

**IN THE SUPREME COURT OF FLORIDA**

<b>THE FLORIDA BAR,</b>	)	
<b>Complainant,</b>	)	<b>Supreme Court Case No.: SC04-40</b>
<b>vs.</b>	)	<b>SC04-41</b>
	)	
<b>JOHN ROBERT PAPE and</b>	)	<b>The Florida Bar Case No.: 2003-90,076(02S)</b>
<b>MARC ANDREW CHANDLER,</b>	)	<b>The Florida Bar Case No.: 2004-90,002(02S)</b>
<b>Respondents.</b>	)	

**RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS'**  
**MOTION FOR FINAL SUMMARY JUDGMENT**

**FACTS**

Respondents in these consolidated cases produced and aired television commercials in which the Respondents appeared in order to inform television viewers and prospective clients of the services that Pape & Chandler, P.A. (the law firm owned and operated by the Respondents) provides. The television commercials, which aired between June of 2001 and the April of 2003, included the toll-free telephone number ending in PIT-BULL (spelled out at the bottom of the screen), through which prospective clients (or anyone else) could contact the law firm of Pape & Chandler, P.A. Pape & Chandler, P.A. also displayed its logo, a realistic sketch of the head of an American Pit Bull Terrier wearing a spiked collar, between the names Pape and Chandler in its television commercials.

On October 3, 2001, attorney Todd Aronovitz (then President-elect of The Florida Bar ) filed a complaint (“Aronovitz Complaint”) with The Florida Bar in which he stated “[i]t is my belief that the conduct on the part of Mr. Pape and Mr. Chandler and the advertisements they air on television violate the Rules Regulating the Florida Bar.” The Aronovitz Complaint was assigned to Complainant’s staff attorney Randi Klayman Lazarus who, after reviewing it, apparently decided that Pape & Chandler, P.A.’s aforementioned telephone number and logo created “unjustified expectations.” Ms. Lazarus, on October 24, 2001, sent letters to Respondents through which she requested from the Respondents a response to the Aronovitz Complaint. Respondents timely filed their responses to the Aronovitz Complaint.

The Aronovitz Complaint and Respondents' responses thereto were sent to and reviewed by a grievance committee of the Complainant that determined that Pape & Chandler, P.A.'s commercials and the telephone number ending in PIT-BULL and the logo did not violate the Rules Regulating the Florida Bar. Accordingly, on December 7, 2001 Complainant issued a Notice of No Probable Cause and Letter of Advice to Respondent to each of the Respondents in the Aronovitz Complaint. The grievance committee of The Florida Bar that was charged with reviewing the advertisements that were at issue in the Aronovitz Complaint, and are at issue in the instant case stated in the Notice of No Probable Cause and Letter of Advice to Respondent "[t]he grievance committee has found no probable cause in the referenced case against you and the complaint has been dismissed."<sup>1</sup>

Despite the December 7, 2001 Notice of No Probable Cause and Letter of Advice to Respondent, Complainant, again, took issue with the commercials of the Respondents and began a second investigation into the matter. The Florida Bar, in 2003, requested information from the Respondents, and the Respondents immediately supplied the requested information. At some point in 2003, The Florida Bar submitted this matter to another grievance committee. The 2003 grievance committee found probable cause that Respondents' advertisements containing the telephone number ending in PIT-BULL and Respondents' logo violated Rules 4-7.2 (b)(3) and 4-7.2(b)(4) of the Rules Regulating the Florida Bar and Complainant then filed the instant complaint.

Complainant has aggressively pursued this case against Respondents (not once, but twice) and has generally failed to prosecute other lawyers who have advertised in a qualitatively similar manner to Respondents. Examples of lawyer advertising that is qualitatively similar to Respondents' advertising that Complainant has not prosecuted abound. The lawyer advertisements that are qualitatively similar to Respondents' advertisements that Complainant has failed to prosecute can be found in several outlets including, but not limited to, television, radio, telephone books and the publications of the Complainant itself (The Florida Bar News and The Florida Bar Journal). Respondents have attached as Exhibits "a"- "rrr" examples of lawyer advertising that is qualitatively similar to Respondents that Complainant has failed to prosecute.

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<sup>1</sup> Oddly, in its response to Respondents First Request for Admissions, Complainant denied that Complainant's grievance committee that reviewed the Aronovitz Complaint found no probable cause in the Aronovitz Complaint. Complainant denied the truth of the finding of no probable cause in the face of the clear fact that Complainant's grievance committee found no probable cause in the Aronovitz Complaint.

## **LAW AND APPLICATION**

### **I. SUMMARY JUDGMENT**

Fla.R.Civ.P. Rule 1.510 empowers trial judges to grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” As Respondents admit that they advertised displaying telephone numbers ending in PIT-BULL and their logo, there is no genuine issue as to any material fact in this case. More importantly, the Respondents are entitled to a judgment as a matter of law as their use of the telephone numbers ending in PIT-BULL and their logo in their advertisements do not violate the Rules Regulating the Florida Bar.

### **II. THERE IS NO GENUINE ISSUE OF MATERIAL FACT IN THIS CASE**

The facts in the instant case are undisputed: Respondents admit that they ran television commercials bearing the telephone number 1 (866) PIT-BULL and 1 (800) PIT-BULL. Respondents also freely admit that their television commercials contained a realistic drawing of the head of an American Pit Bull Terrier wearing a spiked collar. These factual matters are not in dispute.

The only issues to be resolved by this Honorable Court in this matter are ones that involve questions of law. The questions of law for this Honorable Court to decide are as follows: do Respondents’ telephone numbers and logo violate Rules 4-7.2 (b)(3) and 4-7.2(b)(4) of the Rules Regulating the Florida Bar as alleged by Complainant; are the rules as applied in this case unconstitutional restrictions on commercial speech; and has Complainant selectively enforced it rules against Respondents?

### **III. RESPONDENTS ARE ENTITLED TO A JUDGMENT AS A MATTER OF LAW**

The burden of proof in this case, as in all cases, rests squarely on the shoulders of the party bringing the case. The Florida Bar has brought this case, and, accordingly, it must prove its case

by “clear and convincing evidence” in order to prevail in this Honorable Court. The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984) (Citing The Florida Bar v. Hirsch, 359 So.2d 856 (Fla.1978); The Florida Bar v. Quick, 279 So.2d 4 (Fla.1973)). “‘Clear and convincing evidence’ differs from the ‘greater weight of the evidence’ in that it is more compelling and persuasive. ‘Clear and convincing evidence’ is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.” Standard Jury Instructions—Civil Cases, 720 So.2d 1077 (Fla. 1998). The Florida Bar, as evidenced by its answers to interrogatories, and admissions on file, as well as the memorandum of law it filed in this case hasn’t proven its case by any standard, let alone the heightened clear and convincing evidence standard, because it can’t prove its case.

The Florida Bar, through this case, is attempting to restrict the commercial speech of the Respondents. As the United States Supreme Court declared, “The party seeking to uphold a restriction on commercial speech carries the burden of justifying it.” Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 (1983). The burden that it carries “is not satisfied by mere speculation or conjecture.” Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

A. *The Florida Bar’s historical antipathy towards lawyer advertising*

Prior to discussing the legal issues in this case, it is important to briefly discuss the anti-advertising bias prevalent among the Bar’s staff, officials and task forces/committees. As late as 1999, and in the face of clear United States Supreme Court precedent permitting attorney advertising, The Florida Bar’s Joint Presidential Advertising Task Force (“Bar Task Force”) had the audacity and arrogance to propose a total ban on attorney advertising on radio and television. Amendments to the Rules Regulating the Florida Bar, 762 So.2d 392, 396 (Fla. 1999). Although Florida’s Supreme Court perfunctorily shot down the Bar Task Force’s preposterous proposal along with several of its other unconstitutionally restrictive suggestions in Amendments to the Rules Regulating the Florida Bar, 762 So.2d 392, 396 (Fla. 1999), the case clearly demonstrates the anti-advertising backdrop from which the instant case originated.

It is important to note that this antipathy towards attorney advertising and lack of regard for commercial free speech as guaranteed by the First Amendment to the Constitution of the United States of America and as enunciated by the Supreme Court of the United States of

America still exists among members of The Florida Bar's advertising task forces. Evidence of this continuing anti-advertising bias is highlighted in the August 15, 2004 edition of The Florida Bar News. An article printed on page 5 of the August 15, 2004 edition of The Florida Bar News attributed the following quote to advertising task force member attorney Bill Wagner, "I'm very concerned about any prior approval, *unless you are going to completely ban television advertising, which is okay with me* (Emphasis added)."

