

IN THE
SUPREME COURT OF FLORIDA

Case No. SC10-1014

In Re: The Florida Bar's Petition to Amend
Rules Regulating The Florida Bar– Rule 4-7.6,
Computer Accessed Communications

Comment of Eight Law Firms

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INTRODUCTION

Thirty-eight years ago John R. Bates and Van O’Steen graduated from law school. They joined the Maricopa County Legal Aid Society. After two years, they opened their own private “legal clinic” in Phoenix that would offer legal services at modest prices. When the clinic failed to attract enough interest by word of mouth to keep the lawyers in business, they placed the following ad in the *Arizona Republic*:

ADVERTISEMENT

**DO YOU NEED
A LAWYER?**

**LEGAL SERVICES
AT VERY REASONABLE FEES**



- * Divorce or legal separation--uncontested
[both spouses sign papers]
\$175.00 plus \$20.00 court filing fee
- * Preparation of all court papers and instructions on how to do your own simple uncontested divorce
\$100.00
- * Adoption--uncontested severance proceeding
\$225.00 plus approximately \$10.00 publication cost
- * Bankruptcy--non-business, no contested proceedings
Individual
\$250.00 plus \$55.00 court filing fee
Wife and Husband
\$300.00 plus \$110.00 court filing fee
- * Change of Name
\$95.00 plus \$20.00 court filing fee

Information regarding other types of cases
furnished on request

Legal Clinic of Bates & O’Steen
617 North 3rd Street
Phoenix, Arizona 85004
Telephone (602) 252-8888

The ad violated a lawyer disciplinary rule which stated, in relevant part: “A lawyer shall not publicize himself . . . as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity.” Disciplinary Rule 2-101(b), incorporated in Rule 29(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. at 26 (Supp. 1976). Florida had the same disciplinary rule in place. D.R. 2-101(b), Fla. Code of Prof. Resp. (1976).

At the conclusion of disciplinary hearings, the Arizona Supreme Court suspended Bates and O’Steen for one week each. *In re Bates*, 555 P.2d 640 (1976). The United States Supreme Court then vacated the suspensions in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), opening for the first time the mass media for lawyer advertising. Although the ruling favored Bates and O’Steen, the Supreme Court noted that there was some merit to the argument that advertising “does not provide a complete foundation on which to select an attorney.”¹ *Id.* at 374. The Court added that we “do not hold that advertising by attorneys may not be regulated in any way” and then delineated some of the “clearly permissible limitations.” *Id.* at 382. These included prohibitions on false, deceptive, and misleading ads. The Justices noted that claims as to the quality of services were not generally susceptible to measurement or verification and that regulation might be justified “because the public lacks sophistication concerning legal services,” but did not decide whether a broad restraint against such claims could itself survive First Amendment scrutiny. *Id.* at 383. It also suggested that warnings or

¹ The Court found the argument flawed, however, because it assumed that the public was “not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information.” *Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977). This unconstitutionally paternalistic argument, the Court noted, “rests on an underestimation of the public” and held “dubious any justification that is based on the benefits of public ignorance.” *Id.* at 375.

disclaimers might be required to ensure that consumers would not be misled. *Id.*

The Supreme Court of Florida amended its lawyer advertising rules quickly after *Bates* in *Florida Bar re Amendment to the Florida Bar Code*, 380 So. 2d 435 (Fla. 1980). There, the Court discussed the rapid evolution of the law from *Bigelow v. Virginia*, 421 U.S. 809 (1975) (commercial speech is protected by the First Amendment), *Bates* (1977) (lawyer advertising is protected as well), to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (drug price advertising is protected by the First Amendment), to *In re Primus*, 436 U.S. 412 (1978) (solicitation of prospective litigants is protected by First Amendment), and to *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (restrictions on in-person solicitations is constitutional). The Court also reviewed the Model Code produced by the American Bar Association to balance the lawyer's newly recognized right to advertise against the Bar's historical responsibility to protect the public from fraud and deception. The Court characterized the ABA rule as taking a "liberal view," *Florida Bar*, 380 So. 2d at 437, and then adopted its own much more restrictive approach. *Id.* at 438.

Although Florida's rules have been modified incrementally over the years, their substance remains in place and still governs lawyer advertising today. Compare Disciplinary Rule 2-101, adopted at 380 So.2d at 438, with Rule 4-7.2(c) of the Rules Regulating the Florida Bar. The rules not only prohibit false,

misleading, unsubstantiated, and deceptive statements, but also references to past successes or results, implications that certain results can be achieved, comparisons, testimonials, celebrities, and certain sounds. They also ban descriptions or characterizations of the quality of a lawyer's services, certain visual and verbal portrayals, and certain types of information about areas and fields of practice. *See* Rule 4-7.2(c)(1)-(16).

When Florida adopted the above rules regulating lawyer advertising in 1980, the daily newspaper was the dominant medium of local expression and advertising. Consumers had access to a limited number of broadcast stations. Cable was just starting to make inroads. The Internet was still in its formative years. Computers were expensive and not readily available. The massive, expensive, multi-volume Martindale-Hubbell Law Directory was a primary source of information about lawyers and law firms.² A trip to the county law library was needed to read cases. Finding an individual lawyer's litigated cases or experience with corporate matters was next to impossible. Mead Data Central had just introduced its LEXIS service that provided the full text of Ohio and New York codes and cases, the U.S. code

² The Martindale volumes from that period provided, however, precious little information about each lawyer. For example, the 1976 entry for former Florida Bar President Patricia A. Seitz showed only her date and place of birth, the schools where she received her degrees, her clerkship for a judge, her bar admissions, and her legal fraternity memberships. *Martindale-Hubbell Legal Directory* at 451B (1976).

and some cases. Online research would not become commonplace until many years later. Data transmission speeds were slow. Finding and evaluating lawyers was very hard, time-consuming work, and lawyer advertising in mass media then was about to become the exclusive free information about lawyers that most consumers would have readily available. Given the limited information that was readily accessible, rules that were highly restrictive of attorney advertising may well have seemed more easily rationalized.³

When lawyers began earnest development of websites in the 1990s, now nearly 20 years ago, the information they placed there was not subjected to the restrictive Rule 4-7.2 for lawyer advertising because it was regarded as communicated at the request of prospective clients. Given the technology of how websites and browsers or search engines work, this is both literally and technically accurate. Rule 4-7.1(f) provided, as it does today, that “Subchapter 4-7 shall not apply to communications between a lawyer and a prospective client if made at the

³ The rules nevertheless were challenged from time to time as too restrictive. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995) (upholding rule prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster); *Fla. Bar v. Pape*, 918 So.2d 240, 247 (Fla. 2005) (upholding rule prohibiting use of image of a pit bull in advertising); *Fla. Bar v. Herrick*, 571 So.2d 1303, 1305 (Fla. 1990) (upholding direct mail solicitation not marked as an advertisement); *The Fla. Bar v. Schrieber*, 407 So. 2d 595 (Fla. 1981) (upholding prohibition against direct mail solicitation of potential client), *vacated*, 420 So. 2d 599 (Fla. 1982) (citing *In re R.M.J.*, 455 U.S. 191 (1982)).

request of that prospective client.” The Florida Bar and lawyers were in general agreement that people searching the Internet were actively seeking out information, which was qualitatively different than a random, unavoidable exposure to a lawyer ad in *The Tallahassee Democrat* or a commercial broadcast over radio or television. In fact, there was general agreement that information obtained from a lawyer’s website was analogous to information given to a prospective client who had come to the attorney and asked for the information directly. This is scarcely surprising since lawyer websites are located and accessed by sophisticated “browsers” and search engines which seek them out and request entry to them. The Bar and this Court believed that, when information was requested by a client, it would be inappropriate to apply restrictive Rule 4-7.2 regulating advertising, as it would interfere with direct attorney-client communications and, in any case, that the volume of such communications could not be effectively monitored or regulated.

Since the lawyer advertising rules were first adopted in the 1980s, a sea change in technology and the availability of information about lawyers has occurred. Computers now are inexpensive and almost universally available; data transmission speeds have increased exponentially; handheld devices such as iPhones, iPads, Kindles, and Blackberries, provide the same Internet access as desktops and laptops; and public accessibility to free online sources of information

about individual lawyers is dynamic and effective. A Google search today for the term “Thomas R. Julin” in combination with the terms “Florida” and “lawyer: instantly yields 1,410 results. The first two hits come from the Hunton & Williams LLP website. But the next dozen are from Martindale-Hubbell, The Florida Bar, FindLaw, Southfloridalawyers Blogspot, the University of Florida College of Law, a state prisoner, 123people, the FSU law library, PR Newswire, The Brechner Center for Freedom of Information, the Florida Supreme Court, the Third District Court of Appeal, *The New York Times*, *The Daily Business Review*, the ACLU, and Chambers & Partners.

