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.

REPLY BRIEF OF COMPLAINANT

On Review of Final Order of Referee

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

ARGUMENT

I. Standard of Review.

The Florida Bar represented the correct standard of review in attorney disciplinary proceedings in its Initial Brief. A referee's findings of fact regarding guilt in an attorney disciplinary proceeding carry a presumption of correctness and are reviewed under a clearly erroneous standard. *The Florida Bar v. Senton,* 882 So. 2d 997, 1001 (Fla. 2004). A clearly erroneous standard means that this Court will reverse if such findings are without support of competent, substantial evidence, clearly against the weight of the evidence, or if the law has been misapplied to the established facts. *See Holland v. Gross* 89 So. 2d 255, 258 (Fla. 1956). Although Respondents choose not to acknowledge it (Answer Brief (AB) at 3), this Court has also held that in attorney disciplinary proceedings a referee's conclusions of law are not given the same presumption of correctness afforded to a referee's findings of fact. *The Florida Bar v. Trazenfeld,* 833 So. 2d 734, 736 (Fla. 2002).

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

The referee made a specific finding that Respondents' television advertisements are not deceptive or misleading. Remarkably, Respondents

challenge the Bar's ability to raise this as an issue in this appeal. AB at 20-23. Of course, the Bar appropriately addressed this finding in its Initial Brief. Moreover, the Bar prosecuted this case under Rule 4-7.2(b)(4) which prohibits attorney advertising that is "deceptive, misleading or manipulative." R. Regulating Fla. Bar 4-7.2(b)(4).

As repeatedly mentioned by Respondents in their Answer Brief, the referee based its finding regarding the deceptive and misleading nature of the advertisements on the basis that the Bar made no record to the contrary with surveys or studies of the public. AB 5-6, 11, 23, 30. However, as explained in detail by the Bar in its Initial Brief (Initial Brief (IB) at 6-7), pursuant to controlling precedent, surveys or studies, or the equivalent evidence, are not required where the misleading and deceptive nature of an advertisement is inherent and self-evident. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Illinois*, 471 U.S. 626, 652-53 (1985); *The Florida Bar v. Elster*, 770 So. 2d 1184, 1987 (Fla. 2000) (referee's finding that business card was not misleading because there was no evidence that anyone had actually been misled was erroneous). Indeed it is self-evident and does not take a survey or study to determine that pit bulls are commonly perceived by the American public as vicious, extremely aggressive, relentless, and ruthless. Such inferences by the Bar regarding

such public perception are not "wild and unsubstantiated speculation" (AB at 6) or "rank speculation and melodrama" (AB at 11) as shown by the Bar's cites to just a sliver of the case law in Florida and elsewhere regarding pit bull attacks and pit bull ordinances adopted by municipalities banning or otherwise heavily regulating this isolated category of dogs. IB at 8 – 11.

Respondents correctly point out that the Bar conceded in interrogatories that pit bulls may embody positive traits such as being "loyal" and "determined." AB at 8, 21. However, Respondents' unfounded assertion that the Bar "hung its entire case" on the proffer of the interrogatories is misleading. AB at 25. 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 in question is the issue. To this end, Bar trial counsel vigorously 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 and entered into evidence the Miami-Dade County ordinance distinguishing pit bulls from other dogs and banning pit bulls in Miami-Dade County. Transcript at 20-26, 33, 39.

By finding that the Bar did not make a proper record to show that the advertisements were not misleading or deceptive because it did not enter into evidence surveys or studies, or additional evidence, for something so self-

evident and inherently misleading is contrary to controlling precedent. Hence, the referee misapprehended the law on this issue and therefore misapplied the law to the facts in this matter.

Respondents list a number of logos that have been held by the Bar to be acceptable and claim that their illustration of a pit bull in a spiked collar is no different from these other logos. AB at 26-27. Respondents apparently fail to understand the distinction between 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, and provide no answer on this point. When an illustration presents an objective and verifiable fact that is of informational value to a person seeking a certain type of representation, the illustration is not misleading. *See Zauderer,* 471 U.S. at 640 n.9; *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois,* 496 U.S. 91, 100 (1990); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). When an illustration suggests an ability to achieve results or a characteristic of practice, particularly one that suggests the ability to engage in a type of practice considered unethical and unprofessional, such representation is subjective and unverifiable by any objective test, and is misleading. *See* Comment to Rule 4-7.2(b)(4).

The purpose for which statements are used in lawyer advertising is key. Therefore, illustrations referred to by Respondents of (i) a woman straightening the clothes of two small children in a family law advertisement; (ii) handcuffs in a criminal law advertisement; and (iii) a family in a family owned business in an advertisement pertaining to representation of family limited partnerships are acceptable under this standard. *See* AB at 26-27. These illustrations provide useful types of objective and verifiable information about the type of legal services being offered.

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 statement would be an objective verifiable fact and would provide the same type of information as do the illustrations set forth above. But Respondents are using the illustration of a pit bull in a spiked collar to suggest that they possess and use in their practice certain traits that are subjective and unverifiable by any objective test. In this regard, the pit bull logo is indistinguishable from a logo of a fist which suggests an ability to achieve results, and utilize tactics considered unprofessional and unethical, which would be barred pursuant to the Comment to Rule 4-

7.2(b)(4). Again, the referee misapprehended the law and therefore misapplied the law to the facts in the matter at hand.

