

**IN THE SUPREME COURT OF FLORIDA**

Before A Referee

THE FLORIDA BAR,

Complainant,

Supreme Court Case no: SC08-1278

vs.

TFB File no: 2008-90,049(02S)  
TFB File no: 2008-90,094(02S)

GARY ELVIN DOANE,

Respondent.

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**APPELLANT'S SECOND AMENDED INITIAL BRIEF**

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**STATEMENT OF THE CASE AND FACTS**

Respondent used the trade name “Legal Experts” or “Legal Expert” from 2005 through 2008. The Florida Bar objected to the use of the name, claiming it was false, misleading or deceptive. Respondent has denied the allegations and asserted defenses thereto.

The COMPLAINT OF THE FLORIDA BAR OF MINOR MISCONDUCT was brought in two counts. Count I - Misleading Trade Name, alleges that the name “Legal Experts” is misleading under Rule 4-7.2(c)(1)(A), Statements about Legal Services, alleging that because it represents that there is more than one attorney in the firm, when there was not, and that alleging it represents that all attorneys in the firm are experts in all fields. (Respondent changed the name to the singular, “Expert” well before the charges against Respondent were filed.)

Count II - Improper Use of the Term “Experts” in Firm Name, alleges that the name is misleading because it allegedly states that Respondent is - ...”an expert

generally when he is board certified in only one area of the law - civil trial.” It also alleges that the firm name violates Rule 6-3.4(c), Certification of Individuals Only

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(Limitations on the Powers or the Board of Governors), because a law firm cannot be board certified.

As to the issues in the allegations, initially please note that the use of a trade name is permitted by the Rules Regulating the Florida Bar 4-7.9(b), Trade Names (Firm Names and Letterhead) -

“A lawyer may practice under a trade name if the name is not deceptive ...”

The Florida Bar first made the allegations of deceptive trade name against Respondent in Case No. 2005-31,400, Complaint by The Florida Bar Against Gary Elvin Doane. The matter was brought before the Ninth Judicial Circuit Grievance Committee and the finding was No Probable Cause, dated October 27, 2005. (Stipulation of Facts, attachment “P”) The Committee recommended that Respondent accurately reflect his area of Board Certification as a Civil Trial Attorney, which Respondent complied with.

Despite the finding of No Probable Cause, the Florida Bar again made the same allegations against Respondent's use of the trade name in Case No. 2006-31,524, Complaint by The Florida Bar Against Gary Elvin Doane. The matter was again brought before the Ninth Judicial Circuit Grievance Committee and the

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finding was again No Probable Cause, dated December 27, 2006. (Stipulation of Facts, attachment "V"). Respondent thereafter ceased the use of the plural of the word "expert" and added the phrase "Board Certified Civil Trial Attorney" in every location where the firm name was used.

Despite two findings of No Probable Cause, the Florida Bar elected to again bring the same charges against Respondent, yet to choose a different forum, hoping for a different result. Indeed that is what the Bar got, the Statewide Advertising Grievance Committee found probable cause and the litigation below began.

This Honorable Court designated the Honorable William L. Roby, Chief Judge of the Nineteenth Judicial Circuit of Florida to appoint a referee in the matter. Judge Roby did not appoint a referee. A referee was appointed by Judge Elizabeth Metzger, who had no authority from this Court to make any appointment.

The referee who decided this matter did not have proper authority to make any rulings whatsoever. The referee that decided this case had no jurisdiction over Respondent.

The undersigned's RESPONDENT'S MOTION TO DISMISS, ANSWER AND DEFENSES dated July 28, 2008 was filed and the motion portion of it heard.

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The pleading raised the following issues:

- that there was no allegation as to how the name could mislead anyone, nor of any person who claimed to have been mislead.
- Respondent was Board Certified and was entitled to use the word "expert" as per Rule 4-7.2(c)(6), Communication of Fields of Practice, which specifically states such.
- the use of the word "expert" had already been extensively reviewed by the Supreme Court and the use approved (albeit with a dissenting opinion) in In Re: Amendments to the Rules Regulating the Florida Bar - Advertising , Revised Opinion dated December 20, 2007. (Please note that the Opinion is attached to RESPONDENT'S MOTION TO DISMISS, ANSWER AND DEFENSES dated July 28, 2008.)

- the Florida Supreme Court case of The Florida Bar v. Fetterman, 439 So. 2<sup>nd</sup> 835 (Fl. S.C. 1983) determined that the constitutional guarantees of free speech protect the attorney's use of a trade name. The Bar must show that the name is "inherently or operatively misleading" and the allegations against Respondent Doane's use of the name "Legal Expert" did not include any such allegations.

