

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CASE NO. SC06-2024

MICHAEL KEVIN RATHEL

TFB File No. 2006-90,066(02S)

Respondent.

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**REPORT OF THE REFEREE**

I. **SUMMARY OF THE PROCEEDINGS**

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On October 13, 2006, the Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings, alleging that the Respondent violated two rules, stating:

- A. Rule 4-7(b)(2)(J) (Every direct mail advertisement ~~A~~Prompted by a specific occurrence~~@~~ must disclose how the lawyer obtained the recipient's name and address. The purpose is to inform the recipient of the extent of the information the lawyer has about the matter.
- B. Rule 4-8.4) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

Respondent denied the allegations, and this proceeding followed.

On March 30, 2007, a final hearing was held on this matter. All of the aforementioned pleadings, responses thereto, exhibits received in evidence and This Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

A. Jurisdictional Statement.

Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary of Case.

On September 29, 2003, The Standing Committee on Advertising of The Florida Bar received an undated letter from Respondent which stated in pertinent part:

Please find a copy for your review of my self mailing brochure. This will be a direct mail piece sent daily throughout 2003 to individuals who have been arrested and who-s [sic] name is provided via public records.

The letter enclosed a copy of Respondent-s direct mail advertisement.

On December 10, 2003, Barbara B. Moore, Assistant Ethics Counsel of The Florida Bar wrote a letter to Respondent, stating that advertisement did not comply with Rules 4-7.1 through 4-7.11, Rules Regulating The Florida Bar, because the postcard revealed on that the ad was for criminal representation, through clearly visible information about specific fees for criminal representation, and that A[i]f you have retained a lawyer, please disregard this advertisement.@The latter statement was also deemed to reveal that the addressee had the need for a lawyer. Ms. Moore also advised Respondent that the mailing did not comply with the requirement for Atargeted@direct mail, since it did not reveal that how the recipient-s name and

arrest information had been obtained.

On January 26, 2004, Ms. Moore received an undated letter from Respondent, seeking approval of a revised mailer, stating in pertinent part that the mailer would be used as a general mailer to unspecified individuals. The mailer will be addressed to Resident not a specific person.

On January 28, 2004, Ms. Moore responded in a letter, stating in pertinent part:

I received your revised direct mail advertisement on January 26, 2004. Your revised advertisement, which you have indicated will not be disseminated to a recipient with a known legal matter but rather as a general mailer to unspecified persons, complies with Rules 4-7.1 through 4-7.11, Rules Regulating The Florida Bar.

In the latter part of 2005, The Florida Bar received a few unsigned complaint letters, which appeared to have been sent mainly by other lawyers, complaining in essence that Respondent had been sending solicitation postcards to persons with known legal criminal problems, without revealing how he obtained the recipient's name and case information, and which communications revealed that the person had an unspecified criminal problem, since the mailings listed responded as a Former Prosecutor and listed specific fee schedules for specific types of crimes ranging from misdemeanors and DUIs to first degree felony offenses and felony violations of probation. The postcards were generally addressed to Resident or to Dear Friend.

Based upon these complaints. On January 13, 2006, Mr. Arne C. Vanstrum, Advertising Counsel for The Florida Bar, sent an informal inquiry letter to Respondent, alleging that the mailings were in violation of Rule 4-7.4(b)(2)(K), for revealing the nature of the prospective client's legal problem on the outside of the brochure; 4-7.4(b)(2)(J), that the

mailing was sent to a recipient with a known legal problem and did not disclose how the lawyer obtained the recipient's name and address; and 4-8.48, that the Respondent had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

On January 19, 2006, Respondent replied to Mr. Vanstrum in pertinent part that:

I am somewhat bewildered due to the fact that the copy of the advertisement you provided has already been approved by the Florida Bar. I have enclosed a letter dated January 28, 2004 which indicates that this advertisement complies with Rules 4-7.1 through 4-7.11. This advertisement is only disseminated to unspecified persons, which is indicated above the mailing address as AResident@ or ADear Friend.@"

Following receipt of that letter, on February 8, 2006, Mr. Vanstrum wrote a letter to Mr. Respondent, stating in pertinent part:

Finally, I would like a complete explanation as to why you have continued to mail your advertisement to individuals who had been arrested subsequent to your admonishment for disseminating a similar mailer.

In response, on February 23, 2006, Mr. Respondent responded in pertinent part:

With regard to your final question, I still contend that mailing to ADear Resident@ or ADear Friend@ is not mailing to any person in particular, and therefore is not a violation of any Bar Rules. The United States Postal Service indicates that mail addressed to ADear Resident@ or ADear Friend@ is general junk mail which is not intended to any direct person. The mailer I sent out was approved by the Bar as a general mailer which could be sent out to ADear Resident@ or ADear Friend.@" As I understand the rules and the purpose of the rule A4-7.4(b)(2)(J), The purpose is to inform the recipient the extent of the information the lawyer has about the matter.@" As I understand the rule, mailing to ADear Resident@ or ADear Friend@ is not directed to any one recipient and therefore is a general mailer to an address and not a person. As regards to rule 4-7.4(b)(2)(K) the same argument applies since it is not directed to a specific person and is addressed to ADear Resident@ or ADear Friend@" and therefore cannot reveal the nature of the legal problem.

