

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

**The Florida Bar v. Mark Stephen Gold
Docket Number: SC04-1661**

THE MARSHAL: PLEASE RISE .

THE MARSHAL: LADIES ANDGENTLEMEN, THE FLORIDASUPREME COURT.

PLEASE BE S EATE D .

CHIEF JUSTICE: GOOD MORNING. THE N EXT CASE O N T HE D OCKET IS THE FLO RI DA BAR V ER
SU S MARK STEPHEN GOL D . GOOD MORN I NG .

MAY IT PLEASE T HE COURT , I'M HOPE KEATING O N B EHALF OF THE F LORIDA BAR. THE I SS UE
BEF ORE T HI S C OU RT IS W HE TH ER STATE ME NT S CONTAINED IN THE LAW YER' S A
DVERTISEMENT, WHICH ARE OTHERWISE IN VIOLATION O F THE RULES REGULATING THE FLORIDA
BAR, GAIN IMM UN IT Y SIMPLY BECAUSE THEY FIRST APPEARED I N NEWSPAP ER ARTICLES.

CHIEF JUSTICE: BEFORE YOU GET INTO THAT, COULD YOU GIVE US S ORT O F A CHRONOLOGICAL
SUM MA RY O F WHEN T HE SE A DS F IR ST S TART ED A PPEARING AND MOR E O F THE ESTOPPEL
ISSUE, THA T I S WHETHER THE BAR H AD ACTUALLY APPROVED THESE ADS I N THE PAST ?

I DON'T T HINK THERE IS ANY DISPUTE IN THE RECORD THAT THERE WER E PRE VIOU S GRIEVANCE
PROCEEDIN GS , B UT THE RECORD IS - - D OE SN 'T GIVE THE DETAILS AS TO W HICH -- WHAT THE
A DVER TI SEME NT S EXACTLY WER E , AND WHA T R UL ES WERE AT ISSUE.

JUSTICE: W ELL , THE I SS UE THAT I AM CONCE RN ED A BOUT I S THAT IN THE - - I N T HE DEF
ENDANT'S P APER S H ERE , THERE IS AN ASS ERTI ON T HA T THIS A D W HICH I S I N SUBST
ANTIALLY SIMILAR FORM HAD BEEN FILED U NDER 4-7 WITH T HE A DVER TI SI NG COMMITTEE
AND THAT THE BAR HAD NEVER RAISE D ANY POI NT ABOUT A SUB ST ANTI ALLY SIM ILAR AD P
RI OR T O THE T IM E THAT THIS AD WAS RUN . IS THAT NOT C ORRECT ?

THE R EC OR D D OE S S HO W THA T THERE WER E PRE VIOU S FIN DI NG S O F NO PROBA BL E CAU
SE O N A DS T HAT C ONTAIN ED T HE N EWSP APER ARTICLES.

JUSTICE: W HA T I'M CONCERNED ABOUT IS W IT H T HE ADVERTISING COMMITTEE OF THE
FLORIDA BAR. THE ASSER TION S M ADE T HA T THESE ADS I N A SUB ST ANTI AL LY SIM ILAR
FORM P REVI OU SL Y H AD BEEN FILED WITH T HE BAR 'S ADV ERTISING COM MI TT EE U NDER
THE PROCEDU RE THAT IS OUTLINED IN THE R UL E FOR PASSING T HESE B EFOR E T HE BAR P RIOR
TO THE TIM E T HA T THE Y ARE RUN AS A DVER TI SEME NT S.

I THINK THAT THE R EC OR D IS I NCOM PL ET E A S T O W HA T NOTIFICATIONS T HE R ESPO ND EN
T GOT FRO M T HE F LORI DA B AR , THE ETHIC S I N A DVER TI SING OFFICE AND AS T O W HA T
VIOLATIONS . > > JUSTICE: WELL, TEL L U S WHAT YOU CAN TELL US ABOUT WHAT THE RECORD
DOES S HOW I N TERMS OF AND I'M NOT S UR E WE'RE GETTING ACROSS T HE ISSUE THAT WE ARE
ASK ING ABOUT . THESE OEN C LOSU RE S - - THE SE E NCLOSURES, M AILING S ?

THAT'S CORRECT .

JUSTICE: THE CON TE NT S O F THE SE GO BEFORE THE B AR F OR SOME YEARS B EFORE T HE PROSECUTION OF THESE PARTICULAR VIOLATI ONS I N T HE CASE THAT WE HAVE BEF OR E U S , AND WERE THE C ON TENT S A RE SUBSTANTIALLY SIMILAR CONTENTS A PPROVED BY T HE B AR FOR U SE B Y THI S LAW YE R P RIOR TO THIS P RO SE CU TI ON , AN D I F SO, YOU K NOW , HOW F AR B AC K DOE S THAT APPROVAL GO? DO YOU UNDERSTAND MYQUESTION?

I T HINK SO . > > JUSTICE: THE P ROCEDURE I S THEY ARE NOT IN THE B AR AS PART OF THE ADV ERTISI NG SCHEME, THAT L AW YE RS C AN SEND TO A BAR C OM MITT EE O R THE BAR IN TAL LAHA SSEE A ND SAY HERE'S MY P ROPO SE D A DVVERTISEMENT OR P RACT IC E.

R IGH T .

JUSTICE: AND IT IS O KAY IN ESSENCE AND THE BAR LOO KS AT IT A ND SAY S I T I S O KA Y O R IT IS NOT O KA Y O R WHA TEVE R. NOW, W AS T HA T P RACTIC E ENG AGED I N I N SOFA R A S THI S PARTICULAR ADVERTISEMENT IS CONCERNED?

YES, SIR, I BELIEVE IT WAS.

JUSTICE: AND HOW FAR B AC K DO WE GO?

I B EL IE VE , I A M N OT EXACTLY SURE, BUT I THINK I T GOES BACK T O A N UM BE R O F YEARS TO THE EAR LY ' 90 s.