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- that Respondent had been twice prosecuted by The Florida Bar with two findings of No Probable Cause and that it was manifestly unfair and a violation of due process to continue to prosecute Respondent.

- that bringing another case for the same activity before a different forum, the Statewide Advertising Grievance Committee, after two prior findings of No Probable Cause was improper forum shopping.

- that if The Florida Bar wished to continue to prosecute Respondent for the same activity despite two prior findings of No Probable Cause, it was required to do so in the same grievance committee that heard the case initially. Rule 3-7.4(j)(3), Effect of No Probable Cause Finding, allows the "reopening" of a case when a committee finds No Probable Cause, but does not allow forum shopping in a different committee.

- that The Florida Bar failed to inform the Respondent of the identity of any complaining party.

- that The Florida Bar filed the Complaint as No. 2007-90,049 and 2007-90,094, neither of which have anything to do with Respondent, as the current allegations were filed in 2008, and the Complaint was not properly amended.

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Despite the meritorious nature of RESPONDENT'S MOTION TO DISMISS, ANSWER AND DEFENSES, the Referee denied the motion in all of its aspects. It was agreed between the parties that no member of the public has ever complained to The Florida Bar, or anyone else, that the trade name was misleading or deceptive in any way. The parties engaged in discovery. Notably Respondent propounded a Request to Produce dated September 9, 2008 and Interrogatories dated September 10, 2008.

The Request to Produce sought -

1. - any writings in reference to any person who may have complained against Respondent.
2. - any writings in reference to the prosecution of a case involving a trade name in the past 5 years.
3. - any writings that would tend to show that any person has suffered any

harm by Respondent's trade name.

The Florida Bar served its Responses and Objections to Respondent's Request to Produce on November 13, 2008 and noted that it had nothing to produce in response to number 1 and number 3. As to number 2, The Florida Bar

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produced some materials, but objected as some such files were in the investigative stage, but most importantly - was unable to produce files in which the accused had been exonerated, having destroyed them, stating -

“....files and records of complaints in which no discipline are imposed are destroyed after one year as a matter of Bar policy and the information is purged from the Bar’s records after one year.”

The Bar destroys most every file that may be useful to a Respondent in providing himself a defense.

As to the Interrogatory answers, the Bar served answers dated November 13, 2008. As to the identity of any person who complained of, or who was harmed or mislead and how they might have been harmed or mislead, the answer admitted that no member of the public had ever complained.

Interrogatory number 4 asked for the identity of other Respondent's

involved in grievances concerning a trade name for the last 5 years. As in the response to the request to produce, the Bar was unable to provide any information, having destroyed the files in which there was no discipline imposed, as they destroyed the files on cases they lost.

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Also, notable is interrogatory 5 wherein the Bar is asked to identify every document provided to the Statewide Advertising Grievance Committee concerning this Respondent's case. The Bar objects to providing any information contending a privilege that it is "work product", "attorney client" and "advice of counsel" to the Statewide Advertising Grievance Committee.

Respondent would certainly dispute that there is any due process in a procedure wherein the Bar secretly presents a case to its "client" and thereby obtains the right to prosecute a member. Certainly, there is a conflict of interest as the Bar considers the Grievance Committee its "client", who indicted the Respondent.

This and the other failures of law and evidence in the matter brought Respondent to file **RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SANCTIONS**. The issues raised included that the standard for imposing sanctions against a member of the Bar is "clear and convincing

evidence” Lawyer Sanction Standard 1.1, and that there was no evidence as to any violation alleged.

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The motion for summary judgment cited to this Honorable Court’s opinion’s in the cases of Florida Bar v. Fetterman, 439 So. 2<sup>nd</sup> 835 (Fl. S.C. 1983) and Florida Bar v. Elster, 770 So. 2<sup>nd</sup> 1184 - the Bar would have to prove by “clear and convincing evidence” that the trade name was “inherently misleading”. It also cited the United States Supreme Court case of Bates v. State Bar of Arizona, 433 U.S. 350 (1977), which held that attorney advertising is a type of commercial speech that is protected by the First Amendment.

The Fetterman case had previously determined that the use of the plural in “associates”, when there was only one associate, did not violate any rule as it was inconsequential to the purpose of the Rules.

RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SANCTIONS also argued that the use of the word “expert” had already been approved for use by an attorney who was Board Certified. Rule

4-7.2(c)(6), Communication of Fields of Practice, and the Florida Bar Revised Opinion dated December 20, 2007. (Attached to the motion to dismiss.)