B. As a matter of law, the telephone number, 1(800) PIT-BULL, and Respondents' logo (a realistic drawing of a dog's head with a spiked collar) do not violate Rule 4-7.2(b)(3) of The Rules Regulating the Florida Bar

**a. Rule 4-7.2(b)(3) does not apply to the facts of this particular case**

The relevant portion of Rule 4-7.2(b)(3) states: "A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications...." The first issue that must be addressed is whether this rule is applicable in this case.

"[I]t is well settled that statutes imposing a penalty must always be construed strictly in favor of the one against whom the penalty is imposed and are never to be extended by construction." See Hotel & Restaurant Comm'n v. Sunny Seas No. One, Inc., 104 So.2d 570, 571 (Fla. 1958). As Complainant seeks to use Rules Regulating the Florida Bar to impose a penalty in this case, the terms of the rules must be strictly construed.

Respondents posit that neither a realistic drawing of a dog's head nor a telephone number ending in PIT-BULL are "statements" as anticipated in Rule 4-7.2(b)(3), and are certainly not "statements describing or characterizing the quality of the lawyer's services." Instead, the logo stands on its own as a visual depiction of a dog's head. The logo is not an adjective or a descriptive statement. As a plain drawing, it describes or characterizes nothing. It most certainly does not describe or characterize the quality of a lawyer's services. Complainant has applied and seeks to have this honorable Court endorse its application of an extremely broad interpretation of the language "statements describing or characterizing" in reference to Rule 4-7.2(b)(3).

Complainant argues that the telephone number and logo at issue in this case are “statements describing or characterizing” within the meaning of Rule 4-7.2(b)(3).

Likewise, the mnemonic device PIT-BULL in Respondents’ telephone number does not describe or characterize anything. A pit bull is a breed of dog and is not an adjective. The most basic rules of English language tell us that a simple noun like “pit bull” describes or characterizes nothing. Most certainly, the noun, “pit bull,” has absolutely nothing to do with “the *quality* of the lawyer’s services” from either a descriptive or non-descriptive standpoint. Complainant has admitted the same in its response to Respondents’ Request for Admissions. *See The Florida Bar’s Response to Respondent’s First Request for Admissions*, answer 9. Neither the drawing of a head of a dog nor a mnemonic device that spells the breed of a dog are synonymous with quality legal services.

**b. Complainant has not applied Rule 4-7.2(b)(3) to prohibit advertising lawyers from using spoken and written descriptive words to describe themselves**

Should the court need to delve into Complainant’s misapplication of Rule 4-7.2(b)(3) even further, we can turn our attention to the purpose of the rule. Rule 4-7.2(b)(3) is based on the assumption that all statements describing or characterizing the quality of a lawyer’s services are inherently misleading. The primary purpose of Rule 4-7.2(b)(3) is to prohibit advertising lawyers from comparing their services to other lawyers in ways that cannot be factually substantiated.

For purposes of analyzing this case, it must be noted that the Bar has not tried to apply Rule 4-7.2(b)(3) to prohibit all statements describing lawyers or their services. Descriptive words such as “aggressive,” “committed,” “concerned,” “dedicated,” “efficient,” “resourceful,” “skilled,” and “understanding” have been permitted in lawyer advertisements repeatedly by Complainant. Complainant rightly permits use of those words because they do not describe or characterize *the quality* of the lawyer’s services. Instead, they are merely words descriptive of the personal attributes of the advertising attorney. Regardless, one could reasonably argue that the word “skilled,” which Complainant permits in advertisements, touches at least tangentially upon the quality of the services. Without a doubt, the word “skilled” has much more to do with

the quality of legal services than does the word “aggressive” or an image of a dog’s head or the words “PIT-BULL” in a telephone number.

On the other hand, words and phrases like “the best” or “the highest quality” or “the greatest results” describe the quality of the lawyer’s services and are comparative in nature and inherently misleading in that consumers are misled to believe that any other lawyer is inferior to the advertising lawyer who uses those types of descriptions. Those types of comparative words and phrases are violative of Rule 4-7.2(b)(3) in that they are “statements describing or characterizing the quality of the lawyer’s services.”

Words like “aggressive,” “diligent,” and “loyal” are not comparative in nature and, therefore, do not mislead the public. Any lawyer can be aggressive or diligent or loyal or all three if it is in his/her nature and if he or she so chooses. As a matter of fact, Complainant, through its Rules of Professional Conduct, demands diligent representation of clients and zealous advocacy of a client’s cause by members of The Florida Bar (*See* Rule 4-1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”); Comment to Rule 4-1.3 (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with *zeal* in advocacy upon the client's behalf.” (Emphasis added)); Comment to Rule 4-1.7 (“**Loyalty to a client:** Loyalty is an essential element in the lawyer's relationship to a client.”); and Preamble to The Rules Regulating the Florida Bar—Rules of Professional Conduct (“In all professional functions a lawyer should be competent, prompt, and diligent.”)(“As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.”). In fact, Complainant regularly brings disciplinary actions against its members for not diligently representing their clients.

Though “aggressive” and “loyal” and “diligent” are descriptive words, they do not describe or characterize *the quality of the lawyer’s services* and are not comparative in nature. Not all descriptive words pertain to the quality of the lawyer’s services. This concept becomes even more obvious when you look at an antonym to “aggressive.” If a lawyer describes himself as laid back instead of aggressive it is even more apparent that this class of descriptive word touching upon a lawyer’s personal attributes does not describe or characterize the quality of legal services.

Furthermore, it is undisputed that Complainant has expressly and tacitly approved the use of the word “aggressive” in Respondents’ television scripts that are at the heart of the instant Complaint. Initially, the Bar’s Standing Committee on Advertising approved the scripts, which contained the word “aggressive” prior to production of the commercial. Additionally, Complainant has not raised the issue of Respondents’ use of the word “aggressive” in either of the two Complaints that it has filed against Respondents in connection with the subject television commercials. Accordingly, we must surmise that Complainant has no quarrel with the spoken descriptive word “aggressive” as it was used in Respondents’ television advertisements. It appears at least disingenuous of Complainant to approve the use of the spoken word “aggressive” yet to object to an image that it claims connotes the same attribute.

Respondents described their law firm as “aggressive” in an attempt to convey to the public that Respondents’ firm is forceful and assertive in its dealings with adversaries, and that Respondents’ zealously and diligently assert their clients’ positions as they are required to do according to Complainant’s Rules of Professional Conduct.” We must also note that although some may wrongly perceive the American Pit Bull Terrier as a violent or anti-social animal, it was never Respondents’ intent to feed that erroneous perception when it adopted the American Pit Bull Terrier as its logo and 1 (800)-PIT-BULL as its telephone number. In fact, Respondents, like anyone remotely familiar with the breed and not swayed by sensationalistic media coverage, know the American Pit Bull Terrier as a breed of dog that is loyal, tenacious and willing to work hard.<sup>2</sup>

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

- c. **Complainant has misapplied Rule 4-7.2(b)(3) by neglecting to apply the rule according to its express terms; to wit, Complainant has attempted to create a new standard for application of the rule by omitting a material portion of the rule**

Of utmost importance in evaluating Respondents' Motion for Final Summary Judgment are The Florida Bar's Answers to Respondents' First Set of Interrogatories. Respondents, on February 24, 2004 (John Robert Pape) and February 26, 2004 (Marc Andrew Chandler) served their respective, identical first set of interrogatories on Complainant in this case (Exhibit "1"). Respondents', through interrogatory number 2 of their first sets of interrogatories to Complainant, asked Complainant to "Describe in detail how the telephone number ending in PIT-BULL is a 'statement describing or characterizing the quality of the lawyer's services' in violation of rule 4-7.2(b)(3) of the Rules Regulating the Florida Bar." Randi Klayman Lazarus, on behalf of Complainant, answered interrogatory number 2 under oath as follows: "Pit-bulls are commonly perceived to be aggressive and unrelenting. Pit-bulls are also perceived by others to be loyal and determined. Either way, the use of the word in the telephone number is *intended as a description or characterization of the lawyers* to be hired by telephoning that number (emphasis added). See The Florida Bar's Answers to Respondents' First Set of Interrogatories at number 2 (Exhibit "2").

Respondents, through interrogatory number 4 of their first sets of interrogatories to Complainant, asked Complainant to "(d)escribe in detail how Pape & Chandler, P.A.'s logo (head of American Pit Bull Terrier with collar) is 'a statement describing or characterizing the quality of the lawyer's services' in violation or rule 4-7.2(b)(3) of the Rules Regulating the Florida Bar." Complainant gave the exact same answer as it did to the interrogatory number 2 involving the telephone number: "Pit-bulls are commonly perceived to be aggressive and unrelenting. Pit-bulls are also perceived by others to be loyal and determined. Either way, the use of the word in the telephone number is *intended as a description or characterization of the lawyers* to be hired by telephoning that number (emphasis added). See The Florida Bar's Answers to Respondent's First Set of Interrogatories at number 4.