JUSTICE: SO WAS THI S ADVERTISEMENT ENDOR SED O R OKAYED BY THE B AR G OI NG B AC K A NUMBER OF YEA RS ?

S I N CE 1 99 6 , I KNO W T HA T THERE HAV E B EE N S EVER AL N OTIFICATIONS AFTER THE AD WAS FILED WITH THE O FF IC E O F ETHICS I N A DV ERTI SI NG , A ND T HE RES PONDENT WAS N OT IF IE D ON SEVERAL OCCASIONS THAT , NO, HIS AD WAS NOT I N COMPLIANCE .

CHIEF JUSTICE: BECAUSE THE RES PONDENT SAY S T HE BAR APPROVED THIS AD I N 2 00 3. WHAT I'M H EARING YOU SAY I S THAT, N O , THA T NEVER HAPPENED. I N FACT , THERE W ER E N OTIC ES THAT THE AD W AS I MP ROPE R ? THI S SHOULD BE A PRETT Y E AS Y QUESTION.

I N 2 003 THE RE WAS A GRIEVANCE COMMITTEE ON AN A D ALMOST EXACTLY LIKE T HI S , AND A FIN DI NG O F P ROBABL E CAUSE WAS I SSUE D I N 200 3.

CHIEF JUSTICE: S O YOU R POSITION IS THAT THE B AR NEVER A PPROVED THIS AD?

NOT THE OFFICE O F E TH IC S I N ADVER TISI NG . ON SEVERAL O CCAS IONS , I T WENT TO A G RIEV AN CE C OMMITTEE WHO ISSUE D L ETTE RS OF N O PRO BA BL E C AUSE.

JUSTICE: ALL RIGHT . SOM ETHING THAT IS REL AT IVEL Y SIMPLE SEEMS TO B E V ER Y COMPLICATED HERE I N WHI CH WOULD USUALLY ORA L A RGUMENT IS THE PLACE THAT WE UNCOMPLICATE THINGS T O LET 'S KEEP TRYING. YOU ARE S AYING THAT , NO , T HE BAR N EVER APP RO VE D A N ADVERTISE MENT SIMILAR TO THIS FOR USE BY T HI S L AW YE R. LET ME JUS T S TO P R IGH T THERE. IS THAT C ORRECT?

I B EL IE VE A T LEA ST SIN CE 1 996.

JUSTICE: IS THAT A CORRECT STATEMENT OR IS THAT NOT A CORRECT STA TEMENT?

TO M Y K NO WL EDGE SINCE 1996 THEY DID NOT APPROVE IT.

JUSTICE: IN FACT , WHAT HAPPENED IS THAT AS OPPOSED TO APPROVING THIS ADVERTISEMENT THE BAR HAS ISSUED RULES CAUTIONING THAT THIS IS AN ETHICAL VIOLATION?

THAT IS CORRECT. THE LETTERS OF NO PROBABLE CAUSE RESULTED FROM COMPLAINTS FILED AGAINST ADS THAT WENT TO THE GRIEVANCE COMMITTEE , BUT THE LETTERS FROM THE OFFICE OF ETHICS IN ADVERTISING DID NOT APPROVE THE AD .

CHIEF JUSTICE: DO YOU WANT TO CONTINUE THE N?

YES . THE ISSUE BEFORE THE COURT IS - . >> JUSTICE: YOU NEED TO GET RIGHT TO THE THING HERE BECAUSE WE WERE HALFWAY THROUGH YOUR ORAL ARGUMENT AND WE WERE CONCERNED ABOUT WHAT THE RECORD SHOWED ABOUT THIS PREVIOUS THING. NOW, WHY SHOULDN'T LAWYERS IF THEY GET A NICE WRITE-UP IN THE NEWSPAPER AND IT IS THE NEWSPAPER THAT SAYS THINGS ABOUT THE MATTER THAT THEY THINK MIGHT HELP THEM GET CLIENTS, WHY SHOULDN'T THEY BE ABLE TO PUBLICIZE THAT NICE NEWSPAPER ARTICLE THAT THEY DIDN'T WRITE THAT SOMEBODY ELSE WROTE?

WELL, WHEN THE NEWSPAPER ARTICLES WERE PUBLISHED IN THE NEWSPAPER PRESUMABLY THEY WERE BONAFIDE NEWS STORIES. NOT WRITTEN, PAID FOR OR SOLICITED BY THE RESPONDENT. AND NOT CONSIDERED AN ADVERTISEMENT AND PRESUMABLY THERE WAS NO REASON FOR THE BAR TO OBJECT TO THE RESPONDENT'S PARTICIPATION IN THOSE NEWS STORIES . AND THE BAR OTHERWISE HAS NO AUTHORITY TO REGULATE NEWS ARTICLES. BUT SINCE WHEN THE ARTICLES WERE PUBLISHED IN THE NEWSPAPER THEY WERE NOT SUBJECT TO THE BAR RULES , BUT THE BAR IS CHARGED WITH REGULATING LAWYER ADVERTISEMENT, AND NOW , THOUGH, THE ARTICLES AND WORDS IN THOSE ARTICLES , IN THOSE NEWS ARTICLES ARE NOW PART OF THE LAWYER'S ADVERTISEMENT . >> CHIEF JUSTICE : IS THAT THE BRIGHT-LINE RULE THAT AS SOON AS THIS NEWSPAPER ARTICLE GOES INTO AN ADVERTISEMENT THEN IT IS IMPROPER OR IS THE BAR IN THIS CASE BASING IT ALL ON THE FACT WHICH CONCERNS ME THAT THESE ARE REALLY OLD STORIES. THESE STORIES ARE OVER A DECADE OLD SO IT COULD BE VERY MISLEADING TO A POTENTIAL RECIPIENT THAT THE SE WERE RECENT RESULTS?

