IN THE SUPREME COURT OF FLORIDA

Case No: SC04-1661

THE FLORIDA BAR,

Complainant,

v.

MARK STEPHEN GOLD

Respondent.

THE FLORIDA BAR'S INITIAL BRIEF ON PETITION FOR REVIEW

On Review of Final Report of Referee

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STATEMENT OF THE CASE AND OF FACTS

Respondent, Mark Stephen Gold, is the founder of the law firm "The Ticket Clinic." (Gold's Mot. for Partial Summ. J. at 3 dated March 9, 2005, at 3). The Ticket Clinic is a firm that concentrates on representing clients in the defense of traffic tickets and D.U.I. arrests. *Id.* Respondent generates business for The Ticket Clinic by advertising through direct mailings. *Id.* For this purpose, he targets individuals who have received traffic citations and obtains the names and addresses of such individuals from various County Court Clerk's offices. *Id.* As part of his advertising efforts, Respondent mailed out a brochure dated June 30, 2003.[1]

Reprinted in the brochure are three newspaper articles highlighting Respondent and The Ticket Clinic. The newspaper articles, which are incorporated into and made a part of the advertisement, include the following statements:

a. "There are no guarantees," [Respondent] said, "but we've been relatively successful. Out of 45 speeding tickets we defended last month,

[1] A copy of the Respondent's advertisement, which is the subject of this proceeding, was Exhibit A to The Florida Bar's Complaint and was Respondent's Exhibit B at the May 20, 2005 hearing. For the Court's reference, a copy of the advertisement is attached hereto as Appendix 1.

only one person was found guilty and four people had adjudication withheld. The rest were dismissed." [App. 1 at 2].

b. "If you know the rules, you can usually find some error in the way the citation was issued or the machine was calibrated." [App. 1 at 2].

c. "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." [App. 1 at 3].

d. "[Respondent] said he successfully defended a client against a [leaving the scene or refusing to provide information to a police officer] charge by proving there was no property or bodily damage." [App. 1 at 2].

e. "[Respondent], who sports a red Ferrari and has beaten several tickets of his own, doesn't have a magic wand. What he does have is a battery of defenses aimed at breaking down the government's case. [Respondent] is a master of traffic technicalities." [App. 1 at 2].

f. "I've always had fast cars and gotten a number of tickets and successfully defended myself." [App. 1 at 3].

g. "When [Respondent] defends the client, he looks for technicalities that will win the case for him: procedures that aren't followed

correctly, improper use of radar equipment or Breathalyzer testing." [App. 1 at 4].

h. "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." [App. 1 at 4].

The front cover of Respondent's advertisement, which is self-mailing, contains the statement "Don't Just Roll Over Fight Back." [App. 1 at 1]. Also, "The Ticket Clinic" appears on the front cover of the Advertisement. [App. 1 at 1]. The front cover also features the images of a stop sign and another road sign. [App. 1 at 1].

In July 2003, The Florida Bar received a grievance regarding Respondent's advertisement. [Transcript of May 20, 2005 hearing at 25]. Following a finding of probable cause by a grievance committee, The Florida Bar filed a Complaint against Respondent alleging that: (i) the statements in the advertisement set forth in paragraphs (a), (b) and (c) above violate Rules 4-7.2(b)(1)(B) and 4-7.4(b)(1)(E) of the Rules Regulating the Florida Bar (references to past successes and/or results obtained are misleading and are likely to create unjustified expectations in the minds of clients who respond to the advertisement); (ii) the statements in the advertisement set forth in paragraphs (e), (f), (g) and (h) above violate Rule

4-7.2(b)(3) of the Rules Regulating the Florida Bar (describe and/or characterize the quality of a lawyer's services); (iii) the advertisement is in violation of Rule 4-7.3(b) of the Rules Regulating the Florida Bar (lacks the requisite disclosure statement and information regarding a lawyer's background, training, and experience); (iv) the statements and images on the front cover of the advertisement violate Rule 4-7.4(b)(2)(K) of the Rules Regulating the Florida Bar (reveal the nature of a potential client's legal problem); and (iv) Respondent did not file the advertisement or submit the late fee in a timely manner in violation of Rule 4-7.7(a) of the Rules Regulating the Florida Bar. [Compl. of The Florida Bar].