Free services not only allow consumers to find lawyers who have relevant experience, but also to rate, compare and study lawyers. “Avvo” bills itself as “the world’s largest legal directory.” “Rate A Lawyer” is available at FindLaw.com. The website www.LegalMatch.com promises to “match you to the right lawyer.” LawyerRatingZ.com is a site where consumers can share their experiences with lawyers. Hundreds, if not thousands, of other such websites exist. The free Thomas Reuters database on the FindLaw website allows a consumer to research a lawyer’s “litigation record” through Westlaw. It instantly displays federal and state dockets in which the lawyer has appeared, reported federal and state decisions, and the names of the state and federal judges before whom the lawyer has appeared. Thus, anyone interested in evaluating a lawyer’s history and

performance has a wealth of public and private resources to do so, and a law firm's website is transparently and obviously yet another source of information, and one that differs from third party websites. In short, law firm or lawyer Internet websites are one of many tools through which the public gathers essential information when actively seeking law firms and lawyers.

For all practical purposes, the scope and content of law firm or lawyer websites are unlimited. Millions of pages of information are available, and they are maintained and constantly updated by thousands of attorneys and other professionals. These sites have been developed and refined over the course of the last 20 years and today represent resources of great value both to the firms and the public. They help consumers to distinguish firms and lawyers with limited resources and experience from those with vast resources and relevant experience. The availability of extensive resources to evaluate lawyers, through their own websites and other Internet resources, strongly suggests that this free market of information should not be muffled or censored by governmental restrictions that are so paternalistic and overbroad that they constrict the flow of valuable information to the general public. *See generally Harrell v. The Fla. Bar*, 608 F.3d 1241 (11th Cir. 2010) (reversing summary judgment in favor of the Bar in suit alleging certain lawyer advertising rules are impermissibly vague).

RELEVANT FACTS AND PROCEEDINGS

Interest of the Commenters

We, the commenters, are eight large law firms with offices in Florida and in many other states and countries. We each have developed very extensive websites over the course of the last two decades. Collectively we have devoted millions of dollars and thousands of hours of professional time to publishing information on our websites. We encourage the Court to sample the various sites.⁴ Our experience in developing and maintaining our websites is similar. We provide here examples of how four of the commenters have developed and used their websites, how treatment of the information on these websites as not having been requested will affect the information on those sites, and how the sites are maintained.

Foley Lardner LLP

As one of the largest full-service, general practice law firms in the United States — and one that prides itself on client service and innovation — Foley makes every effort to develop and use technology to better serve its clients.

For nearly 10 years, Foley has encouraged clients and prospects to use the firm's flagship site, Foley.com, to:

⁴ The sites are accessible here: www.hunton.com, www.jordenburt.com, www.hklaw.com, www.foley.com, www.weil.com, www.carltonfields.com, www.bilzin.com, www.whitecase.com.

- Learn more about the firm, including its services, experience, and more than 900 attorneys
- Quickly access firm substantive legal materials, including articles, newsletters, and white papers
- Register for in-person and online events that the firm is participating in, hosting, or sponsoring

About 60,000 unique visitors and 80,000 total visitors each month seek out and enter Foley.com. Of the total visitors, 35,000 access the site directly while 45,000 reach the site through search engines. These visitors come to Foley.com site specifically because they are requesting detailed information on the legal services Foley provides, the educational programs Foley presents, and the experience and expertise of Foley's attorneys.⁵

Tangible costs to Foley are not trivial, and intangible costs are even greater. Current and prospective clients searching for legal representation expect national firms to include significant information on their Websites to help visitors evaluate options.

To comply with Florida's proposed rules would require a significant investment by Foley in screening the 15,000-plus pages of information on its website to remove material Florida (alone among the states) considers

⁵ The site comprises 7,746 HTML code pages and 7,406 documents, including PDF files and .DOC files. This translates to 7 GB of code files, images, and documents; 600 MB for the Website database; and nearly 21 GB of multimedia files.

objectionable. In addition, new programming would be needed to provide the disclaimer. The aggregated cost of compliance with the website rule for all law firms subject to it will be in the millions and millions of dollars, based on what the commenters have estimated would be their own costs.

Those compliance costs, however, pale in comparison to the value of information that would be lost to Foley Website visitors under the new rules.

Holland & Knight LLP

Holland & Knight LLP was created in 1968 by the merger of two Florida law firms, one headed by State Representative Peter Knight and the other by United States Senator Spessard Holland, and eventually was led by former American Bar Association President Chesterfield Smith. Currently, Holland & Knight LLP has approximately 1000 lawyers and offices in the following United States cities and locales: Atlanta, Bethesda, Boston, Chicago, Ft. Lauderdale, Jacksonville, Lakeland, Los Angeles, Miami, New York, Northern Virginia, Orlando, Portland, San Francisco, Tallahassee, Tampa, Washington, D.C., and West Palm Beach. The firm also has lawyers and offices in Beijing, China, Mexico City, Mexico, and Abu Dhabi, UAE. Approximately 375 lawyers in the firm are members of The Florida Bar. Of the firm's total number of lawyers, approximately 34% are located in the firm's Florida offices with the balance located outside of Florida.

The firm has maintained a website, www.hklaw.com, since 1996. The Holland & Knight LLP website contains a vast amount of information that would be of interest to clients and prospective clients. The website includes lawyer biographies, practice area descriptions, representative transactions and litigation matters, news, events, publications (alerts, newsletters, articles, books), webinars, and podcasts. The website also provides information about the history, culture, and values of the firm, the locations of its offices and lawyers, and the firm's charitable organizations, community service activities, pro bono work, diversity and career opportunities. The website contains more than *33,500 pages* and is maintained and updated on a continual basis by full-time Holland & Knight LLP lawyers, professional marketing staff, technology specialists and other personnel. The firm already has spent thousands of dollars and hundreds of hours of time taking steps toward bringing its website into compliance.

The Holland & Knight LLP website has been developed and is maintained to comply with the law and ethics rules of the jurisdictions in which the firm's lawyers practice. The website information is a very significant resource available to individuals throughout the country and abroad who conduct research concerning the firm itself as well as the firm's lawyers' experience and capabilities.

Hunton & Williams LLP

Hunton & Williams LLP is a law firm with more than 900 lawyers and

offices in Miami, Florida, and 13 other U.S. cities, including Atlanta, Austin, Charlotte, Dallas, Houston, Los Angeles, McLean, New York, Norfolk, Raleigh, Richmond, San Francisco, and Washington, D.C. The firm also has offices in Bangkok, Beijing, Brussels, and London. Approximately 55 partners and associates in the firm are members of The Florida Bar. Most of them are based in the Miami office, but several practice in firm offices outside of Florida.

The firm has maintained a primary website since June 15, 1994, and a Florida office since 1999. The Hunton & Williams website, like the websites of many other large law firms, contains information that clients and prospective clients seek when they consider hiring a law firm. The site includes lawyer biographies, practice descriptions, selected transactions and litigation matters, news and events, and articles. The website also provides information about the culture and values of the firm, including firm history, accolades, pro bono, community service, diversity and career opportunities. The firm also maintains five blogs for its Finance Industry Resource Center, Hunton Immigration & Nationality Law Center, Hunton Employment & Labor Perspective, Privacy and Information Security Law Blog, and Hunton Business Tort Liability Report.

In addition, the firm maintains 20 ancillary websites focused on particular client interests. For example the site www.bayalliance.org is maintained for builders, developers and allied industries protecting the Chesapeake Bay. The

website www.waterpolicyinstitute.com is a forum for water leaders to discuss policy, regulatory and legal issues related to a sustainable water supply. The website www.homeland-security-law.com helps clients in regulated industries and government entities understand and comply with new regulations that apply in complex crisis situations such as oil spills, blackouts, and explosions. The websites collectively contain more than *100,000 pages* and are maintained and updated on a continual basis by full-time professional staff, lawyers, technology specialists and other personnel.

Site content has been carefully constructed to comply with laws and rules in all jurisdictions in which the firm practices, including Florida. The posted information is an important resource for individuals who wish to conduct research concerning the firm's experience and capabilities.

Rule 4-7.6, as amended, and the proposed amendment to that rule will require substantial changes to the website. Review of the site will take thousands of hours of time. The firm has not yet altered any of the content on its site in response to the proposed rule change.

Hunton & Williams LLP competes for legal work with law firms throughout the United States and the world, including many firms that do not have lawyers who are members of the Florida Bar. The work is on behalf of clients in Florida and outside of Florida, as well as clients with legal matters in both locations. Often

the legal work sought is conducted entirely outside of Florida and has no contact with Florida. The work may be done by lawyers admitted to the Florida Bar or lawyers who are not admitted to the Florida Bar. Often the staffing of legal matters is not determined until after the representation is accepted. The staffing of matters also changes frequently depending on the need of the clients.

Carlton Fields P.A.

Carlton Fields is a 300-lawyer firm with offices throughout Florida and in Atlanta. Its anticipated compliance problems with the new rules are in many ways similar to those of the other firms represented here. Its website is 32,000 pages. There is a Spanish language version. Each page will require examination to assure compliance with the rules when finalized, estimated at 3000 hours by its marketing staff.

While the pecuniary costs of compliance would be significant, it is not the most important reason for Carlton Fields' objection. There is no question that the added impediments that will result from the proposed new rule will make it harder, make it take longer, make it more difficult to find, information that prospective clients are looking for. This impediment factor will hurt Carlton Fields, or can be demonstrated to serve no purpose whatever in Carlton Fields' case.

