Medium-Specific Regulation of Attorney Advertising: A Critique

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ARTICLES

MEDIUM-SPECIFIC REGULATION OF ATTORNEY ADVERTISING: A CRITIQUE

Lyrissa Barnett Lidsky* & Tera Jckowski Peterson**

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I. INTRODUCTION

Florida is one of the most aggressive states in the nation in regulating attorney advertising.¹ Backed by the authority of the Florida Supreme

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¹ Over the years, Florida Bar leaders have frequently commented on the negative affects of attorney advertising. For example, while serving as the Florida Bar President, Judge Patricia A. Seitz stated, "Aggressive ads have caused the public to see the legal system as a lottery of fictitious claims in which lawyers make out like bandits in fees. . . . This has increased the public's cynicism about the legal system, which undermines the system that lawyers take an oath to uphold." James Podgers, IMAGE PROBLEM: Burned by a Fall in Public Favor, the Organized Bar Turns Up the Heat on Lawyer Advertising, A.B.A. J., Feb. 1994, at 66, 68. Former member of the Board of Governors (Board), Mike Glazer, said, "We need to be focusing on really bad ads and not allow bad ads to make bad law," ... Gary Blankenship, Bar to Take a Harder Line Toward Lawyer Ad Violations, FLA. B. NEWS, July 1, 2000, at 13. Kelly Overstreet Johnson, while serving as Bar President-elect, claimed, "many lawyers still dislike or oppose lawyer advertising, believing it's the largest cause of public discontent with the profession." New Bar Panel to Review Attorney Advertising Rules, FLA. B. NEWS, Dec. 15, 2003, at 1. According to former Board member Stuart Grossman, "[A]dvertising is misleading because 'it's the difference between image and reputation, and these guys who make images are making [undeserved] reputations . . . and they are hurting the
Court, the Florida Bar continually pushes the First Amendment envelope that safeguards the right of attorneys to inform potential clients about the services they offer.  

In 2006, the Florida Supreme Court added a “licensing” scheme for attorney advertising on television or radio to its existing panoply of attorney advertising regulations. The new rule imposes a prior restraint on all radio and television ads by Florida attorneys: every ad must run the gauntlet of the Bar’s censors prior to airing, and the ad may not air unless its content meets with the approval of the censors. Not content with its foray into regulating the broadcast medium, the Florida Supreme Court is now poised to add a rule that will regulate attorney speech on the Internet much more extensively than ever before. In the Spring of 2007, the Bar

rest of us.”  

Kelly Overstreet Johnson created The Florida Bar’s Advertising Task Force 2004 as a result of the Board’s lengthy and “[v]exing discussions” regarding whether attorney ads violated the Bar’s advertising rules. A Pair of Pressing Presidential Goals, FLA. B.J., Aug. 2004, at 19. Although “Johnson doesn’t particularly like lawyer advertising, . . . [she] acknowledges there is a First Amendment right to advertise.” Id. During her tenure as Bar President, Johnson wanted to “tighten” Florida’s advertising rules to prevent noncompliance and “to protect the public and preserve [lawyers’ professional] image.” Id.

John DeVault, 1995-1996 Bar President, stated that advertising rules “cure [] many excesses and help improve the image of lawyers.” Gary Blankenship, The Story of the Florida Bar, FLA. B.J., Apr. 2000, at 18, 28-29. DeVault remarked, “The ethics and professionalism push was certainly a response to the low esteem in which the profession was coming to be viewed by everyone . . . . In the last few years, it has proven its value and I think we have turned the corner as a result of that.” Id. at 28-29. DeVault further commented, “As a learned profession, that has the threat of totally changing what we are from a profession to totally a business . . . . Businesses look out for what is best for the bottom line, not what’s best for the client, the court, or the system of justice.” Id. at 29.