Proceedings were held before a referee who granted partial summary judgment in favor of Respondent with respect to violations of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3), 4-7.4(b)(1)(E), 4-7.4(b)(2)(K), and 4-7.3(b). The referee found that (i) because Respondent obtained the names and addresses of the recipients of his advertisement from publicly available records, the application of Rule 4-7.4(b)(2)(K) to the front cover of Respondent's advertisement constitutes an unconstitutional suppression of Respondent's protected commercial speech; (ii) pertaining to the application of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3), and 4-7.4(b)(1)(E) to Respondent's advertisement, the newspaper articles contained in the advertisement are not misleading and

attempts to regulate or sanction the dissemination of independently written newspaper articles are unconstitutional; and (iii) Respondent's advertisement is not a violation of Rule 4-7.3(b) because it was sent in compliance with Rule 4-7.4. [Order dated June 9, 2005]. Following a hearing, the referee also found that Respondent was not guilty as to Rule 4-7.7(a).[2] [Report of Referee at 6].

The Florida Bar filed a timely petition for review of the referee's findings pertaining to Rules 4-7.2(b)(1)(B), 4-7.2(b)(3), 4-7.3(b)[3], 4-7.4(b)(1)(E), and 4-7.4(b)(2)(K).

SUMMARY OF ARGUMENT

As determined by this Court, lawyer advertising which includes references to past successes or results obtained or which is otherwise likely to create an unjustified expectation about results the lawyer can achieve, or statements describing or characterizing the quality of a lawyer's services, are misleading and may be prohibited. As such, the statements contained in Respondent's advertisement are misleading and The Florida Bar correctly applied Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and 4-7.4(b)(1)(E). It is of no significance that the statements in the advertisement which violate these

[2] The Florida Bar does not seek review of this finding.
[3] Although included in its petition for review, The Florida Bar does not seek review of the finding pertaining to this rule.

rules are contained in reprints of newspaper articles. The newspaper articles are incorporated into and made a part of Respondent's brochure and are being used solely for the purpose of advertising Respondent's and his law firm's legal services to prospective clients. Respondent cannot be allowed to circumvent the Rules Regulating the Florida Bar simply because he uses newspaper articles to make the statements that he would otherwise be prohibited from making in his advertisement.

The application of Rule 4-7.4(b)(2)(K) to Respondent's advertisement serves The Florida Bar's substantial interest in protecting the privacy and tranquility of prospective legal clients from intrusive and unsolicited contact by lawyers. Traffic infraction and D.U.I. information may be accessed by anyone choosing to peruse through courthouse records. However, this does not mean that placing such personal information about the nature of one's legal problems on the outside of a mailing where anyone may see it and mailing it to someone's home, does not raise legitimate privacy issues. Requiring Respondent to comply with Rule 4-7.4(b)(2)(K) is the least restrictive means of advancing the Bar's interest and does not violate Respondent's constitutional rights.

ARGUMENT

Standard of Review

A referee's findings of fact in attorney disciplinary proceedings are reviewed under a clearly erroneous standard. *E.g., The Florida Bar v. Della-Donna,* 583 So. 2d 307, 310 (Fla. 1989). However, a referee's conclusions of law are not given the same presumption of correctness afforded to a referee's findings of fact. *The Florida Bar v. Trazenfeld*, 833 So. 2d 734, 736 (Fla. 2002).

I.

Respondent's Advertisement Contains Misleading Statements and the Application of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and 4-7.4(b)(1)(E) to the Advertisement is Constitutional

This Court has embraced the proposition that the advertising by a lawyer of his or her past successes, or describing the quality of his or her services, is inherently misleading. To this end, the Court has adopted rules which prohibit such advertising. R. Regulating Fla. Bar 4-7.2(b)(1)(B), 4-7.3(b), 4-7.4(b)(1)(E). The constitutionality of these rules is well established. *E.g., Amendments to Rules Regulating The Florida Bar – Advertising Rules,* 762 So. 2d 392, 403 (Fla. 1999); *The Florida Bar v. Doe*, 634 So. 2d 160, 162 (Fla. 1994). Statements contained in Respondent's advertisement are patent violations of these rules.