A significant part of Carlton Fields practice is in non-Florida matters – International Law, Federal Tax, Intellectual Property, Securities Transactions,

Mergers and Acquisitions, Finance and other transactional matters. Carlton Fields has a national presence in these areas – its lawyers are the current chairs of the ABA’s International Law and Business Law sections, for example. For that work, sophisticated clients are as likely to go to the District of Columbia or the money-center cities – New York, Chicago, Atlanta – as to look in Florida. To the extent it is more difficult to get information that prospective clients think relevant, prospective clients are more likely to become frustrated with a Florida firm’s website than that of a D.C. firm of comparable sophistication. Similarly, businesses with national scope are more and more frequently hiring law firms to manage a segment of their legal business – a firm may be asked to manage all litigation in the country on a particular issue. Why investigate a Florida firm with a good reputation when it is so much easier to look at firms with equal reputation with websites easier to navigate? Florida firms are disadvantaged by requirements that make it more difficult or more frustrating for clients to find desired information about them than competing non-Florida firms.

Carlton Fields surveys its clients to determine the things that they are most interested in when selecting a lawyer. Most say that they select a lawyer rather than a law firm, and do not mind using more than one firm, although they often inquire about other competencies in a firm they are already using. And the most frequent answer to the question what is the most important information that our

clients seek on a website is experience. Sophisticated business clients are not looking for the type of experience that the Court may be concerned with in the case of unsolicited letters touting automobile personal injury prowess – “averaging \$500,000 per whiplash” - but experience in the relevant substantive area of the law, and the sophistication of the clients represented that may be seen from the style of a case. The fact that in the last 2 years we have tried 10 class action cases through class certification is as important as that we defeated certification in only 3 of them. Sophisticated clients know without being told that different facts lead to different results. Likewise, it is important to our clients that the law firms they hire know their industry. Experience and representative matters demonstrate that the firm is likely to understand industry-specific issues.

As with most larger firms, 75 percent of Carlton Fields business comes from its top 200 clients. One hundred sixteen of those are corporations with headquarters outside Florida. Forty-eight of the remaining are business clients inside Florida. Individual clients in the group will be the owners of businesses, professional investors, professionals or higher net worth individuals with estate planning or tax needs, white collar criminal defendants, and high worth divorce clients. The overwhelming majority of Carlton Fields business will be negotiated between in-house counsel for insurance companies or business clients or corporate officers, or in the case of individuals by business owners, professionals or other

sophisticated consumers of legal services. *None* of its clients are at all benefitted or protected by making it harder to find the information that they want, or by telling them that defending a class action for tobacco plaintiffs might be different from defending such an action by persons with automobile acceleration problems. To interrupt a sophisticated Internet user seeking information to require him to read what he will view as a “blinding flash of the obvious” will serve no purpose.

In the area of print advertising, the Court regulates contact with potential personal injury and wrongful death plaintiffs, for example, somewhat differently than other subjects. It has seen no need to provide for similar limits on solicitations for antitrust defense or the merger of two railroads because it is silly to think that an antitrust defendant or merger candidate will be picking its company’s lawyer through a newspaper or unsolicited letter. In the same way, it is not necessary to cast any needed web advertising rules so broadly if there is a narrow segment of potential clients that need extra protection.

Each of these practical concerns has corresponding constitutional issues, of course. But it is hoped that the Court will consider the rules in terms of who as a practical matter needs protection by advertising restrictions, and from what, and the disadvantage placed on law firms centered or with a presence in Florida as compared to the law firms in the rest of the country.

The General Harm That Would be Caused by
Applying the Advertising Rules to Attorney Websites

Because the commenters are major professional services providers in the United States, their websites play a vital role in helping consumers decide whether the firms meet their needs for its professional services in a crowded marketplace. It is essential that website visitors be able to *quickly* access the *high-quality information they seek* to begin the overall process of building a relationship that ends with the visitor deciding to engage any of the commenters.

The importance of this process is reflected by the findings of a recent study by RainToday.com published by Wellesley Hills Group — *How Clients Buy: 2009 Benchmark Report on Professional Services Marketing and Selling from the Client Perspective*. This study of 231 buyers of professional services, including legal services, reported that “58% of buyers indicated they are ‘very’ or ‘somewhat’ likely to identify and learn about service providers using their websites, and 80% of buyers indicated they typically visit the service provider’s website before buying.” Sixty-five percent of the buyers surveyed are employed by a company with at least \$10 million in revenue, which include finance, insurance and real estate; manufacturing; professional and consulting services; retail; and health care and pharmaceuticals. Unlike print or television ads, where space is limited and only brief text (and context) can be provided, the Internet is ideally suited to providing the kind of fully supported and documented information that consumers

want when seeking legal representation.

If attorney websites and other Internet content are subjected to the Rule 4-7.2 advertising restrictions, potential clients seeking services will be lost and the commenters will be placed at a crucial disadvantage to firms that are not subject to the Florida rule. In practice, if not in theory, Rule 4-7.2 will severely limit use of attorney websites and access to the wealth of information available there. Applying Rule 4-7.2 to Florida firms' websites will lead to a result exactly opposite of what the Supreme Court intends. Florida residents surfing the web and looking for legal information from Florida firms will gravitate to the more attractive and accessible websites offered by the non-Florida firms, bypassing the very firms that Florida regulates.

In attempting to comply with Rule 4-7.2, Florida law firms will be forced to delete from their websites a significant volume of information that is designed to aid and inform consumers. Rule 4-7.2 will deny Florida consumers (and consumers nationwide, for that matter, since there is no effective way to "localize" a website on the World Wide Web) the benefit of information that is useful but that has been deemed not to comply with the Rule 4-7.2. As now interpreted, Rule 4-7.2 will require removing from websites any statements that the Bar feels characterize the quality of legal services being offered. Even statements unequivocally substantiated by third-party research are prohibited if the Bar feels

they are a “characterization.” Information regarding past results is barred. So are testimonials.

Without this and other information consumers, clients and prospective clients will (1) be denied useful, truthful information; (2) be denied information that many other law firm websites not subject to the Florida rules will be able to provide, and (3) will not be as well-equipped as they should be to make choices about law firms.

The Disclosures or Disclaimers Will Create, Not Solve, Constitutional Problems

The Florida Bar proposal for separate “information on request” portions of law firm websites, restricted behind disclosures or disclaimers that visitors must affirmatively accept, suffers from serious genuine technological impediments. Consequently, the proposal would not achieve the goals of The Florida Bar, would impose undue burdens on the capabilities of law firms, would leave information out of reach of numbers of consumers, and in some instances would be entirely unworkable.

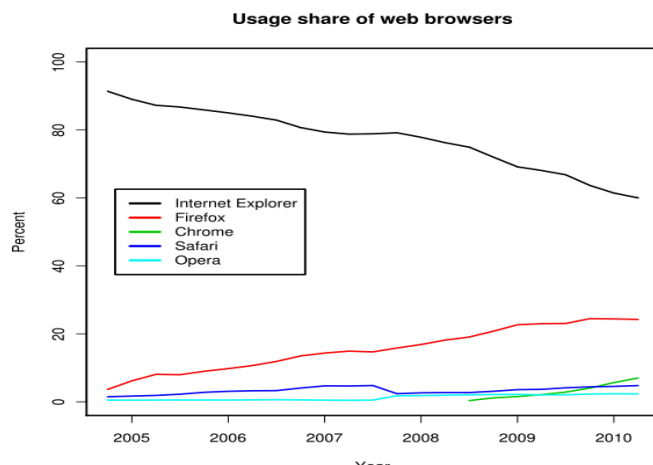
Disclaimers that are posted on law firm websites as “pop-up” pages may be blocked entirely by the computer networks of visitors to the websites. In order to prevent viruses and other attacks on computers, computer networks employ various filters and limitations on browser settings, and on some networks that includes the blocking of “pop-ups”. As such, a “pop-up” disclaimer page may not be accessed

at all by a law firm website visitor. If this happens, the website visitor is given no ability at all to access the “information on request” portion of the website.

In addition, the particular type of browser used by a website visitor can present its own set of compatibility issues with “pop-up” disclaimer pages. Numerous browsers are available today (see the graph below showing market shares of browsers). For law firms to ensure that their “pop-up” disclaimer pages may be accessed by the maximum number of consumers through the variety of different browsers, they would have to drastically alter their current websites at very basic levels. This would require law firms, for example, to strip and redesign current website pages and change or rewrite their computer codes. Even then, however, not all browsers support Java Scripts or Flash necessary to access “pop-up” disclaimers. As a result, access to a “pop-up” disclaimer page would not be available to all potential law firm website visitors.

Most Common Internet Browsers:

- Microsoft Internet Explorer
- Mozilla Firefox
- Google Chrome
- Apple Safari



Instead of utilizing a “pop-up” disclaimer page, a law firm may choose as an alternative to place a disclaimer note on each website page. The disclaimer note

would prohibit visitors from progressing to the next page unless they affirmatively acknowledge the disclaimers via a “check box” through a prompt on the page. To prevent the visitor from having to click on the disclaimer box for every page he or she visits, their computer must accept a “cookie” (a small file that is placed on a user’s computer), session data stored in the visitor’s browser, or some other database-driven technique for the law firm’s servers to recognize that the user has accepted the terms.