Regarding the Board’s advertising rule amendment regulating attorney web sites, Board member Charles Chobee Ebbets said, “Our court is more concerned with the policy issue than the practicality of enforcement . . . .” Gary Blankenship, Board Moves Closer to Web Site Ad Rules, FLA. B. NEWS, Jan. 1, 2007, at 1. Ebbets continued, “[It] wants The Florida Bar to stand for the best possible policy for protecting the dignity of lawyers. Lawyers touting themselves in various formats to build their financial wherewithal does not strike the court as the most dignified [activity].” Id. Ebbets chaired the Special Committee on Website Advertising, which wrote the advertising rule amendment. Gary Blankenship, Board Takes New Tack on Lawyer Web Sites, FLA. B. NEWS, Feb. 15, 2007, at 1. “We are trying to draft something that is fair to lawyers yet protects the integrity of the profession,” said Board member Charles Chobee Ebbets . . . . “It is a unique problem that most bars have not begun to grapple with.” Id. A few months later, Ebbets claimed, “The way we’re doing it is a level playing field for everyone . . . .” Gary Blankenship, Board Approves Lawyer Web Site Rules, FLA. B. NEWS, Apr. 15, 2007, at 1.


adopted a proposed rule that will allow it to regulate a much broader swath of attorney speech on the Internet.\(^4\) This proposed rule, which affects both commercial and non-commercial speech, now awaits the Florida Supreme Court’s approval, with every indication that it will be granted.\(^5\)

Both the new and proposed rules, in the name of regulating speech that is inherently misleading, in fact trench on speech that is entirely true and accurate and on speech that makes no factual assertions whatsoever. As a result, the new and proposed rules, if adopted, will subject Florida attorneys to reprimand, suspension, or even disbarment for conduct protected by the First Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment.\(^6\)

This Article conducts an in-depth analysis of Florida’s new and proposed attorney advertising rules and demonstrates that they are not only unconstitutional, but also fail to serve consumers’ needs for legal services. The Article first provides the background necessary to assess the constitutionality of the rules and then addresses point-by-point their many constitutional flaws, both procedural and substantive. Additionally, this Article shows that Florida’s new medium-specific regulations are flawed in their conception.

The First Amendment protects attorney advertising because it provides valuable information to potential clients and helps them make informed and rational decisions. States may regulate attorney advertising if it is actually or inherently misleading, or if regulation directly and materially advances a substantial state interest and is no more extensive than necessary to accomplish that interest. The U.S. Supreme Court has very clearly held that a state may not base regulation of attorney advertising on its concern for preserving attorney “dignity” or on its paternalistic desire to withhold “potentially misleading” information from consumers.\(^7\)

In its zeal to rid the airwaves and the Internet of distasteful attorney advertising, Florida seems to have lost sight of these basic principles of First Amendment law. Perhaps even more fundamentally, Florida seems to have lost sight of who attorney advertising regulations are supposed to protect, namely, Florida consumers of legal services. Consumers’ interests in learning about their legal rights and the range of legal services available

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7. See infra notes 100 and 107 and accompanying text.
to them are not served by paternalistic regulations that prevent them from receiving truthful or non-misleading information. Nor are their interests served by a regulatory scheme that seems designed to deter attorneys from using any medium but print to reach them.

II. BACKGROUND

A. The Bar’s Historical Opposition to Attorney Advertising

Throughout the twentieth and into the twenty-first century, the legal community has been divided over whether advertising by attorneys is ethical and how advertising can, or should, be regulated. The opposition to attorney advertising has tended to focus on its perceived impact on the dignity of the legal profession. Disturbingly, however, much of the opposition has come from segments of the Florida Bar that do not routinely serve the poor and minority clients who benefit most from the information attorney advertising provides about their legal rights and how to vindicate them.

The history of regulating attorney advertising indicates that bar associations have only tempered their hostility to the practice under direct pressure from the U.S. Supreme Court and the Federal Executive Branch. For most of the twentieth century, states followed the lead of the American Bar Association (ABA), which had banned all advertising except business cards in its 1908 Canon of Ethics.8 The most common justification for the ABA and state bans was that advertising debased the legal profession and commercialized the practice of law.9 The bans remained largely intact until the 1970s, when the Department of Justice began advocating for looser restrictions under the theory that the ban deprived consumers of the benefits of free and open competition.10 Yielding to this pressure, the ABA ultimately approved new rules that narrowly expanded the avenues attorneys could use to convey information to potential clients by allowing them to convey specified information in the yellow pages, reputable law lists, and directories.11

9. Id.
11. Id. at 275.
The Department of Justice was not satisfied and brought an antitrust suit against the ABA. The suit alleged the ABA had violated the Sherman Act by adopting unreasonable restrictions on competitive advertising. While that suit was pending, the U.S. Supreme Court held for the first time that attorneys had a First Amendment right to advertise, and that attorney advertising was constitutionally protected commercial speech. The Department of Justice dismissed its antitrust suit after the ABA revised its rules in response.

