**IN THE SUPREME COURT OF FLORIDA**

**Case Nos.: SC04-40/SC04-41**

**THE FLORIDA BAR,**

*Complainant,*

*V.*

**JOHN ROBERT PAPE and MARC ANDREW CHANDLER,**

*Respondents.*

On Review of Amended Final Order of Referee

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# ANSWER BRIEF OF RESPONDENTS

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## Summary of the Argument

Judge Herring's findings of fact are correct and must be upheld as they are not clearly erroneous. Complainant not only failed to meet its burden of proof that Respondents' logo and telephone number violated Rules 4-7.2(b)(3) and 4-7.2(b)(4) by clear and convincing evidence at the trial of this case, but has also failed to meet the appellate standard of review that Judge Herring's findings were clearly erroneous.

Moreover, Complainant's application of the rules at issue in this case was unconstitutional, and it has failed to prove that Judge Herring's ruling in this regard was clearly erroneous.[1]

[1] Appendices are indicated by appendix number and page as follows: [A: at__].

## Argument

### I. Standard of Review

This Court has repeatedly held and most recently enunciated in 2004's *Florida Bar v. Senton* "A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. Absent 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." 882 So.2d 997, 1001 (Fla. 2004) (*citing Florida Bar v. Wohl*, 842 So.2d 811, 814 (Fla. 2003) (quoting *Florida Bar v. Sweeney*, 730 So. 2d 1269, 1271 (Fla. 1998)); *See Also Florida Bar v. Spann*, 682 So.2d 1070, 1073 (Fla.1996); *Florida Bar v. Brake,* 767 So.2d 1163, 1167 (Fla. 2000).

This Court has further held: "The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." *Florida Bar v. Sweeney*, 730 So. 2d 1269, 1271 (Fla. 1998).

In its Initial Brief of Complainant ("Initial Brief"), Complainant gave short shrift to the aforementioned standard of review and even went so far as to suggest

that this Court's ruling in the *Trazenfeld* case somehow relaxed the standard of review that this Court has frequently and unambiguously articulated. The standard of review is crystal clear and has been in place and repeated by this Court for several years. Furthermore, the standard applies to the referee's findings of facts as well as his conclusions as to guilt. Nowhere in that long-standing standard is there a mention of *Trazenfeld* or a looser standard for conclusions of law.

Further, Rule 3-7.6(m)(1)(A) Rules Regulating the Florida Bar provides that the report of the referee must include "a finding of fact as to each item of misconduct of which the respondent is charged, which findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." This Court validated and applied the predecessor to Rule 3-7.6(m)(1)(A)—Rule 3-7.6(k)(1)(A)—in the case of *Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994) . *See Also Florida Bar v. Hooper*, 509 So.2d 289 (Fla.1987) when it stated "rule 3-7.6(k)(1)(A) of the Rules Regulating the Florida Bar provides that the referee's findings of fact as to items of misconduct charged 'shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding.'"

Complainant's entire appeal hinges on this Court's proper application of the standard of review. Through its Initial Brief, Complainant has attempted to re-try its accusations against Respondents as opposed to asking this Court to review the

referee's findings. Complainant, through its Initial Brief, has offered an abundance of new arguments and different interpretations of the subject rules that it did not present to the referee.

This Court ruled in *Florida Bar v. Niles* that its "review of a referee's findings of fact and conclusions as to guilt is not in the nature of a trial de novo." 644 So.2d at 506 (Fla. 1994). "The responsibility for finding facts and resolving conflicts in the evidence is placed with the referee." *Id*. (*citing Florida Bar v. Hoffer,* 383 So.2d 639 (Fla.1980). "[A] party does not satisfy his or her burden of showing that a referee's findings are clearly erroneous by simply pointing to the contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings." *Florida Bar v. Senton,* 882 So.2d 997, 1001 (Fla. 2004) (quoting *Florida Bar v. Vining,* 761 So.2d 1044, 1048 (Fla.2000)).

## II. Complainant's case was bereft of evidence, and it did not meet its burden of proof

In fact, the **only** evidence in the record supports the referee's findings that Respondents did not violate either of the Rules Regulating the Florida Bar that Complainant charged Respondents with violating. Complainant's attempt to re-try its accusations in this forum on the ground that the referee erred is laughable.

Complainant's new counsel is attempting to introduce brand new arguments and re-try the case under the guise of referee error. It is inconceivable how Complainant can argue to this Court that the referee erred after Complainant presented to him a case so bereft of evidence and in which Complainant so blatantly misapprehended and misapplied its own rules in its never-ending witch hunt against Respondents' logo and telephone number.

At the trial of this case, Complainant had the burden of proving its accusations against Respondents by clear and convincing evidence. *Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994) (*citing Florida Bar v. Rayman*, 238 So.2d 594 (Fla.1970)). In its failed effort to meet that stringent burden, Complainant hung its entire, sparse case on the following: a Dade County ordinance prohibiting pit bull ownership in Dade County; a videotape of Respondents' television commercials; and the conjecture of Bar counsel. Respondents do not dispute the existence of the Dade County ordinance, nor do they see its relevance from either a statistical sampling or evidentiary viewpoint. And neither did Judge Herring. A naked offer into evidence of an ordinance that has nothing to do with this case even when paired with a cornucopia of speculation from counsel did not amount to clear and convincing evidence of a violation of either Rule 4-7.2(b)(3) or Rule 4-7.2(b)(4). Quite simply, Complainant offered no surveys, testimony, discovery responses or evidence of any sort to support its speculation. It merely chose to speculate.

Further, as it has done here in its Initial Brief, Complainant presented wild and unsubstantiated speculation as to Respondents' motive for using its logo and telephone number. Apparently, it never occurred to Complainant to depose either of the Respondents or to otherwise elicit testimony from them in order to ascertain their motives for using the logo and telephone number.

Moreover, Complainant neither sought nor presented to Judge Herring evidence from any source other than Respondents indicating that Respondents chose their logo and telephone number for any purpose outside the Rules Regulating the Florida Bar. Instead, as it has continued to do in this forum, Complainant has chosen guesswork and speculation to ascribe the motives that it chooses in order to fit its agenda.

Complainant has evidently conjured omnipotent powers to come to the unwavering conclusion that "the reality of the matter is that Respondents do not use a 1-800-PIT-BULL telephone number and a pit bull logo showing a pit bull wearing a spiked collar for the purpose of associating themselves with the positive traits of pit bulls, such as 'loyalty.'" Initial Brief at 6. Complaint continues to attempt to disguise its guesswork for fact when it claims that "[t]he obvious purpose of showing a pit bull wearing a spiked collar is to demonstrate extreme aggressiveness and viciousness." *Id*. If that were Respondents' motive Respondents could have more easily and effectively conveyed those ideas by using a snarling dog bearing his

fangs, showing a menacing expression, standing in attack mode, or actually attacking.