However, as with “pop-up” boxes, and in an attempt to block potential viruses, many networks employ restrictions on the ability to place “cookies” on computers in the networks or allow them to transfer data about visited pages back to the website’s servers. If cookies or data transfer are blocked, visitors will have to affirmatively check the “check box” each time they visit a page requiring the disclaimer. Clearly, many visitors will view this as a nuisance and will decline to continue to visit the law firms’ websites.

Moreover, this type of disclaimer note would also require law firms to engage in extensive coding and testing to ensure the disclaimer note works with the different web browsers and different network settings. The disclaimer note could also limit the accessibility of search engines to crawl law firm websites and index key content that visitors may be searching. Such limitation would directly impact law firms’ rankings based on search engine results, a disadvantage that would

result from nothing more than efforts to obey The Florida Bar's regulations.

Many people use mobile devices to access all types of websites, including those of law firms. Depending on his or her mobile device, a website visitor may not be able to affirmatively acknowledge, click, or "check," the required "checkbox" disclaimers in order to move on to the "information on request" portion of the website.

Information on the use of mobile devices to access law firm websites is instructive. As of July 27, 2010, for example, Holland & Knight LLP's 2010 website traffic showed 93,479 hits from known mobile devices (73,557 BlackBerry and 19,992 other mobile browsers/platforms), with another 4.3 million hits that cannot be distinguished as to source, a portion of which could also be coming from mobile devices.

In addition, technology is rapidly changing with regard to the mobile devices used to access the Internet. New Personal Digital Assistant ("PDA") operating systems ("OS") are being introduced with higher access speeds and easier connectivity to the Internet through enhanced and upgraded networks. Currently, there are several competing OS for PDAs. Among these are BlackBerry, Windows Mobile, Google Android, Apple iOS, and legacy devices (with older operating systems).

Some of these systems currently do not allow an affirmative

acknowledgement by a website visitor of a “check-box” disclaimer. For example, a website visitor who uses certain BlackBerry OS may not be able to activate a check-box disclaimer on a law firm website. Instead, the visitor may only be able *to read* the disclaimer and not affirmatively acknowledge, click or check the disclaimer so as to be able to move on in the site. Thus, The Florida Bar’s proposal requiring affirmative acknowledgement of required disclaimers would result in prohibiting access to the “information on request” portion of law firm websites by certain mobile device users.

Also, with the convergence of technologies, PDA manufacturers are likely to continue to offer even more types of devices and supported operating systems and browsers. As a result, it will be difficult to standardize and ensure that all OS will allow the required visitor affirmative acceptance of disclaimers.

The existence of multiple Internet browsers for PDAs adds another layer of complexity to the OS issues. The variety of browsers multiplies the options that need to be reviewed and coded to allow “check box” disclaimer functionality to work as required. At the present time, many law firm websites have not been optimized to run on PDA browsers. Thus, in order to comply with a required “check box” disclaimer functionality, law firms would have to purchase additional developer tools and would need additional time to complete the process.

While much material remains subject to an outright ban, the Florida rules

allow firms to provide a modicum of additional information to persons who request to be informed about the firm. However, under Rule 4-7.6 as proposed, the process and pop-up disclaimers that a consumer must complete in order to “request” information are so complicated that many would-be requesters will be driven off.

According to the Interactive Advertising Bureau (IAB), “more than 90 percent of users cited a ‘very negative effect’ to brands using pop-ups.”⁶ Pop-up disclaimers of the sort envisioned in proposed Rule 4-7.6(b)(3) are so intrusive and unexpected in this era of Internet information that they will — at a minimum — create a significant nuisance for visitors from law firm target audiences. They may compromise credibility, and give firms not subject to the Rule an unfair competitive advantage.

Moreover, visitors are not used to experiencing pop-ups on professional services sites, especially not as complicated as these. Visitors may mistakenly assume they are being asked to enter into some sort of binding agreements by accepting the disclaimers. New and repeat visitors may not take the time to read the disclaimer and may not understand it is actually in response to Florida lawyer advertising regulations; worst case, visitors may assume the disclaimer has been

⁶ Pop-Up Guidelines, Interactive Advertising Bureau (IAB) online, September 2004 (3 March 2010)

required to rectify some wrongdoing by the firm.

Even clients and prospects who have opted in to receive specific newsletters and alerts via e-mail will need to confirm the disclaimers every time they visit the website, likely causing additional confusion and frustration. New visitors may simply exit the site because they cannot quickly access the information for which they came.

Repeat visitors may become even more frustrated than new users at the restrictive process to enter a site that holds less information than they were used to previously accessing. This can only hamper their efforts to become informed, and if they exit in search of other, more user-friendly, more informative law firm sites, Florida's rules will have undermined consumer search efforts.

This is supported by findings of e-commerce experts at The Wharton School at the University of Pennsylvania, who state that "For users who sought out fairly in-depth information from [a] site, the added pop-up basically overloaded them with information, and as a result they exited the website earlier than they probably would have otherwise."⁷

Procedural Background

The commenting law firms are aware, that the Florida Bar's Special

⁷ Darn Those Pop-Up Ads! They're Maddening, But Do They Work?, Knowledge@Wharton, 13 August 2003. 3 March 2010.

Committee on Website Advertising Rules and other Bar Committees on January 15, 2008, recommended that “the homepage of a website comply with all the substantive lawyer advertising regulations, which are set forth in rule 4-7.2. After the homepage, the remainder of the website would not have been viewed as advertising, but would have been treated as information ‘upon request’ of a prospective client.” *In re: Amendment to the Rules Regulating The Fla. Bar -- Rule 4-7.6, Computer Accessed Communications*, No. SC08-1181, 34 Fla. L. Weekly S627 (Fla. Feb. 27, 2009) (hereinafter “*Rule 4-7.6 Opinion I*”) (later withdrawn).

This Court *sua sponte* expressed its disagreement with that position in *Rule 4-7.6 Opinion I*, suggesting that website visitors perhaps should be required to register and view disclaimers, and dismissing the Bar’s concern that it would be unable to review the volume of material submitted on websites. Justices Pariente and Canady, in separate opinions, suggested further study of the issue might be appropriate, while Chief Justice Quince expressed the view that the restrictive Rule 4-7.2 advertising rules should be extended to all website advertising. These opinions were disquieting, and the Bar asked the Court to reconsider the matter by motion for rehearing.

This Court granted rehearing on Nov. 19, 2009, through a new opinion, *In Re Amendments to the Rules Regulating the Florida Bar—Rule 4-7.6, Computer*

Accessed Communications, 24 So. 2d 172 (Fla. 2009) (“*Rule 4-7.6 Opinion II*”). Instead of accepting the Bar’s position, however, the Court announced that Rule 4-7.6(b)(3) would be amended effective January 1, 2010, to provide that all attorney websites would be subject to Rule 4-7.2.

No other state bar association has amended its rules to apply highly restricted advertising rules indiscriminately to the content of all attorney websites, nor has the ABA extended its model advertising rules to materials placed on an attorney website.

The Florida Bar Board of Governors voted at its December 11, 2009, meeting to place a six-month moratorium, beginning January 1, 2010, on the enforcement of the Amended Rule. The Standing Committee on Advertising of The Florida Bar had directed its staff to draft Guidelines by January 1, 2010 regarding the Amended Rule.

On March 31, 2010, the Florida Supreme Court rejected the Guidelines as an interpretation of the Amended Rule and, instead, directed The Florida Bar to submit proposed rule changes consistent with the Guidelines.

On June 1, 2010, The Florida Bar filed two motions, an Emergency Motion to Stay the Effective Date of the Amended Rule and a Motion to Further Amend Rules Regulating The Florida Bar—Rule 4-7.6, Computer Accessed Communications. In the Motion to Stay, The Florida Bar moved that the effective

date of the Amended Rule be 90 days after the Court's ruling on the Bar's Motion to Further Amend.

On June 29, 2010, the commenters filed in the Florida Supreme Court an Unopposed Petition for Enlargement of Time to Submit Comments on The Florida Bar's Motion to Further Amend. On July 2, 2010, this Court granted the Petition and extended the time for filing Comments to August 16, 2010.

OUR COMMENTS

I. Applicable First Amendment Principles

In Part I of this comment, we set forth the applicable First Amendment principles that are implicated by extension of the Florida Bar's advertising rules to website materials. In Part II, we will apply the principles to the facts above.⁸

⁸ Extension of the Bar advertising rules to website materials also implicates dormant Commerce Clause principles that restrict the power of States to regulate interstate commerce. A separate comment of great length might be devoted to that topic. In light of the subject's complexity and the additional facts needed to address the matter fully, we mention only that federal courts have expressed skepticism about whether a single State may require Internet communications to comply with its discrete requirements in light of the potential that such regulation has to require all Internet communications to conform to the most restrictive state standards. In *American Booksellers Foundation for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd in part and modified in part*, 342 F.3d 96 (2d Cir. 2003), for example. operators of websites challenged a state law prohibiting transfer to minors of sexually explicit material. *Id.* at 302. The district court found the law to be "a *per se* violation of the Commerce Clause because it regulates commerce occurring wholly outside Vermont's borders." *Id.* at 320. The law, by its own terms, applied to "any electronic communication, intrastate or interstate, that fits within the prohibition and over which Vermont has

Extending the Florida Bar’s advertising rules to attorney websites raises First Amendment issues because those websites are vast. Not all of the material is commercial speech. Much is educational, noncommercial speech. The content is not easily separated into noncommercial and commercial categories. The distinction, however, is crucial as regulation of noncommercial speech is subject to strict scrutiny, while regulation of commercial speech is subject to an intermediate scrutiny.