Nonetheless, the ABA continued to be reluctant to permit many forms of attorney advertising, including targeted mail solicitations. Many state bars were also disapproving toward attorney advertising, and they began to experiment with stringent restrictions and heavy regulations on advertising practices. In fact, the Florida Bar is deemed to have led the movement for more restrictive rules on attorneys' marketing efforts.

As the legal profession balked, the Federal Trade Commission's Bureau of Competition, Consumer Protections and Economics became involved in attempting to persuade the legal community to embrace attorney advertising. It lobbied the ABA to amend its rules to allow targeted mail solicitations. It also submitted letters to several state bars in an effort to persuade them not to adopt restrictive rules.

While Florida and some other state bars moved towards a more restrictive approach, the ABA began to loosen its restrictions during the 1990s. After several studies and research efforts, the ABA determined that attorney advertising served an important role in informing the public. Moreover, the ABA Commission on Advertising was unable to conclude that lawyer advertising was a primary cause of the public's negative image of lawyers. Consequently, the ABA's current rules take a minimalist approach and permit most advertising as long as the ads are not false or misleading. However, many states, including Florida, continue to push for increasing regulation.

12. Id.
13. Id.
16. Id. at 287 n.164.
17. Id. at 278-79.
18. Id. at 278.
B. Leaving No Stone Unturned: Florida Regulation of Attorney Advertising

On November 2, 2006, the Florida Supreme Court adopted changes to the rules regulating attorney advertising on television and radio, and further adoption of a set of proposed rules on web site regulation is pending. The Florida Bar proposed such changes to the advertising rules after a study by the Bar's Advertising Task Force 2004; however, the Bar's proposal, which was adopted by the Florida Supreme Court, did not match the proposal recommended by the Task Force. In its study, according to the Bar, the "Task Force held several meetings, solicited comments from numerous sources, and consulted various Bar sections." Although the Task Force believed review of television ads for compliance with the rules should not be required prior to publication, the Florida Bar sought, and the Florida Supreme Court adopted, a strict regime of mandatory review of television ads prior to dissemination. Because a special committee was still considering a proposed rule regulating Internet communications, the Florida Supreme Court did not at that time change its existing rule governing Internet advertising. Notably, the Task Force believed Internet communications should not be regulated. However, proposed Rule 4-7.6 regulating Internet communications has now passed its first reading by the Florida Board of Governors and was approved on March 30, 2007. Perhaps to bolster these new and proposed rules, the Florida Supreme Court also requested the Bar to undertake "an additional and contemporary study of lawyer advertising, which shall include public evaluation and comments about lawyer advertising." Currently, the Florida Rules of Professional Conduct acknowledge that advertising by attorneys can provide the public with useful information, especially "in the case of persons of moderate means who have not made extensive use of legal services." However, the rules also state that attorney advertising may be regulated when it poses dangers of "misleading or overreaching" and "creat[ing] unwarranted expectations by

22. Id. at *2.
23. Id. at *3.
24. Id. at *4.
25. Id. at *3.
26. Ebbets, supra note 5. In November 2007, the Florida Bar is scheduled to file the proposed rule in its biannual rules petition to the Florida Supreme Court. Id.
persons untrained in the law."29 Because "[s]uch advertising can also adversely affect the public's confidence and trust in our judicial system," it may be regulated by the Florida Bar under the auspices of the Florida Supreme Court.30