Advertising Past Successes

The following statements in Respondent's advertisement are direct references to Respondent's past successes or results obtained: "There are no guarantees," [Respondent] said, "but we've been relatively successful. Out of 45 speeding tickets we defended last month, only one person was found guilty and four people had adjudication withheld. The rest were dismissed." "If you know the rules, you can usually find some error in the way the citation was issued or the machine was calibrated." "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." "[Respondent said he successfully defended a client against a [leaving the scene or refusing to provide information to a police officer] charge by proving there was no property or bodily damage." [App. 1 at 2-3].

The rule adopted by this Court to prevent such advertising of past successes by a lawyer states:

> *Statements About Legal Services.* A lawyer shall not make or permit to be made a false, misleading, deceptive, or unfair communication about the lawyer or the lawyer's services. A communication violates this rule if it:
>
> ***

> (B) contains any reference to past successes or results obtained or is otherwise likely to create an unjustified expectation about results the lawyer can achieve except as allowed in the rule regulating information about a lawyer's services provided upon request.

R. Regulating Fla. Bar 4-7.2(b)(1)(B). Additionally, Rule 4-7.4(b)(1)(E) prevents a lawyer from sending a written communication to a prospective client if it contains a "false, fraudulent, misleading, deceptive, or unfair statement or claim or is improper under . . . rule 4-7.2." R. Regulating Fla. Bar 7.4(b)(1)(E).

The Comment to Rule 4-7.2 explains the reason such representations are inherently misleading:

> The prohibition in subdivision of (b)(1)(B) of statements that may create "unjustified expectations" precludes advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements or testimonials. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

Comment to R. Regulating Fla. Bar 4-7.2. The Ethical Consideration set forth by this Court pertaining to the predecessor rule to Rule 4-7.2(b) in light of United States Supreme Court precedent also articulately explained this issue:

> It is . . . improper to promise benefits or to assure prospective clients of specific results. Advertisements should not convey

> the impression that the ingenuity of the lawyer rather than the justice of the claim is determinative . . . Statistical data or other information based on past performance and predictions or future success are improper. Advertisements should not suggest that given procedures will always result in desired solutions but should be drawn with the recognition that conclusions as to legal needs and appropriate action depend upon the unique circumstances of each client's case.

The Florida Bar re Amendment to the Florida Bar Code of Professional Responsibility (Advertising), 380 So. 2d 435, 441 (Fla. 1980) (adopting Disciplinary Rule 2-101 (Publicity and Advertising) of The Florida Bar's Code of Professional Responsibility and setting forth Ethical Consideration 2-10).

Furthermore, statistics as to favorable legal results, particularly selective results or covering a short period of time, are not indicative of the ability of a lawyer or the quality of his or her services. Aside from misleading potential clients as to the ability of the advertising lawyer, such selective references to past legal results also implicate the perceived abilities of other lawyers. References to results in prior cases are likely to create a false impression of the superior abilities of the advertising lawyer as compared to those of other lawyers. However, because of the disparities in specific facts and legal circumstances of each individual case, and the varying degree of difficulty presented from one matter to the next, a lawyer who has a worse statistical record might in fact have more ability and better

legal skills, i.e. be the better lawyer, than the one with the "good" statistical data. Selective results from past cases are in no way indicative of a lawyer's ability. To suggest otherwise is misleading.

Here, by referring to his past successes, Respondent has very likely created unjustified expectations about future similar success notwithstanding the particular and unique circumstances of each prospective client's case. Such references to Respondent's past successes do not pertain to the individual legal needs and appropriate course of legal action for any given prospective client in his or her particular case. Therefore, the information about past results is likely to generate false and unrealistic assurances of success. Furthermore, Respondent's references to selective results and those covering a short period of time are not indicative of his ability or of the quality of his services. Such references are also likely to create a false impression of his superior abilities as compared to those of other lawyers.

Advertising Quality of Services

In addition to referencing his specific legal record, Respondent also describes the quality of his legal services so as to convey the potential success of any case he or his firm handles no matter what the merits of the particular case might be and regardless of whether the case has any substance: "[Respondent], who sports a red Ferrari and has beaten several

tickets of his own, doesn't have a magic wand. What he does have is a battery of defenses aimed at breaking down the government's case. [Respondent] is a master of traffic technicalities." "I've always had fast cars and gotten a number of tickets and successfully defended myself." "When [Respondent] defends the client, he looks for technicalities that will win the case for him: procedures that aren't followed correctly, improper use of radar equipment or Breathalyzer testing." "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." [App. 1 at 2-4].