NO, THE ISSUE BEFORE THE COURT IS NOT THE NEWSPAPER ARTICLES. IT IS THE CONTENT OF A LAWYER'S ADVERTISEMENT. THE CONTENT OF THE WORDS AND STATEMENTS WITHIN THE FOUR CORNERS OF THAT ADVERTISEMENT, AND THE REASONS -- THE BAR RULES ARE VERY CLEAR THAT THERE ARE STATEMENTS IN A LAWYER'S ADVERTISEMENT THAT ARE PROHIBITED. STATEMENTS ABOUT PAST SUCCESSES, RESULTS OBTAINED OR STATEMENTS THAT DESCRIBE OR CHARACTERIZE THE QUALITY OF A LAWYER'S SERVICES.

JUSTICE: IS THAT BECAUSE THE STATEMENTS ARE ATTRIBUTED TO THE LAWYER OR WOULD THIS BE THE CASE , FOR EXAMPLE, IF A REPORTER WENT DOWN OR CAME TO THIS CHAMBER AND WATCHED THE PERFORMANCE OF A LAWYER AND DESCRIBED THOSE IN THE REPORTER'S OWN WORDS RATHER THAN AN INTERVIEW WITH THE LAWYER. IS THAT A DISTINCTION OR IS THAT NOT?

NO.

JUSTICE: IT IS NOT? SO THEN IT WOULD BE THAT A LAWYER CANNOT SEND A ROUND COPY OF FTRUTH , NO QUOTES , JUST A LEGITIMATE NEWS PAPER ARTICLE, CAN'T SEND THAT OUT IF IT CONTAINS A LAUDATORY KINDS OF MATERIALS THAT WOULD OTHERWISE VIOLATE THE BAR RULES?

THE RULES PERTAIN TO ANY WRITTEN COMMUNICATION DIRECTED AT A PERSPECTIVE CLIENT FOR THE PURPOSE OF OBTAINING BUSINESS.

JUSTICE: THE ANSWER IS YES?

YES.

JUSTICE: SO LAWYERS CAN'T COPY ARTICLES, EVEN IF THEY DON'T MAKE STATEMENTS IN THE ARTICLES, AND SEND THOSE TO CLIENTS?

NO, NOT IF THEY CONTAIN SOMETHING THAT IS OTHERWISE PROHIBITED BY --.

CHIEF JUSTICE: BUT IF THEY WERE A PRIOR -- SAY YOU ARE A PERSONAL INJURY LAWYER AND YOU JUST GOT GREAT RESULTS AND YOU WANTED TO SHARE THAT WITH ALL OF YOUR PRIOR CLIENTS YOU CAN'T WRITE A LETTER AND SAY HERE IS THIS NICENESS PAPER ARTICLE ABOUT ME? >> NO, BECAUSE THE COMMUNICATIONS THAT ARE GOING TO SPECIFIC CLIENT CAN NOT CONTAIN CERTAIN STATEMENTS AND THAT IS PAST RESULTS OR PAST SUCCESSSES OR RESULTS. BECAUSE THOSE KINDS OF STATEMENTS ARE MISLEADING.

JUSTICE: A NY PERSONAL INJURY FIRM THAT SENDS AROUND A NEWSLETTER AND JUST LISTS HEADLINES FROM NEWSPAPERS SAYING \$3.4 MILLION RECOVERED FOR SAM SMITH, THAT IS -- IS THE -- HAS THE BAR PROSECUTED THAT TYPE OF THING?

IF THAT IS SENT TO A PROSPECTIVE CLIENT FOR THE PURPOSE OF OBTAINING BUSINESS AND IT PERTAINS TO AND IT FALLS UNDER THE RULES AS SOMETHING THAT IS SENT OUT TO SOLICIT CLIENTS THEN ANY REFERENCE TO PAST SUCCESSES OR RESULTS IS PROHIBITED.

JUSTICE: DID THE BAR APPROVE THIS FORM THAT JUSTICE WELLS DESCRIBES THAT IS THEY HAVE OKAYED THE MAILING OF NEWSLETTERS TO A WIDE AUDIENCE THAT JUST DESCRIBE RECENT CASES HANDLED BY THE LAWYERS, HASN'T THE BAR ENDED THAT FORM OF ADVERTISING? DO YOU UNDERSTAND WHAT WE ARE TALKING ABOUT? A NEWSLETTER, YOU KNOW, FROM THE JONES, JONES AND SMITH LAW FIRM THAT SAYS, BOY, IN THE LAST SIX MONTHS HERE IS WHAT HAS HAPPENED WITH OUR CASES, AND, YOU KNOW, WHATEVER, AND HASN'T THE BAR APPROVED THAT KIND OF ADVERTISING?

I AM NOT FAMILIAR WITH THAT.

JUSTICE: WELL, WITH RESPECT TO THIS CASE THIS IS NOT A LETTER TO A FORMER CLIENT.

RIGHT.

JUSTICE: CALL NOW FOR A FREE CONSULTATION.

THIS IS A SOLICITATION AND THE RULE APPLIES TO SOLICITATIONS TO PROSPECTIVE CLIENTS.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL BUT JUSTICE CANTERO HAS A QUESTION AND THEN JUSTICE QUINCE. I JUST WANT YOU TO BE AWARE THAT WE MAY BE USING ALL OF YOUR REBUTTAL TIME.

JUSTICE: I TSEE MS FROM THE DISCUSSION HERE THAT THE DIFFERENCE FOR THE FLORIDA BAR IS THE FACT THAT THIS WAS NOT SENT OUT TO FORMER CLIENTS OR FRIENDS AND THAT I BALTIMORE ORIOLES -- NEIGHBORS, IT WAS SENT OUT SPECIFICALLY TO PEOPLE WHO HAD BEEN ARRESTED AND CHARGED WITH DOUBT?

THAT'S CORRECT.

CHIEF JUSTICE: JUSTICE QUINCE?

