**IN THE SUPREME COURT OF FLORIDA**

**Case No: SC04-1661**

**THE FLORIDA BAR,**

***Complainant,***

**v.**

**MARK STEPHEN GOLD**

***Respondent.***

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# THE FLORIDA BAR'S REPLY BRIEF

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**On Review of Final Report of Referee**

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## TABLES OF CONTENTS

**Table of Citations** ..... **ii**

**Response to Respondent's Statement of the Case and of Facts** ..... **1**

**Argument** ..... **3**

**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** ..... **3**

**II. The Application of Rule 4-7.4(b)(2)(K) To Respondent is Constitutional** ..... **5**

**Conclusion** ..... **8**

**Certificate of Service** ..... **9**

**Certificate of Compliance** ..... **9**

## TABLE OF CITATIONS

**Cases** **Page**

*Babkes v. Satz*
944 F. Supp. 909 (S.D. Fla. 1996) ..... 5

*Bates v. State Bar of Arizona*
433 U.S. 350 (1977) ..... 7

*Carroll v. Gross*
984 F.2d 392 (11th Cir. 1993),
*cert. denied*, 510 U.S. 893 (1993) ..... 2

*Clark v. Community for Creative Non-Violence*
468 U.S. 288 (1984) ..... 7

*Collingsworth v. Mayo*
37 So. 2d 696 (Fla. 1948) ..... 2

*Cox Broadcasting Corp. v. Cohn*
420 U.S. 469 (1975) ..... 6

*Dade-Commonwealth Title Ins. v.*
*North Dade Bar Ass'n*
152 So. 2d 723 (Fla. 1963) ..... 2

*Ficker v. Curran*
119 F.3d 1150 (4th Cir. 1997) ..... 5

*Florida Bar v. Went For It, Inc.*
515 U.S. 618 (1995) ..... 6

*Pellegrino v. Satz*
No. 98-7356-CIV-FERGUSON,
1998 WL 1668786 (S.D. Fla. 1998) ..... 5

*Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994) ..... 5

*Texans Against Censorship, Inc. v. State Bar of Texas*
888 F. Supp. 1328 (E.D. Tex. 1995)
*aff'd*, 100 F.3d 953 (5th Cir. 1996) ..... 7, 8

*The Florida Bar v. Trazenfeld*
833 So. 2d 734 (Fla. 2002) ..... 2, 3

**TABLE OF CITATIONS**
**(continued**

**Page**

*Tindall v. The Florida Bar*
No. 97-387-Civ-T-17C,
1997 WL 689636 (M.D. Fla. 1997),
*aff'd,* 163 F.3d 1358 (11th Cir. 1998) ..... 2

**Rules**

R. Regulating Fla. Bar 3-7.4(j)(3) ..... 3

R. Regulating Fla. Bar 4-7 ..... 3

R. Regulating Fla. Bar 4-7.1 ..... 3

R. Regulating Fla. Bar 4-7.2(b)(1)(B) ..... 3, 4

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

R. Regulating Fla. Bar 4-7.4(b)(1)(E) ..... 3, 4

R. Regulating Fla. Bar 4-7.4(b)(2)(K) ..... 5, 8

## RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE AND OF FACTS

Respondent's statements in his answer brief regarding The Florida Bar's prior review of his advertisements are incomplete. (Answer Brief at 2-3, 5). Likewise incomplete are the documents that Respondent includes in his appendix regarding the Bar's review of these advertisements.[1] Contrary to what Respondent claims, The Florida Bar has not "consistently notif[ied]" him that his advertisements do not violate the Rules Regulating The Florida Bar.

While Respondent refers in his brief and affidavit[2] to grievance files which no longer exist (the Bar's Response dated March 30, 2005, to Respondent's Mot. for Partial Summ. J., at 6-10), he fails to mention in his brief or include in his appendix numerous letters currently in the Bar's files from years 1996 to 2003, noticing Respondent that his advertisements violate the Rules Regulating The Florida Bar. *Id.* at 11.[3] Neither does

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[1] The documents in the Supplemental Appendix to the Answer Brief ("Supplemental Appendix") at Tab 2 are the same ones that were attached to Respondent's motion for partial summary judgment dated March 9, 2005.

