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.

INITIAL BRIEF OF COMPLAINANT

On Review of Final Order of Referee

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STATEMENT OF THE CASE AND OF FACTS

Since June 2001, Respondents John Robert Pape and Marc Andrew Chandler have run television commercials advertising the law firm of Pape & Chandler. [A:1 at 53][1] In the advertisements, Respondents encourage accident victims to call their toll free telephone number 1-800-PIT-BULL. [A:1 at 19-20] The advertisements also display as Respondents' logo the head of a pit bull wearing a spiked collar. [A:1 at 19]

Following a finding of probable cause by a grievance committee, The Florida Bar filed complaints against Respondents, alleging that the television advertisements violate Rules 4-7.2(b)(3) and 4-7.2(b)(4) of the Rules Regulating the Florida Bar. [A:2] Proceedings were held before a referee who found that: (i) the television advertisements are constitutionally protected commercial free speech; (ii) the television advertisements do not violate the Rules Regulating the Florida Bar; and (iii) The Florida Bar's prosecution under Rules 4-7.2(b)(3) and 4-7.2(b)(4) unconstitutionally applies those Rules in violation of Respondents' rights of commercial free speech. [A:3 at 3-4] The Florida Bar timely filed this appeal.

[1] Appendices are abbreviated in this brief by appendix number and page as follows: [A:1 at__.]

SUMMARY OF ARGUMENT

The use in a lawyer's advertisement of a picture of a spiked-collar pit bull and the telephone number 800-PIT-BULL provides the consumer with nothing of informational value and is designed to convey the idea that the lawyer engages in tactics that are considered unprofessional and that are prohibited in practice. Because such tactics are prohibited, the suggestion that the lawyer can engage in them is inherently misleading in violation of Rule 4-7.2(b)(4). Moreover, the use of reference to a pit bull is intended to describe or characterize the lawyer's services in violation Rule 4-7.2(b)(3).

The referee's distinction between the characteristics of a lawyer and of a lawyer's legal services for advertising purposes makes no sense and serves no purpose. For purposes of advertising for legal business, a lawyer's personal traits and the traits attributable to his or her legal services are indistinguishable.

There is no constitutional prohibition on regulating commercial speech that is more likely to deceive the public than inform it. The possibility of deception in using pit bulls in lawyer advertising is self-evident. In any event, the Bar's regulation of Respondents' advertisements satisfies the *Central Hudson* test for the regulation of commercial speech. The application of Rules 4-7.2(b)(3) and 4-7.2(b)(4) to Respondents directly

advances the Bar's substantial interests in (i) regulating lawyer advertising and ensuring that the public has access to helpful, relevant information that is not misleading to assist in the comparison and selection of attorneys; and (ii) in ensuring that the public's confidence in the legal system is not diminished. The Bar's regulation of the advertisements by only disallowing the references to pit bulls is narrowly tailored to achieve the desired objective.

ARGUMENT

I. 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 (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 (Fla. 2002).

II. The Referee Erred in Finding that Respondents' Advertisements Do Not Violate Rule 4-7.2(b)(4) and 4-7.2(b)(3) of the Rules Regulating the Florida Bar

At the time the Florida Bar's Complaint was filed, Rule 4-7.2(b)(4) of the Rules Regulating the Florida Bar provided:

> *Prohibited Visual and Verbal Portrayals.* Visual or verbal descriptions, depictions, or portrayals of persons, things, or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading, or manipulative.

R. Regulating Fla. Bar 4-7.2(b)(4).[2]

[2] Rule 4-7.2(b)(4) has since been amended to remove the phrase "must be objectively relevant to the selection of an attorney." *Amendment to the Rules Regulating The Florida Bar*, 875 So. 2d 448, 511 (Fla. 2004). It is the Florida Bar's position that this amendment should have no effect on the outcome of these proceedings.