While Complainant has no idea what was intended by Respondents' use of its logo or telephone number, it felt comfortable in assuming that the intent was to describe Respondents as

either aggressive, unrelenting, loyal, determined or a combination of all of those characteristics. Significantly, however, in its sworn testimony, Complainant conveniently left out the most important part of Rule 4-7.2(b)(3), which is the section of the rule concerning statements describing or characterizing the *quality of the legal services*. Complainant neglected the most significant language in the rule concerning the quality of legal services because, by its own admission, the American Pit Bull Terrier is not synonymous with quality legal services. See The Florida Bar's Response to Respondent's First Request for Admissions, admission 9 (Exhibit "3").

In its sworn testimony, Complainant also neglected to explain how the dog's head logo and telephone number are "statements" and how they actively "describe or characterize" the quality of legal services as proscribed by the rule. Complainant merely concluded, with no support, that the public may perceive the pit bull as bearing certain characteristics.

Respondents readily admit that they described themselves throughout their television advertisements just as all advertisers do. Additionally, as already noted in this memorandum, Complainant approved of Respondents' use of the descriptive spoken word "aggressive" in the advertisements that are the subject of the case at bar.

In fact, it is axiomatic that all advertisements in some way describe the advertiser. Rule 4-7.2(b)(3) could not have been drafted and cannot be read to forbid all descriptions of the advertising lawyers as Complainant suggested in its sworn answers to Respondents' interrogatories. The rule could not withstand even the loosest of constitutional scrutiny if that was its purpose.

Complainant's attempted application of the rule to prohibit visual images that it claims may lead to the same perception (i.e., aggressiveness, loyalty, diligence) that it permits through the actual spoken words would lead to absurd results. It is wholly incongruous to permit advertisers to use the spoken words "aggressive," "committed," "concerned," "dedicated," "efficient," "resourceful," "skilled," and "understanding," which Complainant has done repeatedly, then to claim, on the other hand, that a telephone number or logo that it alleges may suggest some of those same qualities cannot be permitted. How can Florida lawyers be expected to govern their behavior if courts allow Complainant to apply the rules so subjectively and haphazardly?

Curiously, in its answer to interrogatories 2 and 4, Complainant has taken issue with the public's possible perception of Respondents as "loyal and determined." This novel position is irreconcilable with the Bar's own Rules of Professional Conduct, which demand diligent representation and zealous advocacy of a client's cause. (See Rule 4-1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); Comment to Rule 4-1.3 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with *zeal* in advocacy upon the client's behalf." (Emphasis added)); Comment to Rule 4-1.7 ("**Loyalty to a client:** Loyalty is an essential element in the lawyer's relationship to a client."); and Preamble to The Rules Regulating the Florida Bar—Rules of Professional Conduct ("In all professional functions a lawyer should be competent, prompt, and diligent.")("As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

Through some peculiar contortions, Complainant has tried to characterize the very attributes that it demands from Florida lawyers—loyalty to clients and diligence and determination in handling client's affairs—as impermissible descriptions to convey through advertisements to members of the public who may need to hire a lawyer. Apparently, Complainant demands loyalty, diligence and determination from the lawyers it regulates, but it wants to prohibit those same lawyers from conveying that image to the public through their advertisements.

C. As a matter of law, the telephone number, 1(800) PIT-BULL, and Respondents' logo (a realistic drawing of a dog's head with a spiked collar) do not violate Rule 4-7.2(b)(4) of The Rules Regulating the Florida Bar

**a. Rule 4-7.2(b)(4) was recently amended**

Initially, we must draw the court's attention to the fact that Florida's Supreme Court recently approved an amendment to Rule 4-7.2(b)(4) eliminating the requirement that verbal and visual portrayals or depictions be "objectively relevant to the selection of an attorney."

Amendment to the Rules Regulating the Florida Bar, 875 So.2d 448, 453 (Fla. 2004). Rule 4-7.2(b)(4) now reads: “**Prohibited Visual and Verbal Portrayals.** Visual or verbal descriptions, depictions, or portrayals of persons, things, or events shall not be deceptive, misleading, or manipulative.” As the “objectively relevant” standard is no longer in force, it is surprising that the Complainant is still prosecuting Respondents for this alleged transgression. Despite the fact that Complainant recommended, and The Supreme Court of Florida accepted the recommendation to abrogate the “objectively relevant” standard from the rule, Respondents assert that the logo and the breed of dog identified through the telephone number are objectively relevant to the selection of an attorney as the American Pit Bull Terrier (as admitted by the Complainant in their discovery responses) possesses some of the qualities that consumers of legal services and potential consumers of legal services seek when searching for an attorney, namely, strength, loyalty and tenacity.

**b. The real purpose behind the word “manipulative” in Rule 4-7.2(b)(4)**

A closer inspection of the recent amendments to the Rules Regulating the Florida Bar reveals the probable genesis of the “manipulative” standard contained in Rule 4-7.2(b)(4). In 1991, Florida’s Supreme Court issued an opinion along with its ratification of some of the Bar’s proposed amendments to the rules regulating attorney advertising.<sup>3</sup> The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So.2d 451 (Fla. 1991). As part of that opinion, the Supreme Court discussed the unique challenges presented by the electronic broadcast media in relation to attorney advertising. In agreeing with the Bar that certain types of advertising require more restrictions than others, the Court stated, in obiter dicta, that “the electronic broadcast media, *if manipulated*, can produce unrealistic images and expectations (emphasis added)” and that the Bar’s proposed rules regarding television advertising “concentrate on reducing the effect of *technical* manipulation (emphasis added).” Id. at 458.

Later in that same opinion, again in obiter dicta, the Court discussed the concept of manipulation in relation to the proposed rules and the electronic broadcast media when it stated

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<sup>3</sup> While the 1991 amendments did not concern Rule 4-7.2(b)(4), as that rule did not come into existence until the Supreme Court approved the 1999 Amendment to the Rules Regulating the Florida Bar, the 1991 amendments can shed some light on the concept of manipulation in relation to the rules.

that the proposed rules restrict “those methods which, *through clever manipulation*, could be used to deceive the public.” (emphasis added) *Id.* at 459. It is clear that Florida’s Supreme Court, when discussing the concept of manipulation and how it should be forbidden in lawyer advertising, was concerned with “technical manipulation” of the broadcast media that could produce unrealistic images of the attorneys and “clever manipulation” intended to deceive the audience. The concept of “technical manipulation” was so important to Florida’s Supreme Court that it discussed the issue again in its 1999 decision on amendments to the Rules Regulating the Florida Bar. In 1999, the Court reiterated its earlier statement that ““the electronic broadcast media, if manipulated, can produce unrealistic images and expectations.”” Amendments to the Rules Regulating the Florida Bar, 762 So.2d at 399.

Notably, there was no mention at all in either the Supreme Court’s 1991 or 1999 opinions on the rules amendments of the concept of manipulation in relation to appeals to the emotions of consumers. Instead, the Florida Supreme Court, following United States Supreme Court precedent on commercial free speech, kept its focus on whether or not the rules could withstand constitutional scrutiny. In order to withstand constitutional scrutiny, rules attempting to regulate commercial free speech must be limited to curtailing speech that is unlawful, false, misleading or deceptive.

- c. **Complainant has attempted to create a standard for application of Rule 4-7.2(b)(4) that does not exist and would be impossible to apply by claiming that any advertisement that “appeals to the emotions of consumers” is “manipulative” and, therefore, subject to prohibition**

To carry its burden, and prove a violation of Rule 4-7.2(b)(4), Complainant must offer evidence that establishes that Respondents’ telephone number and logo are “deceptive, misleading, or manipulative.” In their First Set of Interrogatories, Respondents asked Complainant to: “Describe in detail how the telephone number ending in PIT-BULL is ‘not objectively relevant to the selection of an attorney’ and is ‘deceptive, misleading, or manipulative’ in violation of rule 4-7.2(b)(4) of the Rules Regulating the Florida Bar.” In addition, Respondents, in those same interrogatories asked Complainant to: “Describe in detail how Pape & Chandler, P.A.’s logo (head of an American Pit Bull Terrier with collar) is not

‘objectively relevant to the selection of an attorney’ and is ‘deceptive, misleading, or manipulative’ in violation of rule 4-7.2(b)(4) of the Rules Regulating the Florida Bar.” *See Respondent’s First Set of Interrogatories to Complainant*, numbers 3 and 5.