A. Distinguishing Noncommercial & Commercial Speech

Commercial speech is “speech which does ‘no more than propose a commercial transaction.’” *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)); *see also City of Cincinnati v. Discovery*

the capacity to exercise criminal jurisdiction.” *Id.* On appeal, the Second Circuit affirmed, acknowledging that Vermont has an interest in regulating out-of-state commerce because it could have a harmful impact within Vermont, but also holding the law “still runs afoul of the dormant Commerce Clause because the Clause ‘protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state.’” *Dean*, 342 F.3d at 104. “We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they ‘imperatively demand[] a single uniform rule’” and ““we agree with the district court that [the law at issue] presents a *per se* violation of the dormant Commerce Clause.” *Id.* (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851)). Bar counsel Elizabeth Tarbet has advised that the revised rules will require non-Florida lawyers to state in their website bios that they are not admitted in Florida and if the

Network, Inc., 507 U.S. 410, 473-74 (1993). Such speech commonly is referred to as advertising. Speech that goes beyond proposing a commercial transaction is not regarded as commercial speech merely because the speaker makes a profit from speaking. “Some of our most valued forms of fully protected speech are uttered for a profit. *See, e. g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).” *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989). Major newspapers and books are speech sold for profit and are quintessentially recipients of the highest level of First Amendment protection.

B. Content-Based Speech Restrictions of Noncommercial Speech

When the government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded legislative enactments is reversed.⁹ “Content-based regulations are presumptively invalid,”¹⁰ and the Government bears the burden to rebut that presumption. If a statute regulates speech on the basis of content, it must be narrowly tailored to promote a compelling Government interest, and if a less restrictive alternative would serve the Government’s purpose,

websites contain content prohibited by the new Florida rules, a further disclaimer will be required that such content does not refer to Florida matters or lawyers.

⁹ *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 817 (2000).

¹⁰ *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

the legislature must use that alternative.¹¹ “The applicability of the First Amendment to regulation of speech in this context does not vary depending on whether the speech relates to a matter of public concern.”¹² Moreover, “[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities ‘simply by averting [our] eyes.’”¹³

One reason for these rules is that “the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.”¹⁴ It must be finely drawn because “[e]rror in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring

¹¹ *Playboy*, 529 U.S. at 804; see also *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

¹² *Brentwood Acad. v. Tenn. Secondary School Ass’n*, 442 F.3d 410, 424 (6th Cir. 2006); see also *Playboy*, 529 U.S. at 826 (“We cannot be influenced, moreover, by the perception that the . . . speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly”).

¹³ *Playboy*, 529 U.S. at 813 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

¹⁴ *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.”¹⁵ Indeed, even with regard to commercial speech, paternalism is not an acceptable government purpose for restricting expression. *Bates*, 433 U.S. 350; *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

“It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas. When First Amendment compliance is the point to be proved, the risk of nonpersuasion -- operative in all trials -- must rest with the Government, not with the citizen.”¹⁶

When a statute is subject to strict scrutiny, it may be upheld only where the government shows with competent evidence that the statute serves a compelling interest and that the statute is the least restrictive means of achieving that interest.¹⁷

¹⁵ *Playboy*, 529 U.S. at 817.

¹⁶ *Id.*

¹⁷ See *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (content-based regulation of noncommercial speech is subject to strict scrutiny); *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (same); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of*

C. Central Hudson and its Progeny

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), the Supreme Court held that commercial speech is entitled to First Amendment protection when (1) the speech concerns lawful activity and is not misleading, and (2) the regulation does not support a substantial or important government interest, or (3) the regulation does not “directly advance[] the governmental interest asserted,” or (4) the regulation is “more extensive than is necessary” to the purpose for which it was enacted. 447 U.S. at 566. The Bar, as the party seeking to uphold a restriction on commercial speech, bears the burden of proof with respect to all four elements. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). “Unlike rational basis review, the *Central Hudson* standard does not permit [the Court] to supplant the precise interests put forward by the State with other suppositions.” *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)); see also *Harrell*, 608 F.3d at 1268.

Under the second prong of *Central Hudson*, the Bar must “demonstrate that the challenged regulation advances [its asserted] interest[s] in a direct and material way.” *Went For It*, 515 U.S. at 625-26 (quotation marks and citation omitted).

N.Y., 447 U.S. 530, 540 (1980) (strict scrutiny); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (same).

“That burden ... is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the rule at issue ... targets a concrete, nonspeculative harm.” *Id.* at 629; *see also Harrell*, 608 F.3d at 1268.

Under the third prong of the test, “[t]he limitation on expression must be designed carefully to achieve the State’s goal.” *Central Hudson*, 447 U.S. at 564. Toward this end, “the restriction must *directly* advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.” *Id.* (emphasis added). In order to satisfy this requirement, “a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). “[M]ere speculation or conjecture” is insufficient to fulfill these requirements. *Id.* at 770. The government’s burden is not met when a “[s]tate offer[s] no evidence or anecdotes in support of its restriction.” *Went For It*, 515 U.S. at 628 (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)).

Applying these standards, “the Court has declined to uphold regulations that only indirectly advance the state interest involved.” *Central Hudson*, 447 U.S. at 564. For example, in *Bates*, 433 U.S. at 363-64, the Court overturned an advertising prohibition designed to protect the quality of a lawyer’s work, and in

Virginia Pharmacy Board, the Court held that a ban on price advertising could not be imposed to protect the ethical or performance standards of pharmacists. The Court noted in *Virginia Pharmacy Board* that “[t]he advertising ban does not directly affect professional standards one way or the other.” *Virginia Board of Pharmacy*, 425 U.S. at 769.

The Court has held that the requirement that the regulation at issue achieve its goals directly “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.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

In cases addressing this final prong of the *Central Hudson* test, the Supreme Court has made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so. In *Central Hudson*, this aspect of the test proved fatal to “the Commission’s complete suppression of speech ordinarily protected by the First Amendment” -- advertising promoting the use of electricity. 447 U.S. at 570. The problem with that type of prohibition, the Court held, was that it “reaches all promotional advertising, regardless of the impact of the touted service on overall energy use.” *Id.* The Court held that as important as the Commission’s conservation objectives were, it “cannot justify suppressing information about electric devices or services

that would cause no net increase in total energy use. “ *Id.*

In *Rubin*, 514 U.S. 476, the Court found a law prohibiting beer labels from displaying alcohol content to be unconstitutional in part because of the availability of alternatives “such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength ..., or limiting the labeling ban only to malt liquors.” *Id.*, at 490-491. The fact that “all of [these alternatives] could advance the Government’s asserted interest in a manner less intrusive to ... First Amendment rights” indicated that the law was “more extensive than necessary.” *Id.* at 491; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (striking down a prohibition on advertising the price of alcoholic beverages in part because “alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance”).

Interpreting the First Amendment, the U.S. Supreme Court has consistently found that content-based controls barring categories of speech and advertising are unconstitutional. “[T]he 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 also may be presented in a way that is not deceptive.” *In re R.M.J.*, 455 U.S. 191, 203 (1982) (barring enforcement of rules that allowed only limited topics and wording in attorney advertising). The “absolute prohibitions on [an

attorney's] speech, in the absence of finding that his speech was misleading, does not meet these requirements” for limiting expression. *R.M.J.*, 455 U.S. at 207.

If a category of material is not inherently misleading, it can be regulated only where the state *demonstrates through evidence* that the material “has proved to be misleading in practice.” *Id.* at 207. “[I]t is unclear what harm *potentially* misleading advertising creates, and the state bears the burden of proving ‘that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.’ ” *Alexander v. Cahill*, 598 F.3d 79, 91 n.8 (2d Cir. 2010) (emphasis in *Alexander*, quotation marks omitted), quoting *Went for It*, 515 U.S. at 626. Under the First Amendment:

If the “protections afforded commercial speech are to retain their force,” *Zauderer [v. Office of Disciplinary Counsel of Supreme Court of Ohio]*, 471 U.S. 626, 648-49 (1985)], we cannot allow rote invocation of the words “potentially misleading” to supplant the [State’s] burden to “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield*, 507 U.S., at 771.

Ibanez, 512 U.S. at 146 (reversing Florida ban on use of “CPA” and “CFP” labels by attorney). The Bar has developed no record evidence here whatsoever, let alone any that would justify the website rule.