IN THE ADVERTISEMENT THERE ARE STATEMENTS THAT ARE ATTRIBUTABLE TO THE RESPONDENT AND THEN THERE ARE STATEMENTS THAT WERE ACTUALLY MADE BY THE REPORTER. IS THERE A DIFFERENCE IN THOSE STATEMENTS? DOES THE BAR SEE A DIFFERENCE AS TO WHETHER OR NOT THE RESPONDENT ACTUALLY MADE THESE STATEMENTS OR SOMEONE ELSE, THE REPORTER ACTUALLY MADE THE STATEMENTS ABOUT THE QUALITY OF THE WORK THAT WAS DONE?

NO, MA'AM. WHEN THE BAR, IF THE BAR, IF THE ARTICLE IS NOT FIRST OF ALL IS NOT SOLICITED, PAID FOR OR WRITTEN BY THE ATTORNEY IT IS PRESUMABLY NOT AN ADVERTISEMENT, BUT WHEN THOSE WORDS ARE PUT INTO AN ADVERTISEMENT AND SENT OUT THEY ARE SUBJECT TO A SECUNDARY REVIEW.

JUSTICE: SO IT IS AS IF THE ATTORNEY IS ADOPTING THOSE?

RIGHT, ADOPTED THOSE STATEMENTS AND MADE THEM HIS OWN AND NOW THEY ARE COMING FROM HIM TO SOLICIT BUSINESS AND TO SELL HIS LEGAL SERVICES. SO AT THAT POINT THEY BECOME SUBJECT TO A DIFFERENT STANDARD AND THAT IS THE RULE REGULATING FLORIDA LAW.

CHIEF JUSTICE: YOU MAY WANT TO REMAIN THE -- SAVE THE REMAINING MINUTE FOR REBUTTAL.

THANK YOU.

CHIEF JUSTICE: MR. KLUGER?

CHIEF JUSTICE PARENT, MAY IT PLEASE THE COURT, ALAN KLUGER ON BEHALF OF MARK STEPHEN GOLD. YOUR HONORS, THERE ARE THREE ISSUES WE TOUCHED UPON, TOO, ONE IS THE ESTOPPEL AND FRANKLY WHAT THE LOWER COURT DID WAS THE COURT, THE REFEREE SAID THAT SHE FOUND EVIDENCE OF PROBABLE ESTOPPEL AND IT IS IN THE ORDER BUT THAT SHE WAS RULING ON THE CONSTITUTIONAL QUESTIONS.

JUSTICE: WELL, TELL ME WHAT HAPPENED HERE WITH THESE ADS IN SENDING THEM TO THE ADVERTISING COMMISSION.

THE ADVERTISING COMMISSION ISN'T BINDING ON THE BAR.

JUSTICE: I UNDERSTAND.

SO WHAT THEY TELL YOU IS IT IS A PROCESS THAT IS KIND OF INTERESTING BECAUSE IT IS ALMOST LIKE A REVENUE PROCESS WHERE YOU PAY THEM A FEE. THEY LOOK AT YOUR AD AND THEN THE ADVISORY OPINION ISN'T BINDING UPON THE BOARD AND IT CAN STILL GO THROUGH THE GRIEVANCE PROCESS SO WHILE IT IS A NICE ARGUMENT THAT WE COULD RELY ON, I DON'T THINK THAT INTERNALLY IT IS A VALID ARGUMENT THAT I COULD MAKE BECAUSE THE BAR TELLS YOU THAT IT IS ADVISORY AND THE PROCESS, THE GRIEVANCE PROCESS IF YOU WILL THEN FERRETS OUT.

JUSTICE: AT LEAST IT GIVES THE RESPONDENT A GOOD FAITH BASIS WHEN IT IS PROSECUTED SO SAY, HEY, YOU TOLD ME I COULD DO IT AND I WON'T DO IT IN THE FUTURE.

BY THE WAY, THE BAR IN OTHER AREAS HAS ESSENTIALLY TAKEN THAT POSITION OF STOP THIS ISN'T A CASE WHERE THEY ARE TRYING TO DISBAR A LAWYER. THEY ARE TRYING TO STOP A LAWYER FROM ADVERTISING, BUT THE ESTOPPEL ISSUES WERE INTERESTING BECAUSE THE WAY THIS WHOLE THING STARTED ON THE ENVELOPE CONNECTION WITH THE LANGUAGE IS NOW YOU CAN FIGHT BACK AND IT'S AYS TICKET CLINIC. THE WAY THIS STARTED WAS MR.

GOLD MADE A COMPLAINT TO THE FLORIDA BAR GRIEVANCE COMMITTEE FOR ANOTHER COMPETING TRAFFIC GROUP, AND SAID THEY HAVE ON THIS NOW YOU CAN FIGHT BACK AND TICKET DEFENSE TEAM. THIS VIOLATES THE SAME RULE THAT THE BAR IS ACCUSED MR. GOLD OF. IT FOUND NO VIOLATION, AND AS A RESULT GOLD THEN CHANGED HIS ENVELOPE TO TAKE THE EXACT WORDS THAT THE COMPETITORS HAD AND THEY HAVE GONE THROUGH THE 17TH JUDICIAL CIRCUIT GRIEVANCE PROCESS. AFTER THAT, IN 1998, THE GRIEVANCE COMMITTEE FOUND THAT THE SPECIFIC LANGUAGE ON MR. GOLD'S SELF-SEALING ENVELOPE DID NOT REVEAL THAT THE RECIPIENT HAD RECEIVED A TRAFFIC TICKET. THE GRIEVANCE COMMITTEE BASED THE DETERMINATION, I'M READING FROM THE REPORT, ON THE FACT THAT MANY CITIZENS REGULARLY RECEIVE UNSOLICITED JUNK MAIL WHICH DOES NOT REFLECT ANY SPECIFIC KNOWLEDGE OF THE RECIPIENT'S --.

CHIEF JUSTICE: NOW YOU'RE ONLY TALKING ABOUT THE OUTSIDE OF THE ENVELOPE.

THAT'S CORRECT.