Such representations by Respondent in his advertisement are misleading and obvious violations of Rule 4-7.2(b)(3) which provides:

> *Descriptive Statements.* A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients.

R. Regulating Fla. Bar 4-7.2(b)(3).

By way of his advertisement, Respondent communicates the impression that his ingenuity, rather than the facts and justice of the claim, will be determinative in the outcome of any matter he handles. *See Amendment to The Florida Bar Code (Advertising)*, 380 So. 2d at 441.

Moreover, the representation made by Respondent in the advertisement that "[f]ault isn't the issue," and his claim to have gotten a client off for leaving the scene or refusing to provide information to a police officer, suggest that persons can break the law with impunity because of Respondent's technical skills and ability to win. Not only are such representations misleading, but they are objectionable because they do not comport with the professional and ethical standards to which lawyers should be held.

Newspaper Articles Are Being Used as an Advertisement

The fact that the statements in Respondent's advertisement are contained in reprints of newspaper articles is of no significance in the analysis of whether the statements are misleading and in violation of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and 4-7.4(b)(1)(E). The rules in subchapter 4-7 ("Information About Legal Services") of the Rules Regulating the Florida Bar "apply to advertisements and written communications directed at prospective clients and concerning a lawyer's or law firm's availability to provide legal services." Comment to R. Regulating Fla. Bar 4-7.1. Respondent's brochure, in which newspaper articles are reprinted and incorporated as part of the brochure, is directed at prospective clients of Respondent and advertises his or his firm's availability to provide legal

services. As such, the brochure clearly falls within the ambit of subchapter 4-7. Respondent's brochure cannot be considered anything less than an advertisement because it is made up of reprints of newspaper articles. The newspaper articles do not disguise the fact that the brochure is an advertisement.

The Bar agrees that articles which are prepared by representatives of a newspaper about a lawyer with the lawyer's participation are not necessarily a violation of the Bar's rules. *State ex rel. The Florida Bar v. Nichols,* 151 So. 2d 257 (Fla. 1963).[4] In *Nichols,* this Court reviewed a matter where an article had been written by a newspaper based on answers to questions posed to a lawyer about the lawyer, his law practice, and his recently constructed office building. The Court found that the article did not constitute "self-laudation" in violation of the bar's canon regarding advertising where the newspaper had voluntarily solicited the material and where the article was not used as a "commercial method of securing business." 151 So. 2d at 260. This Court noted that the primary purpose of the article "was a news story; it was sought after and composed by newsmen and *was not thought of as being*

[4] *But see In re Connelly*, 240 N.Y.S.2d 126 (N.Y. App. Div. 1963) (article on practice of law firm with acquiescence and aid of members of firm had purpose and effect of advertising services of firm in violation of bar canon on advertising).

used for any other purpose by the newsmen or respondent." *Id.* at 259 (emphasis supplied).

However, the proceeding at hand does not concern the propriety of Respondent's participation in the newspaper articles which he has now made a part of his advertisement. The issue here is the content of Respondent's advertisement. Respondent's advertisement is a brochure wherein three newspaper articles have been reprinted into and made a part of the brochure. While the primary purpose of the news articles may originally have been for their news value, they are now being used for an entirely different purpose. They are now being used exclusively as an advertisement and they are written communications directed at prospective clients. Such advertisements or written communications fall squarely within the scope of subsection 4-7, of the Rules Regulating the Florida Bar.

> If a commercial firm reprints a "news story" from the media and uses it in an advertisement, then this is an advertising use not immunized by the First Amendment . . . .

Bosley v. Wildwett.Com, 310 F. Supp.2d 914, 924-25 (N.D. Ohio 2004) (internal citations omitted) (finding that use of a video that might have newsworthy content as an advertisement did not receive First Amendment protection from either invasion of privacy or infringement of the right of publicity; finding that forbidden uses of news reports under privacy and

publicity law include forthright advertisements as well as anything which may constitute an "advertisement in disguise").

Here, Respondent has reprinted news stories and uses them as nothing more than an advertisement. Respondent cannot be allowed to circumvent the rules of the Bar simply because he incorporates newspaper articles into his advertisement to state what he would otherwise be prohibited from including.