In response to those two interrogatories, Complainant offered the exact same conclusory testimony: “The designation of the word PIT-BULL in the telephone number is not objectively relevant because it is not informational and it is manipulative because it appeals to the emotions of the consumer as the pitt-bull (sic) is commonly perceived as aggressive, unrelenting, loyal and determined.” *See The Florida Bar’s Answers to Respondent’s First Set of Interrogatories* at numbers 3 and 5.

As Rule 4-7.2(b)(4) no longer requires that verbal and visual portrayals or depictions be “objectively relevant to the selection of an attorney,” we will give that alleged violation short shrift. It is curious that Complainant, in one breath, can claim that the logo and telephone number are not informational, yet in the next breath claim that they describe the advertising lawyers as aggressive, unrelenting, loyal and determined. How can something that is “not informational” purportedly describe someone? In light of United States Supreme Court precedent concerning commercial free speech, Complainant wisely submitted, and Florida’s Supreme Court approved, the amendment removing the “objectively relevant” standard from the rule. The United States Supreme Court has been clear in its mandate that commercial free speech can only be prohibited if it is unlawful, false, misleading or deceptive.

Most notably, when asked directly to “describe in detail” how Respondents’ logo and telephone number violate Rule 4-7.2(b)(4), Complainant did not testify that the telephone number or logo are deceptive or misleading. The subject rule expressly forbids images that are “deceptive, misleading, or manipulative.” Therefore, the court must assume that Complainant’s only claimed violation of the current rule hinges on its conclusory statement that the logo and telephone number are “manipulative.”

**d. All advertising is “manipulative” in some manner, and, therefore, there must be a sinister element to the word “manipulative” as used in Rule 4-7.2(b)(4)**

Clearly, all advertisements are manipulative in the sense that the advertiser is attempting to manipulate the audience into choosing his product or service. With this fact in mind, a rule

that completely prohibits any manipulation of the audience would serve to abolish all advertising in contravention of United States Supreme Court precedent regulating commercial free speech. Therefore, as explained earlier in this section, there must be a sinister element to the manipulation that is proscribed by Rule 4-7.2(b)(4).

Neither the United States Supreme Court nor the Florida Supreme Court has ever approved of state action that purports to ban commercial free speech because it “appeals to the emotions of the consumer.” First, that is an impossible standard to apply, as the standard is indefinable and so vague and indefinite that it defies consistent and uniform application or enforcement. Quite simply, no competent arbiter exists to determine what appeals to the emotions of consumers. What may appeal to one consumer’s emotions may not appeal to another’s.

Second, if that were, indeed, a valid standard to ban commercial free speech, then any governing body could arbitrarily and capriciously ban any commercial speech that it did not like by merely making the nebulous assertion that the advertisement “appeals to the emotions of the consumer.” If such a standard was not so obviously unconstitutional, all advertisements with puppies or children or sickly people or anything else that may appeal to one’s emotions could be banned by the State. For example, Complainant could attempt to prohibit a wheelchair bound attorney from appearing in his own advertisement because his mere presence could appeal to the emotions of large segments of the audience.

Complainant’s proposed ban on Respondents’ commercial free speech on the novel ground that it is manipulative in violation of Rule 4-7.2(b)(4) because pit bulls “appeal to the emotions of consumers” must fail as a matter of law. Complainant made no allegations and offered no testimony or proof that Respondents used technical or clever manipulation in an attempt to deceive or mislead the public (*See The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So.2d 451 (Fla. 1991) and *Amendments to the Rules Regulating the Florida Bar*, 762 So.2d at 399) or that the logo and telephone number are misleading in any other way.

When asked directly to describe in detail how Respondents’ telephone number and logo violate Rule 4-7.2(b)(4)--a rule which contains clear language giving Complainant the right to restrict visual images in advertisements that are “deceptive, misleading, or manipulative”-- Complainant expressly avoided making the untenable allegation that the telephone number or

logo are deceptive or misleading. *See* The Florida Bar’s Answers to Respondent’s First Set of Interrogatories at numbers 3 and 5. Instead, Complainant hangs its entire case on the hazy proffer that the telephone number and logo are “manipulative because (they) appeal to the emotions of the consumer as the pit bull is commonly perceived as aggressive, unrelenting, loyal and determined.” *Id.*

**e. Complainant has permitted on numerous occasions lawyer advertising that will appeal to the emotions of large segments of society**

Even if this Honorable Court accepts Complainant’s conclusory and baseless testimony concerning the public’s common perceptions and the public’s emotional reactions and supposed susceptibility to manipulation by an innocuous logo and telephone number, it cannot rule that this is the type of manipulation intended to be proscribed by the rule. In fact, Complainant’s history in applying Rule 4-7.2(b)(4) tells us that Complainant has acknowledged repeatedly that images or portrayals that will, in fact, appeal to the emotions of enormous segments of consumers are not necessarily manipulative for purposes of the rule.

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

Other visual images that certainly appeal to the emotions of some consumers, yet have been determined to be permissible under Rule 4-7.2(b)(4), are: a drawing of empty handcuffs

(*See Bar Ad File No. 00-01167*)<sup>4</sup>; an illustration of a leg brace in a criminal law advertisement (*See Bar Ad File No. 00-00492*); a picture of the Statue of Liberty (*See Bar Ad File No. 01-01334*); pictures of coins in a tray and a stack of money in a bankruptcy law advertisement (*See Bar Ad File No. 00-00942*); a picture of a family in a family owned business accompanied by the statement “Family Limited Partnerships: Succession Issues for the Family Business” (*See Bar Ad File No. 00-00972*); and an illustration of a shield containing a knight and the scales of justice in a personal injury law advertisement (*See Bar Ad File No. 98-00434*). Again, it is curious that Complainant, who was a party to, and, therefore, must have knowledge of all of the aforementioned decisions continues to advance the idea that Respondents’ logo and telephone number are manipulative in violation of Rule 4-7.2(b)(4) because they appeal to the emotions of consumers.

**f. Complainant permits use of spoken and written words such as “aggressive” in lawyer advertising, and, therefore, it should be prohibited from attempting to ban images that it claims portray that same characteristic**

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

Apparently, either Complainant is confused by the rules that it has attempted to invoke here, or, more likely, it has simply reached back into the grab bag of rules to prosecute the Respondents after the Complainant’s 2001 grievance committee found no probable cause the first time Complainant attempted to prosecute Respondents for using the same telephone number and logo. Presently, wild inconsistency abounds in the Complainant’s routine approval of descriptive words that may appeal to the emotions of consumers and its attempted ban of visual images here that it claims may do the same thing. Moreover, there is equal inconsistency between the above-discussed long list of visual images, which might appeal to the emotions of

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<sup>4</sup> The Bar later filed a disciplinary proceeding against an attorney who used, in his advertisement, an illustration of handcuffs with hands in them. However, the court determined that the illustration in question did not violate Rule 4-7.2(b)(4). *See The Florida Bar v. Ostrow*, No. SC 02-970 (Fla. March 11, 2003).

some consumers, yet have been deemed permissible under Rule 4-7.2(b)(4) and the Complainant's attempt to bowdlerize Respondents' logo and telephone number.

*D. In this particular case, the application of rules 4-7.2(b)(3) and 4-7.2(b)(4) is an unconstitutional restriction on Respondents' commercial free speech in violation of the First and Fourteenth Amendments to The Constitution of The United States of America*

- a. Lawyer advertising that is not false, misleading or deceptive cannot be restricted absent a substantial State interest that is directly and materially advanced through a narrowly tailored restriction**

As Justice Kennedy eloquently stated when delivering the opinion of the Court in Edenfield v. Fane, "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." Edenfield v. Fane, 507 U.S. 761, 767 (1993).

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

"Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information may be presented in a way that is not deceptive....Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert

a substantial interest and the interference with speech must be in proportion to the interest served.” Peel v. Attorney Disciplinary Comm’n of Illinois, 496 U.S. 91, 100 (1990) (citing Justice Powell’s decision in In Re RMJ).

In the instant case, Complainant has offered no testimony or other evidence that Respondents’ logo or telephone number is false, misleading or deceptive. Instead, it has attempted to restrict Respondents’ speech under the color of Rule 4-7.2(b)(3) because the logo and telephone number are allegedly intended to describe the advertising lawyers as aggressive, unrelenting, loyal and determined. Moreover, Complainant has attempted to restrict Respondents’ speech under the auspices of Rule 4-7.2(b)(4) because the logo and telephone number are allegedly manipulative in that they appeal to the emotions of consumers who view pit bulls as aggressive, unrelenting, loyal and determined. Nowhere has Complainant alleged or testified that Respondents’ challenged commercial speech is false, deceptive or misleading despite being asked to describe in detail the alleged violative nature of the speech.