[2] Supplemental Appendix at Tab 2.

[3] These letters were included as exhibits to The Florida Bar's response to Respondent's motion for partial summary judgment. The trial court found that the exhibits were submitted without the support of an affidavit and were not submitted within two days of the hearing, and excluded them from the record. (Order dated June 9, 2005, at 3). However, The Florida Bar is the official arm of this Court charged with the responsibility of regulating and

Respondent mention that one of the grievance committees he refers to concurred with The Florida Bar's Ethics Counsel that his advertisement was in violation of the rules because it improperly revealed the nature of a legal problem on the outside of the envelope. *Id. at* 7-8 (referencing The Florida Bar Ethics and Advertising File No. 97-02187). Respondent also fails to mention that in the year 2003, a grievance committee found Respondent's advertisement to be violative of the rules due to the inclusion of testimonials, the listing of the nature of the legal problem on the outside of the brochure, the inclusion of references to past successes, the creation of unjustified expectations and the failure to include a disclosure statement. *Id.* at 10 (referencing The Florida Bar Grievance File No. 2002-71,242(11M)).

In any event, a disciplinary action commenced after a grievance committee issues a finding of no probable cause on the same underlying facts is not barred. *The Florida Bar v. Trazenfeld,* 833 So. 2d 734 (Fla.

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disciplining Florida lawyers, acting at all times under the supervision and control of this Court. *See, e.g., Carroll v. Gross,* 984 F.2d 392, 393 (11th Cir. 1993), *cert. denied,* 510 U.S. 893 (1993); *Tindall v. The Florida Bar,* No. 97-387-Civ-T-17C, 1997 WL 689636 at *4 (M.D. Fla. 1997), *aff'd,* 163 F.3d 1358 (11th Cir. 1998); *Dade-Commonwealth Title Ins. v. North Dade Bar Ass'n,* 152 So. 2d 723, 725 (Fla. 1963); Introduction, Ch. 1, R. Regulating Fla. Bar; R. Regulating Fla. Bar. 3-3.1 and 1-8.1. Inasmuch as documents contained in the Bar's files pertaining to Bar grievances and lawyer regulation are administrative records of this Court, the Bar suggests that to the extent the Court finds it necessary, the Court may take judicial notice of such documents. *See, e.g., Collingsworth v. Mayo,* 37 So. 2d 696, 697 (Fla. 1948).

2002). *See also* R. Reg. Fla. Bar. 3-7.4(j)(3) ("[a] finding of no probable cause by a grievance committee shall not preclude the reopening of the case and further proceedings therein").

## ARGUMENT

### 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

The rules in subchapter 4-7 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. The written communication at issue here, Respondent's brochure, is directed at prospective clients of Respondent and advertises his or his firm's ability to provide legal services. Respondent's brochure falls squarely within the scope of subchapter 4-7, including Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and 4-7.4(b)(1)(E).

Respondent's brochure happens to be made up of reprints of newspaper articles. However, this does not mean that this gives Respondent an "escape hatch" from compliance with the Bar's advertising rules. The primary purpose of the newspaper articles may originally have been for their

news value. Now, however, they are being used exclusively by Respondent as an advertisement and are a written communication directed at his prospective clients. By way of statements in the articles, Respondent is advertising his past successes and results obtained, and is describing and characterizing the quality of his legal services, in violation of Rules 4-7.2(b)(1)(B), 4-7.2(b)(3) and 4-7.4(b)(1)(E). Respondent should not be allowed to circumvent the rules of The Florida Bar simply because he uses newspaper articles to make statements in his advertisement that would otherwise be prohibited.

The statements at issue in Respondent's brochure pertain to Respondent's past successes and results obtained and describe his legal skills. As fully discussed in the Bar's initial brief, lawyer advertising rules prohibiting lawyers from making such communications that create unjustified expectations and/or convey the impression that the ingenuity of the lawyer rather than the facts and justice of the claim will be determinative, have consistently been held by this and other courts to be constitutional because of the misleading nature of such communications. (Initial Brief at 9-10, 16-17). Respondent has cited to no authority holding otherwise nor has he made any effective argument to the contrary.