Application of Rules to Respondent's Advertisement is Constitutional

Lawyer advertising rules that prohibit lawyers from making communications that create unjustified expectations and/or describe their legal services have consistently been held to be constitutional because of the misleading nature of such communications. *E.g., Amendments Regulating Bar-Advertising,* 762 So. 2d at 403; *Amendment to The Florida Bar Code (Advertising),* 380 So. 2d at 441; *Falanga v. State Bar of Ga.,* 150 F.3d 1333 (11th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999); *Farrin v. Thigpen*, 173 F. Supp.2d 427, 446-47 (M.D.N.C. 2001) (finding that advertisement created unjustified expectations regardless of whether lawyer had a high or low settlement rate and that advertisement of high settlement rate would be a clear violation of the rules); *Bishop v. Committee on Professional Ethics and Conduct,* 521 F. Supp. 1219, 1225 (S.D. Iowa 1981), *vacated on other*

grounds, 686 F.2d 1278 (8th Cir. 1982). *See also The Florida Bar v. Wolfe,* 759 So. 2d 639, 641-42 (Fla. 2000); *The Florida Bar v. Lange,* 711 So. 2d 518, 521 (Fla. 1998).

It is well established that advertising which is misleading receives no First Amendment protection. *Central Hudson Gas Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 563 (1980). As discussed above, this Court has determined that lawyer advertising which includes references to past successes or results obtained or which is otherwise likely to create an unjustified expectation about results the lawyer can achieve, or statements describing or characterizing the quality of a lawyer's services, are misleading and may be prohibited within the boundaries of constitutional law. Therefore, by applying Rules 4-7.2(b)(1)(B), 4-7.2(b)(3), and 4-7.4(b)(1)(E) to Respondent's advertisement, The Florida Bar has not violated Respondent's constitutional rights.

Only commercial speech that is not misleading is subject to the constitutional analysis set forth in *Central Hudson.* In any event, The Florida Bar's regulation of Respondent's advertisement meets the *Central Hudson* standard. For commercial speech that is not misleading, the Court in *Central Hudson* set forth the following elements for its regulation: (1) the regulation must promote a substantial governmental interest; (2) the

regulation must directly advance the interest asserted; and (3) the regulation must not be more extensive than necessary to serve that interest. 447 U.S. at 564.

The Florida Bar's application of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and 4-7.4(b)(1)(E) to Respondent's advertisement serves two separate substantial state interests. First, the Bar has a substantial interest in regulating lawyer advertising and ensuring that the public has access to information that is not misleading regarding the comparison and selection of an attorney. Second, the Bar has a substantial interest in preventing the erosion of the public's confidence and trust in the judicial system and curbing activities that negatively affect the administration of justice. The Bar's application of the rules in question to Respondent directly advances both of these interests.

If not inherently misleading, the statements at issue in Respondent's advertisement are at the very least susceptible of being potentially misleading. This Court has approved as constitutional the rules in subchapter 4-7, Rules Regulating the Florida Bar, which were created for the purpose of preventing "misleading or overreaching" advertisements by lawyers which "can create unwarranted expectations by persons untrained in the law," and which "can also adversely affect the public's confidence and trust in our judicial system." *See* Comment to R. Regulating Fla. Bar. 4-7.1.

Therefore, this Court has already determined that advertisements containing statements which violate Rules 4-7.2(b)(1)(B) and 4-7.2(b)(3) are misleading and can adversely affect the public's confidence and trust in our judicial system, and the restriction of such advertisements is necessary to further the substantial state interests advanced.

Thus, in regulating Respondent's advertisement under Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and Rule 4-7.4(b)(1)(E), The Florida Bar has directly advanced its substantial interests. This Court has specifically held that the rules regulating lawyer advertising in Florida are not overbroad, but rather "are narrowly tailored to further a substantial governmental interest." *Amendments Regulating Bar-Advertising*, 762 So. 2d at 403; *Doe*, 634 So. 2d at 162. By disallowing statements which are in violation of these rules, the Bar has not unconstitutionally prohibited Respondent from advertising or conveying non-misleading information about his professional legal services. The Bar's regulation of Respondent's advertising has gone no further than necessary to advance its interests. The Florida Bar's application of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and 4-7.4(b)(1)(E) to Respondent is not a violation of his constitutional right of commercial speech.

II.