## III. Judge Herring correctly ruled that Respondents' logo and telephone number do not violate Rule 4-7.2(b)(3) of the Rules Regulating the Florida Bar

The relevant portion of Rule 4-7.2(b)(3) states: "A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications…." As Respondents did not understand how the logo or telephone number contravened Rule 4-7.2(b)(3), Respondents served discovery requests (Interrogatories (Appendix 1) and Request for Admissions (Appendix 3)) in order to understand Complainant's allegations. Of utmost importance in evaluating the merits of Complainant's appeal are The Florida Bar's Answers to Respondents' First Set of Interrogatories (Appendix 2) and The Florida Bar's Response to Respondent's First Request for Admissions (Appendix 4).

Respondents, served their respective, identical first set of interrogatories ("Interrogatories") on Complainant (Appendix "1") in late February, 2004. Respondents, through interrogatory number 2, asked Complainant to "Describe in detail how the telephone number ending in PIT-BULL is a 'statement describing or characterizing the quality of the lawyer's services' in violation of rule 4-7.2(b)(3) of

the Rules Regulating the Florida Bar." [A:1 at 2]. Complainant answered interrogatory number 2 as follows: "Pit-bulls are commonly perceived to be aggressive and unrelenting. Pit-bulls are also perceived by others to be loyal and determined. Either way, the use of the word in the telephone number is intended as a **description or characterization of the lawyers** to be hired by telephoning that number (emphasis added). [A:2 at 6].

Respondents, through interrogatory number 4, asked Complainant to the same question in relation to the logo. [A:1 at 3]. Complainant gave the exact same answer as it did to interrogatory number 2 involving the telephone number. [A:2 at 7].

In their defense of this case, Respondents proffered Complainant's answers to interrogatories and Complainant's responses to Respondents' requests for admissions. Complainant's Answers to the specific interrogatories related to the alleged rules violations explain how Judge Herring could reach no other conclusion than the one that he made.

While Complainant had no idea what was intended by Respondents' use of its logo or telephone number when it answered the interrogatories, it felt comfortable in assuming that the intent was to describe Respondents as either aggressive, unrelenting, loyal, determined or a combination of all of those characteristics. In its appeal to this Court**,** through the argument of new counsel,

Complainant has decided to drum up new speculation as to Respondents' motive for use of the logo and telephone number in contravention of its sworn testimony.

For purposes of its appeal, Complainant has delicately concocted a line between aggressive, which it now considers permissible (but which it oddly considered impermissible in its answers to interrogatories) and ultra-aggressive and vicious, which it considers impermissible. Not surprisingly, Complainant's homemade aggression barometer has concluded that Respondents' logo and telephone number fall on the side of ultra-aggressive and vicious. As part of its Initial Brief, Complainant speculated that Respondents are attempting to portray through the logo and telephone number some sort of uber-aggression that steps over the imaginary line between acceptable aggression and unacceptable aggression. Complainant conveniently ignored its own sworn interrogatory answers.

Complainant has veered away from the testimony presented to Judge Herring that pit bulls are aggressive, loyal and determined and is now claiming that pit bulls are inherently vile killing machines. It attempts to hoodwink this Court with sensationalism in order to divert this Court's attention from its defective arguments and the complete dearth of evidence that it presented to the referee. Initial Brief at 11.

Complainant makes mention of "ordinances imposed by municipalities across the country" banning pit bull ownership as some sort of proof of public

perception but neglects to tell this Court that only a handful of municipalities in the entire country have enacted such ordinances. Initial Brief at 11. What about the thousands upon thousands of municipalities that do not have such ordinances in place? Obviously, Complainant ignores the incredibly overwhelming majority when it speaks of public perception. Complainant beats the public perception drum by pointing to a handful of ordinances, yet it offers no explanation for the vastly overwhelming majority of municipalities that do not have breed restrictive ordinances in place. Complainant also makes no mention of the United Kennel Club's breed standard for the American Pit Bull Terrier, which Judge Herring reviewed prior to making his findings. The actual standard for the breed paints a realistic picture of the breed and not the sensationalistic tripe regurgitated by tabloid television shows looking for a quick, sexy headline.[2]

Complainant's colorful Initial Brief spoke of viciousness and savageness as if the public would actually be dim enough to think that two lawyers using an expressionless dog (or any dog for that matter) as their logo are going to beat, disembowel or use other illegal means against their adversaries. As Judge Herring realized in his role as fact finder, the ad must be viewed in the proper context.

2 The essential characteristics of the American Pit Bull Terrier ("APBT") are strength, confidence, and zest for life. This breed is eager to please and brimming over with enthusiasm. APBTs make excellent family companions and have always been noted for their love of children. Because most APBTs exhibit some level of dog aggression (aggression toward other dogs) and because of its powerful physique, the APBT requires an owner who will carefully socialize and obedience train the dog. **The APBT is not the best choice for a guard dog since they are extremely friendly, even with strangers. Aggressive behavior toward humans is uncharacteristic of the breed and highly undesirable.** This breed does very well in performance events because of its high level of intelligence and its willingness to work. (Official United Kennel Club Breed Standard of the American Pit Bull Terrier, Revised October 1, 2000 as noted at www.ukcdogs.com)

Referee's Final Order (Appendix 5) at 32, 33. The public realizes that personal injury trial attorneys are not going to physically attack or maim anyone because they use a pit bull's head for a logo no matter how many flimsy ordinances are passed outlawing ownership of pit bulls. Certainly, the citizens of our great state deserve much more credit for rational thought than Complainant is giving them. It is more likely, as Judge Herring determined in his role as fact finder, and as Complainant testified, that the public will link the logo and telephone number to attributes that may be desirable in trial attorneys—loyalty, persistence, determination, aggressiveness. Trial Transcript at 32.

If Complainant felt so strongly that the public would have the irrational reaction to Respondents' ad that it proposed to the referee, then it should have conducted a survey. The burden was on Complainant to have done something to support its guesswork as to the public's perception of Respondents' logo and telephone number. Instead, it offered nothing to Judge Herring but the rank speculation and melodrama that it is now attempting to heap on this Court.

In addition to its continued supposition, Complainant misstates Judge Herring's findings when it claimed "the referee found that the 1-800-PIT-BULL number and the pit bull logo are statements of quality." Initial Brief at 17. Judge Herring made no such finding. Complainant missed the clear wording in Judge

Herring's final order when it erroneously claimed that Judge Herring found the logo and telephone number to be statements of quality. In actuality, Judge Herring ruled that the logo and telephone number "describe qualities of the respondent attorneys." [A:5 at 1].

There is quite a difference between a statement of quality and a person's qualities or attributes. In fact after listening to the evidence and arguments, Judge Herring felt so strongly about the distinction that he made the additional finding that "(t)here is a big difference (qualitatively and substantively) between quality of services that a lawyer renders and the qualities or characteristics of the advertising lawyer. [A:5 at 1].

Lost amidst the hoopla of the dog bite cases and isolated anti-pit bull ordinances in Complainant's Initial Brief is the fact that the evidence that Judge Herring had in front of him when he decided this case was Complainant's answers to interrogatories and admissions. In its attempt to bastardize the appellate process by using it as a machine to re-try the accusations under new theories, Complainant completely disregards its own damning testimony.