III. The Referee Erred in Finding that Respondents' Advertisements Do Not Violate Rule 4.7.2(b)(3) of the Rules Regulating the Florida Bar.

Despite Respondents' claim to the contrary (AB at 15), there is no "bold distinction" between a description of the quality of legal services and a description of the attributes of an attorney. For purposes of advertising for legal business, a lawyer's personal traits and the traits attributable to his or her legal services are indistinguishable. If a lawyer is referring to his or her personal qualities in an advertisement for business, the purpose of the reference is to convey the idea that those qualities will be utilized in providing legal services.

Here, 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 advertisements. Contrary to Respondents' assertion (AB at 13), the position taken by the Bar on the issue is not at odds with its response in the interrogatories.[1] To the extent that Bar counsel at the hearing, while under

[1] The Bar also fails to see what its admission that "The American Pit Bull Terrier ('Pit Bull') is not synonymous with quality legal services" has to do with defining Rule 4-7.2(b)(3). AB at 13; AB at Appendix 4, Admission 10.

questioning by the referee, stated that the Bar recognizes a distinction between the qualities of a lawyer and the lawyer's legal services, the Bar recedes from this position. To uphold the referee's ruling that Respondents are not in violation of Rule 4-7.2(b)(3) because they attribute the qualities or pit bulls to themselves rather than to their legal services would establish precedent providing a huge loophole in the enforceability of the Rule.

Respondent argues that because the Bar has permitted the use of some descriptive words in attorney advertising that the Bar is applying the rules "subjectively and haphazardly" and in a "wildly inconsistent and haphazard" manner. AB at 15, 17. The Bar submits that it is within the Bar's reasonable discretion to interpret the Rule so as to make the distinction between characteristics that represent acceptable professional conduct and which are not overly subjective from those that cross the line into unprofessional, unacceptable conduct and which are overly subjective statements of quality. Certainly, it is within the Bar's reasonable discretion to draw the line when an attorney wants to represent in advertisements that he or she possesses the characteristics of a pit bull, such qualities of which will impliedly be utilized in providing legal services.[2]

[2] The Bar notes that Respondents emphasize in their Answer Brief that their logo of a pit bull in a spiked collar is advertised "in a South Florida market where many persons are not fluent in English." AB at 46.

IV. The Referee Erred in Finding that Rules 4-7.2(b)(3) and 4-7.2(b)(4) were Unconstitutionally Applied as to Respondents and that Respondents' Television Advertisements are Constitutionally Protected Commercial Speech.

A state may prohibit entirely advertising by an attorney that is misleading. *In re R.M.J.*, 455 U.S. 191, 203 (1982)*; Peel,* 496 U.S. 91, 100 (1990)*; Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York,* 447 U.S. 557, 563-64 (1980). Here, the logo of the pit bull and the 1-800-PITBULL telephone number are inherently misleading and may be prohibited by the Bar. 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) of such misleading advertising that may be barred. Like the fist, the pit bull suggests the ability to achieve results and is therefore inherently misleading. Surveys or equivalent evidence is not required for the possibility of deception involving an aspect of our culture that is so common place and self-evident. *Zauderer,* 471 U.S. at 652-53.

The United States Supreme Court has found the following advertising by attorneys not to be misleading: (i) advertising of prices;[3] (ii) advertising identifying jurisdictions in which an attorney is licensed to practice;[4] (iii)

[3] *Bates,* 433 U.S. at 350.
[4] *R.M.J.,* 455 U.S. at 191.

mailing of cards announcing opening of an office;[5] (iii) illustration of a Dalkon Shield IUD where attorney represented victims of the Dalkon Shield;[6] (iv) truthful and non-deceptive letters to potential clients known to face particular legal problems;[7] and (v) advertising of certification as a specialist.[8] Obviously, the United States Supreme Court has not addressed whether an illustration of a pit bull or a 1-800-PITBULL number in attorney advertisements is misleading. However, the existing case law clearly indicates that such unverifiable statements of the subjective quality of attorneys and their legal services are viewed as misleading. *See Peel,* 496 U.S. at 101; *Zauderer,* 471 U.S. at 640 n. 9; *Bates,* 422 U.S. at 350. Respondents fail to address this specific and crucial issue in their Answer Brief and accordingly cannot undermine the rationale of the United States Supreme Court on this point.

In any event, it has long been established that The Florida Bar has a substantial interest in regulating attorney advertising. *See, e.g, The Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 624-25 (1995). As fully set forth in the Initial Brief, the Bar's regulation of Respondents' advertisements meets all other prongs of the *Central Hudson* test. IB 19-22. Respondents have

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[5] *Id.*
[6] *Zauderer,* 471 U.S. at 626.
[7] *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466 (1988).
[8] *Peel,* 496 U.S. at 91.

made no effective argument in their Answer Brief and have cited to no authority to show otherwise.

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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 17th day of February, 2005.

_____
M. Hope Keating

CERTIFICATE OF COMPLIANCE

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

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M. Hope Keating