The referee found that by using the 1-800-PIT-BULL telephone number and the logo of a pit bull wearing a spiked collar Respondents certainly wanted to analogize their qualities with the qualities of a pit bull or else they wouldn't have used them. [A:1 at 66] However, in finding that the Respondents' television advertisements do not violate Rule 4-7.3(4), the referee stated that:

> The 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 these are qualities that a consuming public would want in a trial lawyer; someone who is aggressive, tenacious, loyal, and persistent, and the ad is not improperly manipulative . . .

[A:3 at 2]

Rather than focus on what image the Respondents are trying to project by using the depictions of pit bulls, the referee instead 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.

The Florida Bar has no quarrel with the fact that pit bulls may have positive qualities.[3] However, the issue in this matter is what image

[3] The Bar conceded in interrogatories that pit bulls may embody positive traits such as being "loyal" and "determined." The Bar also advocated in its motion for summary judgment and at the hearing the negative aspects of pit bulls and the public's perception of pit bulls as vicious animals. [A:1 at 20-

Respondents are trying to project by associating themselves with pit bulls. The Bar submits 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." The obvious purpose of showing a pit bull wearing a spiked collar is to demonstrate extreme aggressiveness and viciousness. A spiked collared pit bull is the quintessential icon for demonstrating those traits. If Respondents had wanted to project themselves as loyal or tenacious or persistent, most certainly they would have chosen some other logo than a pit bull in a spiked collar.

The referee makes much of the fact that the Bar failed to introduce into evidence surveys or studies of the public's perception of pit bulls. [A:1 at 13, 33, 34, 67, 68, 105, 106]. However, surveys, or the equivalent evidence are not required where the misleading and deceptive nature of an advertisement is self-evident. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ill.*, 471 U.S. 626, 652-53 (1985). *See also The Florida Bar v. Elster*, 770 So. 2d 1184 (Fla. 2000) (holding that even if there

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26, 33, 39]. To this end, at the hearing Bar counsel introduced into evidence the Miami-Dade County ordinance making it illegal to sell, purchase, obtain, or bring into Miami-Dade County a pit bull and otherwise heavily regulating the ownership of pit bulls. [A:4].

is no evidence that the public has actually been misled, advertisement is still in violation of bar rules if it is inherently misleading).

In *Zauderer*, the Court upheld a state's requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful. 471 U.S. at 652. In reviewing the advertisement at issue, the Court noted that it made no mention of the distinction between "legal fees" and "costs." In finding that it was not necessary for the state to conduct a survey to show that the public could not distinguish between "fees" and "costs" the Court stated that:

> The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is commonplace that members of the public are often unaware of the technical meanings of such terms as 'fees' and 'costs' – terms that, in ordinary usage, might well be virtually interchangeable. When 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.'

Id. at 652-53 (internal citations ommitted).

In the case at bar, no surveys or studies are required to show that a spiked-collared pit bull is likely to convey to many members of the public the negative qualities traditionally associated with such an image. One need look no further than the dictionary to understand what that term "pit bull" commonly means in American culture. A pit bull is "one who behaves in a

markedly aggressive or ruthless manner." American Heritage Dictionary (4th ed. 2000). *See also* American Heritage College Dictionary (3d ed. 1993) (defining pit bull as "marked by or exhibiting great aggression, ruthlessness, and often bitterness").

An internet search using the term "pit bull attack" uncovers story upon story of brutal pit bull attacks upon humans in this country. Further, the vicious and savage nature of pit bulls has been consistently documented in case law in Florida and around the country.[4] *E.g.*, *Clark v. State*, 632 So. 2d 88, 89 (Fla. 4th DCA 1994) (alleged deadly weapon was pit bull), *overruled on other grounds*, 669 So. 2d 1085 (Fla. 4th DCA 1996); *Giaculli v. Bright*, 584 So. 2d 187, 189 (Fla. 5th DCA 1991) ("[p]it bulls as a breed are known to be extremely aggressive and have been bred as attack animals"); *State v. Peters*, 534 So. 2d 760, 764, 765 n. 6 (Fla. 3d DCA 1988) (reviewing ordinance setting forth the traits of pit bulls including "extremely powerful jaws, a high sensitivity to pain . . . a natural tendency to refuse to