The motion also raised the issue of the spoliation of evidence by the Bar.

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Having destroyed files in which the accused attorney was found not guilty, yet maintaining files in which guilt was found, created a legacy of convictions for the Bar. It destroyed any precedence in favor of innocence. The motion argued that the destruction of exculpatory evidence is not permitted. This was especially germane to the case as there were no witnesses to anything deceptive or misleading, the case revolved entirely around the opinion of Bar counsel. Respondent was unable to demonstrate cases in which the opinions of Bar counsel were found to have been erroneous.

The motion for summary judgment was accompanied by the AFFIDAVIT OF GARY DOANE. The affidavit stated that the name Legal Expert never resulted in any complaint by any member of the public. It also verifies the two previous prosecutions for the use of the same trade name and the two prior findings

of No Probable Cause.

The motion for summary judgment was heard and denied.

The case went to trial on February 6, 2009, with the Bar calling no witnesses other than the Respondent. Respondent's testimony was straightforward and he verified the facts as laid out in this brief, and has never denied any of the facts. Respondent has admitted using the trade name for several years, but denies that its

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use is a violation of any Rule, and specifically that it is not deceptive, nor has any member of the public ever claimed it was deceptive. There was no evidence at trial that it was deceptive and the only persons claiming it to be deceptive are Bar counsel.

The parties had entered into a Stipulation of Facts - it was placed into evidence. The essence of the stipulations was that the parties agreed that Respondent has used the trade name "Legal Experts", then "Legal Expert" from 2005 through 2008, and that he had been Board Certified since 1990. The Stipulation attached documents which the parties agreed were true and correct copies of various communications between the parties, as well as the two No Probable Cause findings, and documents showing the use by Respondent of the trade name.

The prepared and served his REPORT OF REFEREE dated February 20, 2009. It found in favor of the Bar as to Count I, specifically that of a violation of Rule 4-7.2(c)(1)(A), Statement about Legal Services, which is the Rule that prohibits a lawyer from making a material misrepresentation about the lawyer in a communication about the lawyer. There was also found to be a violation of Rule 4-7.9(a) and (b), Trade Names, which are the rules that allow the use of a trade name as long as it is not deceptive or misleading.

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As to Count II, the referee found Respondent guilty of a violation of Rule 4-7.2(c)(6)(A), (Florida Bar Certified Lawyers), which is the rule that allows a lawyer to use the word “expert” in informing the public of the areas of his board certification.

Also a part of Count II, the referee found that Respondent did not violate Rule 6-3.4(c) , Certification of Individuals Only (Limitations on the Power of the Board of Governors) which is a rule that limits the right of the Bar to apply board certification to law firms.

The referee recommended that Respondent be admonished for minor misconduct. In making his recommendations of discipline, the referee found that Respondent had no prior disciplinary convictions.

The referee went on to tax costs against Respondent. Respondent objected to the costs sought to be taxed as they were unsupported by any documentation. Respondent filed his RESPONDENT'S OBJECTION TO FIRST AFFIDAVIT OF COSTS, objecting to the costs as there was no documentation of the costs and they were not in compliance with the Statewide Uniform Guidelines for the Taxation of Costs in Civil Actions. Rule 3-7.6(q), Costs, providing for the taxation of costs in Bar actions must require some documentation or verification of what the costs

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actually are. That objection was overruled and all of the costs sought by the Bar were taxed against Respondent.

This Petition for Review followed.

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### **SUMMARY OF ARGUMENT**

“A lawyer may practice under a trade name if the name is not deceptive...”

Rule 4-7.9(b) (Trade Names (Firm Names and Letterhead)

There is no evidence that the name is deceptive, nor “inherently” so. The evidence in the record and the evidence at trial is that no member of the public ever complained that the trade name at issue was misleading or deceptive in any way. There was but one witness at the trial - Respondent, who testified in his own favor. Not even Bar counsel took the stand to testify against Respondent.

The Bar had brought the same issues to the Ninth Judicial Circuit Grievance Committee on no less than two prior occasions and each time the findings had been

the same - No Probable Cause. (Stipulation of Facts, attachment "P" and "V")

Rule 3-7.4(j), Effect of No Probable Cause Finding, allows the reopening of a case after a finding of No Probable Cause, but the "reopening" language, by its plain meaning, requires that particular case to be "reopened", not brought again in a different forum. The Bar brought the instant case to the Statewide Advertising Grievance Committee instead of taking it back to the Ninth Judicial Circuit Grievance Committee in accordance with the Rule. Such forum shopping should not be permitted and the finding of a violation is a nullity. This Honorable Court

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appointed the Honorable William L. Roby, Chief Judge of the Nineteenth Judicial Circuit of Florida to appoint a referee (Order of Supreme Court dated July 7, 2008), however, he did not do so. The referee was appointed by a different Judge (Order Appointing Referee dated July 11, 2008), therefore the referee who decided this matter did not have authority to do so and his recommendations are a nullity.