## II.

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

Contrary to Respondent's assertion, *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997) is not on point regarding this issue. The court in *Ficker* held that a 30-day prohibition of lawyer direct-mail solicitation of criminal and traffic defendants was unconstitutional. While the court acknowledges and discusses the fact that criminal arrests are a matter of public record and the privacy of criminal defendants has therefore been compromised in this regard, 119 F.2d at 1154, the crux of the court's ruling was based on the unique representation needs of criminal defendants including needing representation within a quick time frame. *Id.* at 1155-56.

Neither are *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), *Babkes v. Satz*, 944 F. Supp. 909 (S.D. Fla. 1996), and *Pellegrino v. Satz*, No. 98-7356-FERGUSON, 1998 WL 1668786 (S.D. Fla. 1998), all of which are cited by Respondent in support of his argument, on point with regard to the issue at bar. These cases all stand for the proposition that lawyers and

others may obtain the names and addresses of potential clients from public records for the purpose of commercial solicitation.[4]

The Florida Bar does not challenge Respondent's solicitation of clients within a certain time frame, nor does it challenge Respondent's solicitation of clients by way of direct mail using names and addresses that he has obtained from court records. Rather, the Bar is attempting to enforce its rule prohibiting lawyers from revealing the nature of a client's legal problem on the **outside** of a self-mailing brochure. It is the Bar's position that all prospective clients should be protected from such intrusive contact by attorneys regardless of whether their names are obtained from public records or from other sources.[5]

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, 625 (1995). Furthermore, in its opinion first recognizing that attorney advertising was

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[4] The Respondent's reliance on *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) is also irrelevant to this issue. In *Cox*, a non-commercial speech case, the United States Supreme Court held that the state could not impose sanctions on a reporter who broadcast the name of a rape victim where the victim's name was contained in judicial records.

[5] It is also the policy of the Bar to apply the rule evenly to all lawyer written solicitation communications regardless of the degree to which the nature of one's legal problem is revealed on the outside of the solicitations.

entitled to First Amendment protections, the Supreme Court expressly noted, "that there may be reasonable restrictions on the time, place and manner" of advertising. *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977). *See also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (holding that states may place restrictions on the time, place, and manner of constitutionally protected communication if they do so: (1) without regard to the content of the communication, (2) in a manner narrowly tailored to serve a significant governmental interest, and (3) leaving open alternative channels for communication).

It is not difficult to imagine that an unsolicited mailing from a lawyer arriving at one's home, with the nature of one's legal problems revealed on the outside of such mailing, might be considered intrusive and an invasion of privacy and tranquility. It is one thing for a solicitation to arrive at one's home enclosed in an envelope, and quite another for it to arrive with the nature of one's legal problems on the outside of the envelope.[6]

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[6] This issue in this case was decided pursuant to a motion for summary judgment and no testimony or other evidence was presented demonstrating invasions of privacy that might occur if a lawyer does not comply with Rule 7.4(b)(2)(K). However, evidence has been presented in a trial in at least one other case for the purpose of upholding a similar bar rule. *See Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1362 (E.D. Tex. 1995) (testimony presented based on a series of hearings in eight

Rule 4-7.4(b)(2)(K) advances the Bar's interest in protecting the public from intrusive contact by Florida lawyers and is a reasonable content-neutral restriction on the "time, place and manner" of advertising. The restriction is narrowly tailored to meet the Bar's interest and its application to Respondent does not in any way prevent him from contacting prospective clients.

## Conclusion

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

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cities), *aff'd,* 100 F.3d 953 (5th Cir. 1996). As discussed in the initial brief, the Bar believes that a compilation of data should not be necessary with regard to a matter which is so self-evident. (Initial Brief at 21-23).

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was sent by U.S. Certified Mail to Alan Jay Kluger and Francesca Russo-Di Staulo, 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 ___ day of December, 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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M. Hope Keating

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