Significantly, in its sworn testimony via interrogatory answers 2 and 4, Complainant opportunely disregarded the gravamen of Rule 4-7.2(b)(3), which is the section of the rule concerning statements describing or characterizing the **quality of the legal services**. Perhaps, Complainant neglected the most significant

language in the rule concerning the quality of legal services because, by its own admission, "the American Pit Bull Terrier is not synonymous with quality legal services." *See The Florida Bar's Response to Respondent's First Request for Admissions*, admission 9 (Appendix "3"). Complainant knew when it swore to its answers that the head of a dog and a telephone number spelling out a dog breed have nothing to do with the quality of legal services. As a result, Complainant attempted to craft a new version of Rule 4-7.2(b)(3) by disemboweling the old rule. It cut out its guts—that part of the rule concerning the quality of legal services. Judge Herring correctly rebuffed Complainant's attempt to fashion a new rule that made any description or characterization of the advertising attorneys illegal.

In a sudden departure from its prior testimony, Complainant argues for the first time that the logo and telephone number are impermissible descriptions of **the quality of legal services** in contravention of the rule. Initial Brief at 13. In a novel twist, Complainant asserts that Judge Herring's finding in paragraph 4 of the *Amended Final Order of Referee William W. Herring* ("Referee's Final Order") that the telephone number and the logo do not constitute descriptions of the quality of the lawyers' services but instead describe qualities of the Respondents "makes no sense and is not supported by anything in the comment or history of the rule." Initial Brief at 18. What makes no sense is Complainant disregarding its own sworn testimony, which bolstered Judge Herring's findings. Equally nonsensical is

Complainant's mocking claim that Judge Herring's finding "makes no sense" when the burden to prove the accusations did not belong to Judge Herring and Complainant offered him nothing compelling in support of its accusations.

In its answers to interrogatories, Complainant testified only that the logo and telephone number were impermissible descriptions or characterizations of the advertising lawyers. [A:2 at 6-7]. Unless Complainant is now claiming that its own testimony "makes no sense," its claim that Judge Herring's ruling that the logo and telephone number are descriptions of qualities of the Respondent attorneys "makes no sense" is irreconcilable. [A:5 at 1].

The words "aggressive," "determined" and "loyal" are not words that touch upon the quality of services. One can be the most aggressive, loyal person in the word and still be a terrible attorney. Conversely, one can be incredibly laid back and a conniving liar and be an incredibly effective attorney.

Complainant proceeds in its meandering misapprehension of Rule 4-7.2(b)(3) by citing the case of *Florida Bar v. Lange*, 711 So.2d 518 (Fla. 1998), which does nothing to support its position. Initial Brief at 19. In *Lange*, this Court upheld the Bar's restriction on an attorney's use of the phrase "When the Best is Simply Essential." Respondents endorse the Court's holding in *Lange*, as the phrase "When the Best is Simply Essential" clearly and impermissibly touches upon the quality of legal services. The words "the best" go directly to the quality of legal

services. The words "aggressive," "loyal," and "determined" do not. Accordingly, *Lange* is plainly and easily distinguishable from the instant case.

Apparently, Complainant does not recognize the bold distinction between a description of the quality of legal services (e.g. "the best") and a description of the attributes of an attorney (e.g., "aggressive"). Complainant claims that Rule 4-7.2(b)(3) would be unenforceable if this Court upholds the clear distinction that Judge Herring made in this case between statements that touch upon the quality of legal services and those that concern the personal attributes of the attorney but have nothing to do with the quality of the legal service. Initial Brief at 19. That assertion smacks of melodrama. Easy distinctions, such as the one that Judge Herring made in this case, do not make a rule unenforceable, however, the wildly inconsistent and haphazard application of the rule proffered by Complainant in this case would.

In fact, Complainant's prior counsel, Attorney Lazarus, who has 18 years of experience handling cases on behalf of the Bar, realized the distinction when she testified through Complainant's answers to interrogatories and when she spoke in front of Judge Herring at the trial of this case. Attorney Lazarus admitted at the trial that use of the spoken word "aggressive" in attorney ads is permissible and, as a result, the Bar did not prosecute Respondents for using the word "aggressive" in their ad. See Trial Transcript at 37 and 38. Attorney Lazarus noted the distinction that Complainant is now claiming illusory and nonsensical in its Initial Brief.

However, when pressed by Judge Herring, she was apparently unable to articulate exactly why the Bar has no issue with Respondents' use of the spoken word "aggressive" in their ad but objects so vehemently to a logo and telephone number that it claims connotes the same attribute. See Trial Transcript at 37 and 38. Respondents were not surprised that Attorney Lazarus could not explain the inexplicable. Attorney Lazarus seemed to misapprehend the clear language of Rule 4-7.2(b)(3) when she stated to Judge Herring that "we (the Bar) distinguish the legal services that are being rendered and the qualifications of the lawyers." See Trial Transcript at 38. Rule 4-7.2(b)(3) makes no reference to qualifications; the talisman of the rule concerns statements regarding the quality of legal services.

Respondents posit that every advertisement contains some descriptions of the advertising attorneys and that Complainant has approved the use in lawyer advertisements, including the ads that are the subject of the present dispute, of descriptive words such as "aggressive," "skilled," "experienced "committed," "concerned," "dedicated," "efficient," "resourceful," and "understanding."

Complainant's attempted application of the rule to prohibit visual images that it claims may lead to the same perception (i.e., aggressiveness, loyalty, diligence) that it permits through the actual spoken words would lead to absurd results. How can Florida lawyers be expected to govern their behavior if Courts allow Complainant to apply the rules so subjectively and haphazardly?

As a matter of fact, Complainant, through its Rules of Professional Conduct, demands that members of The Florida Bar diligently represent clients and zealously advocate their clients' causes (S*ee Rule 4-1.3 Rules Regulating the Florida Bar* ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *Comment to Rule 4-1.3 Rules Regulating the Florida Bar* ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with ***zeal*** in advocacy upon the client's behalf." (Emphasis added)); *Comment to Rule 4-1.7* ("**Loyalty to a client:** Loyalty is an essential element in the lawyer's relationship to a client."); and *Preamble to The Rules Regulating the Florida Bar—Rules of Professional Conduct* ("In all professional functions a lawyer should be competent, prompt, and diligent.")("As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

Strangely though, through some peculiar contortions, Complainant, in the instant case, tried to characterize the very attributes that it demands from Florida lawyers—loyalty to clients and diligence and determination in handling client's affairs—as impermissible descriptions to convey through advertisements. Complainant demands loyalty, diligence and determination from the lawyers it

regulates, yet, curiously, it sought to prohibit Respondents from conveying that image to the public through their advertisements.

