and that: (2) the Florida Bar's application of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3), 4-7.4(b)(1)(E) are unconstitutional as applied to Gold. In addition, the Florida Bar argues that the Referee erred in finding that the information contained on the envelope of Gold's advertisement did not violate Rule 4-7.4(b)(2)(K) and that likewise, she erred in finding that the Florida Bar's application of this Rule to Gold's envelope portion of the advertisement is unconstitutional. The Florida Bar's position before this Court is untenable.

On no less than seven (7) occasions over a period of fourteen (14) years, the Florida Bar has reviewed essentially the same advertisement that is at issue here, and condoned it. Understandably, Gold has relied on the Florida Bar's consistent approval of his advertisement and continued to disseminate this same type of advertisement. Now, the Florida Bar tries to undo those 14 years and reverse its own prior position with arguments that are not only baseless but at times constitute nothing more than circular reasoning in a desperate attempt to justify its about-face

position.[1] After consistently notifying Gold on several different occasions, that his advertisements did not violate the Rules, the Florida Bar now comes before this Court to attempt to convince this Court that the same advertisement violates the Rules and that the Florida Bar's application of the subject Rules is constitutional. The Florida Bar's claims against Gold are meritless and its persistence seemingly vindictive. In the words of the Referee:

> It just seems like the most ridiculous complaint. It smacks of just trying to find something…It just seems to me that they're just trying to find something to pin on Mr. Gold…I don't think he did anything wrong here.

[Transcript, Oral Argument, May 20, 2005 Hearing, at 76].

Moreover, the Florida Bar's unfounded assertions are fundamentally flawed, they do not withstand judicial scrutiny and are contrary to established legal precedent. For the reasons set forth below, Gold submits that the Florida Bar's

[1] The Florida Bar claims that the Complaint in this case was filed after a finding of probable cause by a grievance committee. [Fla. Bar Initial Brief at 3]. The Florida Bar conveniently omits that the same advertisement at issue here is the same advertisement, in all material forms, as the one that the Florida Bar has repeatedly reviewed in the past, approved and which the Florida Bar explicitly stated, did not violate the same Rules at issue here. Accordingly, Gold incorporates herein as if recited at length herein, the Florida Bar's prior challenges on this same advertisement and its prior consistent conclusions that the Advertisements were permissible, all of which are detailed in Gold's Motion for Partial Summary Judgment and Gold's Affidavit filed in support thereof. [SA- Tab 1, p. 6-10; SA-Tab 2, p. 3-7, plus Exhibits A-D attached thereto].

unconvincing attempt to cast doubt on the Referee's findings must fail and that the Referee's Order should be approved in its entirety.

2. Background Facts

As detailed in Gold's Motion for Partial Summary Judgment[2] and his sworn affidavit[3] filed in support thereof, the salient background facts are as follows:

Gold is an attorney admitted to practice law in the State of Florida, he founded the law firm "The Ticket Clinic" in 1987 and has practiced law at The Ticket Clinic since that time. [SA - Tab 1, p. 3]. The Ticket Clinic is a law firm that concentrates on representing clients in connection with defense of traffic tickets and D.U.I. arrests. [*Id*.]. Gold generates a significant portion of business for The Ticket Clinic by advertising through direct-mailings. [*Id*.]. Gold targets his intended audience by mailing advertising materials -- newspaper articles -- to individuals who have received traffic citations and whose names and addresses appear in publicly available records at various County Court Clerk's offices. [*Id*.]. The advertisement that is attached to the Florida Bar's Initial Brief is a copy of an advertisement that Gold has mailed to individuals who have received traffic citations (the "Advertisement"). [*Id*.].

[2] [SA - Tab. 1, p. 3-9].

[3] [SA - Tab. 2, p. 1-3].

Since 1991, and for over fourteen (14) years, Gold has distributed the Advertisement in materially the same form.[4] The Advertisement consists of an envelope with three enclosures. The first page of the Advertisement functions as an envelope and includes, (a) the name of Gold's law firm, The Ticket Clinic; (b) the slogan "Don't Just Roll Over Fight Back;" and (c) an image of a road sign and a stop sign (hereinafter referred to, collectively, as the Envelope Content"). [SA - Tab 1, p. 4; A-Tab 1, p.1]. As affirmed in Gold's affidavit and as is evident from observing the outside of the envelope, nowhere does it indicate on the outside of the envelope that the recipient of the mailing received a traffic ticket, nor does it indicate that the recipient has received the mailing due to any specifically known legal problem. [*Id.*].

Inside the envelope, there are three enclosures, all of which are copies of newspaper articles concerning The Ticket Clinic that had been published by *The Miami Herald* and *Fort Lauderdale Sun Sentinel* (hereinafter referred to as the "Newspaper Articles"). [A - Tab. 1, p. 2-4]. It is undisputed that *The Miami*

[4] As previously set forth, the Florida Bar has consistently approved Gold's Advertisement. In fact, so egregious and baseless are the Florida Bar's claims, that the Referee was also inclined to grant summary judgment in Gold's favor on the equitable estoppel argument. [SA - Tab. 3, p. 5]. While the Referee did not have to reach this conclusion given her ruling on the unconstitutionality of the subject Rules, the fact that the Florida Bar issued several prior approvals of the Advertisement, constitutes an important fact that helps provide a more accurate, complete factual background, and which demonstrates the lack of merit in the Florida Bar's position.

Herald and the *Fort Lauderdale Sun Sentinel* are independent third-parties having no relation to Gold, and that these newspapers created and published the Newspaper Articles for what they believed were newsworthy stories and/or for newsworthy purposes. [SA - Tab 1, p. 4]. The Newspaper Articles were not solicited, written, paid for, or otherwise procured by Gold or by anyone else on his behalf. [*Id.*].

3. The March 31, 2005 and May 20, 2005 Hearings

On March 31, 2005 and again on May 20, 2005, extensive oral argument was held before the Referee on Gold's Motion for Partial Summary Judgment on the Florida Bar's claims pertaining to the Envelope Content of Gold's Advertisement and the Newspaper Articles. Specifically, Gold sought summary judgment dismissing the Florida Bar's claims that the Newspaper Articles violated Rules 4-7.2(b)(1)(B), 4-7.2(b)(3), 4-7.4(b)(1)(E) (hereinafter sometimes referred to as the "Newspaper Article Claims") and dismissing the Florida Bar's claims that the Envelope Content of Gold's Advertisement violated Rule 4-7.4(b)(2)(K) (hereinafter sometimes referred to as the "Envelope Content Claims"). [SA - Tab 1, p. 1].

After hearing argument of counsel for both parties, after detailed discussion with counsel and after studying all the documentary evidence before her, including the prior challenges of the Florida Bar and all the documentation in support of the

Florida Bar's prior approvals of essentially the same Advertisement, as well as the Advertisement at issue here, the Referee ruled in favor of Gold and held that the Advertisement did not violate the Rules at issue. [*See* Transcripts, Oral Argument, March 31, 2005, and May 20, 2005].

4. <u>The Referee's Order</u>

On June 9, 2005, the Referee granted summary judgment in Gold's favor and dismissed the Florida Bar's claims with respect to both the Newspaper Articles and the Envelope Content. Specifically, on the Envelope Content, the Referee held as follows:

> This Referee is granting Respondent's motion for summary judgment to the extent it concerns Complainant's Envelope Content Claims based on this Referee's conclusion that application of Rule 4-7.4(b)(2)(K) to Respondent's conduct would constitute the unconstitutional suppression of Respondent's protected commercial speech pursuant to the law set forth in *Central Hudson Gas & Elec. v. Public Svc. Comm. of N.Y.*, 447 U.S. 557 (1980) and its progeny. Such conclusion is based on (a) the undisputed fact that Respondent obtains the names and addresses of the recipients of the Advertisement from publicly available traffic ticket records at various County Clerk's offices, and (b) as such information is publicly available, application of Rule 4-7.4(b)(2)(K) does not advance any governmental interest and/or is more extensive than necessary to serve any governmental interest relating to the recipient's privacy. Complainant had the burden to show this Referee otherwise, but came forward with no admissible evidence to support its attempt to regulate or sanction commercially protected speech in this circumstance.[5]

[5] [SA - Tab. 3, p. 4].