[4] Florida case law is replete with cases involving attacks and maulings by pit bulls. *E.g.*, *Florida Residential Property & Casualty Joint Underwriting Assn. v. Anthony*, 842 So. 2d 951 (Fla. 4th DCA 2003); *Philbin v. American States Ins. Co.*, 729 So. 2d 484 (Fla. 4th DCA 1999); *White v. Whitworth*, 509 So. 2d 378 (Fla. 4th DCA 1987); *Vasques v. Rocha*, 509 So. 2d 1241 (Fla. 4th DCA 1987); *Ward v. Young*, 504 So. 2d 528 (Fla. 2d DCA 1987); *American States Ins. Co. v. Allstate Ins. Co.*, 484 So. 2d 1363 (Fla. 5th DCA 1986); *Anderson v. Walthal*, 468 So. 2d 291 (Fla. 1st DCA 1985); *Carter v. City of Stuart*, 433 So. 2d 669 (Fla. 4th DCA 1983), *approved*, 468 So. 2d 955 (Fla. 1985); *Manucy v. Manucy*, 362 So. 2d 478 (Fla. 1st DCA 1978).

terminate an attack once it has begun; and . . . a greater propensity to bite humans than all other breeds" and pointing out that a pit bull's massive jaws can "crush a victim with up to . . . 2,000 pounds of pressure per square inch – three times that of a German Shepherd or Doberman Pinscher, making the Pit Bull's jaws the strongest of any animal per pound"; quoting testimony that pit bulls will "bite like a shark, will bite and lock, and will not release, and if it does, whatever it bites, its going to keep in its mouth"; taking note of newspapers and television news programs reporting brutal attacks), *rev. denied,* 542 So. 2d 1334 (Fla 1989); *Matthews v. Amberwood Assocs. Lmt. Partnership, Inc.,* 351 Md. 544, 561 (Md. 1998) ("the extreme dangerousness of [pit bulls] . . . is well recognized"); *Dog Fed'n of Wis. v. City of South Milwaukee,* 504 N.W.2d 375, 381 (Wis. Ct. App. 1993) ("the most prominent difference between the pit bull terrier and other breeds is its capability of inflicting very serious damage"), *rev. denied,* 508 N.W. 2d 423 (Wis. 1993); *State v. Anderson,* 566 N.E. 2d 1224 (Ohio 1991) (upholding statute stating that pit bull is prima facie evidence of ownership of a vicious dog), *cert. denied,* 501 U.S. 1257 (1991); *Garcia v. Village of Tijeras,* 767 P.2d 355, 359 (N.M. Ct. App. 1988) (pit bulls possess "inherent characteristics of . . . viciousness and unpredictability not found in any other breed of dog"), *cert. denied,* 765 P.2d 758 (N.M. 1988); *Hearn v. City of*

Overland Park, 772 P.2d 758, 765, 768 (Kan. 1989) ("pit bulls are both more aggressive and destructive than other dogs. . . . [p]it bulls possess a strongly developed 'kill instinct' not shared by other breeds . . . pit bull dogs represent a unique public health hazard not presented by other . . . dogs . . . . [p]it bull dogs possess both the capacity for extraordinary savage behavior . . . this capacity for uniquely vicious attacks is coupled with an unpredictable nature"; noting that of 32 human deaths in the United States due to dog attacks between 1983 and 1989, 23 were caused by pit bulls), *cert. denied*; 493 U.S. 976 (1989); *Starkey v. Township of Chester,* 628 F. Supp. 196, 197 (E.D. Pa. 1986) (finding that the township could reasonably determine that pit bulls are dangerous; noting that a pit bull "bites to kill without signal").