Respondent's motion to dismiss and/or motion for summary judgement should have been granted as there was no allegation nor demonstration of any fact that would overcome the constitutional protections afforded Respondent. There was no showing of any harm that came to, or could have come to, any member of

the public.

The opinion of this Honorable Court in Fetterman, Elster, and the United States Supreme Court in Bates recognizes a constitutional right of free speech that applies to attorney advertising and that is protected by the First Amendment. The Bar must prove by “clear and convincing evidence” (Lawyer Sanction Standard 1.3) that Respondent’s trade name is “inherently or operatively misleading”. In the Report of Referee there was a complete absence of any such finding by the referee, and no evidence presented of such that would have supported such a finding. A conviction cannot stand unless facts are established and applied to the law.

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Respondent has, at all material times, been Board Certified and is specifically entitled to use the word “expert” as per Rule 4-7.2(c)(6), Communication of Fields of Practice, and thoroughly discussed by this Honorable Court in In Re: Amendments to the Rules Regulating the Florida Bar - Advertising, Revised Opinion dated December 20, 2007.

A review of the attachments to the Stipulation entered into evidence show that Respondent included the language that he was a Board Certified Civil Trial

Attorney everywhere the trade name “Legal Expert” appeared, with the exception of the return address on his envelopes. (The Post Office just wants a name and return address.)

The Bar filed the Complaint against Respondent and in the style designated it as Case No. 2007-90,049, and 2007-90,094, which do not apply to Respondent as the allegations at issue were made by the Bar in 2008. The Rules of Civil Procedure provide a procedure for amending a pleading, however, the Bar failed to do so.

Respondent’s discovery from the Bar shows conclusively that there is no evidence of any complaint by member of the public nor of any harm coming to any person.

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The discovery sought in reference to other cases wherein the Bar attacked a member for the use of a trade name resulted in objections, and lack of production - the Bar destroys files in which no sanctions are made. The Bar will cite to this Court, and cited to the referee, cases in which there was a finding of guilt, yet destroys files in which there was no guilt. The destruction of evidence that would tend to exonerate Respondent is not permitted. State v. Powers, 555 So. 2<sup>nd</sup> 888

(Fl. 2<sup>nd</sup> D.C.A. 1990). Especially in a case such as this, wherein the Bar prosecuted the Respondent based solely the opinion of its own attorneys, the opinion of others who have considered the propriety of trade names is exceedingly germane.

The Report of Referee did not apply the proper law. The law as determined by Fetterman, Elster, and Bates was ignored by the referee. There was no finding that Respondent's trade name was "inherently or operatively misleading". This requirement is distinctly different from a finding of "misleading" in ordinary terms. It is a more rigorous requirement, and it rises above the mere opinion of Bar counsel, (for which no evidence of that was even presented.)

A member of the Bar should have the right to rely upon two prior findings of No Probable Cause, the procedures established for "reopening" a case, the constitutional protections demonstrated by the case law, the procedures established

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for bringing a matter against him, the law establishing his right to use certain words, the privilege established associated with his Board Certification, his rights to access of exonerating evidence and right to due process and fairness, and his

right to have conclusions of fact and findings of law comport with the evidence and the law.

The recommended findings of the referee should not be adopted by this Honorable Court.

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## ARGUMENT

### **I. THERE WERE NO FINDINGS OR EVIDENCE THAT WOULD SUPPORT A CONVICTION UNDER THE LAW**

The trial transcript begins with statements by Bar counsel addressing the referee as to the issues in the case to be tried against Respondent. She advises the court that there are - “three issues of conduct”. Page 5. She states that the first issue is that the trade name had been used in the plural sense, i.e. “Legal Experts”. She contends that the name is misleading as it indicates that there is more than one attorney in the firm.

Second, she states that it is misleading because - “it indicates that Mr. Doane is an expert in all areas of the law in which one can be Board Certified.” An incredulous statement indeed.

Finally, she contends that under Chapter 6 it is improper for a law firm to hold itself out as Board Certified. The referee found no violation of this Chapter, as its purpose is to define the parameters of the board certification committee. It will therefore not be discussed herein.