Likewise, on the Newspaper Articles, the Referee ruling in Gold's favor, held:

> This Referee is further granting Respondent's motion for summary judgment to the extent it concerns Complainant's Newspaper Article Claims. Complainant took the position that the newspaper articles in Respondent's advertisements were misleading. This Referee did not find the newspaper articles to be misleading and thus, under the law of *Central Hudson*, Complainant had the burden to show that its attempt to regulate or sanction Respondent's dissemination of independently written newspapers articles advanced a substantial government interest in a way no more extensive than necessary to serve that interest. Complainant failed to meet that burden.[6]

The Referee's Order should not be disturbed.

SUMMARY OF THE ARGUMENT

The Florida Bar's Initial brief is misleading. The Florida Bar impermissibly takes certain statements included in the Newspaper Articles that comprise Gold's Advertisement, out of context, in a useless effort to convince this Court that Gold has made: (a) statements that reference past successes or results or create unjustified expectations; and (b) statements describing or characterizing the quality of his services in violation of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3), and 4-7.4(b)(1)(E). However, by taking the subject statements out of their context, the Florida Bar succeeds only in its deliberate, futile, attempt to confuse this Court. The Newspaper Articles (and their contents), are not misleading, inherently or

[6] [*Id.*].

otherwise, and they constitute protected commercial speech, regardless of their subsequent inclusion in Gold's Advertisement.

Moreover, the Florida Bar's application of the foregoing Rules to these Newspaper Articles is unconstitutional because it does not directly advance the Florida Bar's asserted state interest and it is not more extensive than necessary. Given the nature and the context of Gold's Advertisement -- newspaper articles written for their inherent bona fide value as news stories -- their content was subject to the scrutiny of the press when written and prior to their publication. Far from jeopardizing the public's confidence and trust in the judicial system, this serves to enhance it.

Likewise, the application of Rule 4-7.4(b)(2)(K) to the Envelope Content of Gold's Advertisement constitutes an unconstitutional suppression of Gold's protected commercial speech. The slogan "Don't Just Roll Over Fight Back," the trade name, The Ticket Clinic, and the images of a winding road and a stop sign do not reveal the *existence* of a legal problem, let alone, the *nature* of one. Alternatively, these same items, at the most, permissibly reveal the nature of Gold's legal services and the types of cases his law firm handles.

Even if the subject items reveal the recipient's legal problem, the Florida Bar's contention that these three items should be banned in order to protect the privacy of citizens runs afoul of established legal precedent. Courts have

repeatedly ruled that the government cannot assert the state interest of privacy protection to justify banning or restricting the flow of public information, especially, as is the case here, where the Advertisement consists of a direct mailing that is sent to persons whose names and addresses are obtained from public records. Furthermore, as legal authority provides, since the direct mailings -- as is the case here -- are mailed to traffic defendants who are in need of prompt representation against the state -- which is itself prosecuting the recipient defendant -- then the state cannot justifiably restrict the direct mailing which might contain critical information to assist the defendant in effectively exercising his or her rights in litigation against the state. Accordingly, as more fully set forth below, all of the Florida Bar's contentions fail and the Referee's Order should be approved.

ARGUMENT

I. Standard Of Review

Courts have repeatedly recognized that a referee's findings of fact and findings of guilt are presumed correct and will not be disturbed unless the findings were clearly erroneous or were without any support in the records. *See The Florida Bar v. Della-Donna*, 583 So. 2d 307, 310 (1989); *see also The Florida Bar v. Senton*, 882 So. 2d 997, 1000 (Fla. 2004) (holding that "[A]bsent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for

that of the referee.") (quoting *The Florida Bar v. Wohl*, 842 So. 2d 811, 814 (Fla. 2003)); *The Florida Bar v. Furman*, 451 So. 2d 808, 812 (Fla. 1984) (stating that the referee's findings must be approved unless they are erroneous or wholly lacking in evidentiary support). Because the referee's findings of fact are presumed correct, then this presumption "prohibits the appellate court from reweighing the evidence and substituting its judgment for that of the trier of fact." *See The Florida Bar v. Hooper*, 509 So. 2d 289, 291 (Fla. 1987).

Where the question presented on appeal is purely a question of law and there are no genuine issues of material fact in dispute, courts apply a "de novo" standard of review. *See Rykiel v. Rykiel*, 838 So. 2d 508, 510 (Fla. 2003)(finding that the standard of review was de novo because the issue presented on appeal concerned conflicting decisions of law); *see also The Florida Bar v. Cosnow*, 797 So. 2d 1255, 1258 (Fla. 2001)(stating that the question presented was a question of law requiring a de novo review because there was no genuine issue of material fact and the sole consideration was whether the admitted actions constituted unethical conduct).

In this case, the Florida Bar's Initial Brief raises both a question of fact and a question of law. While the issue of whether the application of the foregoing Rules to Gold's Advertisement is constitutional may present this Court with a question of

law and thus justify the application of a de novo review, the issue of whether the Advertisement is misleading resembles more closely a question of fact.

The Florida Bar disputes the Referee's finding that Gold's Advertisement is not misleading. Whether or not Gold's Advertisement is misleading, inherently or actually misleading, will depend upon the particular facts and circumstances in each case. *See The Florida Bar v. Elster*, 770 So. 2d 1184, 1187 (Fla. 2000)[7]. Accordingly, under the context of this case, the Referee's finding that the Advertisement is not misleading is a finding of fact which should not be disturbed absent a showing that the Referee's finding on "misleading" was clearly erroneous and/or that it was wholly lacking in evidentiary support. *See Della-Donna, supra, Senton, supra,* and *Elster, supra.* The Referee's finding that Gold's Advertisement is not misleading is thus presumed correct. Since the Florida Bar has not come forth with any arguments, much less evidence, to show that the Referee's finding was wholly lacking in record evidentiary support, this Court should not disturb the Referee's finding on this issue.

---

[7] Gold is mindful of the holding in *Elster*, but since the underlying facts of that case are diametrically opposed to the facts in this case, the ruling in *Elster* has no bearing on the outcome here. In *Elster*, the referee found that the lawyer's business card was misleading because among other things, the card read "Immigration Verification Associates," despite the fact that the attorney admitted he never had any associate attorneys working for him. Unlike in *Elster*, the Florida Bar has not produced a scintilla of evidence to suggest, nor has it hinted, that any statements included in Gold's Advertisement are false. Nevertheless, *Elster*'s finding that the issue of misleading depends on the circumstances in each case, is relevant.

Alternatively, and as articulated more fully below, even if this Court applies a de novo standard of review to all of the Referee's findings, including the issue of whether the Advertisement is misleading, this Court should reach the same conclusion and should still approve the Referee's Order.

II. The Referee Correctly Found That The Independently Written Newspaper Articles Accurately Reproduced In Gold's Advertisement Are Not Misleading, They Constitute Protected Commercial Speech And The Florida Bar Has Not Justified A Restriction

The Florida Bar contends that six (6) statements taken in isolation from the Newspaper Articles included in Gold's Advertisement are misleading. [Fla. Bar Initial Brief at 7-12]. This contention is fatally flawed. The Newspaper Articles are not inherently misleading, nor has the Florida Bar shown them to be operatively misleading. While in certain cases, the state has the power to prohibit advertising that is false, deceptive or misleading, the state also bears the difficult burden to distinguish the "truthful from the false, the helpful from the misleading and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 646 (1985). Advertising can be inherently misleading to the public or operatively misleading. *See, e.g., Elster*, 770 So. 2d at 1187. An advertisement is "actually" or "operatively" misleading, if there is evidence of deception. *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91, 106 (1990). To be "inherently" misleading,

the advertisement must be "devoid of intrinsic meaning." *Id.* at 112 (citing *In re R.M.J.*, 455 U.S. 191, 202 (1982)). However, an advertisement is not necessarily inherently misleading just because it includes a statement that is uninformative or because the advertisement trivializes unimportant facts. *See R.M.J.*, 455 U.S. at 205-206 (explaining that while the uninformative fact in the lawyer's advertisement that he is a member of the Supreme Court of the United States, could be misleading to the public uniformed with the requirements of admission to that court, it was nonetheless, not inherently misleading and nothing in the record indicated that the information was misleading).