Moreover, because of the unique danger perceived by many to be posed by pit bulls, many local governments have singled out pit bulls by enacting ordinances to control or ban the breed in their communities, and courts have upheld these ordinances because the inherent viciousness of pit bulls provides a rational basis for the regulations.[5] *See, e.g., American Dog Owners Ass'n v. Dade County,* 728 F. Supp. 1533 (S.D. Fla. 1989); *Peters*, 534 So. 2d at 760; *Dog Fed'n of Wis.*, 504 N.W. 2d at 423; *Holt v. City of Maumelle,* 817 S.W.2d at 208 (Ark. 1991); *Colorado Dog Fanciers, Inc. v.*

[5] *See* Miami-Dade County ordinance introduced into evidence at the hearing. [A:4]

City and County of Denver, 820 P.2d at 644 (Colo. 1991); *American Dog Owners Ass'n, Inc. v. City of Des Moines,* 469 N.W.2d at 416 (Iowa 1991); *Garcia,* 767 P.2d at 355; *Greenwood v. North Salt Lake City,* 817 P.2d 816 (Utah 1991); *City of Richardson v. Responsible Dog Owners of Tex.,* 794 S.W.2d 17 (Tex. 1990); *American Dog Owners Ass'n v. City of Yakima,* 777 P.2d 1046 (Wash. 1989); *Hearn,* 772 P.2d at 758; *Starkey,* 628 F. Supp. at 196.

Whether or not a given pit bull or pit bulls in general are vicious is not the issue. The public's likely perception of the advertisements at issue is the issue. The ordinances imposed by municipalities across the country distinguishing pit bulls from other dog breeds and banning or regulating pit bulls reflect the common perception by the American public that pit bulls are inherently vicious, savage, overly aggressive, unrelenting and ruthless. These are the inherent characteristics of pit bulls projected by an illustration of a pit bull in a spiked collar. And these inherent characteristics of pit bulls are not relevant or acceptable characteristics for lawyers in the practice of law in the State of Florida.

As an advocate, a lawyer in Florida should "zealously" assert his or her client's position. Preamble, Ch. 4, R. Regulating Fla. Bar. However, a lawyer's obligation of zealous representation does not mean that a lawyer

may harass and intimidate others. *Id.*; *The Florida Bar v. Buckle*, 771 So. 2d 1131 (Fla. 2000) (imposing discipline on an attorney for threatening, disparaging, intimidating and humiliating the opposing party). Over-zealousness in the legal profession is not acceptable. As this Court stated in *Buckle:*

> Certainly, the principles underlying [the Rules of Professional Conduct of the Rules Regulating the Florida Bar] include basic fairness, respect for others, human dignity, and upholding the quality of justice. Zealous advocacy cannot be translated to mean win at all costs, and although the line may be difficult to establish, standards of good taste and professionalism must be maintained while we support and defend the role of counsel in proper advocacy. . . . [a] lawyer's obligation of zealous representation should not and cannot be transformed into a vehicle intent upon harassment and intimidation.

771 So. 2d at 1134. *See also The Florida Bar v. Martocci,* 791 So. 2d 1074 (Fla. 2001) (finding that attorney crossed the line from that of zealous advocacy to unethical misconduct in making remarks to belittle and humiliate opposing party and counsel).

Attorneys in Florida may not elevate the perceived duty of zealous representation over all other professional duties. *Plant v. Doe,* 19 F. Supp. 2d 1316 (S.D. Fla. 1998); *Lingle v. Dion,* 776 So. 2d 1073 (Fla. 4th DCA 2001); *Visoly v. Security Pacific Credit Corp.,* 768 So. 2d 482 (Fla. 3d DCA 2000); *Carnival Corp. v. Beverly,* 744 So. 2d 489 (Fla. 1st DCA 1999);

Sanborn v. State, 474 So. 2d 309 (Fla. 3d DCA 1985); *Sanchez v. Sanchez*, 435 So. 2d 347 (Fla. 3d DCA 1983). In fact, all attorneys in Florida take an oath to "abstain from all offensive personality." [A:5]