Respondent then addressed the Referee and advised that he had never claimed to be Board Certified in anything other than Civil Trial Law, and that

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where the trade name is used there is also “Board Certified Civil Trial Lawyer” with it. No one was ever, nor claimed to be, mislead into thinking something as

bizarre as Respondent being board certified in 22 areas. (Indeed, no one testified to such, nor frankly do I think it even possible.)

Respondent also advised the referee that the Rules allowed the use of the word “expert” if one was board certified, and the debate in the Supreme Court (In Re: Amendments to the Rules Regulating the Florida Bar - Advertising, Revised Opinion dated December 20, 2007) over whether the word “expert” could be misleading had been decided in favor of allowing the use of the word. That is, the majority felt it was not misleading. (There is a lengthy dissenting opinion, however, Respondent can’t be convicted based on a dissenting opinion.)

The Rule that allows the use of the word “expert” by a board certified lawyer is 4-7.2(c)(6), Communication of Fields of Practice).

Respondent also advised the Referee that the Bar was required to show by clear and convincing evidence that the name was inherently misleading, not just misleading, because of the protections of the First Amendment.

Witnesses - the first and only witness at trial was the Respondent. There was no dispute that the trade name had been used. Bar counsel questions

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surrounded the number of times the Bar had rendered the opinion that the name

was improper, versus the number of time the grievance committee has previously considered it and rendered a No Probable Cause finding. On page 15, the testimony is that on the No Probable Cause finding dated October 27, 2007, the committee recommended that Respondent reflect the area of certification, and that Respondent did so. Please note that Page 15, line 14 contains a typographical error. It should read -

“...wherever you see the trade name Legal Expert you will see Board Certified Civil Trial Lawyer just as they suggested on October 27, 2007.”

And on page 17, Respondent’s testimony is -

“..and I endeavored to make sure that whenever that trade name appeared, that the phrase “Board Certified Civil Trial Lawyer” would also appear so as not to - and I don’t think it was misleading to begin with, but so as not to — so as to satisfy the Florida Bar, not to mislead somebody into thinking I’m something other than a Board Certified Civil Trial Lawyer.”

There was a similar exchange on page 23, wherein Bar Counsel asks Respondent to refer to the No Probable Cause finding of December 27, 2006 (Stipulation of Facts, Exhibit “P”). At line 7 -

“Yes, I see that. It says, Notice of No Probable Cause and Letter of Advice to Accused, that’s the letter that asked me to reflect my area of certification, and I did.”

Further testimony from the Respondent requested the referee to examine the photograph of the sign in front of Respondent's building (Stipulation of Facts, Exhibit "K") -

"Your Honor, you can see that the Expert is singular and underneath it, it says Board Certified Civil Trial Lawyer."

At page 27, line 12 -

"I have an honest difference of opinion with Ms. Wichrowski (Bar Counsel) as well as the Florida Bar over whether or not it is misleading. I don't think the name Legal Expert is misleading when in truth and in fact under the Code I'm able to use the word "Expert" and I am Board Certified. I don't think there is anything misleading about that.

I can testify, and I think Ms. Wichrowski isn't going to dispute this because, again, there is no one here that will testify that I ever mislead them in any way in reference to this trade name or in any other way. I didn't deceive anybody in any way in reference to this trade name or any other way."

Respondent goes on to point out to the referee the dissenting opinion of Justice Lewis In Re: Amendments to the Rules Regulating the Florida Bar - Advertising, December 20, 2007, Revised Opinion, wherein Justice Lewis in his dissent states - "Although I agree with most of the new amendments, I dissent with regard to the advertising pandering of the new designation termed "expert"."

The dissent of Justice Lewis continues -

"I, therefore, express my disagreement with the decisions of the majority In re Amendments to the Rules Regulating the Florida Bar, SC06-736(Fla. Dec. 20, 2007), and the instant case, to the extent that these decisions authorize board-certified attorneys to denominate and advertise themselves as "experts".

Respondent also cited to the referee, and had previously cited to him, the Fetterman case wherein the attorney's trade name was "The Law Team, Fetterman and Associates". The Bar had attacked the attorney for the use of the name, claiming among other issues, that the plural of "associates" was misleading. There was a time when Fetterman did not have associates. Importantly, this Honorable Court found that the plural of "associates" was not a material misrepresentation and would not support a conviction.

Similarly, Respondent had first created the name when he had a partner who was also board certified. The partner retired and the name was ultimately changed to the singular. (Transcript page 53 - 54.)

This Honorable Court found that since there was no evidence that the public had been mislead or deceived, that because of the First Amendment constitutional rights, the Bar must prove that the name was "inherently misleading".