Where commercial speech concerns lawful activity and is not misleading, the speech is constitutionally protected and may only be restricted under prescribed circumstances. Having made no allegation and having offered no proof that Respondents’ logo and telephone number are false, misleading or deceptive, Complainant must satisfy the test enunciated by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Comm’n of N.Y., 447 U.S. 557 (1980) in order to lawfully restrict Respondents’ commercial speech: (1) the government’s interest at the base of the restriction must be substantial; (2) the restriction must directly and materially advance the asserted governmental interest; and (3) the restriction must be narrowly tailored to the governmental interest involved. Central Hudson Gas & Electric Corp. v. Public Comm’n of N.Y., 447 U.S. 557, 563-66 (1980).

A regulation will not be sustained if it “provides only ineffective or remote support for the government’s purpose.” Ibanez v. Florida Dept. of Bus. & Prof. Reg., 512 U.S. 136 (1994) (citing Central Hudson Gas & Electric v. Public Service Comm’n of N.Y., 447 U.S. 557, 564, 566 (1980)). The State’s burden is not slight; “mere speculation or conjecture” will not suffice; rather the State “must demonstrate that the harms it recites are real and that its restrictions will, in fact, alleviate them to a material degree.” Id. (citing Edenfield v. Fane, 507 U.S. 761 (1993)). The “free flow of commercial information is valuable enough to justify imposing on would-be

regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.” Id. (citing Zauderer, supra at 646); see also Zauderer, supra, at 648-649 (State’s “unsupported assertions” insufficient to justify prohibition on attorney advertising). Id.

In order to justify a restriction on commercial speech, the State must prove the existence of a certain and identifiable harm that it seeks to remedy through its proposed restriction. Unsubstantiated fear of potential harm is not sufficient to justify the chilling effect on First Amendment rights. See Tinker v. Des Moines Independent School Dist., 89 S.Ct. 733 (1969). In the present case, Complainant makes the conclusory and baseless claims that Respondents attempted to describe themselves as aggressive, loyal, unrelenting and determined through use of their logo and telephone number (in violation of Rule 4-7.2(b)(3)) and that the public will have an emotional reaction to Respondents’ logo and telephone number (in violation of Rule 4-7.2(b)(4)) and that that purported reaction is sufficient to justify its proposed restriction. It offers no more to support its proposed ban. Complainant has not even bothered to allege a substantial State interest or certain and identifiable harm as a basis for restricting Respondents’ commercial speech because they are not able to do so. Clearly, according to United States Supreme Court precedent, that is not enough to justify a ban on commercial speech.

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

supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will, in fact, alleviate them to a material degree.'" Id. at 146.

The requirement that the State provide concrete proof that its proposed restriction on commercial speech advances a substantial State interest "is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" Rubin v. Coors Brewing Co., 115 S.Ct. 1585 (1995)(quoting Edenfield, 113 S.Ct. at 1800). Here, in light of the inconsistent application of Rules 4-7.2(b)(3) and (4) laid out thoroughly in this memorandum and the hollow and bare testimony offered by Complainant in support of its proposed ban, the Court can presume that there may be "other objectives" at play.

As Complainant's testimony offers nothing but mere speculation into unidentifiable harms, its attempt to ban Respondents' commercial speech in contravention of the First and Fourteenth Amendments to The Constitution of The United States of America must fail as a matter of law. As the Supreme Court mandated in Peel and later quoted in Ibanez, a "State may not...completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA." Id. at 144 (quoting Peel, 496 U.S. at 110). In the instant case, in contravention of the referenced Supreme Court precedent, Complainant attempts to ban Respondents' logo and telephone number--both protected commercial speech--completely absent even the barest allegation or testimony that either is misleading or deceptive. In addition, Complainant has proffered no evidence to meet any of the 3 prongs enunciated by the Supreme Court in Central Hudson to justify its attempted restriction on Respondents' non-misleading commercial speech.

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

As the Supreme Court in Peel announced, the first inquiry when faced with a disputed restriction on commercial speech is whether the statement being restricted by the State is misleading and, even if it was not, whether the potentially misleading character of such statements (i.e., Certified Civil Trial Specialist—By the National Board of Trial Advocacy) creates a state interest sufficiently substantial to justify a categorical ban on their use. Id. The Court recognized the long held distinction between facially misleading or deceptive statements and potentially misleading statements where the statement may be true, but the effect can be to mislead the public. The Peel Court also noted that there is “a presumption that members of a respected profession are unlikely to engage in practices that deceive their clients and potential clients.” Id. at 109. As the Court noted in Bates, “It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort.” Id. (citing language from Bates, 433 U.S. at 379).

**b. A simple description of a personal attribute of an advertising attorney that does not concern the quality of legal representation or promise of results is not subject to suppression**

As referenced earlier in this memorandum, Complainant has testified that Respondents’ telephone number and logo violate Rule 4-7.2(b)(3) because “Pit-bulls are commonly perceived to be aggressive and unrelenting. Pit-bulls are also perceived by others to be loyal and determined. Either way, the use of the word in the telephone number is *intended as a description or characterization of the lawyers* to be hired by telephoning that number (emphasis added).” See The Florida Bar’s Answers to Respondent’s First Set of Interrogatories at numbers 2 and 4.

Complainant’s contrived constraint on Respondents’ commercial free speech rests on the unsteady ground that the logo and telephone number are descriptions or characterizations of the advertising attorneys. Complainant intentionally omitted from its testimony any allegation that the telephone number or logo are descriptions or characterizations of *the quality* of Respondents’ legal services. The section of the rule discussing statements that describe or characterize “the quality” of legal services is the part of utmost concern as that is the portion that could make such statements potentially misleading. A simple description of the personal attributes of the

advertising lawyer that does not concern “the quality” of his services and makes no promise of results is neither facially misleading nor inherently misleading and, therefore, it is not subject to state restriction.

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

Knowing the purpose of the rule, Respondents accept that Complainant can lawfully prohibit Florida lawyers from potentially misleading the public by claiming in advertisements that they are “the best” or by using similar comparative phrases reflecting on the *quality* of legal services. *See In Re RMJ*, 455 U.S. 191, 200 (1982) (interpreting the ruling in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), to warrant restrictions on statements in advertisements concerning quality of legal services, as such statements are so likely to mislead). Equally, Complainant can legally prohibit Florida lawyers from providing testimonials in advertisements that may mislead potential consumers, who may assume, based on the testimonial, that the lawyer will achieve the same results on their particular case. The inherent variability in the facts of separate and distinct legal cases could make that type of comparative advertising misleading.

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

However, in this case, Complainant has blatantly misapprehended the purpose of and misapplied Rule 4-7.2(b)(3) and has attempted to regulate Respondents’ commercial speech on entirely unconstitutional grounds. Complainant has not attempted to banish Respondents’ telephone number and logo on the grounds that they are misleading or deceptive or that they constitute statements concerning the quality of legal services. Instead it claims that the logo and telephone number are intended as descriptions of the advertising lawyers and that, as descriptions

of advertising lawyers, they violate Rule 4-7.2(b)(3). In other words, Complainant has concluded that the public views pit bulls as aggressive, unrelenting, loyal and determined and that Respondents, through their logo and telephone number, attempt to ascribe to themselves those very characteristics.

Complainant makes its erroneous assertion of a rule violation despite the fact that the rule it cites does not provide for a blanket prohibition against lawyers describing themselves in advertisements; the rule forbids advertisers from *describing or characterizing the quality of the lawyer's services*. Likewise, United States Supreme Court precedent on commercial speech does not provide a basis for States to prohibit lawyers from describing themselves in a non-misleading way in advertisements.

Moreover, Complainant has already testified that pit bulls are not synonymous with quality legal representation. *See The Florida Bar's Response to Respondent's First Request for Admissions*, answer 9. Therefore, by its own admission, Complainant is not accurately applying the rule that it claims Respondents violated. Accordingly, through its errant wangling of the terms of Rule 4-7.2(b)(3) in order to perpetuate its agenda to eliminate Respondents' logo and telephone number from the airwaves, it has unconstitutionally restricted Respondents' commercial speech.

Complainant's past and continuing approval of specific descriptive words belies its conclusory claim in the instant case that descriptions of personal characteristics of lawyers run afoul of Rule 4-7.2(b)(3). Complainant has repeatedly permitted advertising lawyers to describe themselves with the spoken and written words "aggressive," "committed," "concerned," "dedicated," "efficient," "resourceful," "skilled," and "understanding." It does not claim that those written or verbal descriptions violate the rule. Likely, Complainant realizes that attempting to restrict the use of those descriptive words would not pass Constitutional muster, as the words are not misleading. However, in a contortion that would make a yoga master shudder, Complainant asks this Honorable Court to ratify its attempt to ban a logo and telephone number that it claims describes Respondents in a way that Respondents could permissibly describe themselves with spoken or written words.