Typically, an advertisement will not be deemed misleading if the facts stated are easily verifiable and/or accurate. *See Zauderer*, 471 U.S. at 645 (finding that the attorney's newspaper advertisement publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive known as the Dakon Shield Intrauterine Device was not misleading because the facts were easily verifiable and completely accurate). This is why courts will distinguish between statements of opinion or quality and statements of objective facts that may support an inference of quality—the latter being permissible. *See Peel*, 496 U.S. at 101 (finding that the attorney's letterhead which advertised his certification by NBTA was neither inherently nor actually misleading, even though it likely drew an inference about the quality of the lawyer's services, since the statement was a

verifiable fact). Ultimately, whether or not an advertisement is inherently misleading will depend upon the particular facts and circumstances in each case. *See Elster*, 770 So. 2d at 1184. Accordingly, the context in all cases is critical and will, like in this case, determine the outcome. *See The Florida Bar v. Nichols*, 151 So. 2d 257, 259 (1963).

A. Independently Written Newspaper Articles Are Not Misleading And They Do Not Fall Within The Scope of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and 4-7.4(b)(1)(E)

Because the inside of Gold's Advertisement consists of Newspaper Articles which were written by independent journalists and which were published in *The Miami Herald* and the *Fort Lauderdale Sun Sentinel*, two reputable newspapers, they do not fall within the scope, letter or spirit of the applicable Rules.[8] For this same reason, the Newspaper Articles are not misleading.

A common concern at the root of the prohibition against misleading advertisements is the desire to reduce the likelihood that lawyers will engage in puffing or merely exaggerating their abilities and the results they can achieve for their clients.[9] *See, e.g., Jacoby v. The State Bar*, 19 Cal. 3d 359, 378, 562 P.2d

[8] Indeed, the Florida Bar has repeatedly and consistently recognized as such. Gold incorporates at length herein the contents of his Motion for Partial Summary Judgment on this issue. [SA - Tab 1, p. 21-22; SA -Tab 2, p. 3-7].

[9] Incidentally, this is the gravamen of the Florida Bar's Newspaper Article Claims. [*See* Fla. Bar's Initial Brief at 11, 12].

1326, 1339, 138 Cal. Rptr. 77, 90 (Cal. 1977). However, such a concern is significantly reduced, indeed eliminated, in the case of independently written newspaper articles by representatives of reputable newspapers.[10]

This Court has already recognized that newspaper articles are treated differently from the typical lawyer advertisement because of the context in which the statements are collected and by whom they are collected. *See Nichols*, 151 So. 2d at 259. In *Nichols*, the representatives of *The Miami News*, a very reputable newspaper published in Miami, Florida, approached an attorney to write a story about the attorney, his law practice and his office building. *Id.* The representatives of *The Miami News* propounded questions to the attorney and they prepared the article in question based on their deductions from the attorney's answers. *Id.* As this Court explained, if taken in isolation, the answers given by the attorney might have been construed as self-laudation because they described his talents as an attorney and his successes. *See Id.* Particularly, some of the answers included statements such as: "But the enormous damages which he has collected for his

[10] The Florida Bar's citation to the Comment to Rule 4-7.2 on page 9 of its Initial Brief, does nothing to advance its claim. First, the statements are impermissibly taken out of context, they were not statements made by Gold, they are within the context of newspaper articles written by third party independent journalists. Second, the Comments are explanations of the Rule only, and not part of the Rules. *See Amendments to Rules Regulating the Florida Bar—Advertising Rules*, 762 So. 2d 392, 403 (Fla. 1999); *Fla. Bar, re Amendment to Rules Regulating the Fla. Bar*, 544 So. 2d 193, 194 (Fla. 1989)(stating that the Comments are offered for guidance and explanation only and are not adopted as part of the Rules).

clients represent only a fraction of the wealth he has redistributed," "He's the biggest showman since Barnum and Bailey," "When he describes an accident, he recreates the event so the jury can live every moment of it. No one can do it better." *Id.* However, because of the context in which these statements appeared, this Court dismissed the complaint against the attorney and held that the newspaper article did not violate the rules regulating lawyer advertising. *Id.* at 262.

Specifically, this Court reasoned that the newspaper article at issue which was prepared by representatives of a very reputable newspaper from answers to questions they propounded to the attorney, did not violate the applicable rules of ethics, and this even if the attorney cooperated with the journalists and participated in the article. *Id.* In addition, this Court explicitly stated that the contents of newspaper articles even when the statements discuss the talents and skills of an attorney, whether the attorney's statements are responses to the news reporter's questions or whether the statements were made about the attorney by others in the field, are not "self-laudation," "nor would they offend the traditions or lower the tone of [the legal] profession." *Id.* at 260, 262.

This Court's decision in *Nichols* is consistent with *Jacoby*, *supra*, a subsequent pertinent decision that also dealt with this same context. In *Jacoby*, the attorney Jacoby, opened a law office with other attorneys which sought to provide low cost legal services to a segment of the population that could not meet

indigency standards to qualify for legal aid programs but who could not afford to retain most law firms. *Jacoby*, 562 P.2d at 1329. After news of this firm's plans attracted the attention of a statewide consumer organization, its president held an open house at the law office and invited members of the news media. The attorneys also appeared and answered questions and participated in a number of interviews initiated by news reporters. *Id.* The interviews and the open house lead to the filing of disciplinary proceedings against the attorneys. *See Id.*

However, the *Jacoby* court dismissed the proceedings and in echoing *Nichols*, recognized the need to distinguish statements in a newspaper article that were not solicited, written, or paid for by the attorney, thereby similarly concluding that statements in such a context are not misleading, largely due to the attorney's independence from the journalists who write the articles. *Id.* at 1331, 1339-1340. The *Jacoby* court explicitly stated:

> It can be readily seen…that such concerns[11] relate at most to paid advertisements written by or at the direction of the attorney himself, and to direct solicitations of clients by the attorney. The danger is not necessarily inherent in an attorney's cooperation with the publication of a news story. In order for an attorney to intentionally mislead the public through a bona fide news article it would be necessary for him

[11] The *Jacoby* court was referring to concerns (like the one raised by the Florida Bar here) that some forms of attorney advertising can be inherently misleading. As set forth above, the *Jacoby* court rejected such concerns when the context at issue concerns a newspaper article. Similarly, here, the Florida Bar's claims (on page 12 of its Initial Brief) that Gold's advertisement (i.e., the Newspaper Articles' content) is misleading, should be rejected by this Court.

> to first convince reporters and editors that he is newsworthy, then induce them to print what he relates without verification and hope the public accepts the tale at face value. To project this scenario as likely to occur requires a cynical view of the journalist integrity and public gullibility. Journalists have never demonstrated a desire to serve as 'cappers' or 'runners' for attorneys: except in sensational cases or when performing a relatively unusual service -- as here -- attorneys are rarely 'news'.
>
> Even if an attorney does manage to get his name in print or on the air, he does not have control over the content of the journalist's story; thus, any misstatements by the attorney can be checked by diligent reporters. In the present case, for example, most of the reporters writing about the legal clinic apparently verified important information given to them by petitioners before printing it, and some conducted further interviews to ascertain the quality of the services being offered. Also, it bears reiterating the State Bar found no instance which petitioners deliberately misrepresented facts to reporters or exaggerated their abilities in any way.

Jacoby, 562 P.2d at 1339-1340 (emphasis added).[12]

In this case, The Florida Bar, choosing to ignore legal precedent -- in a deliberate attempt to confuse the issue -- impermissibly seeks to extrapolate six (6)

[12] *In re Connelly*, 240 N.Y.S.2d 126 (N.Y. App. Div. 1963), cited by the Florida Bar at page 14 of its Initial Brief, is inapposite. In *Connelly*, the attorneys actually worked on the drafts prepared by the reporter and suggested changes and revisions thereto. *Connelly*, 240 N.Y.S.2d at 131. By contrast in this case, the Florida Bar concedes (since it does not dispute) that Gold did not write any of the newspaper articles or participate in any of the drafts. *Connelly* is thus wholly inapplicable to this case. Moreover, *Connelly* was criticized in the later decision of *Jacoby.* In referring to *Connelly*, the *Jacoby* court suggested its dislike for the holding in that case when it explained that *Connelly* has had the effect of deterring lawyers from talking to journalists and "hence has prevented laymen from learning important facts about the legal profession." *Jacoby*, *supra*, at 1333. *Connelly* stands alone and Gold's case more closely resembles *Jacoby* and *Nichols*.

statements that are included in the Newspaper Articles, to convince this Court that when taken in isolation, the statements constitute prohibited statements by Gold that advertise Gold's past successes or results obtained or which describe the quality of his services. [Fla. Bar Initial Brief at 8-12]. Specifically, the Florida Bar argues -- without citing to any authority -- that somehow the statements in the newspaper articles are likely to create a false impression of Gold's superior abilities as compared to those of other lawyers. [Fla. Bar Initial Brief at 11]. Also, according to the Florida Bar, the Advertisement communicates the impression that Gold's ingenuity, rather than the "facts and justice of the claim, will be determinative in the outcome of any matter he handles." [*Id.* at 12]. The Florida Bar's contentions are baseless. Such contentions proceed from the faulty premise that Gold made the statements to solicit clients through a direct solicitation and that the statements highlighted by the Florida Bar should be taken in isolation and out of the context in which they were written. This attempt fails for several reasons.