In Fetterman, this Honorable Court reviewed the constitutional issues and noted, starting at page 839 -

“The Supreme Court has recently set forth the commercial speech doctrine as it should be applied in the context of professional advertising:

Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows; Truthful advertising related to lawful activities is entitled to the protection of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restriction. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information...”

This Honorable Court in Fetterman found that the advertising was not inherently or operatively misleading and that the Bar had therefore not met its burden.

The appropriate question is not whether some person might be misled. The question is whether or not it is “inherently or operatively misleading”. There is no evidence or assumption of such, and the answer has to be that the Bar cannot meet its burden in this case either.

The standard and the application of it was again stated and verified in The Florida Bar v. Elster, 770 So. 2<sup>nd</sup> 1184 (Fl. S.C. 2000), wherein this Honorable

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Court once again stated that if the public has not been harmed the Bar must prove “inherently or operatively misleading”.

In the case at bar, no finding of “inherently or operatively misleading” appears in the Report of Referee that is now before this Honorable Court. Under the facts of this case, no such finding can be made. In the absence of any such finding, no conviction can stand, and the constitutional guarantees cannot be overcome. Two prior findings of No Probable Cause by a grievance committee, and no evidence of any complaint or any harm, certainly stand in the face of the conclusion that the name is “inherently or operatively misleading”

## **II. DUE PROCESS VIOLATIONS AND SPOILATION OF EVIDENCE REQUIRE DISMISSAL**

The Respondent propounded discovery to the Bar - a Request to Produce dated September 9, 2008 and Interrogatories dated September 10, 2008.

The Request to Produce sought -

2. - any writings in reference to the prosecution of any case involving a trade name in the past 5 years.

The Florida Bar served its Responses and Objections to Respondent's Request to Produce on November 13, 2008 and stated as to number 2, that it produced some materials, but objected as some such files were in the investigative

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stage, but most importantly - was unable to produce files in which the accused had been exonerated, having destroyed them, stating -

“....files and records of complaints in which no discipline are imposed are destroyed after one year as a matter of Bar policy and the information is purged from the Bar’s records after one year.”

The Bar destroys most every file that may be useful to a Respondent in providing himself a defense.

Similarly, concerning the Interrogatory answers, the Bar served answers dated November 13, 2008. Interrogatory number 4 asked for the identity of other Respondents involved in grievances concerning a trade name for the last 5 years. As in the response to the Request to Produce, the Bar was unable to provide any information, having destroyed the files in which there was no discipline imposed - they destroyed the files on cases they lost.

Having intentionally destroyed evidence that might tend to acquit Respondent, the action against Respondent must be dismissed. In State v. Powers,

555 So. 2<sup>nd</sup> 888, (Fl.2nd D.C.A. 1990) the Court held that an accused's due process rights are violated, irrespective of good faith or bad faith, if the prosecution suppresses material, favorable evidence.

In addition, the Bar is guilty of "spoliation" of evidence. The principles

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apply to even negligent destruction of evidence if the "spoliation" of evidence is prejudicial to Respondent. In the case at bar the destruction is intentional.

Ours is a system where precedent is honored, and binding in many circumstances. The application of the law to the facts in this case would certainly be influenced by previous prosecutions wherein other respondents have been exonerated. These are essential evidence of the type and kind of trade name that has been determined not be misleading or deceptive. The defenses of Respondent herein are prejudiced by the actions of the Bar. As it specifically applies to this case, please note that this is a case wherein there is not even the allegation of harm and the evidence is solely Bar counsel's opinion.

The significance of this is illustrated by a question to the Respondent from the referee, at page 34, line 14 -

"Let me interrupt you for one second. My question before, I didn't really frame it right and I was a little obtuse, and I apologize. Since

the change where you're allowed to use the word 'expert', do you have any authority or cases on the way that the word 'expert' can be used, that it's going to adjudicate it so that we have some feeling for that issue that's been determined either by the Supreme Court or some other courts that may have looked at it?"

There were none available to Respondent.

The referee is obviously looking for some precedent or guidance in making a decision. The inability to show the referee cases where the accused member was

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exonerated is certainly prejudicial to the defense.

The referee also comments on page 60, line 23 -

"I do note the lack of guidance, however, that we've received from those who promulgate these rules with the use of the term expert as well as any lack of any case law that either side could present, and I will certainly take that into consideration as far as any disciplinary recommendations that we may make."

It is obvious that if Respondent could show to the referee instances wherein the accused member had been exonerated in the use of an allegedly improper trade name, the referee would have considered them and ruled in favor of the Respondent.