The Second Circuit invoked this basic First Amendment principle earlier this year as it declared unconstitutional several proposed rules of conduct for New York attorneys. *Alexander, id.* As the Second Circuit stated, constitutional

protection is afforded to lawyer advertising that is “not inherently false, deceptive or misleading,” even if regulators consider the content to be “irrelevant, unverifiable, and non-informational.” *See id.* at 90.

“Our recent decisions involving commercial speech have been grounded in the faith that 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.” *Zauderer*, 471 U.S. at 646. *See also Central Hudson*, 447 U.S. at 562 n.5, suggesting that “institutional and informational” messages from a commercial entity are entitled to full First Amendment protection, not just the limited protection afforded to common speech.

“An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.” *Zauderer*, 471 U.S. at 647. It is no more difficult to sort deceptive from non-deceptive attorney advertising than it is to apply that test in other areas of commerce. *Id.* at 644-46. “Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable” as applied to attorney advertising. *Id.* at 646-47.

D. Zauderer & Disclosure Principles

Speech mandated by the State, such as the disclosures the Court contemplates, is equally problematic under the Constitution. The Supreme Court has long held that “compulsion to speak may be as violative of the First Amendment as prohibitions on speech.” *Zauderer*, 471 U.S. at 650 (collecting cases).¹⁸ See also *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010). In *Zauderer*, the Supreme Court recognized that in the commercial speech context, “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.” 471 U.S. at 651. To avoid that potential chilling effect, a disclosure requirement for advertising must be “reasonably related to the State’s interest in preventing deception of consumers.” *Id.* To support a disclosure requirement, the state must demonstrate that the harm it posits is “potentially real, not purely hypothetical.” *Ibanez v. Fla. Dep’t of Bus. & Prof. Reg., Bd. of Accountancy*, 512

¹⁸ The Court in *Zauderer* relied on several decades of jurisprudence establishing a prohibition against compelled speech: *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding state may not require citizens to display license plates pronouncing motto “Live Free or Die”); *Miami Herald Pub’g Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized); and *Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding school board cannot compel salute to flag or pledge of allegiance; stating “involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence”).

U.S. 136, 146 (1994) (invalidating disclosure requirement for attorney advertising; “Given the state of this record – the failure of the Board to point to any harm that is potentially real, not purely hypothetical – we are satisfied that the Board’s action is unjustified.”).

E. Vagueness and Overbreadth

Laws are unconstitutionally vague where they fail to provide the requisite notice and undermine public confidence that the laws are equally enforced. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). A statute must define the prohibited conduct with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement. *Grayned*, 408 U.S. at 108; *see also United States v. Williams*, 504 U.S. 36 (2008); *Hill v. Colorado*, 530 U. S. 703, 732 (2000). The vagueness of a content-based regulation of speech “raises special First Amendment concerns because of its obvious chilling effect on free speech,” *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997), in part due to the risk of discriminatory enforcement when either the speaker or the message is critical of those who enforce the law. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1050 (1991).

Just two months ago, Judge Stanley Marcus writing for an unanimous panel of the United States Court of Appeals for the Eleventh Circuit in *Harrell v. The*

Florida Bar, 608 F.3d 1241, ruled that the plaintiff had standing to proceed with facial vagueness challenges to no fewer than five Bar Rules relating to attorney advertising, Rules 4-7.2(c)(3), 4-7.5(b)(1)(A), 4-7.2(c)(1)(G), 4-7.2(c)(2), and 4-7.1. Judge Marcus concluded that Harrell “has made an adequate threshold showing” that these Rules apply to his proposed advertising, but fail to provide meaningful standards and thus chill his speech.” *Id.* at 1255.

When a law, or as here, a rule is written so broadly that it restricts or prohibits protected speech, as well as unprotected speech, a facial challenge also may be brought to it on overbreadth grounds. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (Child Pornography Prevention Act’s prohibition on depictions of minors engaging in sexually explicit conduct is unconstitutionally overbroad); *Reno v. Civil Liberties Union*, 521 U.S. 844 (1997) (Communication Decency Act contained ambiguity which meant it could be applied to protected speech); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

Website rules may be overbroad in two distinct ways. First, to the extent the Rules restrict noncommercial speech, the traditional overbreadth doctrine applies. The commenters’ websites contain vast amounts of noncommercial speech that are impinged on by the proposed web rules. Second, under the fourth prong of *Central Hudson*, discussed above and applied more fully below, there must be an adequate “fit” between the substantial government interest the Rules must serve and the

restrictions it imposes. Judge Guido Calabresi, formerly Dean of the Yale Law School, recently issued an opinion for a unanimous panel of the Second Circuit, United States Court of Appeals in *Alexander*, 598 F.3d at 92, holding, among other things, that a prohibition on client testimonials, like that found in the proposed website Rule, fails the fourth prong of the *Central Hudson* test. The Second Circuit concluded the prohibition is overbroad because a testimonial may be true and is not misleading unless it is used to suggest past results dictate future performance. *Id.*

II. Applying The Advertising Rules To Attorney Websites Would Violate The First Amendment

Treating attorney websites as material that has not been requested by clients, and subjecting the information on those sites to the Bar's advertising rules, would violate the First Amendment. The violation would be especially egregious here since absolutely no factual record has been assembled or relied upon to support this Rule change.

Applying Rule 4-7.2 to all attorney websites violates the First Amendment in several basic ways.

A. Attorney Websites are Permeated with Noncommercial Speech

As shown in the discussion above, attorney websites do not simply propose a sale of a good or service. The sites provide a rich resource that educates consumers about legal problems: they provide a forum where legal issues may be

discussed and debated, they provide historical information about firms and the lawyers at the firms, and many other types of information. An advertisement that says to the consumer “Memorial Day Sale -- One Day Only -- \$199 for Each Sony Television” is classic commercial speech that does nothing more than propose the sale of a product. Attorney websites only rarely contain information in this form. None of the websites maintained by the commenters contain such commercial speech. These sites contain articles, white papers and analysis of legal issues and decisions. They also include important reported judicial opinions, briefs and memoranda filed on important issues, and even transcripts of oral arguments and trials. They offer background information on the education and experience of lawyers in the firm, and explain the firm’s history, practice, and culture. As a consequence, if the Court’s amendment of Rule 4-7.6 is treated as subjecting all information placed on attorney websites to the requirements of Rule 4-7.2, which applies to advertisements and unsolicited communications, Rule 4-7.2 may be upheld as constitutional only if it survives the strict scrutiny that must be applied to government regulation of the content of noncommercial speech, and the traditional overbreadth doctrine.

B. The Rules Would Fail Strict Scrutiny

To the extent that the amendment to Rule 4-7.6 would apply the Bar’s advertising rules to noncommercial speech on attorney websites, all aspects of

those rules would be rendered facially unconstitutional. The Florida Bar cannot show a compelling interest in regulating such speech or that the rules are the least restricting means of achieving the Bar's objections. This result should be no surprise because the rules were not drafted in order to survive strict scrutiny. They were drafted in response to *Bates v. State Bar of Arizona* in order to regulate only the commercial speech of lawyers, not the noncommercial speech of lawyers that constitutes so much of the information found on the commenters' websites.

C. The Rules Would Fail Intermediate Scrutiny

To the extent that the amendment to Rule 4-7.6 makes Rule 4-7.2 applicable only to speech on attorney websites that can be categorized as "commercial speech," Rule 4-7.2 is unconstitutional because it cannot survive the intermediate scrutiny required by *Central Hudson* and *Bates*.

1. The Rules Apply to Truthful, Nonmisleading Information on Websites

The proposed restriction flatly bans broad categories of truthful content from attorney websites. Moreover, while the Bar's proposed modification to Rule 4-7.6 at least envisions acceptance of disclaimers as a gateway to the otherwise forbidden content, the disclaimer process itself would actually serve as an impermissible content-based restriction, and unconstitutionally forced speech.

Consumers visit the Internet, and request information found in law firm websites, precisely because they actively seek readily accessible information in a

format that encourages detailed explanation and validation. Passive, non-requested attorney advertising on radio, television and in print cannot duplicate the Internet's capacity for content. Imposing Rule 4-7.2 on Internet postings on grounds consumers have not requested the information is both counter to consumers' expectations and an unconstitutional content-based restriction.

Rule 4-7.2 flatly bars advertisements or unsolicited writings from including any content at all in certain categories, even if those statements are true and not likely to deceive, mislead, or confuse the reader.

Specifically, Rule 4-7.2 bars:

- “any reference to past successes or results obtained.” Rule 4-7.2(c)(1)(F).
- “compar[ison of] the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated.” Rule 4-7.2(c)(1)(I).
- “a testimonial.” Rule 4-7.2(c)(1)(J).
- “statements describing or characterizing the quality of the lawyer’s services.” Rule 4-7.2(c)(2).
- “visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events that are deceptive, misleading, manipulative, or likely to confuse the viewer.” Rule 4-7.2(c)(3).¹⁹

¹⁹ While the text of this rule purports to ban only “deceptive” illustrations, as discussed more specifically below, the application of this Rule by the Bar is so stringent as to constitute content-based restrictions on all but the most simplistic illustrations. *See* Section II.C.3.e. *infra*.