First, in keeping with this Court's prior ruling in *Nichols*, the Florida Bar cannot chose to ignore the context in which the statements were made. Nor should it be permitted to take the statements in isolation. *Nichols*, 151 So. 2d at 257. As previously set forth, the inside of Gold's Advertisement consists of three enclosures which are the Newspaper Articles. All three Newspaper Articles were written by journalists employed by *The Miami Herald* and the *Fort Lauderdale*

Sun Sentinel. Like in *Nichols* and *Jacoby* and unlike *Connelly*, the journalists in this case chose to write a story about Gold, Gold did not solicit the articles, he did not write or edit the articles, nor did he pay for them. [SA - Tab. 1, p. 4]. The Florida Bar does not contend otherwise, nor could it. Second, like *Nichols* and *Jacoby*, the Newspaper Articles in this case, including the very references the Florida Bar takes issue with, are based on the reporters' deductions from answers given by Gold to the reporters' questions. [A-Tab 1, p. 2-4]. Third, the statements are all verifiable facts, thereby further indicating that the Newspaper Articles are not misleading. *See, e.g.*, *Peel*, *supra*, at 100-101. Also, like in *Nichols* and *Jacoby*, the reporters in question are from reputable newspapers who more than likely verified the information before printing it. The Florida Bar does not, nor can it, dispute this reality. This also reduces the likelihood that Gold would have exaggerated his abilities (like creating the impression that he has superior abilities or that his ingenuity would determine the outcome). Again, like *Jacoby*, the Florida Bar here does not contend that Gold exaggerated his abilities or that he deliberately misrepresented facts.[13] Accordingly the Newspaper Articles are not

[13] Instead, the Florida Bar misconstrues some of the very statements it takes issue with. For example, on page 12 of its Initial Brief, the Florida Bar cites to the statement "Fault isn't the issue," [Respondent said]. "We very zealously defend the clients. We get some police officers mad at us because we're good at it." The Florida Bar uses this as an example to support its position that Gold is communicating the impression that his ingenuity will determine the outcome rather than the facts and justice of the claim. This is disingenuous because the Florida Bar

misleading in the first place and since they are Newspaper Articles, they do not fall within the scope of the foregoing Rules. *Nichols, supra*, *Jacoby, supra*.

Likewise, the Newspaper Articles do not suddenly become misleading after-the-fact because they are enclosed in an advertisement. The Florida Bar tries to argue that Gold's simple reprinting of the Newspaper Articles makes the Newspaper Articles misleading after-the-fact, even though as the Florida Bar concedes, they were originally prepared for their news value and were not originally misleading. [Fla. Bar Initial Brief at 13-15]. This argument wholly misses the mark and flies in the face of logic. If the Newspapers Articles and their contents were not misleading when written, then they do not magically become misleading and illegal subsequently, just because they are included in Gold's Advertisement. Stated slightly differently, the Florida Bar cannot now claim with

---

chooses to omit the very next response included in one of the Newspaper Articles which came from a Traffic Judge. According to the Newspaper Article, Traffic Judge Baxter replied: "In a lot of situations, the issue is not guilt or innocence." "The citizens are availing themselves of every right they have." [A-Tab. 1, p. 4]. Other out-of-context statements cited by the Florida Bar consist of deductions from answers given by Gold or the reporter's paraphrasing an answer given by Gold, not solicitations by Gold (i.e., "When [Respondent] defends the client, he looks for technicalities that will win the case for him . . . ." [Fla. Bar's Initial Brief at 12]; "For example, [Respondent] got one client off recently because a breath test machine was taken out of service for maintenance three days after the client was tested. He was able to cast doubts on the results." [*Id.* at 8]. Moreover, the Florida Bar conveniently omits statements made by other persons in the community (i.e., a law professor and a traffic judge). However, the Florida Bar cannot pick and choose and take statements out of context.

a straight face, that one can make something (i.e., a Newspaper Article) illegal after-the-fact, if it was legal in the first place.

Moreover, *Bosley v. Wildwett.Com*, 310 F. Supp. 2d 914 (N.D. Ohio 2004), the single, solitary case cited by the Florida Bar, in support of the foregoing nonsensical position, is unavailing. Bosley did not concern lawyer advertising. In stark contrast to the facts and issues in this case, *Bosley* concerned the right to publicity and the exploitation of one's persona or image. Specifically, the court was faced with the request for an injunction against the defendant who published sexual images of a former anchorwoman without her consent. *Id.* at 917-918. The court found the publication was misleading and illegal because it gave the impression that the plaintiff consented to the use of her persona or image, when she clearly did not consent. *Id.* at 926. As the court ruled, under the limited facts of that case, the "informational function of advertising is impaired when one wrongfully appropriates another's image for commercial purposes. This underlying deception is the myth that an individual actually endorses or supports a product when, in fact, she does not." *Id.* at 926. While an interesting read, *Bosley* is inapplicable here and it has no affect on the outcome in this case.[14]

[14] Incidentally, the quote on page 15 of Florida Bar's Initial Brief is itself misleading and fails to support the Florida Bar's position. When read in its proper context, the quote is actually part of an excerpt from a treatise on the "right to publicity" which provides that if one uses another's personal identity without permission, even if used in connection with the news or comment on public issues,

Accordingly, the Florida Bar's claim that the Newspaper Articles are misleading, fails. Since they are not misleading, as set forth below, they constitute protected commercial speech.

B. The Newspaper Articles Constitute Protected Commercial Speech

It has long been established that the First Amendment as applied to the States through the Fourteenth Amendment protects commercial speech from unwarranted governmental intrusion or regulation. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). Commercial speech serves both the economic interests of the speaker and assists consumers in making informed decisions, which is why commercial speech furthers societal interest when dissemination of information is permitted to the fullest extent possible. *See Id.* at 770; *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977)(explaining that advertising, even if entirely commercial, serves to inform the "public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."). Lawyer advertising, including Gold's Advertisement, is comprised in the category of constitutionally protected commercial speech. *See Id.* at 383; *see also Peel*, 496 U.S. at 100 (stating that lawyer advertising is a form of commercial speech entitled to protection by the First Amendment); *Bolger v. Youngs Drug*

---

this does not automatically receive protection under the First Amendment. *Id.* at 924. In addition, *Bosley* is neither controlling nor persuasive law for this Court.

Products, 463 U.S. 60, 66(1983)(finding that the mailings in question fell within the core notion of commercial speech which is speech that simply proposes a commercial transaction).

Because lawyer advertising, including the Newspaper Articles in Gold's Advertisement, constitute constitutionally protected speech, the Florida Bar must justify any regulation or restriction of this commercial speech. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 570 (1980); *see also Bolger*, 463 U.S. at 70, n. 20 (stating that since the government sought to prohibit the mailing of unsolicited contraceptive advertisements, then it fell upon the government to justify such a restriction). Such a burden cannot be satisfied by "mere speculation or conjecture." *Mason v. Florida Bar*, 208 F.3d 952, 958 (11th Cir. 2000) (citing *Edenfeld v. Fane*, 507 U.S. 761, 770-71 (1993)).