CHIEF JUSTICE: HOW ABOUT, THOUGH, THIS IS WHAT CONCERNS ME.

I HAVE A NEWSPAPER ARTICLE ALSO THE NEXT GRIEVANCE COMMITTEE.

CHIEF JUSTICE: BUT WHAT YEAR WERE THESE NEWSPAPER ARTICLES WRITTEN?

I THINK THE LATE '80S.

CHIEF JUSTICE: HE WAS 32 YEARS OLD AT THE TIME AND ONE OF THE REASONS THAT THE FLORIDA BAR DOESN'T WANT LAWYERS TO TALK ABOUT RESULTS OBTAINED IS BECAUSE IT COULD GIVE PROSPECTIVE CLIENTS A FALSE SENSE THAT THEY ARE GOING TO GET THE SAME RESULTS. NOW, I'M NOT SURE WHETHER I AGREE OR DISAGREE WITH THAT, BUT HERE THE PROBLEM I HAVE IS THAT THESE ARE VERY OLD ARTICLES. IS THERE ANYTHING IN THE ADVERTISEMENT THAT INDICATES THAT THESE ARE ACTUALLY 17-YEAR-OLD ARTICLES TO SHOW THAT THIS IS NOT A -- THIS IS SIMPLY AN HISTORICAL HAPPENSTANCE THAT 17 YEARS BEFORE HE WAS ABLE TO GET OFF CLIENTS BECAUSE OF EVERYTHING THAT IS IN THERE. IS THAT IN THE ADVERTISEMENT?

NO, AND THE BAR DIDN'T ASK FOR THAT TO BE IN THERE AND THAT'S IMPORTANT BECAUSE THE BAR DOES FEEDBACK WITH THE LAWYERS THAT ADVERTISE.

CHIEF JUSTICE: DO YOU AGREE THAT THAT IS POTENTIALLY A BIG PROBLEM WHEN AN ARTICLE MAKES IT SOUND LIKE THIS IS SOMETHING IN THE PRESENT TENSE WHEN, IN FACT, IT IS VERY --

I UNDERSTAND THE COURT'S CONCERN BUT AS BAR COUNSEL CANDIDLY ADMITTED THAT WASN'T RAISED BY THE BAR AND IT HAS NEVER BEEN ASSERTED. YOU'VE ASSERTED IT BUT UNDERSTAND FROM MR. GOLD'S STANDPOINT THE BAR HAS NEVER ASSERTED YOU DIDN'T DATE THE ARTICLES BECAUSE THAT WOULD HAVE BEEN SIMPLE AND HE WOULD HAVE DATED THE ARTICLE. I MEAN, HE PAYS FOR ADVERTISING, YOU KNOW, REAL ADVERTISING IS ALLOWED ON THE RADIO AND ALL OF THE REST. IT IS PROBABLY THE LARGEST CLINIC, YOU KNOW, STATE WIDE OF ITS KIND. THEY HAVE BEEN IN BUSINESS ALL OF THIS TIME. THEY REALLY ARE THE GRANDDADDY OF THIS BUSINESS SO WHATEVER THE BAR WOULD HAVE DEMANDED WITHIN REASON THAT HE COULD HAVE DONE HE WOULD HAVE DONE BUT THEY HAVE NEVER DONE IT.

JUSTICE: WILL IS A LINE OF CASES THAT YOU SEEM TO CITE AND SUPPORT IS THAT SEMAIL-OUTS ARE CASES WHERE LAWYERS HAVE BEEN INTERVIEWED AND THEN THE QUESTION IS WHETHER OR NOT SUBMITTING TO THOSE INTERVIEWS AND THEN HAVING THESE NEWSPAPER STORIES OR WHATEVER COME OUT IS ITS ELF VIOLATION. WOULD YOU AGREE THAT'S V

ER Y DIFFERENT THAN THE LAWYER MAKING COPIES OF ARTICLES THAT MAY PAPER AND THEN USING THEM AS A DVERTISING OVER A LONG PERIOD OF TIME ? WOULD YOU AGREE THERE IS A DIFFERENCE?

I BELIEVE THERE IS A DIFFERENCE BUT I DON'T THINK CONSTITUTIONALLY IT IS A DIFFERENCE THAT MATTERS AT ALL AND HERE'S WHY. THE FIRST STEP IN THE ANALYSIS IS WHETHER IT IS MISLEADING. THE BAR HAS NOT TAKEN THE POSITION IT IS MISLEADING AND THE REFERENCE BELOW FOUND SPECIFIC FINDING THAT IT WAS NOT MISLEADING. THAT IS SUBJECT TO THE CLEARLY ERRONEOUS STANDARD NOT THE DENOVOSTANDARD THAT WE HAVE ON THE SUMMARY JUDGMENT AND THERE IS NO EVIDENCE IN THE RECORD AND I MEAN NOTHING.

JUSTICE: LET ME GIVE YOU A HYPOTHETICAL JUST TO SEE WHAT THE BOUNDS ARE HERE THAT YOU ARE ARGUING FOR. LET'S SUPPOSE EVERECENT - - WE'VE RECENTLY HAVESOMETHING WHERE WE HAVE HELD THAT LAWYERS COULD NOT ADVERTISE AS PITBULLS.

I'VE READ THE OPINION.

JUSTICE: LET'S SUPPOSE TEN YEARS AGO THERE WAS AN ARTICLE THAT APPEARED IN THE NEWSPAPERS THAT DESCRIBED YOUR CLIENT AS A PITBULL, AND THEN WAS OTHERWISE LAUDATORY AND SAID THE RESULTS OBTAINED WERE TERRIFIC AND MANY TIMES MAYBE THE RESULTS DIDN'T HAVE TO DO WITH THE MERITS OF THE CASE BUT JUST AGGRESSIVE LAWYERING OR WHATEVER. ARE YOU SAYING THAT THE FACT THAT THOSE STATEMENTS APPEARED IN A NEWSPAPER ARTICLE UNDER THE AUTHORITY OF SOMEONE ELSE THEN PROVIDES AN INSULATION AND THAT IS THAT THE LAWYER NOW CAN TAKE THOSE AND FOR INSTANCE PUT UP ON A BILLBOARD, OKAY, FROM A NEWSPAPER ARTICLE TEN YEARS BEFORE JOE JONES IS A REAL PITBULL AND THE PITBULL IN QUOTE, OKAY? AND THEN UNDERNEATH HAVE ATTRIBUTED TO THE MIAMI HERALD BUT, OF COURSE, NOW, WOULD THAT BILLBOARD BE ALL RIGHT?