Therefore, while zealousness and aggressiveness are acceptable professional qualities for attorneys in Florida,[6] those traits perceived by many as being inherent in pit bulls such as viciousness, savage behavior, and extreme aggressiveness, are not. Consequently, advertisements that suggest that a lawyer, if hired, can and will utilize tactics involving such behavior are inherently misleading.[7]

Further, the television advertisements containing the 1-800-PIT-BULL telephone number and the logo of the pit bull wearing the spiked collar are misleading because they are subjective statements of the quality of Respondents and their legal services. In determining whether lawyer

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[6] Note that in May 2001 the Florida Bar issued a preliminary opinion regarding two of Respondents' television scripts which contained the words "very aggressive." [A:6] However, the scripts submitted to the Bar by Respondent did not contain the 1-800-PIT-BULL telephone number or the pit bull logo. [A:7] The Bar stated in its preliminary opinion that a final opinion would be issued once the final transcripts and a copy of the television advertisements on video cassette were submitted for review. Respondents never submitted the final transcripts or the video cassette to the Bar for review.

[7] Even if the pit bull connotation is deemed to be only an exaggeration of the types of lawyers or legal services that Respondents offer, such exaggeration is also a violation of Rule 4-7.2(b)(4). *See* Comment to Rule 4-7.2(b)(4).

advertisements are misleading, the United States Supreme Court has distinguished subjective statements of opinion or quality of a lawyer's services from statements of objective and verifiable facts that may support an inference of quality.

In *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.,* 496 U.S. 91 (1990), the Supreme Court reviewed a lawyer's letterhead upon which he advertised his certification as a trial specialist by the National Board of Trial Advocacy (NBTA). The Court stated that:

> In evaluating petitioner's claim of certification, the Illinois Supreme Court focused not on its facial accuracy, but on its implied claim 'as to the quality of [petitioner's] legal services,' and concluded that such a qualitative claim 'might be so likely to mislead as to warrant restriction.' This analysis confuses the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality. A lawyer's certification by NBTA is a verifiable fact, as are the predicate requirements for that certification. Measures of trial experience and hours of continuing education, like information about what schools the lawyer attended or his or her bar activities, are facts about a lawyer's training and practice. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice.

Peel, 496 U.S. at 100-101 (internal citations omitted)

In *Zauderer*, the Supreme Court reviewed an advertisement of a lawyer who was publicizing his willingness to represent women suffering injuries from the use of the Dalkon Shield intrauterine device (IUD). The advertisement featured an illustration of an IUD. The Court found that the illustration of the IUD was an accurate representation of the Dalkon Shield, and had no features that were likely to deceive, mislead, or confuse the reader. The Court stated:

> The absence from appellant's advertising of any claims of expertise or promises relating to the quality of appellant's services renders the Ohio Supreme Court's statement that 'an allowable restriction for lawyer advertising is that of asserted expertise' beside the point. Appellant stated only that he had represented other women in Dalkon Shield litigation – a statement of fact not in itself inaccurate. Although our decisions have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services, they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

Zauderer, 471 U.S. at 640 n.9. *See also Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (finding that lawyer's advertisement was not misleading and stating that "[t]his case does not involve any question concerning . . . advertising as to the quality of legal services, but only the question whether lawyers may constitutionally advertise the prices at which certain routine services will be performed").

In *Zauderer,* the illustration of the Dalkon Shield informed the public that the lawyer represented cases involving Dalkon Shields – an objective and verifiable fact that was of informational value to a person seeking or in need of legal services relating to the Dalkon Shield. The illustration did not make a subjective statement as to the quality of the lawyer's services. Therefore, the Court found that it was not misleading.

The purpose for which statements are used in lawyer advertising is key. Here, it would be one thing if the pit bull references were being used to communicate that Respondents represent victims of dog bites or matters involving pit bulls. Such a statement would be an objective, verifiable fact and would provide the same type of useful information as did the Dalkon Shield picture in *Zauderer*. But the Respondents do not claim to practice dog bite or pit bull law and are not trying to convey such information. What they are patently attempting to convey is a suggestion that they possess and use in their practice certain traits that are subjective and unverifiable by any objective test.