The Florida Bar rejected Mr. Respondent's explanations, and filed the instant complaint

on October 13, 2005. Although the complaint alleges in the introductory paragraphs that the mailings were in violation of Rule 4-7.4(b)(2)(K), for revealing the nature of the prospective client's legal problem on the outside of the brochure, that was not alleged as one of the Rules violated in the Complaint (see Complaint paragraph 18). Only Rules 4-7(b)(2)(J) (pertaining to targeted mailings) and 4-8.48 (pertaining to fraud and misrepresentation). Thus, I will not address the purported violation of Rule 4-7.4(b)(2)(K), which in my opinion would not survive in light of the opinion in *The Florida Bar v. Gold*, 937 So.2d (Fla. 2006).

### III. RECOMMENDATIONS AS TO GUILT

I recommend that the Respondent be found not guilty of violating either of the rules alleged, for the reasons stated below.

#### A. Rule 4-7(b)(2)(J)

Rule 4-7(b)(2)(J) [now Rule 4-7(b)(2)(J), Rules Regulating The Florida Bar stated as follows:

Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication. The disclosure required by this rule shall be specific enough to help the recipient understand the extent of the lawyer's knowledge regarding the recipient's particular situation.

I find that The Florida Bar did not meet its burden to establish by clear and convincing evidence that the Respondent violated this rule. Respondent testified that he felt that since his mailers were not addressed to specific, named persons, and that he felt that this rule did not apply. I find that, although the mailers were being sent to addresses of persons with known legal problems, by addressing the letters to AResident@ or ADear Friend,@ the mailers could have been opened by any person at the specified address, regardless of who resided at the

premises, and thus there was no intended recipient with a known legal problem. Respondent could have sent the exact same mailer to every address on the block of the selected address or to every address in the selected zip code, and The Florida Bar admitted that such a mailing would not have violated this rule. This would have merely increased the cost to Respondent without serving the purposes of the rule. Had the Respondent addressed the mailer as he did, to Resident or Friend, and specified how the Respondent obtained information about a specific legal problem, then anyone opening the envelope would have known that someone at the address had a specific legal problem. By addressing the mailer generically and not identifying a specific legal problem, any person who opened the mailer would get the impression that it was in fact, a general mailing, not addressed to any specific person.

Even though Respondent no doubt hoped that the person with a known legal problem would have received the mailer, there was no assurance that such a person would be the one to receive or open the envelope. It could have been opened by anyone at said address, and could easily have been discarded as junk mail before the person with the known legal problem opened it. I find that this Rule is somewhat ambiguous and subject to differing interpretations. Therefore, Respondent-s interpretation was reasonable and credible, and I find that Respondent attempted to comply with the rule in good faith, and certainly did not intentionally attempt to violate or circumvent the rule. Accordingly, I recommend that he be found not guilty a violation of Rule 4-7.4(b)(2)(J).

B. Rule 4-8.4(c)

Rule 4-8.4(c) Rules Regulating The Florida Bar states in pertinent part as follows:

A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or

misrepresentation.

The Florida Bar asserts that Respondent violated this rule by failing to disclose to them that his mailers were being sent to addresses of persons with known legal problems, and that this failure to disclose constituted fraud by failing to disclose a material fact. While I feel that Respondent would have been better served to have advised The Florida Bar that this mailers were being sent to the addresses of persons with known legal problems, I do not feel that The Florida Bar met its burden of proving by clear and convincing evidence that the Respondent intentionally withheld material information from them, as opposed to a good faith belief of Respondent that he did not intent to mislead The Florida Bar in his contacts with them. I find the Respondent-s testimony credible that he did not intend to so mislead The Florida Bar. Accordingly, I recommend that the Respondent be found not guilty of this alleged rule violation.

IV. COSTS

I find that, although The Florida Bar was unsuccessful in the prosecution of this matter, that there were justiciable issues of law and fact raised by The Florida Bar, and that the prosecution was brought in good faith. Therefore, I recommend that no costs be assessed against The Florida Bar.

Dated this \_\_\_\_ day of April, 2007

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THOMAS W. TURNER, CIRCUIT JUDGE  
Orange County Courthouse  
425 N. Orange Avenue Suite 810  
Orlando, FL 32801

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the **original** of the foregoing Report of Referee has mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32301, and that copies were mailed by regular U.S. Mail to JOHN ANTHONY BOGGS, Staff counsel, The Florida Bar, 651 E. Jefferson St., Tallahassee, Florida 32399-2300; Kathy J. Bible, Bar counsel, the Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and to Michael Kevin Rathel, Respondent and pro-se Respondent, at 736 North Magnolia Avenue, Orlando, FL 32803 on this \_\_\_\_\_ day of April, 2007.

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THOMAS W. TURNER, REFEREE