- “stat[ing] or imply[ing] that the lawyer is ... an ‘expert.’” Rule 4-7.2(c)(6).

2. Protecting Consumers is an Important Government Interest

A state “has a legitimate and indeed ‘compelling’ interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct.’” *Ohralik*, 436 U.S. at 462. It also “has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers.” *Went For It*, 515 U.S. at 624. There is not, however, a substantial or important governmental interest in protecting consumers from truthful material that they have requested from a website. Indeed, such paternalism is forbidden by the First Amendment. *Bates*, 433 U.S. 350; *Linmark*, 431 U.S. 85.

3. Application of Advertising Rules to Web Sites Does not Directly or Materially Advance Any Important or Substantial Government Interest

It is dispositive that The Florida Bar did not originally seek adoption of the rules that the Court ultimately adopted. As a consequence, *there is no record evidence establishing that application of the advertising Rules to law firm websites would directly and materially advance any substantial or important governmental interest* as is required by the third prong of the *Central Hudson* test. *See Went For It*, 575 U.S. at 626; *Ibanez*, 512 U.S. at 146. Moreover, it is evident that application of the Rule 4-7.2 rules to attorney websites not only would not advance

important interests, but that it would harm important interests. Here are several examples.

- a. “Past successes or results obtained.” Rule 4-7.2(c)(1)(F)

Consumers seeking legal advice or representation are naturally interested in an attorney’s past performance, and in this area naturally would turn to the Internet to find this information. For example, a business faced with a lawsuit for tortious interference is interested in attorneys who have a track record in that area. Whatever the merits of limiting access to such information through traditional advertising, it cannot be justified in the context of attorney and law firm websites. Yet the amended rule would prevent consumers from finding the very information they seek through attorney and law firm websites, which they use to view information efficiently and to guide their choice of counsel. *See Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 473-74 (1988) (the “state may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable”).

- b. Comparisons of a lawyer’s services with other lawyers’ services, “unless the comparison can be factually substantiated.” Rule 4-7.2(c)(1)(I)

Florida’s content-based restrictions also prevent comparative advertising. While the text of the rule seems to allow true, substantiated comparisons to be offered, in practice, the Bar’s Standing Committee on Advertising has issued its

own interpretation, holding that advertising about comparative ratings or awards violates Rule 4-7.2(c)(2) “unless the exact name of the rating or award is used, the exact name of the organization giving the rating or award is included, and the year the rating or award is bestowed is included.” Moreover, the Committee appears to expect full substantiation to appear in the advertisement.

This rule also bars attorneys and firms from saying they are “the best” or “one of the best” or “one of the most experienced” in a particular field. *See* Rule 4-7.2 comment on “Prohibited information.”

Rather than embrace the web as a good place to provide full substantiation for these claims, the new Rules simply restrict this material as a category, regardless of truthfulness or usefulness to consumers.

c. Testimonials. Rule 4-7.2(c)(1)(J)

The proposed rules flatly ban all testimonials, apparently assuming consumers are not sufficiently sophisticated to evaluate information from past clients who offer a recommendation. Without pointing to any research or factual support, the Rules declare testimonials “inherently misleading to a person untrained in the law.” *See* Rule 4-7.2 comment on “Prohibited information.” This shortchanges the consumer and underestimates his or her ability to discern a valid testimonial. It is contrary to the recent *Alexander* decision, and embodies the sort of unconstitutional paternalism that the First Amendment forbids. *Bates*, 433 U.S.

350; *Linmark*, 431 U.S. 85.

The Second Circuit, for example, found that neither “consensus [n]or common sense supports the conclusion that client testimonials are inherently misleading” when included in lawyer communication and struck down a prohibition on them. *Alexander*, 598 F.3d at 92. Yet, Rule 4-7.2(c)(1)(J) is a content-based restriction that prohibits *any* lawyer advertising or unsolicited communication that “contains a testimonial,” even if that testimonial is indisputably true.

- d. Statements “Describing or Characterizing the Quality of the Lawyer’s Services,” or Calling the Lawyer “An Expert.” Rules 4-7.2(C)(2) & (C)(6)

This common form of advertising is prohibited, even where provably true, by reference to treatises authored, expert testimony given, cases handled, or positions on law school faculties. There has been no showing by the Bar that such content is actually or inherently misleading, and there is no reason to believe that it is. This is an improper, content-based restriction.

- e. Illustrations or Other “Portrayals of Persons, Things, or Events that are Deceptive, Misleading, Manipulative, or Likely to Confuse the Viewer.” Rule 4-7.2(C)(3)

Particularly relevant to website communications and advertising are the Rules’ flat prohibitions on all but the most basic illustrations.

While the text of this rule correctly bans “deceptive” illustrations, the

application of this Rule by the Bar is so stringent as to constitute content-based restrictions on all but the most simplistic illustrations. In practice, this means finding safe harbor in primitive, “unadorned” clip art. Rule 4-7.2(b)(1)(L) lists the presumptively “permissible” illustrations: “the scales of justice..., a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), diploma(s), or a photograph of the lawyer ... against a plain background consisting of a single solid color or a plain unadorned set of law books.” *See also* Examples of Complying and Noncomplying Ads.²⁰ The Bar routinely rejects advertising proposed by attorneys with any other illustrations.

Again, Dean Calabresi, writing for the Second Circuit admonishes: “Given the prevalence of ... special effects in advertising and entertainment, we cannot seriously believe – purely as a matter of ‘common sense’ – that ordinary individuals are likely to be misled into thinking that [such] advertisements depict true characteristics.” *Alexander*, 598 F.3d at 94.

On the contrary, use of illustrations in attorney advertising “serves important

²⁰ The “Examples” are found at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/436ECE5C3B63C24B85257283005E112B/\\$FILE/Examples%20of%20complying%20and%20noncomplying%20ads.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/436ECE5C3B63C24B85257283005E112B/$FILE/Examples%20of%20complying%20and%20noncomplying%20ads.pdf?OpenElement) (visited July 25, 2010).

communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly.” *Zauderer*, 471 U.S. at 647 (upholding use of an accurate illustration of an IUD birth control device in an attorney's advertisement seeking potential IUD plaintiffs). “Accordingly commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech.” *Id.*

In this era, a website that attempted to limit the “look and feel” of its artwork to “an illustration of the scales of justice,” “the American eagle,” an “unadorned set of law books” or other elements permitted under Rule 4-7.2(b)(1)(L) risks ridicule, not professional respect. The Internet is fertile ground for artwork, animation and visual effects of all sorts, and consumers expect to find appealing or even dazzling displays as they surf for information. Consumers seeing primitive artwork on a website may wonder whether the professional services being offered are equally primitive. It is worth noting that the websites of both The Florida Bar and the Florida Supreme Court include elements that arguably violate the Rules as interpreted by the Bar; these elements are not, of course, an attempt to deceive but rather recognize that users expect websites to be visually pleasing and sophisticated.

Florida's ban on “manipulative” illustration is improper in its own right. The U.S. Supreme Court could not be more clear: the test for evaluating an

illustration in attorney advertising is whether it is “likely to deceive, mislead, or confuse the reader,” and otherwise the “the burden is on the State to present a substantial governmental interest justifying” stronger regulations. *Zauderer*, 471 U.S. at 647. Florida’s blanket ban on illustration content that the Bar deems “manipulative” has no basis in constitutional law and is an impermissible limitation. Just because illustrations may entice the viewer to stop and read further, or may enhance or explain the message contained in the text, that is no justification for barring them as “manipulative” artwork from a website since they simply are not likely to deceive, mislead or confuse the reader. The US Supreme Court specifically rejected controls on advertising illustrations that are based on “the general argument that that the visual content of advertisements may, under some circumstances, be deceptive or manipulative.” *Zauderer*, 471 U.S. at 649. In light of that teaching, Rule 4-7.2(c)(3) amounts to an impermissible content-based restriction that automatically prohibits use of illustrations of the sort used throughout the Internet and that consumers view daily without being deceived, misled or confused.

There is no basis for a blanket ban on such information in any medium, including the Internet, as long as it is truthful, and attempts to enforce these and similar bans on broad, content-based categories rather than actual misrepresentations in specific materials are unconstitutional.

4. Application of Advertising Rules to Websites is not
not Properly Tailored to Achieve the Court's Objectives

The fourth prong of *Central Hudson* requires a determination of whether the regulation at issue has been appropriately tailored so that it is neither so broad that it prohibits a substantial amount of protected speech nor so narrow that it exempts much speech similar to that which is prohibited; that is, a regulation must not be either unreasonably overinclusive or underinclusive. The amended rule suffers from both problems, as it makes no attempt to distinguish between commercial and noncommercial speech on attorney websites, nor speech which may be false and that which is not. Instead it subjects all speech on attorney websites to regulation as advertising or unsolicited communications. There is no basis to conclude that speech will cause any harm to consumers merely because it is on an attorney's website -- yet that is the basis on which the Court has elected to regulate the speech. The rule therefore is vastly overinclusive, even assuming that some speech on some attorney websites cause harm to consumer interests.