TWO ANSWERS TO THAT. I DON'T KNOW THAT BILLBOARDS AS OPPOSED TO ADVERTISING, I'M GOING TO ASSUME IT IS AN ADVERTISEMENT THAT WOULD FALL WITHIN THE RULES, SO WE ARE TALKING ABOUT THE SAME THING AS I UNDERSTAND YOUR QUESTION. I THINK. BASED UPON YOUR OPINION THAT PITBULL TODESCRIBE A LAWYER'S ATTRIBUTES IS INHERENTLY MISLEADING. YOU'VE SAID THAT. SO IF IT IS INHERENTLY MISLEADING THEN I THINK THAT IT GETS CAUGHT UP IN THE INHERENTLY MISLEADING PART AND THEN THAT PART OF THE AD IF YOU WILL OF THE ARTICLE HAS A PROBLEM. I THINK IT HAS A PROBLEM. BUT NOT HERE, NOT HERE.

JUSTICE: BUT JUST STAYING ON THAT DISCUSSION AND REALIZING YOU SAID YOU HAD TWO ANSWERS THAT SOMETHING THAT IS OTHERWISE INAPPROPRIATE, OKAY, WHETHER IT IS THE PITBULL AND OR PAST PERFORMANCE OR WHATEVER IT IS, THAT IS INAPPROPRIATE UNDER THE ADVERTISING RULES WOULD REMAIN INAPPROPRIATE REGARDLESS OF WHETHER IT APPEARED IN A NEWS STORY ; DO YOU AGREE WITH THAT?

THAT IS CORRECT.

JUSTICE: WHAT'S YOUR SECOND ANSWER?

THAT IS CORRECT. THESE ARTICLES ARE - - THEY ARE EDUCATIONAL. THEY ARE NOT TESTIMONIALS. THE BAR ACTUALLY IN ANOTHER GRIEVANCE WROTE MR. GOLD AND SAID WE ARE APPROVING THEM BECAUSE THEY ARE NOT TESTIMONIAL IN NATURE. THERE IS ONE LINE IN ONE OF THE ARTICLES WHERE HE SAID IN RESPONSE TO A QUESTION OF HIS SUCCESSES, HE ACTUALLY TOLD THAT OF THE LASTSOMANY CASES HE HAD SUCCESS AND SUCCESS HAPPEN BUT IT WASN'T AT ALL IN A GUARANTOR ANYTHING. IT WAS IN DIRECT RESPONSE TO A QUESTION AND WHAT THE BAR SAID IS THESE ARE EDUCATIONAL AND IF YOU LOOK AT SOME OF

THE THINGS HE ACTUALLY SAYS IN THERE RECKLESS DRIVING IS PUNISHABLE AND HE EXPLAIN S THE STA TUTOR Y SCHEME. HE EXPLA IN S POI NT S. IN ANOTHER INT ER VIEW T HE Y QUOTA MEMBER OF THE F LORI DA HIGHWAY PATROL. THEY QUOTE TRA FF IC JUD GE HARVEY BAXTE R .

JUSTICE: LET M E S WI TC H HORSES FOR JUST A MINUTE BECAUSE I THINK I UNDERSTAND YOUR ANSWER T O J US TICE ANSTEAD'S QUESTION , BUT T HE BAR M AKES A D ISTI NCTION H ER E B ETWEEN A NEW SL ETTE R THA T GOES TO OTHER L AW YERS P RESUMABLY O R N ON CLIE NT S , A ND A TAR GETE D MAI LI NG T O PEOPLE WHO A RE FOU ND A T THE COU RTHOUSE TO HAVE H AD A T RAFFIC I NFRACTION. NOW, OR D UI . W HY IS THAT NOT A SOUND DISTINCTION?

I THINK IT IS A SOUND DISTINCTION. I MEA N , I DON'T HAVE A PROBLEM WITH THAT CONCEPT THAT THESE R ULES A RE D RA FTED T O DEAL W IT H T HE D IREC T SOLICITATION AS OPPOSED TO SENDING SOMETHING TO A CLIENT. I THINK THAT IS WHE RE WE A RE TODAY. I THINK IT IS A D IS TI NC TI ON WITHOUT A DIFFERENCE WHEN WE FERRET OUT T HE W HOLE C ON CE PT OF LAWYER ADVERTISING A ND BASED UPON THE SUPREME COURT AND THE B ATES C AS E A ND F OR PURPOSES OF YOUR QUESTION I AGREE WITH YOU AND I THINK THAT IS A V ALID DIS TI NC TION AND I THINK THAT THE RULES CONTEMPLATE THAT TODAY AS A VALID DISTINCTION BUT I A LS O IN LIGHT OF THA T Q UEST IO N WHETHER THAT IS A V AL ID DISTINCTION I THINK THERE IS A S UB VALI D D IS TI NCTION THAT I HAVEN'T TOUCHED ON B UT I T IS CRITICAL TO MY ARGUMENT AND THAT'S THE TRAFFIC CAS ES AND CRIMINAL CASES , ARE A WHOLE DIFFERENT BASIS AND IN THINKING ABOUT THIS ARGUMENT AND F IGURING OUT WHE RE T HI S COURT SHOULD BE BASED ON I TS CASE LAW I THINK THIS C OURT SHOULD BE IN A P LA CE THA T TRAFFIC TIC KE TS A ND C RIMINALS ARE TRE AT ED DIFFERENTLY AND THE BASIS FOR THAT.