The Application of Rule 4-7.4(b)(2)(K) to Respondent is Constitutional

This Court has also adopted a rule which prohibits a lawyer from revealing the nature of a client's legal problem on the outside of a self-mailing brochure. R. Regulating Fla. Bar 4-7.4(b)(2)(K). The constitutionality of this rule is well established. *E.g.*, *Amendments Regulating Bar-Advertising*, 762 So. 2d at 403; *Doe*, 634 So. 2d at 162.

Rule 4-7.4(2)(b)(K) provides that:

> A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

R. Regulating Fla. Bar 4-7.4(b)(2)(K).

On the outside of Respondent's advertisement, which is self-mailing, the following statements are printed: "Don't Just Roll Over Fight Back" and "The Ticket Clinic." Additionally, the front cover features the images of a stop sign and another road sign. [App. 1 at 1]. On its face, the outside of Respondent's advertisement reveals the nature of the prospective client's legal problem. Thus, The Florida Bar correctly applied Rule 4-7.4(b)(2)(K) to Respondent.

Nevertheless, the referee found that since Respondent obtains the names and addresses of the advertisement recipients from publicly available traffic ticket records, the 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 recipients' privacy. This is plainly not the case.

The United States Supreme Court has recognized that there is a substantial governmental interest in protecting the privacy and tranquility of prospective legal clients from intrusive and unsolicited contact by lawyers. *Florida Bar v. Went For It, Inc.* 515 U.S. 618, 624 (1995). Rule 4-7.4(b)(2)(K) obviously advances that interest. Simply because traffic infractions and D.U.I. information may be accessed by perusing through courthouse records does not mean that placing such information about the nature of one's legal problems on the outside of a mailing where there is a likelihood that others will see such information, and mailing it to someone's home, fails to raise legitimate privacy concerns.

The referee stated that the Bar came forth with no evidence to show that the regulation of Respondent's advertisement was an advancement of a substantial interest or that the restriction was not more restrictive than necessary. However, this is not a situation as was presented in *Went For It*

where The Florida Bar had conducted a study with regard to solicitation of personal injury victims and then presented the results of the study to the Court in order to support its restriction on the actual solicitation of potential clients by lawyers. Here, the Bar is not seeking to prevent Respondent from soliciting clients and the application of Rule 4-7.4(b)(2)(K) to Respondent does not in any way prevent him from contacting prospective clients. By applying the rule to Respondent, the Bar is only trying to advance its interest in protecting the privacy and tranquility of potential clients by requiring Respondent to make minimal modifications to his advertisement.

The United States Supreme in *Went For It* recognized that restrictions in circumstances other than the ones in that case need not be supported by studies but may be justified by "simple common sense." 515 U.S. at 628.[5] The case at bar concerns such other circumstances. No study or equivalent

[5] Studies, surveys, or equivalent evidence is not required to show that the application of a Bar rule is constitutional where the matter at issue is self-evident. *See, e.g., The Florida Bar v. Elster*, 770 So. 2d 1184 (Fla. 2000) (holding that even if there is no evidence that the public has actually been misled, advertisement is in violation of bar rules if it is inherently misleading); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 652-53 (1985) ("[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to conduct a survey of the public before it [may] determine that the [advertisement] had a tendency to mislead"); *Farrin*, 173 F. Supp. 2d at 437-38 (advertisement contained a self-evident message and no public survey or other extrinsic evidence was required to show that the advertisement was misleading).

evidence is required to show that having an unsolicited personally addressed mailer arrive at one's home announcing to anyone that might see it the nature of one's legal problems might be intrusive and implicate privacy concerns or impede tranquility. Such a circumstance is one as contemplated by the Court in *Went For It* to be adequately supported by "simple common sense."

The application of Rule 4-7.4(b)(2)(K) by the Bar to Respondent is a direct advancement of a substantial interest and goes no further than necessary to advance that interest. Requiring Respondent to abide by the rule is not a violation of his right to commercial speech.

Conclusion

For the foregoing reasons, the Court is respectfully requested to disapprove the order of the referee.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was sent by Federal Express to Alan Jay Kluger, Kluger, Peretz, Kaplan & Berlin, 201 South Biscayne Blvd., 17th Floor, Miami Florida 33131, and by U.S. mail to William Mulligan, The Florida Bar, Suite M100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131-2404 and to Kenneth Lawrence Marvin, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, this 20th day of October, 2005.

_____

M. Hope Keating

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).

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