Not only is Complainant's thinly veiled restriction on commercial speech unconstitutional, but it is wholly illogical. Any reasonable person knows that the descriptive words "aggressive," "committed," "concerned," "dedicated," "efficient," "resourceful,"

“skilled,” and “understanding,” when used in advertisements, are *intended as a description or characterization of the lawyers* in the advertisements. Complainant has testified in the instant case that the standard for restriction of Respondents’ commercial speech under Rule 4-7.2(b)(3) is that Respondents’ logo and telephone number are “intended as a description or characterization of the lawyers to be hired” as either loyal, unrelenting, aggressive, determined or a combination of those characteristics. See The Florida Bar’s Answers to Respondent’s First Set of Interrogatories at numbers 2 and 4. Meanwhile, it continually approves of advertisements containing those exact words.

Complainant’s attempt at censorship under the guise of Rule 4-7.2(b)(3) cannot withstand a scintilla of constitutional scrutiny let alone the intermediate scrutiny demanded by the Supreme Court when analyzing State bans on commercial speech.

**c. Complainant’s attempt to restrict non-misleading, non-deceptive images under the color of Rule 4-7.2(b)(4) is an unconstitutional restriction on commercial speech.**

As amended earlier this year, Rule 4-7.2(b)(4) now reads: “**Prohibited Visual and Verbal Portrayals.** Visual or verbal descriptions, depictions, or portrayals of persons, things, or events shall not be deceptive, misleading, or manipulative.” Clearly, the purpose of the rule is to prohibit lawyers from misleading the public through contrived visuals or scenes, special effects or technical manipulations that create unrealistic pictures of the attorney and the services he can provide. As required by United States Supreme Court precedent, the validity of the rule and its application hinges on the concepts of misleading and deception. As already discussed, if commercial speech misleads the public, the state can restrict it.

Under the color of Rule 4-7.2(b)(4), Complainant has attempted to prohibit Respondents’ use of its logo and telephone number on the wobbly ground that they are manipulative because they “appeal to the emotions of the consumer as the pitt-bull (sic) is commonly perceived as aggressive, unrelenting, loyal and determined.” See The Florida Bar’s Answers to Respondent’s First Set of Interrogatories at numbers 3 and 5.

**i. A simple, realistic drawing of a pit bull head and a telephone number ending in “PIT-BULL” do not evoke an emotional reaction**

The first inquiry, of course, is to ask how Complainant came to its conclusion. Second, in the face of this conclusory testimony, we are left to wonder that even if the public sees pit bulls as aggressive, unrelenting, loyal and determined how those perceptions “appeal to the emotions.”

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

Therefore, if we accept Complainant’s conclusion as to how the public perceives American Pit Bull Terriers, we must also accept its conclusion that the public has a reaction that rises to a level so intense as to affect its emotional state upon the mere sight of Respondents’ plain logo of the drawing of a dog’s head and the words “PIT-BULL” at the end of its telephone number.

Third, in order to withstand constitutional scrutiny, we must accept that Respondents’ logo and telephone number are visuals that mislead or deceive the public. Despite an express prohibition against misleading and deceptive visual images or depictions in Rule 4-7.2(b)(4), Complainant made no allegation and offered no testimony that Respondents’ logo and telephone number were misleading or deceptive. Through this omission in response to Respondents’ direct question asking it to describe in detail how the logo and telephone violate the rule, Complainant acknowledges that the logo and telephone number are not misleading or deceptive.

Instead, Complainant claims only that the logo and telephone number are manipulative in violation of the rule. And as support for that claim, it has testified that they are manipulative because they appeal to the emotions of the consumer as Complainant alleges the American Pit Bull Terrier to be commonly perceived as aggressive, unrelenting, loyal and determined. As discussed earlier, the link Complainant adverts between the public’s proposed perception and the corresponding purported emotional reaction is contrived. And even if some members of the public do have a reaction intense enough to rise to the level of emotional upon the sight of a

plain drawing of a dog's head and the words "PIT-BULL," that is not a sufficient ground to ban Respondents' commercial speech according to the Supreme Court precedent discussed already in this memorandum.

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

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

In Ibanez v. Florida Dept. of Bus. & Prof. Reg., the Supreme Court struck down the Florida Board of Accountancy's attempted ban on Ibanez's use of the terms CPA and CFP (Certified Financial Planner) in her advertisements. The Board alleged that the terms CPA and CFP were false, deceptive and misleading. In determining that the Board failed to meet its burden of proof that the terms were false, misleading and deceptive, the Court held that the Board had not "demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes." 512 U.S. at 138. Complainant has not alleged that Respondents' logo and telephone number are misleading or deceptive in violation of Rule 4-7.2(b)(4). If it does not see the logo and telephone number as misleading or

deceptive in violation of the rule, it cannot expect the Court to determine that the public has been misled by the challenged speech.

**ii. The nebulous “appeal to the emotions” standard offered by Complainant as support for its ban on Respondents’ commercial speech is unconstitutional**

To suggest that any advertisement that may appeal to a consumer’s emotions is subject to banishment is preposterous and flies directly in the face of the First and Fourteenth Amendments. A laundry list 500 miles long exists of images and concepts in advertisements that appeal to the emotions of some consumers. In fact, Complainant has approved of several of those images in other lawyer advertisements, including, but not limited to: the American Bald Eagle, which is a symbol of America, and at a time of war, especially, can appeal to the emotions of a gigantic segment of consumers; the American flag, which can appeal to the emotions for the same reasons as the eagle; a picture of a woman straightening the clothes of two small children accompanied by the statement “Relocation: Is it in the Best Interest of the Child?” in a family law advertisement, which can appeal to the emotions of the enormous population affected by divorce; a drawing of empty handcuffs, which can appeal to the emotions of those who have been arrested or those who have a bias against the police or those who have lost a family member in a crime; handcuffs with hands in them; an illustration of a leg brace in a criminal law advertisement; a picture of the Statue of Liberty; pictures of coins in a tray and a stack of money in a bankruptcy law advertisement; a picture of a family in a family owned business accompanied by the statement “Family Limited Partnerships: Succession Issues for the Family Business”; and an illustration of a shield containing a knight and the scales of justice in a personal injury law advertisement.

To propose a standard that permits States to ban commercial speech that may appeal to the emotions would effectively squelch advertising in its entirety. Further, it is a standard that is impossible to understand or apply or interpret evenhandedly. While such a standard may make for more enjoyable and uninterrupted television viewing for the infinitesimal period that it would last until the networks went bankrupt, it cannot pass Constitutional muster. Accordingly, as a

matter of law, the Court must determine that Rule 4-7.2(b)(4), as it has been applied in this case, is unconstitutional.

- d. Based upon Complainant’s inconsistent application of Rule 4-7.2(b)(4) and its misapplication of the rule in this case and all of the other evidence in this case, Complainant’s attempted ban of Respondents’ logo and telephone number is an unconstitutional attempt to regulate what it sees as good taste in lawyer advertising.**

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

In Zauderer v. Office of Disciplinary Counsel, the United States Supreme Court addressed the issue of an attorney’s use of an illustration of a Dalkon Shield Intrauterine Device in his advertisement seeking cases stemming from physical problems associated with the use of the device. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). Ohio’s Office of Disciplinary Counsel brought suit against Attorney Zauderer claiming, amongst other issues, that the illustration violated its rules on advertising. In rebuking the Bar’s claim that the advertisement should be banned, in part, because it was not dignified, the Zauderer Court stated, “The mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.” Id. at 648.

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

advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising.” Id. at 649.

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

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

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

Without proof or even the barest allegation that the logo and telephone number are false, misleading or deceptive, Complainant has stated no constitutional ground upon which a restriction of Respondents’ commercial free speech may lie. Certainly, Complainant may attempt to ban the speech through misapplication or clever finagling of its rules or through application of unconstitutional standards, as it has done here. However, regulatory action of that insidious nature is clearly impermissible.

**e. Respondents' logo and telephone number are analogous to nondeceptive, nonmisleading trade names approved by the Florida Supreme Court**

In its 1999 decision in Amendments to Rules Regulating the Florida Bar—Advertising Rules, the Florida Supreme Court delved into the issue of attorneys' use of trade names. The Bar had proposed to the Supreme Court a prophylactic ban on the use of trade names by attorneys because the Bar claimed that “the use of trade names has proven to be actually and potentially misleading to the public.” 762 So.2d at 400. In refusing to adopt the Bar's suggestion that all trade names for attorneys should be banned, Florida's Supreme Court paid particular attention to a comment that stated that “a trade name is easy to remember and to refer on to others” and that “(w)hile false, misleading, or deceptive trade names should clearly be prohibited, a trade name that assists clients in identifying and recalling the attorney who helps them should be permitted in advertisements for legal services.” Id. at 402.