Specifically, the party seeking to uphold a restriction on commercial speech, as the Florida Bar seeks to do in this case, has the burden of satisfying the well established *Central Hudson* test that is applied to all commercial speech cases whenever a restriction on commercial speech is challenged. *See Central Hudson*, 447 U.S. at 566. The *Central Hudson* test concerns a four-prong test. Since the first prong (i.e., that the Newspaper Articles are not misleading and therefore

constitute constitutionally protected speech) has already been established,[15] this leaves the Florida Bar with three prongs it must satisfy. The Florida Bar must establish that: (1) the applicable Rules serve a substantial state interest; (2) the application of the Rules directly advances the asserted state interest(s); and (3) the applicable Rules are no more extensive than necessary to serve that interest. *See Central Hudson*, 447 U.S. at 566. Application of the *Central Hudson* test and its progeny, clearly renders unconstitutional the application of the foregoing Rules to the Newspaper Articles comprising Gold's Advertisement.

C. The Florida Bar Has Failed to Justify a Ban or Restriction on the Dissemination of the Newspaper Articles Comprising Gold's Advertisement

Under *Central Hudson*, the Florida Bar must first assert a "substantial" state interest that the foregoing Rules seek to serve. *See Id*. The Florida Bar has asserted two state interests: (1) it has an interest in ensuring that the public has access to information that is not misleading regarding the comparison and selection of an attorney; and (2) it has an interest in preventing the erosion of the public's confidence and trust in the judicial system. [Fla. Bar Initial Brief at 18]. Even assuming, *arguendo*, that these are legitimate substantial state interests, the Florida Bar must still show that the application of the foregoing Rules to the Newspaper Articles in this case, directly advances these asserted state interests and that as

[15] *See* Sec. II. A, B, above.

applied to this case, they are no more extensive than necessary to serve those interests. *See Central Hudson*, 447 U.S. at 566. The Florida Bar fails miserably.

1. Application of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and 4-7.4(b)(1)(E) to the Newspaper Articles Does Not Directly Advance the Florida Bar's Asserted State Interests

The Florida Bar bears the burden of justifying that the application of the foregoing Rules directly advances its asserted interests. *See Central Hudson, supra, see also Babkes v. Satz*, 944 F. Supp. 909, 912 (S.D. Fla. 1996)(stating that even if the court accepts the governmental interest proffered is substantial, the court must then determine whether the statute at issue directly advances the asserted governmental interests); *Edenfeld*, 507 U.S. at 770-771 (stating that it is the party seeking to restrict the commercial speech that bears the burden of justifying the restrictions the State has placed on commercial speech). To prevail on this third prong of *Central Hudson*, the Florida Bar must demonstrate that the link between the specific foregoing Rules and its asserted interests is an "immediate connection" or a "direct link." *Babkes*, 944 F. Supp. at 912 (citing *Central Hudson*, 447 U.S. at 569). It is well established that a "tenuous" or "speculative" link is insufficient to meet this burden. *Id.* In short, the application of the regulation in question [the application of the foregoing Rules] will not be sustained if it provides only "ineffective or remote support for the government's [the Florida Bar's] purpose." *Id.*

In this case, the Florida Bar claims that the application of the foregoing Rules directly advances its asserted interests because apparently this Court has already approved the body of Rules regulating lawyer advertising. [Fla. Bar Initial Brief at 7, 16]. This is the Florida Bar's sole argument in support of its proposition that it has satisfied the third prong of the *Central Hudson* test. This argument proceeds from the faulty premise that the mere existence of these Rules is sufficient to justify their constitutionality in every circumstance.[16] This is nothing more than faulty, circular reasoning. Indeed, if this was true, then the *Central Hudson* test would be irrelevant and this Court could simply do away with over twenty-five years of established precedent which imposes upon the state (i.e., the Florida Bar) the burden of proving that the application of the challenged regulation (in this case the Rules) is constitutional as applied to the given facts and circumstances. *See Central Hudson*, *supra*, at 564 (establishing the test); *Babkes*,

[16] The Florida Bar cites in vain, to *Amendments to Rules Regulating the Florida Bar –Advertising Rules*, 762 So. 2d 392, 403 (Fla. 1999); *The Florida Bar re Amendment to the Florida Bar Code of Professional Responsibility (Advertising)*, 380 So. 2d 435, 441 (Fla. 1980) and the *Florida Bar v. Doe*, 634 So. 2d 160 (Fla. 1994), as support for its conclusory assertion. However, the first two decisions do not support the Florida Bar's proposition that because the Rules were approved, they will automatically be deemed constitutional as applied in every circumstance. The Florida Bar cannot point to anything in these decisions which supports this proposition. Moreover, *Doe*, whose facts were clearly distinguishable from those in this case, is inapplicable. In *Doe*, unlike here, the issue concerned whether the materials in question constituted an advertisement or a public service announcement and John Doe, unlike Gold, paid for the article to be run in the newspaper. *Doe*, 634 So. 2d at 161.

supra, at 912 (restating the test and approving its application); *Mason, supra*, at 955 (same). The mere existence of the Rules, does not dictate their constitutionality in every circumstance. The challenged rules must still pass constitutional muster in each circumstance that they are applied. *See Id*. Nowhere does the Florida Bar explain how the foregoing Rules are constitutional "as applied" to the Newspaper Articles. Instead, the Florida Bar seems to claim -- without bringing forth any evidence -- that since the "statements" appear to be at least "potentially misleading," then this should be sufficient to satisfy this prong of the *Central Hudson* test. [Fla. Bar Initial Brief at 18].[17] Instead, the law is clear, this is simply not sufficient.

---

[17] The authorities cited by the Florida Bar on pages 16-17 of its Initial Brief are unavailing. *Falanga v. State Bar of Ga.*, 150 F.3d 1333 (11th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999), has no application to this case since it concerned face-to-face solicitations by attorneys of injured persons in personal injury cases. *Farrin v. Thigpen*, 173 F. Supp. 2d 427 (M.D.N.C. 2001), which is not controlling law for this Court, concerned, unlike here, a television commercial which portrayed a short aggressive fictional dramatization by a paid spokesperson that conveyed the message that no lawyer wants to go up against the law firm portrayed. *Id.* at 434. *Bishop v. Committee on Professional Ethics and Conduct*, 521 F. Supp. 1219 (S.D. Iowa 1981), an Iowa decision, actually does more to advance Gold's position than the Florida Bar's since it held that the Iowa rules regulating lawyer advertising were unconstitutional as applied to the direct mailings they sought to prohibit. *See Id.* at 1230. *The Florida Bar v. Wolfe*, 759 So. 2d 639 (Fla. 2000), is also clearly distinguishable and inapplicable since it concerned overreaching in the context of person-to-person solicitations of victims whose properties were damaged by the effects of a tornado. *Id.* at 643. Finally, *The Florida Bar v. Lange*, 711 So. 2d 518 (Fla. 1998), is similarly inapplicable to this case, since there, the issues concerned a paid advertisement where the lawyer stated "All Federal & State Court in 50 States," thereby implying he was admitted

In *Mason v. Florida Bar*, where a similar ethics rule was at issue,[18] the court was faced with a challenge by Mason, a criminal defense attorney in connection with his advertisement in the yellow pages which stated in pertinent part that Mason is "AV Rated, the Highest Rating Martindale-Hubbell National Law Directory." *Mason*, 208 F.3d at 954. In that case, like here, the Florida Bar claimed that these words were misleading or potentially misleading. *Id.* Also, in *Mason*, as in this case, the Florida Bar claimed that it was justified in regulating Mason's commercial speech because it had an interest in ensuring that attorney advertisements are not misleading and that the public has access to relevant information to assist in the comparison and selection of attorneys.[19] The *Mason* court disagreed and held that while these interests may be substantial, the Florida Bar failed to satisfy the third prong of the *Central Hudson* test because it failed to adduce any evidence. *Id.* Significantly, in *Mason*, the court explained that the Florida Bar's use of the words "potentially misleading," -- just like the Florida

---

to practice in all fifty states, which was false. *Id.* at 521. By contrast, here, the Florida Bar has not contended -- nor could it -- that Gold made false statements.

[18] *Mason* concerned Rule 4-7.2 (j) of the Rules Regulating the Florida Bar ("Rule 4-7.2(j)"), which is now Rule 4-7.2(b)(3) asserted by the Florida Bar in this case. The only substantive change between the two Rules is the removal of the word "self-laudatory" in the new statute. *See Mason*, 208 F.3d at 954, n. 2.

[19] The court, in *Mason*, rejected outright the Florida Bar's third asserted interest which was to encourage attorneys rating services to use objective criteria. *Id.* at 956.