Furthermore, as Attorney Lazarus admitted at trial, Complainant has expressly approved the use of the word "aggressive" in Respondents' television scripts that are at the heart of the instant Complaint. However, in a contortion that would make Yogi Coudoux from, *That's Incredible* shudder Complainant asked Judge Herring to ratify its attempt to ban a logo and telephone number that it claims describe Respondents in a way that Respondents could permissibly describe themselves with spoken or written words. [A:2 at 6-7].

## IV. Judge Herring correctly ruled that Respondents' logo and telephone number do not violate Rule 4-7.2(b)(4) of the Rules Regulating the Florida Bar

This Court recently approved an amendment to Rule 4-7.2(b)(4) eliminating the requirement that verbal and visual portrayals or depictions be "objectively relevant to the selection of an attorney." *Amendment to the Rules Regulating the Florida Bar*, 875 So.2d 448, 453 (Fla. 2004). Now, and at the time that this case was tried in front of Judge Herring, Rule 4-7.2(b)(4) reads: "**Prohibited Visual and Verbal Portrayals**. Visual or verbal descriptions, depictions, or portrayals of persons, things, or events shall not be deceptive, misleading, or manipulative." As

the "objectively relevant" standard is no longer in force, it is surprising that the Complainant is still prosecuting Respondents for this alleged transgression.

At trial, Respondents argued that the logo and the breed of dog identified through the telephone number are objectively relevant to the selection of an attorney as the American Pit Bull Terrier (as admitted by the Complainant in its discovery responses) possesses some of the qualities that consumers of legal services and potential consumers of legal services seek when searching for a trial attorney, namely, aggressiveness, loyalty, determination and tenacity.

In his role as fact finder, Judge Herring, found that "(t)he characteristics that The Florida Bar ascribed to pit bulls through their answers to interrogatories are desirable traits in attorneys." [A:5 at 2]. In addition, Judge Herring found "(t)he qualities that are depicted by the logo and the telephone number are objectively relevant to the selection of an attorney as they are informational, because they are qualities that a consuming public would want in a trial lawyer: someone who is aggressive, tenacious, loyal and persistent…." [A:5 at 2].

In a twist of irony, Bar Counsel Richard's most famous client, George W. Bush, clearly believes that the attributes of a pit bull are objectively relevant when selecting an attorney. This is evident in President Bush's nomination of Harriet Miers, whom he once described as "a pit bull in size 6 shoes," to succeed Alberto R. Gonzalez as White House Counsel. See Milbank, D., "Bush Promotes Miers

From Staff to Counsel," *Washington Post*, November 18, 2004. Clearly, the characteristics that President Bush attributes to the American Pit Bull Terrier are traits that he seeks and finds desirable in an attorney.

Curiously, in support of its argument that Judge Herring's findings relative to Rule 4-7.2(b)(4) were erroneous, Complainant offers an entirely new theory that it never presented to the referee. From the beginning of discovery through the trial, Complainant's sole claim regarding this particular rule was that Respondents' logo and telephone number ran afoul of Rule 4-7.2(b)(4) because they were manipulative in that they appealed to the emotions of potential consumers. In a sudden about-face, Complainant, in its Initial Brief, makes no mention of the only argument that it presented to Judge Herring. Instead, Complainant, in an attempt to take yet another bite at the apple, has turned its attention to an entirely new unsubstantiated argument—that the logo and telephone number are deceptive and misleading.

In the Interrogatories, Respondents asked Complainant the following direct, uncomplicated question: "Describe in detail how the telephone number ending in PIT-BULL is 'not objectively relevant to the selection of an attorney' and is 'deceptive, misleading, or manipulative' in violation of rule 4-7.2(b)(4) of the Rules Regulating the Florida Bar." In addition, Respondents posed the exact same interrogatory in relation to the logo. [A:2 at 6-7].

In response to those two interrogatories, Complainant offered the exact conclusory testimony: "The designation of the word PIT-BULL in the telephone number is not objectively relevant because it is not informational and it is manipulative because it appeals to the emotions of the consumer as the pitt-bull (sic) is commonly perceived as aggressive, unrelenting, loyal and determined." [A:2 at 6-7].

Complainant now claims erroneous Judge Herring's finding that the logo and telephone number are objectively relevant and not manipulative in violation of Rule 4-7.2(b)(4) because the qualities depicted by the logo and telephone number are qualities that a consuming public would want in a trial lawyer; someone who is aggressive, tenacious, loyal, and persistent. [A:5 at 2]. How Complainant can argue to this Court that the referee erred in his finding when Complainant swore to the same traits in its answers to interrogatories is mind-boggling.

The only evidence presented to Judge Herring on this issue was Complainant's interrogatory answers. Everything else was argument of counsel. Now, Complainant has the audacity to claim that "the referee selectively focused on particular traits of the pit bull that are not those generally identified with the breed and that are certainly not those intended to be conveyed by Respondents." Initial Brief at 5. Judge Herring focused on those traits, in part, because those are the

traits that Complainant swore violated Rule 4-7.2(b)(4) in its answers to interrogatories.

Most notably, Complainant did not testify that the telephone number or logo are deceptive or misleading. The subject rule expressly forbids images that are "deceptive, misleading, or manipulative." In its interrogatory answers, Complainant consciously ignored the deceptive and misleading prongs of Rule 4-7.2(b)(4) and testified only that the logo and telephone number were manipulative. Therefore, Judge Herring was correct in focusing the majority of his attention on whether or not the logo and telephone number were impermissibly manipulative in violation of the rule. That Complainant now sees fit to argue a new theory to this Court (i.e., that the logo and telephone number are deceptive and misleading) that it did not present to Judge Herring, and in the same breath claims that Judge Herring erred in not ruling in its favor on issues that it did not place before him, is farcical.

Even though Complainant did not present argument or evidence on the issue of whether or not the logo and telephone number were misleading or deceptive, Judge Herring made findings on those issues relative to Respondents' argument that the rules were applied unconstitutionally. Judge Herring found that "(t)he logo and telephone number are not misleading or deceptive, and the Florida Bar has made no record to the contrary, as to surveys or studies of the public." [A:5 at 2]. Complainant is precluded from arguing to this Court that the logo and telephone are

misleading or deceptive in violation of Rule 4-7.2(b)(4) when it never even broached those issues in front of Judge Herring. Complainant is merely attempting to re-try its accusations in this forum on wholly new grounds.

As Respondents argued in their Memorandum of Law in Support of Their Motion for Final Summary Judgment and at trial, all advertisements are manipulative in the sense that the advertiser is attempting to manipulate the audience into choosing his product or service. Judge Herring accepted this argument, when he made the finding that "all advertising, to be effective, is manipulative at some level." [A:5 at 2]. With this fact in mind, a rule that completely prohibits any manipulation of the audience would serve to abolish all advertising in contravention of United States Supreme Court precedent regulating commercial free speech. Therefore, there must be a sinister element to the manipulation that is proscribed by Rule 4-7.2(b)(4). Again, Judge Herring realized that fact when he ruled that the logo and telephone number are not "**improperly** manipulative." (Emphasis added). [A:5 at 2].