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

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

E. Complainant's attempt to selectively enforce rules 4-7.2(b)(3) and 4-7.2(b)(4) against Respondents in this case is unconstitutional in violation of the Fourteenth Amendment to The Constitution of The United States of America

Respondents have attached copies of a plethora of attorney advertisements that are qualitatively similar to Respondents advertisements that Complainant has either approved or not prosecuted. Examples of qualitatively similar advertisements that have been published in the Complainant's own publications in the last year include, but are not limited to:

- a. Panter, Panter & Sampedro advertisement published in the July 15, 2003 issue of The Florida Bar News (advertisement including images of panthers) (Exhibit "A");
- b. Ricci & Leopold advertisement published in the August 15, 2003 issue of The Florida Bar News (advertisement including logo and image of marble columns) (Exhibit "B");
- c. Ricci & Leopold advertisement published in the November, 2003 issue of The Florida Bar Journal (advertisement including logo and image of people sitting on what appears to be courthouse steps) (Exhibit "C");
- d. Ricci & Leopold advertisement published in the April, 2004 issue of The Florida Bar Journal (advertisement including logo and image of marble columns) (Exhibit "D");
- e. Ricci & Leopold advertisement published in the May, 2004 issue of The Florida Bar Journal (advertisement including logo and image of marble columns) (Exhibit "E");
- f. Simpson & Simpson advertisement published in the June 15, 2004 issue of The Florida Bar News (advertisement including logo and image of paper with technical drawing/writing on it) (Exhibit "F");
- g. Rosenthal & Levy, P.A. advertisement published in the June 15, 2004 issue of The Florida Bar News (advertisement including logo and image of a handshake) (Exhibit "G");

- h.** Dennis Hernandez & Associates, P.A. advertisement published in the July 1, 2004 issue of The Florida Bar News (advertisement including image of a coat of arms) (Exhibit “H”);
- i.** Simpson & Simpson advertisement published in the July 1, 2004 issue of The Florida Bar News (advertisement including logo and image of paper with technical drawing/writing on it) (Exhibit “T”);
- j.** Dennis Hernandez & Associates, P.A. advertisement published in the July 15, 2004 issue of The Florida Bar News (advertisement including image of a coat of arms) (Exhibit “J”);
- k.** Hightower & Pozo, P.A. advertisement published in the July 15, 2004 issue of The Florida Bar News (advertisement including image of a fighting fish) (Exhibit “K”); and
- l.** Broad & Cassel advertisement published on page 24 of the August 1, 2004 issue of The Florida Bar News (advertisement including the slogan “Our Interest is Your Best Interest) (Exhibit “L”).

Examples of qualitatively similar advertisements that have been published in Fort Lauderdale and Miami area telephone books in the last year include, but are not limited to:

- m.** Rosen & Chalik, P.A. advertisement published in several locations (including the back cover and page 67) in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of an American Bald Eagle, the American flag, lightning crackling, and icons including the head of a dog) (Exhibit “m”);
- n.** Zebersky & Associates, P.A. advertisement published on page 69 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including the slogan “We Can Make A Difference”) (Exhibit “n”);
- o.** Jason G. Barnett, P.A. advertisement published on page 71 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including the slogan “Allow Me To Fight For Your Rights”) (Exhibit “o”);

- p.** Goldberg & Dohan advertisement published on page 72 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of the American flag) (Exhibit “p”);
- q.** Feldman & Getz, LLP advertisement published on page 73 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including photo of a family with small children and a logo of the Fleur de lis) (Exhibit “q”);
- r.** Friedman & Friedman advertisement published on page 75 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including image of an American Bald Eagle and references to endorsements by publications concerning attorneys) (Exhibit “r”);
- s.** Dunn & Associates, P.A. advertisement published on page 76 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of the American flag) (Exhibit “s”);
- t.** Scott Saul advertisement published on page 77 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including the slogan “I Fight For Your Rights!”) (Exhibit “t”);
- u.** Peter S. Heller, Esq. advertisement published on page 79 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of the American flag) (Exhibit “u”);
- v.** Stephen T. Millan advertisement published on page 80 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including images of hands in handcuffs, what appears to be a man poised to strike a woman, court proceedings...)(Exhibit “v”);
- w.** Jay Halpern & Associates advertisement published on page 81 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of the American flag and photos of newspaper articles and headlines detailing large jury verdicts) (Exhibit “w”);
- x.** Joshua J. Hertz, P.A. advertisement published on page 82 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of automobiles driving on a highway) (Exhibit “x”);

- y.** Yale L. Galanter, P.A. advertisement published on page 84 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including a statement that “Yale Galanter is a nationally recognized authority in the field of criminal litigation” and a list of television networks on which he has appeared) (Exhibit “y”);
- z.** Glinn & Somera, P.A. advertisement published on page 85 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of Lady Justice) (Exhibit “z”);
- aa.** Scott J. Hidnert and Anthony J. Mallo advertisement published on page 86 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of automobiles on a highway) (Exhibit “aa”);
- bb.** Law Offices of Marilyn Colon, Esq. advertisement published on page 87 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of a gavel) (Exhibit “bb”);
- cc.** Jacobi & Jacobi, P.A. advertisement published on page 89 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of stock certificates) (Exhibit “cc”);
- dd.** Law Offices of Victor F. Dante & Associates, P.A. advertisement published on page 90 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including the slogan “We Can Settle Most Cases Without Going to Court”) (Exhibit “dd”);
- ee.** Weinstein & Associates, P.A. advertisement published on page 91 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of a gavel) (Exhibit “ee”);
- ff.** Karlan & Associates, P.A. advertisement published on page 91 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of a gavel and a globe) (Exhibit “ff”);
- gg.** Robert A. Mercer, P.A. advertisement published on page 136 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including an image of a woman kissing a baby) (Exhibit “gg”);

- hh.** Taylor Hodkin Kopelowitz & Ostrow, P.A. advertisement published on page 143 in the June 2004 “Greater Miami” edition of the Verizon “Super Pages” (advertisement including the slogan “You Deserve The Maximum Possible Recovery”) (Exhibit “hh”);
- ii.** Law Offices of Jaime E. Suarez, P.A. advertisement published on the inside cover of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including the slogan “My goal is to get you the most money for your injury”) (Exhibit “ii”);
- jj.** Law Offices of Downs & Associates advertisement published inside the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including the slogan “Winning is knowing how to fight for your rights”) (Exhibit “jj”);
- kk.** Alter Law Office advertisement published on pages 100-101 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photos of people standing in front of Mercedes-Benz and Cadillac automobiles with the slogan :Maximize your recovery”) (Exhibit “kk”);
- ll.** Friedman & Friedman advertisement published on pages 104-105 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including image of an American Bald Eagle and references to endorsements by publications concerning attorneys) (Exhibit “ll”);
- mm.** Friedman, Rodman & Frank advertisement published on pages 106-107 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including image of an American flag) (Exhibit “mm”);
- nn.** Feldman & Getz, LLP advertisement published on pages 112-113 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photo of a family with small children and a logo of the Fleur de lis) (Exhibit “nn”);
- oo.** Del Amo & Segurola, PL advertisement published on pages 120-121 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real

- Yellow Pages” (advertisement including the slogan “Serious injuries require experienced litigators to maximize your recovery”) (Exhibit “oo”);
- pp.** Glenn J. Holzberg advertisement published on pages 124-125 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including the statement “My commitment to you...maximize your recovery) (Exhibit “pp”);
- qq.** Levine, Busch, Schnepfer & Stein, PA advertisement published on pages 130-131 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including image of marble columns and statues) (Exhibit “qq”);
- rr.** Jose M. Francisco, PA advertisement published on pages 134-135 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photo of what appears to be the Supreme Court) (Exhibit “rr”);
- ss.** Cohen & Juda advertisement published on pages 136-137 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including the slogan “We protect your rights-at a fair fee” and telephone number (866) FAIR FEE) (Exhibit “ss”);
- tt.** Montalvo & Associates advertisement published on page 139 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photos of children) (Exhibit “tt”);
- uu.** Carrillo & Carrillo, LLP advertisement published on page 140 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photo of a statue) (Exhibit “uu”);
- vv.** Law Offices of Randy M. Weber advertisement published on page 141 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including slogan “Don’t settle for less than you deserve”) (Exhibit “vv”);
- ww.** Ronald M. Kovnot advertisement published on page 143 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photo with a child in it) (Exhibit “ww”);