This point of law is very clearly recognized in the Comment to Rule 4-7.2(b)(4) which provides that:

> Subdivision (b)(4) prohibits visual or verbal descriptions, depictions, or portrayals in any advertisement which create suspense, or contain exaggerations or appeals to the emotions, call for legal services, or create consumer

> problems through characterization and dialogue ending with the lawyer solving the problem. *Illustrations permitted under Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985), are informational and not misleading, and are therefore permissible.* ***As an example, a drawing of a fist, to suggest the lawyer's ability to achieve results, would be barred.*** Examples of permissible illustrations would include a graphic rendering of the scales of justice to indicate that the advertising attorney practices law, a picture of the lawyer, or a map of the office location.

(Emphasis added). **For purposes of suggesting an ability to achieve results, a drawing of a fist and a drawing of a pit bull are indistinguishable.**

The advertisements are also in violation of Rule 4-7.2(b)(3) which provides in pertinent part:

> *Descriptive Statements.* A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications . . . .

R. Regulating Fla. Bar 4-7.3(b)(3).

In ruling that the Respondents' television advertisements do not violate Rule 4-7.2(b)(3), the referee found that the 1-800 PIT-BULL number and the pit bull logo are statements of quality. However, the referee drew a distinction between qualities of a lawyer and qualities of a lawyers' services, determined that the advertisements related solely to the qualities of the lawyers, and found that this was not prohibited by the rule.

Such distinction makes no sense and is not supported by anything in the comment or history of the rule. For purposes of advertising for legal business, a lawyer's personal traits and the traits attributable to his or her legal services are indistinguishable.[8] *See The Florida Bar v. Lange,* 711 So. 2d 518 (Fla. 1998) (finding that advertisement stating "When the Best is Simply Essential" was both self-laudatory and purported to describe attorney's legal services). If a lawyer is referring to his or her personal "qualities" in an advertisement for business, the purpose of the reference is surely to convey the idea that those "qualities" will be utilized in providing legal services or the use of the reference in the advertisement would serve no purpose.

Here, the advertisements in question are for the purpose of promoting and obtaining legal business for Respondents' law firm. As such, whether Respondents are attempting to analogize their personal characteristics with those of pit bulls or the characteristics of their legal services with those of pit bulls makes no difference for the purpose of the advertisement. Either way,

[8] Although in response to questions at the hearing, Bar counsel stated that with regard to advertising the Bar recognizes a distinction between the qualities of a lawyer and a lawyer's legal services, the response is of no consequence to this appeal. There is no suggestion that the Bar conveyed advice to that effect to the Respondents and the Bar rejects the idea that the distinction was intended to define the rule.

Respondents are associating pit bulls with their law firm. Either way, the advertisements are intended to convey the likelihood of success.

To uphold the referee's ruling that Respondents are not in violation of the Rule 4-7.2(b)(3) because they attribute the qualities or characteristics of pit bulls to themselves as lawyers as opposed to the quality of their legal services would leave both the Bar and advertising lawyers without any meaningful guidelines as to what is or is not permissible. The rule would be unenforceable.

III. The Referee Erred in Finding that Rules 4-7.2(b)(3) and 4-7.2(b)(4) were Unconstitutionally Applied as to Respondents in Violation of the Federal and Florida Constitutions and that Respondents' Television Advertisements are Constitutionally Protected Commercial Speech

Deceptive advertising receives no First Amendment protection and there is no constitutional prohibition on regulating commercial speech that is more likely to deceive the public than to inform it. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980).[9] As set forth more fully above, using depictions of pit bulls in lawyer advertising is self-evidently deceptive. The Bar's inferences regarding the public's

[9] The scope of the Florida Constitution's protection of freedom of speech is the same as required under the First Amendment and Florida courts apply the principles of freedom of speech as announced in the decisions of the United States Supreme Court. *Café Erotica v. Florida Dept. of Transportation*, 830 So. 2d 181 (Fla. 1st DCA 2002), *rev. denied*, 845 So. 2d 888 (Fla. 2003).

perception of pit bulls are not mere speculation or unsupported conjecture. Communities across the nation have adopted ordinances to protect the public against pit bulls. Case law is abundant regarding the vicious nature of pit bulls. Surveys or equivalent evidence is not required for the possibility of deception involving an aspect of our culture that is so commonplace and self-evident. *See Zauderer*, 471 U.S. at 652-53.