Neither the United States Supreme Court nor this Court has ever approved of state action that purports to ban commercial free speech because it manipulates the consumer by appealing to his emotions as Complainant proposed through its own testimony. First, that is an impossible standard to apply, as it is indefinable and so vague and indefinite that it defies consistent and uniform application or

enforcement. Quite simply, no competent arbiter exists to determine what appeals to the emotions of consumers. What may appeal to one consumer's emotions may not appeal to another's.

Second, if that were, indeed, a valid standard to ban commercial free speech, then any governing body could arbitrarily and capriciously ban any commercial speech that it did not like by merely making the nebulous assertion that the advertisement "appeals to the emotions of the consumer." For example, Complainant could attempt to prohibit a wheelchair bound attorney from appearing in his own advertisement because his mere presence could appeal to the emotions of large segments of the audience.

Further, Complainant made no allegations and offered no proof that Respondents used technical or clever manipulation in an attempt to deceive or mislead the public (*See The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So.2d 451 (Fla. 1991) and *Amendments to the Rules Regulating the Florida Bar*, 762 So.2d at 399) or that the logo and telephone number are misleading in any other way. Judge Herring specifically noted in his final order that Complainant established no record whatsoever that the logo and telephone number were misleading or deceptive. [A:5 at 2]. Moreover, Judge Herring contrasted Complainant's non-existent evidence here with the specific

factual findings required by United States Supreme Court precedent to limit commercial free speech. *Id.*

Complainant hung its entire case on the hazy proffer that the telephone number and logo are "manipulative because (they) appeal to the emotions of the consumer as the pit bull is commonly perceived as aggressive, unrelenting, loyal and determined." Judge Herring had the discretion to determine that Complainant did not meet its burden of proof based on such a sparse and uncompelling proffer. This Court cannot allow Complainant to reach back into its bag of tricks yet again and argue a whole new theory after failing the first two times it prosecuted Respondents for use of their logo and telephone number.

Even if Judge Herring had accepted Complainant's conclusory and baseless testimony concerning the public's common perceptions and its purported emotional reactions and supposed susceptibility to manipulation by an innocuous logo and telephone number, he could not have ruled that this is the type of manipulation intended to be proscribed by the rule. In fact, Complainant's history in applying Rule 4-7.2(b)(4) told Judge Herring that Complainant has acknowledged repeatedly that images or portrayals that will, in fact, appeal to the emotions of enormous segments of consumers are not necessarily manipulative for purposes of the rule.

For instance, Complainant has determined that a picture of a woman straightening the clothes of two small children accompanied by the statement "Relocation: Is it in the Best Interest of the Child?" does not violate Rule 4-7.2(b)(4) in a family law advertisement (*See Bar Ad File No. 00-00972*). Clearly, that advertisement, which does not violate the subject rule, could appeal to the emotions of a huge segment of society (i.e., those families affected by divorce) to a much more significant degree than an innocuous telephone number and dog head logo ever could. What is most alarming is that Complainant knew that the referenced divorce advertisement that blatantly appeals to the emotions of a large set of consumers is permissible under the subject rule, yet it argued to Judge Herring that a drawing of a dog's head and a telephone number ending in PIT-BULL is impermissible solely because it appeals to the emotions of consumers. The visual in the divorce advertisement is permissible for the same reason that Respondents' logo and telephone number are—while they may or may not appeal to the emotions they are not misleading, deceptive or manipulative.

Other visual images that certainly could appeal to the emotions of some consumers, yet have been determined to be permissible under Rule 4-7.2(b)(4), are: a drawing of empty handcuffs (*See Bar Ad File No. 00-01167*)[3]; an illustration of a leg brace in a criminal law advertisement (*See Bar Ad File No. 00-00492*); a picture

of the Statue of Liberty (*See Bar Ad File No. 01-01334*); a picture of a family in a family owned business accompanied by the statement "Family Limited Partnerships: Succession Issues for the Family Business" (*See Bar Ad File No. 00-00972*).

Furthermore, as stated earlier Complainant permitted use of the spoken word "aggressive" to describe or characterize qualities possessed by Respondents'. If the use of a descriptive word is not deemed manipulative by the Complainant, it cannot be manipulative to use a telephone number that Complainant alleges symbolizes or is a manifestation of that same quality.

Given the evidence before him and Complainant's butchering of its own rule, Judge Herring's ruling regarding Respondents' alleged violations of Rule 4-7.2(b)(4) must stand.

## V. Judge Herring was correct in ruling that Complainant's application of rules 4-7.2(b)(3) and 4-7.2(b)(4) in an attempt to prohibit Respondents from using their logo and telephone number was an unconstitutional restriction on Respondents' commercial free speech in violation of the First and Fourteenth Amendments to The Constitution of The United States of America

As Justice Kennedy eloquently stated when delivering the opinion of the Court in *Edenfield v. Fane,* "The commercial marketplace, like other spheres of

3 The Bar later filed a disciplinary proceeding against an attorney who used, in his advertisement, an illustration of handcuffs with hands in them. However, the Court determined that the

our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the United States Supreme Court decided that advertising by lawyers was a form of commercial speech entitled to protection by the First Amendment. Later, Justice Powell summarized the standards applicable to such claims for the unanimous Court in *In Re RMJ*, 455 U.S. 191, 203 (1982):

> "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information may be presented in a way that is not deceptive….Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served." *Peel v. Attorney Disciplinary Comm'n of Illinois*, 496 U.S. 91, 100 (1990) (citing Justice Powell's decision in *In Re RMJ*).

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illustration in question did not violate Rule 4-7.2(b)(4). See The Florida Bar v. Ostrow, No. SC 02-970 (Fla. March 11, 2003).

In the instant case, Complainant offered to Judge Herring no evidence that Respondents' logo or telephone number is false, misleading or deceptive. In fact, it never even made the argument that the logo or telephone number is false, misleading or deceptive. See [A:5 at 2]. Instead, Complainant attempted to curb Respondents' constitutionally-protected commercial speech under the color of Rule 4-7.2(b)(3) because it claimed that the logo and telephone number are intended to describe the advertising lawyers as aggressive, unrelenting, loyal and determined. And it has attempted to excise Respondents' speech under the auspices of Rule 4-7.2(b)(4) because it strangely alleged that the logo and telephone number are manipulative in that they appeal to the emotions of consumers who view pit bulls as aggressive, unrelenting, loyal and determined. Nowhere did Complainant allege or offer evidence that Respondents' challenged commercial speech is false, deceptive or misleading despite being asked to describe in detail the alleged violative nature of the speech in several specific interrogatories.