- xx.** Rubin & Rubin, P.A. advertisement published on page 148 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including the slogan “Don’t get hurt twice! Let us get you the maximum settlement you deserve”) (Exhibit “xx”);
- yy.** Barry M. Snyder, P.A. advertisement published on page 151 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including the slogan “Call the problem solver”) (Exhibit “yy”);
- zz.** Cohen & Cohen, P.A. advertisement published on page 154 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including the slogan “Tradition of excellence”) (Exhibit “zz”);
- aaa.** Law Offices of Ada M. Barreto, P.A. advertisement published on page 155 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photo of the Supreme Court) (Exhibit “aaa”);
- bbb.** Jeffrey P. Raffle advertisement published on page 194 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including the slogan “When you need the best defense”) (Exhibit “bbb”);
- ccc.** Brauwerman, Brauwerman & June, P.A. advertisement published on page 199 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photo of a courtroom) (Exhibit “ccc”);
- ddd.** Alex Solomiany, P.A. advertisement published on page 200 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photos of the Statue of Liberty, American flag and people) (Exhibit “ddd”);
- eee.** Rhonda F. Gelfman, P.A. advertisement published on page 201 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages” (advertisement including photos of the Statue of Liberty and American flag) (Exhibit “eee”);
- fff.** David Singer advertisement published on page 236 of the October 2003-04 “Miami-Dade County” edition of the Bellsouth “The Real Yellow Pages”

- (advertisement including the phrase “Member of the Million Dollar Advocates Forum:”) (Exhibit “fff”)
- ggg.** Angelo Marino, Jr., P.A. advertisement published on page 91 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the slogan “Why settle for less? Have a Board Certified Attorney Fight For Your Rights” and “We’re In Your Corner From Beginning To End”) (Exhibit “ggg”);
- hhh.** Patric L. Jones, Esq. advertisement published on page 93 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including a picture of a gavel) (Exhibit “hhh”);
- iii.** Evan M. Kleiman, P.A. advertisement published on page 97 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the a photo of the Statue of Liberty) (Exhibit “iii”);
- jjj.** Attorney Chris Keith advertisement published on page 101 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the slogan “We Help Good People Through Difficult Times”) (Exhibit “jjj”);
- kkk.** Thomas & Pearl, P.A. advertisement published on page 103 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the slogan “The Injury Attorneys”) (Exhibit “kkk”);
- lll.** Neufeld, Kleinberg & Pinkiert P.A. advertisement published on page 105 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the slogan “When You Need Experienced Trial Attorneys to Fight For You”) (Exhibit “lll”);
- mmm.** Louis C. Pironti advertisement published on page 106 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including a picture of handcuffs) (Exhibit “mmm”);
- nnn.** Kane & Vital, P.A. advertisement published on page 107 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the slogan “We Will Help You!”) (Exhibit “nnn”);
- ooo.** Elena M. Perez, P.A. advertisement published on page 108 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the slogan “You Deserve The Right Legal Representation”) (Exhibit “ooo”);

- ppp.** Arthur A. Cohen advertisement published on page 108 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the slogan “Get The Money You Deserve”) (Exhibit “ppp”);
- qqq.** Gail M. Fisher, P.L. advertisement published on page 112 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the slogan “Your Legal Matter Deserves My Personal Attention”) (Exhibit “qqq”); and
- rrr.** Brooks & Associates, P.A. advertisement published on page 113 of the 2004-2005 “Coastal South” edition of the Yellow Book (advertisement including the a photo of the Statue of Liberty) (Exhibit “rrr”).

Complainant’s approval of some of the qualitatively similar attorney advertisements or failure to prosecute those attorneys whose advertisements are qualitatively similar to Respondents raises the issue of selective (arbitrary and capricious) or discriminatory enforcement of the Rules Regulating the Florida Bar in this case. This lends support to Respondents’ “other objectives” theory.

As promulgated by the 1<sup>st</sup> DCA, “[t]o support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.” State of Florida v. A.R.S., 684 So.2d 1383 (Fla. 1<sup>st</sup> DCA 1996).

**a. Respondents have been singled out for prosecution by the Complainant despite Complainant’s failure to prosecute other attorneys who have published advertisements that are qualitatively similar to Respondents**

Complainant is prosecuting the Respondents in the instant case based on its claims that the Respondents violated 4-7.2(b)(3) and 4-7.2(b)(4) of The Rules Regulating the Florida Bar by including a telephone number ending in “PIT-BULL” and Pape & Chandler, P.A.’s logo of the

head of an American Pit Bull Terrier wearing a spiked collar in its advertisements. As already stated, Rule 4-7.2(b)(3) of The Rules Regulating the Florida Bar states, in pari materia: “[a] lawyer shall not make statements describing or characterizing the quality of the lawyer’s services in advertisements and written communications....” Rule 4-7.2(b)(4) states “[v]isual 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.”

Complainant has aggressively pursued this case against the Respondents (this is the second attempt) but has generally failed to prosecute other lawyers who have advertised in a qualitatively similar manner. Examples of the lawyer advertising that is qualitatively similar to the Respondents’ that has not been prosecuted by the Complainant abound. Those advertisements can be found in several forms of the media including, but not limited to television, radio, telephone books and even in the publications of the Complainant. Respondents listed 70 such advertisements that were culled from a limited number of sources. The examples of qualitatively similar but not prosecuted advertisements Respondents cited in this memorandum are but a sample of the advertisements actually published in the State of Florida every year. Bear in mind that the advertisements cited above were found in the Complainant’s own publications and Fort Lauderdale and Miami area telephone books. As Fort Lauderdale and Miami comprise only a small portion of Florida, the Court can extrapolate those advertisements to arrive at the true number of qualitatively similar advertisements that are not prosecuted throughout the State of Florida.

The myriad examples of lawyer advertisements published in the State of Florida that are qualitatively similar to those of Respondents that Complainant has failed to prosecute are sufficient proof that the first prong of the test promulgated by the First DCA in State of Florida v. A.R.S., 684 So.2d 1383 (Fla. 1<sup>st</sup> DCA 1996) has been met.

**b. Complainant’s discriminatory selection of Respondents for prosecution has been undertaken for invidious reasons**

The second prong of the test promulgated in State of Florida v. A.R.S., 684 So.2d 1383 (Fla. 1<sup>st</sup> DCA 1996) is “that the government’s discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race,

religion, or the desire to prevent his exercise of constitutional rights.” As we have discussed in this memorandum, commercial speech is protected by the First Amendment to the Constitution of the United States of America, and as the Supreme Court of the United States of America has steadfastly declared, a government can only restrict that speech in limited circumstances. Those circumstances do not exist in this case.

Complainant’s selection of Respondents for prosecution has been based on Complainant’s desire to prevent Respondents from exercising their constitutional right to commercial speech as enunciated by the Supreme Court of the United States of America in the cases cited above. As is evident from Complainant’s actions and statements made by members of Complainant’s task forces/committees on advertising, Complainant has long harbored an antipathy towards attorneys’ commercial free speech. This prosecution through which Complainant is attempting to abrogate Respondents’ right of commercial speech, was undertaken because high-ranking members of the Complainant simply do not like the telephone number ending in PIT-BULL or the logo of the American Pit Bull Terrier respondent utilizes in its advertisements. Complainant’s disdain for those items has formed the basis of this prosecution of Respondents as well as the earlier prosecution of Respondents that resulted from the Aronovitz Complaint.

Complainant’s attempt to abridge the commercial speech of Respondents in this case, while failing to do the same to other attorneys who publish advertisements that are qualitatively similar to the advertisements of Respondents is a textbook example of selective or discriminatory enforcement of the law. In addition to the other reasons stated in this memorandum of law, as selective or discriminatory enforcement of the law is proscribed, this case must be dismissed with prejudice.

## **CONCLUSION**

There is no issue of material fact in this case, and, as stated in detail in this memorandum, Respondents are entitled to a judgment as a matter of law. Respondents’ advertisements containing the telephone number ending in PIT-BULL and Respondents’ logo do not violate the Rules Regulating the Florida Bar. Moreover, the Rules Regulating the Florida Bar that Complainant claims Respondents violated are unconstitutional as applied here. Finally,

Complainant's prosecution of Respondents while generally failing to prosecute other attorneys who have published advertisements that are qualitatively similar to Respondents' advertisements is selective enforcement of the law, and unconstitutional.

**CERTIFICATE OF SERVICE**

I **CERTIFY** that a copy hereof has been furnished to Randi Klayman Lazarus, Bar Counsel at 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 and Kenneth L. Marvin, Director of Lawyer Regulation, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399 via U.S. Mail on September 1, 2004.

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