Further, the restrictions of Rule 4-7.2 do not apply to "communications between a lawyer and a prospective client if made at the request of that prospective client" as long as they are not on a website. Rule 4-7.1(f). Yet, there is no basis to conclude that communications that take place in person, over the phone, or through mail would not have precisely the same impact on a client as communications through a website. Accordingly, the amended rule is vastly

underinclusive, as well as impermissible overinclusive.

D. The Rules Suffer from Vagueness & Overbreadth

As noted above, in *Harrell*, 608 F.3d 1241, the plaintiff lawyer claimed that nine provisions of the Florida Bar’s advertising rules were void for vagueness. He asserted that “all nine rules are ‘invalid in toto[,] and therefore incapable of any valid application.’ *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)” because they “specify ‘no standard of conduct ... at all [and] simply ha[ve] no core.’ *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n. 7 (1982).” *Harrell*, 608 F.3d at 1253. The district court had rejected the void-for-vagueness claim on standing and ripeness grounds, so the Eleventh Circuit focused on those issues rather than the merits, found facial vagueness challenges to five subsections of Rule 4-7.2 justiciable, and remanded those claims to the district court. *Harrell*, 608 F.3d at 1254-57 & 1271.

The vagueness claims found justiciable attacked Rules 4-7.2(c)(3) and 4-7.5(b)(1)(A) (“manipulative” ads); Rule 4-7.2(c)(1)(G) (ads that “promise[] results”); Rule 4-7.2(c)(2) (ads that “characteriz[e] the quality of the lawyer’s services”); and Rule 4-7.1, cmt. (ads that contain other than “useful, factual information”). *Harrell*, 608 F.3d at 1254. Evidence of their potential vagueness included the contradictory rulings issued by the Bar in attempting to interpret the rules, and ambiguity in the language of the rules themselves. *Id.* at 1254-57. “It is

at least arguable that the rules’ alleged vagueness exerts a chilling effect on [plaintiff’s] proposed commercial speech.” *Id.* at 1257. A vagueness challenge sweeps even broader than a content-based attack. *Id.*²¹

The commenters submit that the amendment to Rule 4-7.6 to subject all attorney websites to the restrictions of Rule 4-7.2 is itself impermissibly vague. By amending the rule in this fashion, is the Court determining that *all* aspects of attorney websites are to be regarded as advertisements or unsolicited communications or is it simply saying that certain aspects of the sites that do nothing more than offer for sale legal services are subject to the advertising rule? Which aspects of the websites should be regarded as advertising? The rule, as amended, simply states: “All websites accessed via the Internet that are controlled or sponsored by a lawyer or law firm and that contain information concerning the lawyer’s or law firm’s services: . . . are subject to the requirements of rule 4-7.2.” Rule 4-7.6(b)(3). The prohibitions of Rule 4-7.2(c) apply solely to “advertisements and unsolicited communications.”

²¹ “[A]ll vague statutes are unacceptable because they encourage . . . arbitrary and discriminatory application” and “enable low-level administrative officials to act as censors, deciding for themselves which expressive activities to permit. The very existence of this censorial power, regardless of how or whether it is exercised, is unacceptable.” *Harrell*, 608 F.3d at 1258, quoting *ISKCON v. Eaves*, 601 F.2d 809, 822-23 (5th Cir. 1979) (citations and quotation marks from *Eaves* omitted).

Large, complex websites contain material that cannot reasonably be considered advertisements or unsolicited communications, but such material often is integrated into material that some might categorize as an advertisement or an unsolicited communication. A single website page may contain a practice description, a discussion of a recent issue, a listing of lawyers who practice in that area, the qualifications of those lawyers, commentary by the lawyers on the issues, and other materials. Identifying and separating different types of materials would require a team of lawyers to do so. In *Citizens United v. Federal Elections Commission*, 130 S.Ct. 876 (2010), the Supreme Court recently held that “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.”

Beyond the problem of identifying which aspects of a website are subject to the prohibitions of Rule 4-7.2(c) is the difficulty of trying to bring the thousands of pages of materials that may be subject to the rule into compliance with it. The *Harrell* case arose from the efforts of a single lawyer to determine whether he could use the slogan “Don’t settle for less than you deserve” and proposed ads based on the theme of “family,” proposed ads based on the theme “choices,” and a loosely defined group of ads in which he intended to feature one or more individual slogans. *Harrell* claimed it was impossible to assess whether these ads

would violate the Rule 4-7.2 prohibitions. Now multiply Harrell's dilemma a hundred thousand fold and the scope of the vagueness problem created by subjecting attorney websites to Rule 4-7.2 can be seen.

The vagueness problems raised by specific applications of Rule 4-7.2 to attorney websites are far too numerous to mention here. Suffice it to say for now, that we agree with the arguments advanced by *Harrell* regarding the vagueness of the rules and would anticipate that innumerable disputes will arise should the amendment to Rule 4-7.6 remain in place.

Extending the advertising rules to websites also suffered from exceptional overbreadth. The regulation assumes the consumer is at the lowest common denominator -- those barely computer literate -- when in fact the user is as likely to be the general counsel of a Fortune 500 company. One may generalize that an accident victim should be free of unsolicited advertising for a period of 30 days because a large number of such victims will have some level of vulnerability during that period, but to assume that visitors to complex, legal websites require the same type of protection is not justified.

E. Disclosures & Disclaimers Cannot Solve the Problems

Many problems of constitutional dimension would be created by forcing consumers accessing websites to view disclaimers or agree that the material that they are about to view is requested by them.

1. Click-to-Accept Disclaimers are Not a Solution

The Bar has proposed that website advertising be exempt from the Rule 4-7.2 limitations for content offered only to those who complete a lengthy, 5-part acceptance of terms. This distinction is misguided. In the context of websites, the burdensome requirements for disclaimers contained in proposed Rule 4-7.6(B)(3) amount to content-based controls. This negates any contention that by allowing click-to-accept disclaimers, attorneys are allowed to advertise freely in Florida.

It is inaccurate to suggest that website information is “unsolicited” absent the click-to-accept process. A consumer viewing a lawyer website has already affirmatively chosen to review the information found there. Websites are not like unsolicited mail communications, newspaper advertising or pop-up ads or banner ads that appear without being requested. Clicking to open a law firm’s website is an affirmative request for information, and the requirement for affirmatively accepting disclaimers is superfluous and in the context of the website amounts to an unconstitutional restriction.

The proposed scheme demonstrates something else, as well. It undermines the Court’s and the Bar’s argument that using the web to post truthful information about testimonials and past results on the Internet is harmful to the general public. It apparently is not the content to which the regulators object, only to the possibility that it might be viewed without sufficient disclaimers in place. Yet

there is no reason to believe that someone who takes the time to find and view information about a lawyer on the web is any more likely to be deceived by truthful information than someone who “requests” the same information through a cumbersome disclaimer acceptance.

2. The Proposed Disclaimers are an Impermissible Barrier

As noted above, requiring disclaimers will serve as a de facto bar to access for many consumers because their search engines, browsers, or computer access programs will not permit pop-ups, cookies, or other devices necessary to accept disclaimers. This access bar is unconstitutional. Even where access is not denied by disclaimers, according to the Interactive Advertising Bureau (IAB), “more than 90 percent of users cited a ‘very negative effect’ to brands using pop-ups.” (Pop-Up Guidelines, Interactive Advertising Bureau (IAB) online, September 2004. 3 March 2010.) Pop-up disclaimers of the sort envisioned in proposed Rule 4-7.6(b)(3) are so intrusive and unexpected in this era of Internet information that they will — at a minimum — create a significant nuisance for visitors from the target audiences of law firms that advertise on the Internet.

Moreover, visitors are not used to experiencing pop-ups on professional services sites, especially not as complicated as these. Even clients and prospects who have opted in to receive specific newsletters and alerts from the advertising law firm via e-mail will need to confirm the disclaimers every time they visit the

firm's site, likely causing additional confusion and frustration.

Florida consumers of legal services may even exit a Florida firm's website and seek information from out-of-state law firms where they can much more quickly access the kind of information they seek. As stated by e-commerce experts at The Wharton School at the University of Pennsylvania:

For users who sought out fairly in-depth information from [a] site, the added pop-up basically overloaded them with information, and as a result they exited the website earlier than they probably would have otherwise.

Those Pop-Up Ads! They're Maddening, But Do They Work?, Knowledge @Wharton, (Aug. 13 2003) (<http://knowledge.wharton.upenn.edu/article.cfm?articleid=828>) (last visited March 3, 2010).

CONCLUSION

In the circumstances in which this matter has arisen, there is *no record whatsoever* on which the Court can find that extension of the Bar's advertising rules to lawyer websites meets the applicable constitutional standards. Regulation of truthful speech based on conjecture rather than evidence necessarily fails. The Court should withdraw its opinion *In Re Amendments to the Rules Regulating the Florida Bar—Rule 4-7.6, Computer Accessed Communications*, 24 So. 2d 172 (Fla. 2009), restore Rule 4-7.6(b)(3), and make clear that information on attorney websites will continue to be treated under Rule 4-7.1 as communications “made at the request of that prospective client.”

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I hereby certify that a true and correct copy of the foregoing was mailed
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