Where commercial speech concerns lawful activity and is not misleading, the speech is constitutionally protected and may only be restricted under prescribed circumstances. Having made no allegation and having offered no proof that Respondents' logo and telephone number are false, misleading or deceptive, Complainant had to satisfy the test enunciated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Comm'n of N.Y.*, 447 U.S. 557 (1980) in

order to lawfully restrict Respondents' commercial speech: (1) the government's interest at the base of the restriction must be substantial; (2) the restriction must directly and materially advance the asserted governmental interest; and (3) the restriction must be narrowly tailored to the governmental interest involved. *Central Hudson Gas & Electric Corp. v. Public Comm'n of N.Y.*, 447 U.S. 557, 563-66 (1980). As Judge Herring found, in contravention of the dictates of *Central Hudson* and its progeny, Complainant offered no evidence to support its proposed restriction of Respondents' commercial speech. [A:5 at 2].

A regulation will not be sustained if it "provides only ineffective or remote support for the government's purpose." *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 512 U.S. 136 (1994) (citing *Central Hudson Gas & Electric v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 564, 566 (1980)). Certainly, it cannot be sustained if, as here, the State offers **no** support and no evidence of a valid governmental purpose.

The State's burden is not slight; "mere speculation or conjecture" will not suffice; rather the State "must demonstrate that the harms it recites are real and that its restrictions will, in fact, alleviate them to a material degree." *Id*. (citing *Edenfield v. Fane*, 507 U.S. 761 (1993)). The "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the

harmless from the harmful." *Id*. (citing *Zauderer*, supra at 646); see also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, at 648-649 (1985) (State's "unsupported assertions" insufficient to justify prohibition on attorney advertising).

In order to justify a restriction on commercial speech, the State must prove the existence of a certain and identifiable harm that it seeks to remedy through its proposed restriction. Unsubstantiated fear of potential harm is not sufficient to justify the chilling effect on First Amendment rights. *See Tinker v. Des Moines Independent School Dist*., 89 S.Ct. 733 (1969). In the present case, Complainant made the conclusory and baseless claims that Respondents attempted to describe themselves as aggressive, loyal, unrelenting and determined through use of their logo and telephone number (in violation of Rule 4-7.2(b)(3)) and that the public will have an emotional reaction to Respondents' logo and telephone number (in violation of Rule 4-7.2(b)(4)) and that that purported reaction is sufficient to justify its proposed restriction. It offered nothing more to support its proposed ban. Complainant did not even bother to offer any evidence of a substantial State interest or certain and identifiable harm as a basis for restricting Respondents' commercial speech because they were not able to do so. Clearly, according to United States Supreme Court precedent, Complainant's baseless speculation is not enough to justify a ban on Respondents' commercial speech.

Although there is no need to reach the second prong of the *Central Hudson* test, as Complainant failed to satisfy the first prong before Judge Herring, the penultimate prong of the *Central Hudson* test is part 2. Part 2 of the *Central Hudson* test requires the restriction on speech to target the identifiable harm, and mandates that the restriction directly and effectively alleviates that harm. In *Ibanez*, the Board plead in the alternative that if the CFP designation in Ibanez' advertisements was not facially misleading that it was at least "potentially misleading" entitling the Board to enact measures short of a total ban to prevent deception or confusion. If the Board could not convince the Court to uphold a total ban on Ibanez' use of the CFP designation, the Board sought the requirement that Ibanez use a lengthy disclaimer. *Id*. at 145. The Board failed on both counts. Quoting language from its prior holding in *Zauderer*, the Supreme Court rejected the Board's unsubstantiated allegation that the CFP designation was "potentially misleading" when it declared: "If the 'protections afforded commercial speech are to retain their force, *Zauderer*, 471 U.S. at 648-649, we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board'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*. at 146.

The requirement that the State provide concrete proof that its proposed restriction on commercial speech advances a substantial State interest "is critical;

otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995)(quoting *Edenfield*, 113 S.Ct. at 1800). Here, in light of the Bar's blatant antipathy toward attorney advertising, its inconsistent application of Rules 4-7.2(b)(3) and (4) laid out thoroughly in this paper, and the bare testimony offered by Complainant in support of its proposed ban, this Court can presume that the insidious "other objectives" that the Supreme Court warned of in *Rubin* and *Edenfield* may be at play.

As Complainant's testimony offered nothing but mere speculation into unidentifiable harms, Judge Herring correctly ruled that its attempt to ban Respondents' commercial speech was done in contravention of the First and Fourteenth Amendments to The Constitution of The United States of America. As the Supreme Court mandated in *Peel* and later quoted in *Ibanez*, a "State may not…completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA." *Id*. at 144 (*quoting Peel*, 496 U.S. at 110).

In the instant case, in contravention of the referenced Supreme Court precedent, Complainant attempted to ban Respondents' logo and telephone number--both protected commercial speech--completely absent even the barest allegation or testimony that either is misleading or deceptive. In addition,

Complainant proffered no evidence to Judge Herring to meet any of the 3 prongs enunciated by the Supreme Court in *Central Hudson* to justify its attempted restriction on Respondents' non-misleading commercial speech. It, instead, resorted to rote invocation of speculated harm with no factual or evidentiary support.

In *Peel*, the Court was faced with the question of whether the Illinois Bar's prophylactic ban on attorneys' use of the words "certified" or "specialist" withstood First Amendment scrutiny. Attorney Peel, on his letterhead, noted that he was a "Certified Civil Trial Specialist—By the National Board of Trial Advocacy." The Illinois Bar filed a Complaint against him claiming a violation of the rule prohibiting attorneys from referring to themselves as certified or as specialists. The Illinois Supreme Court sided with the Illinois Bar and recommended censure after it determined that Attorney Peel's letter was misleading. The United States Supreme Court reversed.

As the Supreme Court in *Peel* announced, the first inquiry when faced with a disputed restriction on commercial speech is whether the statement being restricted by the State is misleading and, even if it was not, whether the potentially misleading character of such statements (i.e., Certified Civil Trial Specialist—By the National Board of Trial Advocacy) creates a state interest sufficiently substantial to justify a categorical ban on their use. *Id*. The Supreme Court recognized the long held

distinction between facially misleading or deceptive statements and potentially misleading statements where the statement may be true, but the effect can be to mislead the public. The *Peel* Court also noted that there is "a presumption that members of a respected profession are unlikely to engage in practices that deceive their clients and potential clients." *Id.* at 109. As the Court noted in *Bates*, "It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." *Id.* (citing language from *Bates*, 433 U.S. at 379).

Now, Complainant traipses before this Court with entirely new baseless and unsupported arguments. But, this time, Complainant has decided to use the buzz words "misleading" and "deceptive" in its flagrant attempt to have its accusations heard one more time. However, Complainant is still missing any proof for its allegations by way of studies, surveys or even anecdotal evidence. In its Initial Brief, it provided this Court with several cites to dog bite cases. But, again, Respondents are fairly certain that the citizens of the State of Florida, if they are even familiar with the cited cases, can draw the distinction between actual dogs that some irresponsible owners either bred for fighting or did not raise properly and Respondent attorneys.