1. Regulation of Attorney Advertising in Print Media

Even before adopting its new rules governing television advertising, Florida had taken an aggressive stance toward advertising that appeals to the emotions or even the sense of humor of targeted consumers.31 To combat such advertising tactics, Florida requires advertisements and unsolicited written communications to include certain information, such as the name of the lawyer and location of the practice.32 The rules then "permit" other rather innocuous information in the advertisement about the lawyer's practice and verifiable professional credentials. Permitted illustrations are limited to the following: a picture of the scales of justice, as long as it does not look like an official certification; 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; columns; diplomas; and a photograph of the lawyer against a plain background consisting of a single color or a plain unadorned set of law books.33 If the advertisement is limited to the permissible information listed above, the Florida Bar will not evaluate it for compliance with the rules.34

The Florida Bar will scrutinize all other advertisements.35 An attorney will be subject to discipline for including any information outside the "permissible" list36 that is false, misleading, or deceptive.37 An advertisement will be deemed misleading if it includes references to past results, comparisons with other lawyers' services that cannot be factually substantiated, or testimonials.38 The comment to the rule explains that testimonials may lead potential clients "to infer from the testimonial that

29. Id.
30. Id.
32. Id. R. 4-7.2(a) (2007).
34. Id. R. 4-7.2(b).
35. Id. R. 4-7.8(a)-(e) (2007).
36. Id. R. 4-7.2(b) (2007).
37. Id. R. 4-7.2(c).
the lawyer will reach similar results in future cases.”

Thus, this rule prohibits the publication of accurate factual information, such as the amount of a damage award recovered by the attorney, an attorney’s win-loss record at trial, or a phrase such as that an attorney is “one of the most experienced” in a field of law.

Rule 4-7.2 also prohibits certain nonfactual statements that an attorney might wish to include in his advertisement to make it more memorable to potential clients. The language of the rule forbids depictions, illustrations or portrayals that are “deceptive, misleading, manipulative, or likely to confuse the viewer.” The comments clarify that visual or verbal descriptions “which create suspense, or contain exaggerations or appeals to the emotions, call for legal services, or create consumer problems through characterization and dialogue” are prohibited. An example of a prohibited depiction is the drawing of a fist.

2. Licensing Scheme for Attorney Advertisements on Television and Radio

The Florida Bar imposes even greater restrictions on television and radio advertisements. The asserted purpose of the Bar’s new regulatory scheme, which appears in Rule 4-7.5, is “to ensure that [television and radio] advertising is not misleading and does not create unreasonable or unrealistic expectations . . . and to encourage the provision of useful information to the public . . . .” Furthermore, the rule is intended to prevent abuses, including “potential interferences with the fair and proper administration of justice and the creation of incorrect public perceptions or assumptions about the manner in which our legal system works, [as well as] to promote the public’s confidence in the legal profession and this country’s system of justice . . . .” As a result, the rules prohibit any features that are “deceptive, misleading, manipulative, or that [are] likely to confuse the viewer.” This rule precludes “the use of scenes creating suspense, scenes containing exaggerations, or situations calling for legal services, [or depicting] consumer problems through characterization and

39. Id. R. 4-7.2 cmt.
40. Id.
41. Id. R. 4-7.2(c)(2)-(3).
42. Id. R. 4-7.2 cmt.
43. FLA. RULES OF PROF’L CONDUCT R. 4-7.2 cmt. (2007).
44. Id. R. 4-7.5 cmt. (2007).
45. Id.
46. Id. R. 4-7.5(b)(1)(A).
dialogue . . . ." Furthermore, spokespersons recognizable to the public and any background sound other than instrumental music are also prohibited. Thus, the sounds of sirens, car crashes, and jingles are forbidden.

3. Evaluating Compliance with the Rules

The Florida Rules of Professional Conduct require a copy of all printed attorney advertisements, except for those that are exempt or those that fall within the more restrictive rules for television and radio, to be filed with the Florida Bar. Each submission costs the attorney $150, and the attorney must file either prior to or concurrently with its first dissemination of the advertisement. The Bar will then notify the advertising attorney within fifteen days whether the advertisement is in compliance with the rules. Attorneys can be sanctioned for continued dissemination of noncomplying advertisements. Attorneys must also keep a copy of each advertisement for three years along with when and where it was used, or to whom it was sent.