DIF FERENTLY THAN DOMES TIC CASES?

THAN WHAT YOU D ID I N - - BECAUSE THE Y S AI D T HERE I S SOME FABUL OUS D EC ISIO NS THA T HAVE COME OUT OF THE 4TH CIRCUIT AND OUT OF T HE SOUTHERN DISTRICT OF FLORIDA BUT IN P ARTICU LA R I DRA W T HE C OURT'S ATT EN TI ON T O FIC KE R VERSUS C URRA N AND W HA T T HE Y SAID IN F IC KER A ND T HEY TALKED ABOUT THE F LO RIDA BAR CASE AND THEY TALKED ABOUT CIVIL CASES WHERE SOMEBODY CAN MAKE A DET ER MINATION. I DON'T HAVE TO BE A PLAINTIFF. I CAN B E SERIOUS LY I NJ URED IN A CAR ACCIDENT A ND I DON'T HAVE TO BE A PLAINTIFF. I HAVE THAT PRI VA CY RIG HT T O NOT BE A PLA IN TIFF AND YOU AS THE BAR AS T HEY D ID I N W INTFORT, BUT W HAT THE CIRCUIT COURT SAID AND IT I S TOTALLY CONSISTENT W ITH THIS COURT'S OTHER C AS ES IS CRIMINAL DEFENDANTS AND TRAFFIC DEFENDANTS ARE ON A QUICK BASIS. THEY HAVE T O APPEAR IN C OURT IN 30 DAYS.

CHIEF JUSTICE: BUT N OBODY IS ARGUING THAT YOU CAN'T SEND AS O PENS - - O FF ENSI VE AS THEY MAY B E THE SE DIR EC T S OLIC ITATIONS. IF YOU A CCEPT THAT THE B AR SPECIFICALLY PRO HIBITS ADVERTISE MENTS THAT SPEAK ABOUT RESUL TS H AV E C HANG ED . DO YOU AGR EE T HA T T HA T , T HA T IF I AM THE M OS T CRI MI NAL DEFENSE LAWYER I CAN'T ARGUE TO SAY T HAT L AS T YEA R I HAD 10 OUT OF M Y 1 2 CAS ES I RECEIVED ACQUITT AL. CAN A LAW YER SAY T HAT?

I B EL IE VE T HA T I F T HE THRUST OF THE ART IC LE .

CH IEF JUSTICE: NOT THE ARTICLE, THE ADV ERTISEMENT.

IF T HE PURPOSE OF T HE A D IS TO T AKE YOUR P AS T SUCCESSES AND USE THAT AS A BASIS TO ADVER TISE I N THE FUTURE THAT THAT IS NOT PERMITTED.

CHIEF JUSTICE: T HAT'S NOT PERMITTED AND WHY IS T HAT?

BECAUSE THE SOLE F OC US IS YOU ARE GOING TO S OMEONE AND SAYING HIRE M E.

CHIEF JUSTICE: BECAUSE I WAS REALLY GOOD.

NO, YOU CAN SAY THAT. THAT'S NOT THE PART. YOU ASKED ME IF TOTALLY WHAT THEY ARE DOING IS TALKING ABOUT TOTALLY THEIR PRIOR SUCCESSES AND IF YOU LOOK AT THIS ARTICLE AND THEN YOU POINT ME TO ONE LINE IN THE ARTICLE WHERE HIS PRIOR SUCCESS IS MENTIONED, WHAT I'M SAYING TO YOU IS TWO THINGS. NUMBER ONE, THAT IS A SMALL PART OF ONE OF THE THREE ARTICLES. NUMBER TWO, THE BAR DIDN'T RAISE THAT AS THE PROBLEM, AND ALL I AM SAYING TO YOU IS UNDERSTAND THE BAR IN THE LOWER COURT -- >> CHIEF JUSTICE: SO THE PART THAT SAYS GOLD GOT ONE CLIENT OFF RECENTLY BECAUSE OF A BREATH TEST MACHINE WHICH WAS TAKEN OUT OF SERVICE OF A STATEMENT THAT IS NOT DATED AND GIVES THE RESULTS OBTAINED FROM 17 YEARS AGO, WOULD YOU AGREE THEN THAT THAT IS, THAT ITSELF IS AN INHERENTLY MISLEADING STATEMENT?

I THINK IN THE TOTALITY OF THOSE THREE ARTICLES IT IS NOT. BUT IF THE BAR CAME BACK AND SAID TAKE THAT STATEMENT OUT, THEN HE COULD HAVE TAKEN IT OUT. WHAT I'M TRYING TO SAY IS THE YDID A WHOLE SALE ATTACK HERE. IN THE LOWER COURT AND I BROUGHT THE TRANSSCRIPT BECAUSE THE BUDGET IN FINDING IT UNCONSTITUTIONAL SAID WHAT IS YOUR BASIS? IT IS NOT MISLEADING, BUT WE ASSUME THE BAR HAS A SUBSTANTIAL -- THIS IS A COMPELLING STATE INTEREST TEST. IT IS THE FIRST AMENDMENT RIGHTS. HE SAID, WELL, THE INTEREST HERE IS THE PRIVACY RIGHTS TO THE INDIVIDUAL. THERE IS A FLORIDA STATUTE THAT GOT THROWN OUT BY THE SOUTHERN DISTRICT THAT SAYS THERE IS NO PRIVACY RIGHT IF YOU ARE A TRAFFIC DEFENDER.

CHIEF JUSTICE: AND THAT'S THE ONE THAT IS ON THE ENVELOPE.