Only commercial speech that is not inherently misleading is subject to the constitutional analysis set forth in *Central Hudson*. In any event, The Florida Bar's regulation of Respondent's television advertisements meets the *Central Hudson* standard.

The Bar's application of Rules 4-7.2(b)(3) and 4-7.2(b)(4) to Respondents 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 helpful, relevant information that is not misleading to assist the public in the comparison and selection of attorneys. Second, the Bar has a substantial interest to ensure that the public's confidence in the legal system is not diminished. The Bar's application of the rules in question to Respondents directly advances both of these interests.

The qualities commonly associated with pit bulls -- viciousness, savageness, extreme aggressiveness, and ruthlessness -- are not qualities of a

lawyer or of a lawyer's legal services which are acceptable professional traits in Florida. As such, any verbal or visual description or depiction of a pit bull is not helpful or relevant information for the selection of a Florida attorney by a member of the public.

The pit bull logo and the 1-800-PIT-BULL telephone number are also misleading because they are statements of the subjective quality of Respondents and their legal services. *See Peel*, 496 U.S. at 100-101; *Zauderer*, 471 U.S. at 640 n.9; *Bates*, 433 U.S. at 350). Further, the pit bull depictions are susceptible of misleading consumers to believe that they are hiring a lawyer who behaves like a pit bull in the rendering of legal services. As previously discussed, such behavior is improper and is prohibited in Florida.

Descriptions or depictions of lawyers or their legal services as embodying the traits of pit bulls do not comport with the professional standards to which lawyers are currently held in Florida. It is the Bar's position that Respondents' television advertisements do nothing but threaten such professional standards and erode the confidence of the public in the legal system.

Hence, in regulating Respondents' television advertisements under Rules 4-7.2(b)(3) and 4-7.2(b)(4), The Florida Bar has directly advanced its

substantial interests. By disallowing references to pit bulls, The Bar in no way impedes Respondents' ability to convey information about their professional legal services. Such regulation is narrowly tailored to meet the Bar's interests.

In his finding that Respondents' constitutional rights have been violated, the referee analogizes the illustration of the pit bull in the case at bar with the illustration of the Dalkon Shield in *Zauderer*. In *Zauderer*, the Court held that the state's desire to maintain dignity of legal advertisements and preventing advertisements that some might find embarrassing or offensive did not justify suppressing the illustration of the IUD which was found to be informational and not misleading. *See* discussion of *Zauderer*, *supra.*

As noted by the referee, it is not relevant that Respondents' illustration of the pit bull, like the illustration of the IUD in *Zauderer*, might be found by some members of the public to be offensive or distasteful. However, unlike the illustration of the IUD, the illustration of the pit bull is also deceptive, misleading and confusing. The logo of the pit bull wearing the spiked collar is exactly like the drawing of a fist given as an example in the Comment to Rule 4-7.2(b)(4). Like the fist, pit bull logo suggests the ability to achieve results and is therefore misleading. Hence, like the

illustration of a fist, the illustration of a pit bull runs afoul of standard set forth in *Zauderer*.

Respondents' television advertisements are not constitutionally protected commercial speech and Rules 4-7.2(b)(3) and 4-7.2(b)(4) have not been unconstitutionally applied to Respondents.

Conclusion

With regard to the foregoing issues, the Court is respectfully requested to disapprove the order of the referee.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this brief were sent by U.S. mail to: Marc Andrew Chandler and John Robert Pape, One Financial Plaza, Suite 2210, Fort Lauderdale, Florida 33394, this 10th day of January, 2005.

_____
Barry Richard

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).

_____
Barry Richard

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