The destruction of evidence is also a violation of Rules of Professional Conduct 4-3.4 (a), Fairness to Opposing Party and Counsel, which states -

"A lawyer shall not unlawfully obstruct another party's access to

evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant...”

The entire crux of the evidence against Respondent is a subjective opinion of the part of Bar counsel. Such opinions of counsel concerning facts are not admissible as evidence. In addition, Rule 4-3.4 (e), Fairness to Opposing Party and Counsel, prohibits counsel for a party from stating a personal opinion about the

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credibility of a witness, or to assert personal knowledge of facts in issue except when testifying, or to state a personal opinion as to the justness of a cause, or the culpability of a civil litigant. A witness may not provide an “expert opinion” on which side she believes. Szuba v. State, 749 So.2nd 551, (Fl. 2<sup>nd</sup> D.C.A. 2000)

How other tribunals have ultimately ruled is germane and relevant. In a broader and just as significant sense, the preservation of cases in which Bar members were exonerated would also give Bar members guidance in their conduct. We need to know that which we may do and that which we may not. The destruction of this evidence violates the rights of Respondent. Respondent has the protection of the First Amendment of the Constitution guaranteeing free speech,

including commercial free speech. These rights must be strictly guarded and interpreted by the Court in applying the law and the Rules, whatever the various interpretations of that might be.

The principles of spoliation are illustrated by the following language from Torres v. Matsushita Electric, Corp., 762 So. 2<sup>nd</sup> 1014 (Fl. 5<sup>th</sup> D.C.A. 2000), page 1019 -

“The state’s system of civil litigation is founded in large part on a litigant’s ability under the authority of the Supreme Court rules, to

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investigate and uncover evidence after the filing of suit. Destruction of evidence known to be relevant to pending litigation violates the spirit of liberal discovery. Spoliation of evidence creates enormous costs for both the victimized party and the judicial system, prevents fair and proper adjudication of the issues, and interferes with the administration of justice.”

Previous prosecutions wherein other respondents have been exonerated are essential evidence of the type and kind of trade name that has been determined not be misleading or deceptive. The destruction of evidence potentially exonerating Respondent requires the dismissal of this case under the principles of “spoliation”.

One 2008 file that was produced to Respondent is that of The Florida Bar v. Steven David Miller, TFB File No. 2008-90,091(02S). In that case the Bar

pursued the attorney claiming that the use of the trade name “DivorceEZ” was improper. The accused was granted diversion when he changed the name to a name deemed to be acceptable to the Bar - “DivorceDeli”. The rationale behind the Bar’s approval of one and not the other escapes this writer, however, at least a member can see what happened.

Other prosecutions of like cases are also used to determine the severity of sanctions. Prosecutions wherein other respondents have been exonerated are also essential evidence going to the severity of any sanctions - obviously “none” is a

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choice that should be considered. The sanctions that occur in other cases involving the same conduct are to be considered in rendering sanctions. No one knows or could know these principles better than the Florida Bar. The Supreme Court has stated multiple times that any recommended sanction have a reasonable basis in the Court’s existing case law. The Florida Bar v. Abrams, 919 So. 2<sup>nd</sup> 425 (Fl. S.C. 2006)

Any sanction that might be rendered must be fair to society, fair to the attorney and severe enough to deter other attorneys from similar conduct. Florida Bar v. Lawless, 640 So. 2<sup>nd</sup> 1098 (Fl. S.C. 1998) The Florida Bar, by its

intentional actions, has made it impossible for Respondent to demonstrate that no sanction whatsoever has been rendered against those accused of similar conduct.

**III. THE SUBMITTAL OF THE CASE TO THE STATEWIDE ADVERTISING GRIEVANCE COMMITTEE WAS IMPROPER**

The Florida Bar first made the allegations of deceptive trade name against Respondent in Case No. 2005-31,400, Complaint by The Florida Bar Against Gary Elvin Doane. The matter was brought before the Ninth Judicial Circuit Grievance Committee and the finding was No Probable Cause, dated October 27, 2005. (Stipulation of Facts, attachment "P") The Committee recommended that Respondent accurately reflect his area of Board Certification as a Civil Trial

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Attorney, which Respondent complied with.

Despite the finding of No Probable Cause, the Florida Bar again made the same allegations against Respondent's use of the trade name in Case No. 2006-31,524, Complaint by The Florida Bar Against Gary Elvin Doane. The matter was again brought before the Ninth Judicial Circuit Grievance Committee and the finding was again No Probable Cause, dated December 27, 2006. (Stipulation of Facts, attachment "V"). Respondent thereafter ceased the use of the plural of the word "expert" and added the phrase "Board Certified Civil Trial

Attorney” in every location where the firm name was used.