Further, a plethora of dog bite cases shows nothing regarding the public's perception of Respondents' logo or telephone number and whether or not they are misled or deceived by them. They merely illustrate that some unfortunate people were attacked by poorly bred, poorly raised or agitated dogs. Complainant is asking this Court to engage in treacherous mental gymnastics. It has heaped countless inferences on top of each other to reach the untenable conclusion that because some people were attacked by dogs the public is misled or deceived by Respondents' logo and telephone number. That is not evidence. That is pure, unadulterated gobbledygook.

In addition, Complainant attempts here to analogize Respondents logo and telephone number with a fist despite Judge Herring's determination that there was no correlation between the two and his specific finding that the logo and telephone number do not "suggest a favorable outcome through the employment of improper means." [A:5 at 2]. Complainant, in bold letters, screams to this Court that "(f)or purposes of suggesting an ability to achieve results, a drawing of a fist and a drawing of a pit bull are indistinguishable (emphasis deleted)." Initial Brief at 17. Complainant could make that flimsy analogy about practically any illustration. It could be argued that the scales of justice suggest that the attorney will achieve justice for his clients. Justice could equate to victory in the mind of an aggrieved

client. The comments to the rules are not the rules[4], and, therefore, a reference to a fist in the comments is only meant as explanation, albeit a dicey one, of the purpose of the rules. One of the stated purposes of the rules contained in Chapter 4 is to prohibit attorneys from using illustrations to suggest the ability to achieve results. Respondents are not exactly sure how a fist or a dog's head do that. Perhaps, a better example for the comment would have been an illustration of a giant pile of money or a check for several million dollars.

As referenced earlier in this paper, Complainant testified that Respondents' telephone number and logo violate Rule 4-7.2(b)(3) because "Pit-bulls are commonly perceived to be aggressive and unrelenting. Pit-bulls are also perceived by others to be loyal and determined. Either way, the use of the word in the telephone number is *intended as a description or characterization of the lawyers* to be hired by telephoning that number (emphasis added)." [A:2 at 6-7].

A simple description of the personal attributes of the advertising lawyer that does not concern "the quality" of his services and makes no promise of results is neither facially misleading nor inherently misleading and, therefore, it is not subject to state restriction absent satisfaction of the *Central Hudson* test.

[4] "The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term, 'should,' do not add obligations to the rules but merely provide guidelines for practicing in compliance with the rules." See Preamble, Ch. 4, Rules Regulating Fla. Bar.

Rule 4-7.2(b)(3) is based on the assumption that any statement that describes or characterizes the quality of a lawyer's services is inherently misleading. At the heart of the rule is the notion that the quality of legal services is so variable and hinges upon a multitude of factors that the public is unlikely to grasp. As a result, statements concerning or comparing the quality of legal services are likely to mislead the public.

Knowing the purpose of the rule, Respondents accept that Complainant can lawfully prohibit Florida lawyers from potentially misleading the public by claiming in advertisements that they are "the best" or by using similar comparative or superlative phrases reflecting on the *quality* of legal services. *See In Re RMJ*, 455 U.S. 191, 200 (1982) (interpreting the ruling in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), to warrant restrictions on statements in advertisements concerning quality of legal services, as such statements are so likely to mislead).

And, if the advertising is actually or inherently misleading, then it can be regulated pursuant to United States Supreme Court precedent concerning commercial free speech. *See In Re RMJ*, 455 U.S. at 207 ("although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, *in the absence of a finding that his speech was misleading*, does not meet these

requirements.") (Emphasis added). Here, Judge Herring made no finding that the logo and telephone number are false, deceptive or misleading because: they are not; and Complainant offered no evidence to prove that they are.

Moreover, Complainant has already testified that pit bulls are not synonymous with quality legal representation. [A:4 at 2]. Therefore, by its own admission, Complainant is not accurately applying the rule that it claims Respondents violated. Through its errant wangling of the terms of Rule 4-7.2(b)(3) in order to perpetuate its agenda to eliminate Respondents' logo and telephone number from the airwaves, Complainant unconstitutionally restricted Respondents' commercial speech. Judge Herring recognized the wrong and righted it.

Clearly, the purpose of Rule 4-7.2(b)(4) is to prohibit lawyers from misleading the public through contrived visuals or scenes, special effects or technical manipulations that create unrealistic pictures of the attorney and the services he can provide. As required by United States Supreme Court precedent, the validity of the rule and its application hinges on the concepts of misleading and deception. As already discussed, if commercial speech misleads the public, the state can restrict it.

In the face of Complainant's conclusory testimony, Judge Herring was left to wonder that even if the public sees pit bulls as "aggressive," "unrelenting," "loyal" and "determined," how those perceptions "appeal to the emotions."

"Emotion" is defined in Webster's New Collegiate Dictionary as: "(1)An agitation; strong feeling; any disturbance. (2) A departure from the normal calm state of an organism of such nature as to include strong feeling, an impulse toward open action, and certain physical reactions; any of the states designated as fear, anger, disgust, grief, joy, surprise, yearning, etc—Syn. See FEELING."

Therefore, if Judge Herring were to accept Complainant's conclusion as to how the public perceives American Pit Bull Terriers, he also would have had to accept its conclusion that the public has a reaction that rises to a level so intense as to affect its emotional state upon the mere sight of Respondents' plain logo of the drawing of a dog's head and the words "PIT-BULL" at the end of its telephone number.

Thirdly, and most importanly, in order to withstand constitutional scrutiny, Judge Herring would have had to determine that Respondents' logo and telephone number are visuals that mislead or deceive the public. Despite an express prohibition against misleading and deceptive visual images or depictions in Rule 4-7.2(b)(4), Complainant made no allegation and offered no testimony or other evidence that Respondents' logo and telephone number were misleading or deceptive. Through this omission in response to Respondents' direct question asking it to describe in detail how the logo and telephone violate the rule,

Complainant acknowledged that the logo and telephone number are not misleading or deceptive.

Instead, Complainant claimed only that the logo and telephone number are manipulative in violation of the rule. As discussed earlier, the link Complainant adverted between the public's proposed perception and the corresponding purported emotional reaction is contrived. And even if some members of the public do have a reaction intense enough to rise to the level of emotional upon the sight of a plain drawing of a dog's head and the words "PIT-BULL," that is not a sufficient ground to ban Respondents' commercial speech according to the Supreme Court precedent discussed already.

In conjunction with United States Supreme Court precedent and Florida Supreme Court analysis, the type of manipulation meant to be proscribed by Rule 4-7.2(b)(4) is that which has a nefarious basis in deception or attempts to mislead or trick the public. Every United States Supreme Court case on commercial speech centers around the concept of deception and whether the State-prohibited speech is misleading. No United States Supreme Court case exists upholding a restriction on commercial speech on the ground that some consumers may have an emotional reaction to an image in the advertisement, as Complainant proposed to Judge Herring in this case. There is a simple reason that no cases exist to support such a nebulous standard—it is not the standard.