Bar uses these words in this case -- does not eliminate the Florida Bar's burden of demonstrating through evidence that the advertisement is misleading or threatened to mislead the public. *Id.* at 957-958. Citing to prior decisions of the United States Supreme Court, the *Mason* court explicitly stated:

> Moreover, the Bar has presented no studies, nor empirical evidence of any sort to suggest that Mason's statements would mislead the unsophisticated public…While empirical data supporting the existence of an identifiable harm is not a sine qua non for finding of constitutionality, the Supreme Court has not accepted "common sense" alone to prove the existence of a concrete, non-speculative harm. *See, e.g., Ibanez*, 512 U.S. at 147, 114 S. Ct. 2090 (striking down a disclaimer requirement because the state failed "to back up its alleged concern that the [speech] would mislead rather then inform."; *Edenfeld*, 507 U.S. at 770-71, 113 S. Ct. at 1800 (rejecting the state's asserted harm because the state had presented no studies, nor anecdotal evidence to support its position); *Peel*, 496 U.S. at 108, 110 S. Ct. at 2291-92 (rejecting a claim that certain speech was potentially misleading for lack of empirical evidence); *Zauderer*, 471 U.S. at 648-49, 105 S. Ct. at 2280 (striking down restrictions on attorney advertising where "the State's arguments amount to little more than unsupported assertions."). To the contrary, the law in this field has emphatically dictated that "rote invocation of the words 'potentially misleading'," *Ibanez*, 512 U.S. at 146, 114 S. Ct. at 2090, does not relieve the state's burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* (quoting *Edenfeld*, 507 U.S. at 771, 113 S. Ct. at 1800).

Mason, 208 F.3d at 957-958 (emphasis added). Because the Bar came forward with no evidence in *Mason*, the court refused to sustain the purported restrictions on Mason's constitutionally protected speech. *Id.* at 958.

Similarly, application of the subject Rules in this case does not directly advance the Florida Bar's interest in ensuring the public has access to information

that is not misleading regarding comparison and selection of attorneys. The contrary is true. First, as previously set forth, given the context of Gold's advertisement (i.e., Newspaper Articles) they are not misleading. *See Jacoby, supra, Nichols, supra; see also* Sec. II A, above. Second, because Gold's Advertisement consists of Newspaper Articles, if the Florida Bar is permitted to restrict their dissemination, this only serves to prevent the flow of useful information "perhaps indispensable to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered." *Jacoby*, 19 Cal. 3d at 369 (citing *Bates*, 555 P.2d 640, 648) (Dis. Opn. By Holohan, J.). This is especially so in this case where the Newspaper Articles include journalists' deductions from answers given by persons other than Gold, such as a traffic judge and a professor from a reputable Florida University School of Law (i.e., Nova Southeastern University). [A - Tab.1, p. 2-4].

It is also highly doubtful that the application of the foregoing Rules to Gold's advertisement, directly advances the Florida Bar's interest in preventing an erosion of the public's confidence and trust in the judicial system. To begin with, courts have already determined that it is unlikely that the attorney's reputation in the community and the standard of the legal profession will be diminished because of lawyer advertising. *See Bates*, 433 U.S. at 370. Indeed, other professionals advertise (i.e., bankers, engineers) and they are not regarded as undignified. *Id.*

Moreover, the "dignity and morals of the bar" will not be jeopardized where the medium used consists of newspaper articles. *See Jacoby,* 19 Cal. 3d at 380. Instead, because the subject matter or content is subject to the scrutiny of the press, the public's confidence and trust in the legal system is likely to be enhanced. *See Id.; see also Babkes, 944 F. Supp. at 913*(holding that the defendant did not satisfy the third prong of *Central Hudson* because it could only speculate that barring anyone but commercial driving schools from soliciting business from those people who have recently received traffic citations helps maintain public confidence in the legal system). Likewise, because Gold's Advertisement consists of the Newspaper Articles, all of which were written by independent journalists from reputable newspapers, which were not solicited, paid for or written by Gold or anyone else on his behalf, and whose content was likely scrutinized by the press, application of the subject Rules to Gold's advertisement does not directly advance the Florida Bar's asserted interest of maintaining public confidence in the legal system. Even if the Florida Bar could show a tenuous and speculative link -- which it has not done in this case since it has not produced a scintilla of evidence -- this still would not be sufficient to satisfy the third prong of the *Central Hudson* test. *See Central Hudson*, *supra; Babkes*, *supra*.

Moreover, the foregoing authorities (including *Mason*, *Ibanez*, *Edenfeld, Zauderer* and *Babkes*), make it abundantly clear that the Florida Bar cannot come

before this Court without any evidence to satisfy its claims of "potentially misleading" and/or to satisfy the third prong of the *Central Hudson* test. The Florida Bar, here, concedes that it has produced no evidence. [Fla. Bar Initial Brief at 18, 21, 22]. Therefore, pursuant to *Mason*, *Ibanez*, *Edenfeld* and *Zauderer*, the Florida Bar's contentions are easily dismissed. Anything less, would be to erroneously permit the Florida Bar to restrict (or in this case ban since it seeks to prevent Gold from using the Newspaper Articles as advertisement), Gold's protected commercial speech based on "mere speculation" or "conjecture." *See Edenfeld*, 507 U.S. at 770-71.

2. The Foregoing Rules as Applied to the Newspaper Articles are not Narrowly Tailored

Even if the Florida Bar satisfies the third prong of *Central Hudson* -- which it does not -- it must still show that the application of the foregoing rules to Gold's advertisement (i.e., the Newspaper Articles) is no more extensive than necessary to serve its asserted interests.[20] *Central Hudson*, 447 U.S. at 571; *Babkes*, 944 F. Supp. at 913. This requires evidence that a more limited regulation would be ineffective. *See Id.* Here again, the Florida Bar fails to produce any evidence to support its position. Instead, the Florida Bar merely parrots its circular argument

[20] In fact, because the Florida Bar has failed to satisfy the third prong of *Central Hudson*, then it cannot reach the fourth prong. *See Central Hudson*, 447 U.S. at 571; *Babkes*, 944 F. Supp. at 913.

that the Rules have been approved as constitutional and therefore must necessarily be deemed -- in the abstract -- to be "narrowly tailored." [Fla. Bar Initial Brief at 19]. Contrary, to the Florida Bar's contention, disallowing the Newspaper Articles in this case, based on its conclusory, unfounded and unsubstantiated assertions, would be unconstitutional and thus impermissible under *Central Hudson* and its progeny. Accordingly the Referee was correct in dismissing the Florida Bar's Newspaper Article Claims.

III. The Referee Correctly Found That Rule 4-7.4(b)(2)(K) As Applied To The Envelope Content Of Gold's Advertisement Is Unconstitutional

A. Rule 4-7.4(b)(2)(K) is Inapplicable to the Envelope Content Because it does not Reveal the Nature of the Recipient's legal Problem

The Florida Bar contends that "[O]n its face, the outside of [Gold's] advertisement reveals the nature of the prospective client's legal problem," in violation of Rule 4-7.4(b)(2)(K). [Fla. Bar Initial Brief at 20]. The Florida Bar is wrong.

The Florida Bar takes issue with three items contained on the Envelope at issue: (1) the slogan "Don't Just Roll Over Fight Back"; (2) the images, a winding road and a stop sign; and (3) the trade name "The Ticket Clinic." [*Id.*]. In the Florida Bar's own words, "on its face," the slogan "Don't Just Roll Over Fight Back" does not reveal the *existence* of a legal problem, much less the *nature* of the

recipient's legal problem.[21] With respect to the images, here again, on their "face," neither image reveals the existence of a legal problem or the nature of one. As previously set forth in Gold's Motion for Partial Summary Judgment, "The image of the winding road, for example, could be viewed as relating to any good or service in the field of travel, and such a stop sign image could just as reasonably be used in any advertisement, for any business, suggesting an attempt to "stop" and grab the reader's attention."[22] With respect to the trade name "The Ticket Clinic," while this may reveal a little more about the nature of *Gold's services*, it still does not reveal that the recipient received a traffic ticket or the precise nature of the recipient's legal problem, or that the recipient even has a legal problem.[23] In short, the Envelope Content reveals no more than the myriad of bulk mail one frequently receives in the mail. In addition, Rule 4-7.10(c) does not prohibit an attorney from advertising under a trade name if he practices under that trade name. *See* R. Regulating Fla. Bar 4-7.10(c). Since Gold and his law firm practice law under the

[21] [SA - Tab.1, p. 16 (Sec. 1(a)].