Despite two findings of No Probable Cause, the Florida Bar elected to again bring the same charges against Respondent, yet to choose a different forum, hoping for a different result. Indeed that is what the Bar got, the Statewide Advertising Grievance Committee found probable cause and the litigation below began.

After a finding of No Probable Cause the Bar is permitted to reopen a case. Rule 3-7.4(j)(3) Effect of No Probable Cause Finding, reads as follows -

“A finding of no probable cause by a grievance committee shall not preclude the reopening of the case and further proceedings therein.”

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By its plain meaning the “reopening” of a case requires the case to be “reopened”, not the filing of a new case to be brought in a different forum. That is impermissible forum shopping.

It may be that a grievance committee may choose to revisit a prior decision, perhaps more compelling evidence of a serious harm become known. But this Honorable Court should not allow the Bar to shop its case around seeking a forum that will give it the decision it wishes.

If this Respondent was to be further pursued by the Bar for the use of the trade name “Legal Expert” or in the plural, it must have been brought in the forum that it was originally brought. The Ninth Judicial Circuit Grievance Committee, having heard it twice before is in the best position to hear it again, and that is what the Rule provides. The findings of the Statewide Committee, in violation of this Rule are a nullity.

**IV, THE REFEREE WHO HEARD THIS CASE HAD NO AUTHORITY  
AND NO JURISDICTION OVER RESPONDENT**

This Honorable Court designated the Honorable William L. Roby, Chief Judge of the Nineteenth Judicial Circuit of Florida to appoint a referee in the matter. Order of Supreme Court dated July 7, 2008.

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Judge Roby did not appoint a referee. A referee was appointed by different Judge (Order Appointing Referee dated July 11, 2008), who had not received authority from this Court to make any appointment. The referee who decided this matter was not properly appointed and did not have proper authority to make any recommendations whatsoever. The referee that decided this case, having not been properly appointed, had no jurisdiction over Respondent. Jurisdiction can be

raised at any time.

## **V. COSTS WERE NOT PROPERLY TAXED AGAINST RESPONDENT**

Bar counsel filed its FIRST AFFIDAVIT OF COSTS, which attached no documentation or verification of the amount of costs, but merely information as to what they were. Respondent objected to the costs sought to be taxed as they were unsupported by any documentation. Respondent filed his RESPONDENT'S OBJECTION TO FIRST AFFIDAVIT OF COSTS, objecting to the costs as there was no documentation of the costs and they were not in compliance with the Statewide Uniform Guidelines for the Taxation of Costs in Civil Actions.

Rule 3-7.6(q) providing for the taxation of costs in Bar actions must require some documentation or verification of what the costs actually are. For instance, if a party seeks to have the opposing party pay a Court Reporter's fee of \$650.50, then the bill should be attached or produced, or shown to the opposing party in

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some fashion. That objection was overruled and all of the costs sought by the Bar were taxed against Respondent.

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### CONCLUSION

“A lawyer may practice under a trade name if the name is not deceptive...”

Rule 4-7.9(b) There were two previous findings of No Probable Cause on the same issues. That Committee is the only one empowered to reopen “the case”, not the Statewide Advertising Committee.

At the hearing below, not one person testified against Respondent; there is not one person who claims they were mislead or deceived. For the Bar to prevail,

the constitutional protection of free speech requires a finding that the speech is “inherently or operatively misleading”. There was no such finding by the referee, and no such finding could be made.

Bar counsel’s interpretation that the name “Legal Expert” is misleading because it - “indicates that Mr. Doane is an expert in all areas of the law in which one can be Board Certified.” is exactly what the first amendment decisions are designed to protect against. The burden of proof of “clear and convincing evidence” is not, and cannot, be met.

The destruction by the Bar of records in which no discipline was imposed in reference to the use of a trade name is impermissible - a destruction of potentially exonerating evidence, that goes to not only innocence, but any sanction that may be imposed.

The referee was not properly appointed and had no jurisdiction over Respondent. The recommendations of the referee are not supported by fact or law and should not be adopted by this Honorable Court.

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#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to Kenneth Lawrence Marvin, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399; and Jan Wichrowski, Esquire/Kershara D. Davis, Esquire, The Florida Bar,

1200 Edgewater Drive, Orlando, Florida 32804, by mail delivery, this \_\_\_\_\_  
day of July, 2009.

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(407) 648-2000

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Third Amended Initial Brief satisfies the  
Florida Rules of Appellant Procedure 9.100(1) and 9.21(a)(2).

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