Ever since *Bates* gave attorneys the right to advertise their services to the public, the Supreme Court has repeated in every case involving a state's attempted restriction on commercial speech a single standard allowing States to regulate commercial speech. The standard is fairly straightforward. States can restrict commercial speech that is offered for an unlawful purpose or is false, deceptive or misleading. *See In Re RMJ*, 455 U.S. 191, 200 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Peel v. Attorney Disciplinary Comm'n of Illinois*, 496 U.S. 91, 100 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Shapero v. Kentucky Bar Assn*., 486 U.S. 466 (1988); *Ibanez v. Florida Dept. of Bus. & Prof. Reg*., 512 U.S. 136 (1994).

In *Ibanez v. Florida Dept. of Bus. & Prof. Reg*, the Supreme Court struck down the Florida Board of Accountancy's attempted ban on Ibanez's use of the terms CPA and CFP (Certified Financial Planner) in her advertisements. The Board alleged that the terms CPA and CFP were false, deceptive and misleading. In determining that the Board failed to meet its burden of proof that the terms were false, misleading and deceptive, the Court held that the Board had not "demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes." 512 U.S. at 138. If Complainant did not allege or even argue to Judge Herring that

Respondents' logo and telephone number are misleading or deceptive in violation of Rule 4-7.2(b)(4), then it could not reasonably expect Judge Herring to determine that the public has been misled by the challenged speech. Certainly, it cannot prevail on its claim that Judge Herring's ruling on the issue was clearly erroneous.

To suggest that any advertisement that may appeal to a consumer's emotions is subject to banishment is preposterous and flies directly in the face of the First and Fourteenth Amendments. As listed earlier in this paper, Complainant has approved of several emotion-evoking images in other lawyer advertisements.

Further, the standard that Complainant proposed to Judge Herring is impossible to understand or apply or interpret evenhandedly. Such a vapid standard, as Judge Herring determined, cannot withstand the rigors of Constitutional scrutiny.

It is obvious that there is more to Complainant's attempted expurgation than meets the eye. Most likely, Complainant's attempt at censorship under the guise of Rules 4-7.2(b)(3) and (4) is a thinly veiled attempt to regulate what it views to be good taste in lawyer advertising.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the United States Supreme Court addressed the issue of an attorney's use of an illustration of a Dalkon Shield Intrauterine Device in his advertisement seeking cases stemming from physical problems associated with the use of the device. Ohio's

Office of Disciplinary Counsel brought suit against Attorney Zauderer claiming, amongst other issues, that the illustration violated its rules on advertising. In rebuking the Bar's claim that the advertisement should be banned, in part, because it was not dignified, the *Zauderer* Court stated, "[t]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity." *Id*. at 648.

Similar to Complainant's argument in the case presently at bar, The Ohio Bar argued that the use of illustrations in attorney advertisements create unacceptable risks that the public will be misled, manipulated or confused because the advertiser "is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions." *Id*. The Supreme Court refused to accept the Ohio Bar's argument for a prophylactic ban on illustrations in attorney advertisements on the Bar's alleged ground. The Court reasoned that "because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about the quality of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising." *Id*. at 649.

Importantly, the Supreme Court focused on material misrepresentations in illustrations as the talisman for regulation. This echoes Respondents' position that a mere allegation that the speech at issue "appeals to the emotions of consumers" is insufficient to invoke the state's regulatory power over the advertisement. There must be a component of deception involved in the equation to trigger the State's ability to lawfully restrict the commercial speech.

The Court further explained in its opinion that the First Amendment protection accorded to commercial speech is justified principally by the value to consumers of the information such speech provides. *Id*. at 651. In discussing the importance of illustrations in advertisements and their First Amendment protection, the Court declared: "The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." *Id*. at 647. In the instant case, the logo and telephone number ending in PIT-BULL serve to attract the attention of the audience in a non-deceptive and non-misleading way. In addition, the mnemonic device 1-800-PIT-BULL helps the consumer remember the telephone number, which, as the *Zauderer* Court emphasized, is a primary justification of First Amendment protection for commercial speech (i.e. the speech's value to the consumer). Judge Herring obviously paid close attention to

the *Zauderer* ruling when he made the findings listed in paragraph 9 of his final order.

Moreover, the telephone number and logo convey qualities of the Respondents' firm that prospective clients might find desirable. The logo is particularly informational in a South Florida market where many persons are not fluent in English.

Without proof or even the barest allegation that the logo and telephone number are false, misleading or deceptive, Complainant stated no constitutional ground upon which a restriction of Respondents' commercial free speech may lie. Complainant attempted to ban the speech through misapplication and finagling of its rules and through application of unconstitutional standards.

In its 1999 decision in *Amendments to Rules Regulating the Florida Bar—Advertising Rules*, this Court delved into the issue of attorneys' use of trade names. The Bar had proposed to the Court a prophylactic ban on the use of trade names by attorneys because the Bar claimed that "the use of trade names has proven to be actually and potentially misleading to the public." 762 So.2d at 400. In refusing to adopt the Bar's suggestion that all trade names for attorneys should be banned, this Court paid particular attention to a comment that stated that "a trade name is easy to remember and to refer on to others" and that "(w)hile false, misleading, or deceptive trade names should clearly be prohibited, a trade name that assists clients

in identifying and recalling the attorney who helps them should be permitted in advertisements for legal services." *Id*. at 402.

Again, this Court's emphasis was on allowing a free flow of commercial information to consumers while specifically permitting the Bar to restrict misleading and deceptive trade names. The Court did not open the floodgates for the use of any trade name (e.g., surely, a trade name like "The Best Attorneys" would be subject to restriction); it merely mandated that nondeceptive, nonmisleading trade names could not be squelched.

An effortless analogy can be drawn between an easy-to-remember telephone number like 1-800-PIT-BULL, which is neither false, misleading, nor deceptive and a similarly easy-to-remember trade name, which is permitted. Both merely facilitate a potential client's recall of the advertisement and of the advertising attorney and make it easier for him to remember should he hope to hire the advertising lawyer in the future. Even the Bar itself, in its comment on proposed Rule 4-7.5, referred to its goal as "not interfering with the free flow of useful information to prospective users of legal services." *Id*. at 398. It is fairly easy to see how a non-misleading mnemonic device and a logo representing a visual image of that device can facilitate consumers' memory of Respondents' telephone number should they hope to reach Respondents in relation to a legal matter. If it helps potential consumers, then it is, by definition, useful.

## Conclusion

For the reasons stated above, the October 6, 2004 Amended Final Order of referee William W. Herring should be affirmed.


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## CERTIFICATE OF SERVICE

**I CERTIFY** that a copy hereof has been furnished to Barry Richard, at Greenberg Traurig, P.A. at 101 East College Avenue (32301), Post Office Drawer 1838, Tallahassee, Florida 32302 and Kenneth L. Marvin, Director of Lawyer Regulation, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399 via U.S. Mail on February 4, 2005.

_____
JOHN PAPE

## CERTIFICATE OF COMPLIANCE

**WE CERTIFY** that this brief was prepared using Times New Roman 14-point font and that it complies with the font, margin and spacing requirements promulgated in Rule 9.210(a)(2) Fla. R. App. P.

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JOHN PAPE