[22] [SA- Tab. 1, p. 16 (Sec. 1(b)].

[23] [SA - Tab. 1, p. 16, 17; *see also* Transcript, Oral Argument, March 31, 2005 Hearing, at 8-9].

trade name "The Ticket Clinic," then Gold's use of its own trade name on an advertisement is not prohibited.[24]

Alternatively, and in keeping with pertinent United States Supreme Court precedent, the foregoing items provide accurate factual information that can be easily verified and which serve an important communicative function. As such, they are permissible and the Florida Bar cannot ban their use. *See Bates*, 433 U.S. at 376 (lawyer advertisement upheld where it advertised the lawyer's availability and fees for low cost routine services because among things, this would be relevant information to the public necessary to reach an informed decision); *Zauderer*, 471 U.S. at 629 (lawyer advertisement upheld where the advertisement contained a particular illustration of an intrauterine device because it conveyed to the recipient that the attorney was representing women in Dakon Shield litigation and was willing to represent other women with similar claims);[25] *Peel*, 496 U.S. at 100 (upholding a lawyer advertisement that advertised the lawyer's NBTA's certification because this was true and a verifiable fact).

[24] In fact, the Advertisement specifically states that "Ticket Clinic" is a "d/b/a." [A - Tab. 1, p. 4].

[25] The fact that the Envelope Content includes illustrations does not preclude First Amendment protection. For example, *Zauderer* recognized that accurate illustrations are entitled to the same First Amendment protection that is granted to verbal commercial speech. *See Zauderer*, 471 U.S. at 647.

Most recently, this very Court confirmed that a lawyer advertisement may include an accurate illustration that informs the public of the types of services the lawyer provides or the types of cases he handles. *See The Florida Bar v. Pape*, No. SC04-40 (Fla. Nov. 17, 2005).[26] Likewise, here, if the images of a winding road and a stop sign convey information, at the most, they might convey that Gold and his law firm "The Ticket Clinic" handle cases involving traffic issues and that they would be willing to represent other traffic defendants with similar claims. *See Zauderer*, *supra*. Pursuant to the foregoing authorities, even if such information about the lawyer's services are conveyed, then this is permissible and the Florida Bar cannot restrict Gold's use of them, regardless of how allegedly "minimal" the Florida Bar's purported restriction might be.[27]

---

[26] The facts in *Pape* are clearly distinguishable from the facts here and so the ultimate ruling in that case has no bearing whatsoever on the outcome in this case. In that case, this Court was faced with an image of a pit bull in a television advertisement. *Pape*, *supra*, at 5. There, this Court declined to uphold the image of the pit bull and the words "pit bull" because in the Court's words, they "are intended to convey an image about the nature of the lawyer's litigation tactics," rather than the type of legal services he handles. *Id.* at 18 (emphasis added).

[27] On page 22 of its Initial Brief, the Florida Bar, in apparent recognition that its privacy protection interest is inapplicable in this context, confusingly tries to justify its restriction on the Envelope Content by claiming that after-all, the restriction is "minimal." Of course, the Florida Bar fails to mention just how "minimal," the purported restriction is and its argument wholly misses the mark. As detailed in this Brief, throughout Section III.B below, if the Florida Bar cannot show how the application of Rule 4-7.4(b)(2)(K) directly advances its privacy interest and in a way that is no more extensive than necessary -- which it clearly cannot -- then it cannot impose any restriction on the specific Envelope Content.

B. Regardless, the Florida Bar Cannot Justify Disallowing Gold's Envelope Content on the Assertion of Privacy Protection Because it is a Direct Mailing Sent to Traffic Defendants Whose Names Addresses and Legal Information are Obtained from Public Records

Even if the Envelope Content reveals information about the recipient's legal problem -- which it does not -- Gold has a First Amendment right to do so since Gold mails the Advertisement (with the Envelope Content) to individuals whose legal problems are already a matter of public record. Therefore, the Florida Bar cannot justify its attempted restriction.

1. The Application of Rule 4-7.4(b)(2)(K) in this Case Cannot Possibly Advance the Florida Bar's Privacy Protection Interest and Therefore it is More Extensive Than Necessary

The Envelope Content, forming part of Gold's Advertisement constitutes expression protected by the First Amendment since it concerns a lawful activity and it is not misleading.[28] Indeed, the Florida Bar has not contended otherwise, nor could it. Therefore, as previously set forth, the Florida Bar must satisfy the three remaining prongs under *Central Hudson*.

According to the Florida Bar, it is entitled to prohibit Gold's Envelope Content in the interest of protecting the "privacy and tranquility of prospective

---

Moreover, since the Florida Bar seeks to ban the images, the slogan and the trade name from the Envelope, then this hardly qualifies as a minimal restriction since it would call for the unjustified elimination of these items from the Envelope.

[28] *See* Sec. II.B and III. A, above.

legal clients from intrusive and unsolicited contact by lawyers." [Fla. Bar Initial Brief at 21]. This is the Florida Bar's sole asserted state interest.

Curiously, the only authority cited in support of this assertion is *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995), a case that, unlike here, strictly concerned lawyers' direct solicitation of personal injury victims in the immediate wake of a disaster.[29] *Id.* at 626-627. This decision is therefore inapposite.

Moreover, as set forth below, the case law is replete with examples that contradict the Florida Bar's position and which clearly provide that the application of Rule 4-7.4(b)(2)(K) to the Envelope Content of Gold's advertisement cannot possibly advance a privacy interest in cases (like this one) where the advertisement is mailed to individuals whose names and addresses are obtained from public records and whose legal problems are matters of public record before the mailings are even sent out.

In *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997), a case directly on point,[30] the court was faced with a state statute that required attorneys to wait thirty days

[29] In that case, the Florida Bar sought to protect the privacy of victims of an "accident or disaster" through a 30 day post-accident moratorium on targeted mailings to injured people in order to give victims and/or relatives a period for private grieving. *Id.* at 618. This is stark contrast to this case where the Florida Bar seeks to prohibit Gold from mailing his Advertisement to traffic violators whose names and addresses are of public record and whose legal problems are already public information. [SA- Tab. 2, p. 1-2].

[30] With the exception that *Ficker* dealt with a slightly different statute compared to Rule 4-7.4(b)(2)(K).

after an accident, disaster, criminal charge or traffic charge, before mailing out targeted solicitation to victims or arrestees and their relatives. *Id.* at 1151. The appellee attorneys challenged the constitutionality of those portions of the statute that applied to criminal and traffic defendants. *Id.* In that case, like here, the attorneys customarily obtained clients by mailing letters to individuals who had been issued traffic citations. *Id.* The Court struck down the statute as unconstitutional. *Id.* In so doing, the court made an exhaustive review of prior United States Supreme Court precedent, including *Bates*, *supra*, *Zauderer*, *supra*, *Central Hudson*, *supra*, and *Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988),* to explain why the state did not satisfy its burden under *Central Hudson*, and that specifically, the targeted letters to criminal and traffic defendants were permissible because they did not carry the same potential for undue influence as in-person solicitation, nor did they unduly invade the recipient's privacy. Specifically, the court stated:

> First, as the Supreme Court has already recognized, targeted letters do not carry the same potential for undue influence as in-person solicitation, and such letters are no more likely to overwhelm the judgment of a potential client than an untargeted letter or newspaper advertisement. *Shapero*, 486 U.S. at 475. Thus the type of solicitation is "conducive to reflection and the exercise of choice on the part of the consumer." *Id.* at 476 . . . In fact, the recipient can "effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Ohralik*, 436 U.S. at 465 n. 25. . . He can ignore, discard, or save the letter for future consideration. *Shapero*, 486 U.S. at 476.

> Neither can Maryland's asserted interest in protecting the privacy of criminal and traffic defendants from intrusive attorney contact support the abrogation of free speech in this case. The Supreme Court has already explained in *Shapero* that "a targeted letter [does not] invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." 486 U.S. at 476. In the case of criminal and traffic defendants, their legal problems are already known. The arrest is a matter of public record before any letters are sent. In some jurisdictions, a list of arrestees is published in a local newspaper. Court appearances are mandatory and public . . . .