BUT THIS IMPORTANT ON THE ENVELOPE. UNDERSTAND WHAT HAPPENS, MADD SENDS IT OUT. THE DRIVER'S SCHOOL THAT IS OWNED BY THE STATE OF FLORIDA IN DADE COUNTY, THEY SEND IT OUT. ALCOHOLICS ANONYMOUS SENDS IT OUT SO EVERYBODY GETS THE MAIL AND IT SAYS AA, MADD BUT IT CAN'T SAY THE TICKET CLINIC? LET ME ASK YOU THIS:.

JUSTICE: THE REFEREE'S DETERMINATION WAS BASED ON THE 1ST AMENDMENT, ON THE CONSTITUTIONAL GROUNDS SO ASSUMING FOR A MOMENT THAT WE REVERSE ON THAT ISSUE, ALL OF THE SEOTHER ISSUES ABOUT WHETHER THE ADVERTISEMENT OR THE MAILING WAS FALSE OR MISLEADING, WHETHER IT SHOULD HAVE CONTAINED A DATE, WHETHER THE SAME RECENTLY GOT SOMEBODY OFF WAS MISLEADING, ALL OF THOSE THINGS CAN BE RETURNED TO THE REFEREE FOR THE PROCEEDINGS. CORRECT?

YES, AND IF YOU AFFIRM ON THE ENVELOPE THAT IT VIOLATES THE FIRST AMENDMENT ON PRIVACY GROUNDS AND YOU COULD SEND IT BACK ON THE ARTICLES AND ASK THE COURT TO LOOK AT THEM IN LIGHT OF THAT, THAT COULD HAPPEN. OR THE BAR COULD WRITE MR. GOLD A LETTER AND SAY, YOU KNOW, WE HAVE LISTENED TO THE TAPE OF THE ORAL ARGUMENT AND WE WANT YOU TO TAKE OUT THAT LITTLE PORTION AND I'M SURE HE WOULD. BECAUSE REMEMBER THAT HAS NEVER BEEN RAISED. THIS IS A VALID POINT BUT IT NOT ANYTHING THAT WAS RAISED, BUT IT IS NOT ANYTHING THAT MR. GOLD HAD TO DEFEND AGAINST.

CHIEF JUSTICE: YOU ARE OUT OF TIME BUT WHAT I AM UNDERSTANDING IS THAT YOU, THE MAJOR OBJECTION RIGHT NOW THAT IS HE SHOULD BE REPRIMANDED OR DISCIPLINED FOR SOMETHING THAT HAS BEEN AN OVERSHOOT ON THIS WHOLE THING IS BAD AND YOUR POSITION IS THAT AT THE VERY LEAST WE SHOULD RETURN IT BACK TO THE REFEREE.

I THINK YOU SHOULD AFFIRM ON THE ENVELOPE, ON THE ENVELOPE CONTENTS. I THINK THAT THE CONSTITUTIONAL ARGUMENT WAS WELL. ON THE NEWSPAPER ARTICLE CLAIMS I THINK YOU SHOULD AFFIRM. AT A MINIMUM, IF YOU DON'T WANT TO AFFIRM AND YOU WANT TO DEAL WITH THE OFFENDING PART TO SEND IT BACK TO THE COURT ON THAT ISSUE. BUT I B

ELIEVE THAT THE LOWER COURT WAS RIGHT ON THE CONSTITUTIONAL PART I DON'T THINK THE BAR HAS MET THE STANDARD TO SHOW A COMPELLING STATE INTEREST WITH RESPECT TO TAKE AWAY THE COMMERCIAL FIRST AMENDMENT RIGHTS.

CHIEF JUSTICE: THANK YOU, MR. KLUGER. REBUTTAL? >> THE THRUST OF THE BAR'S INTEREST IS JUST WHAT JUSTICE ANSTEAD STATED AND THAT IS BECAUSE JUST BECAUSE SOMETHING APPEARED IN A NEWSPAPER ARTICLE DOESN'T MEAN THAT A LAWYER COULD TAKE THAT. DESPITE THE CONTENT, AND RUN IT OVER AND OVER AGAIN AS A LAWYER ADVERTISEMENT, AND THE FACT THAT THE WORDS ORIGINALLY IN A NEWSPAPER ARTICLE DOES NOT INSULATE THE LAWYER FROM DISCIPLINE. WE URGE THE COURT NOT TO ALLOW THE RESPONDENT TO CIRCUMVENT THE RULES REGULATING THE BAR JUST BECAUSE HE IS USING NEWSPAPER ARTICLES TO STATE WHAT HE IS OTHERWISE NOT ALLOWED TO STATE IN AN ADVERTISEMENT, AND BY APPROVING THE RULING OF THE REFEREE BELOW, IT WOULD CREATE AN EXCEPTION TO THE RULES WHICH CURRENTLY DOES NOT EXIST FOR STATEMENTS. OTHERWISE PROHIBITED AS BEING MISLEADING SIMPLY BECAUSE THEY ARE CONTAINED IN REPRIINTS OF NEWSPAPER ARTICLES.

CHIEF JUSTICE: BUT ON THE OTHER HAND YOU AGREE THAT THERE ARE MANY PARTS OF THE NEWSPAPER ARTICLES THAT DO NOT CONTAIN STATEMENTS THAT WOULD BE IN VIOLATION OF THE RULES, SO IS THE BAR REALLY AGAINST NEWSPAPER ARTICLES BECAUSE OF THE PARTS THAT DEAL WITH RESULTS OBTAINED?

THE ISSUE IS THE WORDS CONTAINED IN THE ADVERTISEMENT, AND THOSE STATEMENTS THAT ARE AT ISSUE HERE ARE THE STATEMENTS THAT ARE DEEMED TO BE IN VIOLATION OF THE RULES.

CHIEF JUSTICE: THANK YOU FOR YOUR TIME. THE COURT WILL TAKE THE MATTER UNDER ADVISEMENT BUT THIS DOES SEEM LIKE A GOOD CASE WHERE IT SOUNDS LIKE SOMEHOW THE BAR AND THE RESPONDENT COULD END UP WORKING THIS MATTER OUT. JUST MY OWN OBSERVATION. THANK YOU.