Ficker, 119 F.3d at 1153-54 (emphasis added). Significantly, the *Ficker* court explained that privacy protection interests carry little weight in the specific context -- as in Gold's case -- of criminal and traffic defendants. In particular, the court emphasized that: (1) claims of crass intrusions mean little in the case of criminal and traffic defendants who while they may be shaken by their arrest, what they need most is representation; (2) unlike an accident victim who can "choose to avoid public scrutiny of his private affairs by not filing suit or by settling quietly, the criminal arrestee is in the legal system involuntarily and has already had his privacy compromised before a solicitation letter is ever sent;" and (3) unlike a civil litigant, the criminal or incarcerable traffic defendant enjoys a Sixth Amendment right to counsel and in order to give effect to this right, criminal defendants have to be promptly informed of the right to counsel. *Id*. at 1155-56.

In addition, according to *Ficker*, in these circumstances the need to encourage the free flow of information to criminal and traffic defendants is even

more compelling since the state itself is prosecuting the defendant. *See Id.* As such, the *Ficker* court explained, the state "cannot lightly deprive its opponent of critical information which might assist the exercise of even a qualified right." *Id.* at 1156. That is, since the recipient is essentially in litigation against the state, the state should not be permitted to make it more difficult for its opponents to get legal representation. *Id.*

Ficker is consistent with several other pertinent decisions that have repeatedly held that the government does not advance the interest of privacy protection by placing restrictions on the flow of already public information. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494 (1975)("even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record."); *Babkes*, 944 F. Supp. at 910-11 (holding that the statute did not advance the state's interests in protecting citizens' privacy because the attorneys who solicited clients did so by using names and addresses obtained from publicly available traffic records and this was information available for use in other contexts such as for commercial driving schools); *Speer v. Miller*, 15 F.3d 1007, 1011 (11th Cir. 1994)("We note that any privacy arguments the state asserts are disingenuous in light of the fact that the statute carves out an exception for the media to place any information they obtain on the front page of any newspaper in Georgia."); *Pellegrino v. Satz*, 98-7356-

CIV-Ferguson, 1998 WL 1668786, at *3 (S.D. Fla. 1998)(enjoining application of Florida statute that banned the commercial use of public record accident reports; exception allowing accident reports to be published by the press made it "unlikely that any evidence can save the statute" from Constitutional invalidity).

The foregoing decisions of *Ficker*, *Speer*, *Cox*, *Pellegrino* and *Babkes*,[31] all favor Gold's position and confirm that the application of Rule 4-7.4(b)(2)(K) to Gold's Advertisement does not directly advance the Florida Bar's interest of privacy protection, since among other things, it places restriction on already public information. Moreover, the decisions of *Ficker*, *Speer* and *Babkes* -- like in the case of Gold's Advertisement -- all concerned print advertisements mailed to recipients who were criminal or traffic defendants, whose names were obtained from public records, and whose legal problems were already matters of public record. Accordingly, the same inescapable conclusion reached in those cases, is dictated in this case, and the Florida Bar fails both latter prongs of *Central Hudson*.

Not surprisingly, because the Florida Bar cannot produce any legal authority or evidence to support its privacy protection contention in this circumstance, it attempts to camouflage the apparent inadequacy of its position by claiming it need not produce any evidence to satisfy the third and fourth prong of *Central Hudson*.

[31] Compared to the one decision cited by the Florida Bar (the *Went For It, Inc.*, case) which provides no support at all for its contention given the diametrically opposed facts and different advertising medium used in that case.

Specifically, it claims, that in certain circumstances, evidence is not needed to justify placing restrictions on commercial speech and that "simple common sense" is sufficient. [Fla. Bar Initial Brief at 22]. This contention is also fundamentally flawed for several reasons and ignores governing Supreme Court precedent that holds otherwise.

First, the decisions of *Elster*, *Zauderer* and *Farrin*, cited by the Florida Bar, lend no support for its contention since the parenthetical references cited by the Florida Bar discuss whether evidence in some contexts (again the context is key), is necessary to show that the advertisement is "inherently misleading," and not whether evidence is necessary to satisfy the third and fourth prong of *Central Hudson*. Here, the Florida Bar does not claim that the Envelope Content is misleading and even if it did, as previously set forth, there is nothing misleading, inherently or otherwise about the Envelope Content.[32]

Second, even on the issue of misleading, in many cases "common sense" alone will not suffice. *See Mason*, 208 F.3d at 957-58; *Ibanez*, 512 U.S. at 146.

Third, the Florida Bar ignores governing Supreme Court precedent, that clearly establishes the need for evidence if the party imposing the restriction on commercial speech is going to satisfy its burden under the third and fourth prong of *Central Hudson*. *See Central Hudson, supra; see also Edenfeld*, 507 at 771

[32] *See* Sec. III. A, above.

(U.S. Supreme Court invalidated a Florida ban on in-person solicitation by certified public accountants, observing that the State had "present[ed] no studies" and "[t]he record [did] not disclose any anecdotal evidence, either from Florida or another State, that validate[d] the Board's suppositions."); *Bolger*, 463 U.S. at 70, n.20 (stating that the party seeking to restrict commercial speech bears the burden of justifying its restriction); *Zauderer*, 471 U.S. at 648 (rejecting the State's arguments in support of its restriction on print advertisements which contained an illustration because among other things, the State's arguments amounted to little more than "unsupported assertions," because the State did not cite to any evidence to justify its restriction).

Fourth, it bears noting that even in The *Went For It, Inc.*, case inappropriately cited by the Florida Bar in this case, the Florida Bar met its burden under *Central Hudson* only through submission of a "106-page summary of its 2-year study of lawyer advertising and solicitation [which contained] data -- both statistical and anecdotal -- supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of [personal injury] accidents as an intrusion on privacy that reflects poorly upon the profession." *Went For It, Inc.*, 515 U.S. at 626.

Here, on the Envelope Content (as with the Newspaper Articles), the Florida Bar has not submitted -- either at oral argument or in its Initial Brief which

constitutes its second bite at the apple -- any evidence to satisfy its heavy burdens under the third and fourth prong of *Central Hudson*. Therefore, pursuant to the foregoing authorities, and in particular, *Central Hudson*, *Bolger*, *Edenfeld*, *Zauderer*, *Ficker*, *Babkes*, *Speer*, *Cox*, and *Pellegrino*, the Florida Bar cannot justify its restriction or ban of the Envelope Content in Gold's Advertisement.

Indeed, the Florida Bar has not cited to any governing authority applicable to this case, much less evidence, justifying its restriction because of : (1) a privacy interest that specifically relates to the disclosure of already publicly available information; or (2) a public interest relating to distribution or impact of previously-published, independently written newspaper articles. Accordingly, the Florida Bar's attempt to regulate and/or restrict Gold's Advertisement, under the facts and circumstances of this case, constitutes an impermissible suppression of Gold's First Amendment right to commercial speech. The Referee was correct in her conclusions and her Order should be approved.

CONCLUSION

For the foregoing reasons and pursuant to the foregoing authorities, Gold respectfully requests that this Court enter an Order approving the Referee's Order.

Respectfully submitted,

KLUGER, PERETZ, KAPLAN & BERLIN, P.L.
attorneys for Respondent Mark Stephen Gold
Miami Center-17th Floor
201 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 379-9000
Facsimile: (305) 379-3428

By:_____
Francesca Russo-Di Staulo
Florida Bar No. 174912
Alan J. Kluger
Florida Bar No. 200379
Andrew P. Gold
Florida Bar No. 612367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express to: M. Hope Keating, Greenberg Traurig, P.A., Counsel for The Florida Bar, 101 East College Avenue, Tallahassee, Florida 33302; Barry S. Richard, Greenberg Traurig, P.A., Counsel for the Florida Bar, 101 East College Avenue, Tallahassee, Florida 33302; via U.S. Mail to William Mulligan, Bar Counsel, The Florida Bar, Rivergate Plaza, Suite M100, 444 Brickell Avenue, Miami, FL 33131; and via Federal Express to Kenneth Lawrence Marvin, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399, on this ____ day of December, 2005.

_____
Francesca Russo-Di Staulo

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point type, a font that is proportionately spaced and that complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
Francesca Russo-Di Staulo

M0268647 v.3