Any written advertisement that contains either illustrations or information other than permissible content listed in Rule 4-7.2(b) is exempt from the filing requirements of Rule 4-7.7, which obviously creates a strong incentive for attorneys to include only the listed content in their advertisements. Also exempt are sponsorships of public interest programs, entries in bar publications and law lists, and professional announcement cards. Notably, attorney web sites, previously exempt under this same rule, would become non-exempt under the proposed rule the Bar is now considering.

The filing requirements for print advertising are not technically a prior restraint on attorney advertising because attorneys can avoid the filing requirements by using only permissible content, or by disseminating their advertisements concurrently with filing them, albeit at risk of being disciplined later. For television and radio advertisements, however, the
regulatory scheme chosen by the Bar is a prior restraint system in its most traditional form. Under this scheme, an attorney wishing to advertise on television or radio must file his proposed advertisement with the Florida Bar at least fifteen days prior to its dissemination.\textsuperscript{57} The attorney may request an advisory opinion prior to the television or radio ad’s dissemination, but the opinion does not satisfy the filing and evaluation requirement and must be resubmitted in order to comply with the rule.\textsuperscript{58} The attorney can then disseminate the advertisement when he or she has been notified by the Florida Bar that the advertisement complies with Rule 4-7.7.\textsuperscript{59}

The comments to Rule 4-7.7 justify this stricter regulatory framework based on the special “dangers” of television and radio advertising:

The unique characteristics of electronic media, including the pervasiveness of television and radio, the numbers of viewers reached by the electronic media, the ease with which these media are abused, the passiveness of the viewer or listener, the short span of usage of individual television and radio advertisements and the inability of the bar to patrol the airwaves, make the electronic media especially subject to regulation in the public interest.\textsuperscript{60}

Significantly, it is not clear that any of these characteristics make television and radio advertising any more misleading than print advertising; rather, it is clear that the Bar considers it to be more difficult to regulate these types of advertising than print advertising.

4. Regulation of Computer-Accessed Communications and Advertisements

Until recently, the Florida Bar considered all web sites as information provided upon the request of a prospective client and therefore did not apply its general rules regulating attorney advertising to them.\textsuperscript{61} Other Internet communications, such as sponsored links, were advertisements subject to the general rules.\textsuperscript{62} However, the Florida Bar, at the express urging of several justices on the Florida Supreme Court, is proposing

\textsuperscript{57} Id. R. 4-7.7(a)(1)(A) (2007).
\textsuperscript{58} FLA. RULES OF PROF’L CONDUCT R. 4-7.7(a)(1)(B) (2007).
\textsuperscript{59} Id. R. 4-7.7(a)(1)(E).
\textsuperscript{60} Id. R. 4-7.7 cmt.
\textsuperscript{61} Id. R. 4-7.6(b)(3) (2002), R. 4-7.1(f) (2007).
\textsuperscript{62} Id. R. 4-7.6(d) (2002).
strong new rules regulating attorney advertising on the Internet. These new rules were approved by the Board of Governors on March 30, 2007, and will be submitted to the Florida Supreme Court for adoption.

The proposed rules regulate a wide range of advertising under the heading of "Computer-Accessed Communications," which are defined "as information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer." The rule focuses predominantly on regulating attorney "homepages" and other web sites, but its broad definition encompasses any "[c]omputer-accessed communication[ ] . . . concerning a lawyer's or law firm's services[,]" which presumably includes a law-related blog by a Florida attorney, or even a law review article written by an attorney capable of being accessed via the Internet. The new rule would no longer treat attorney home pages as information provided upon request, but would instead treat them, as well as all other attorney web sites, as advertising governed in large part by the same rules as print advertising.

Some of the print rules, however, are loosened for attorney web sites. The proposed rules would permit web sites to contain factually verifiable statements concerning past results, testimonials, and factually verifiable statements describing or characterizing the quality of the lawyer's services as long as these communications are not misleading. Statements concerning past results must appear with the following disclaimer: "Not all results are provided . . . , the results are not necessarily representative of results obtained by the lawyer, and a prospective client's individual facts and circumstance may differ from the matter in which the results . . . are provided." Additionally, web sites with testimonials must include the disclaimer: "Not all clients have provided testimonials, the results are not necessarily representative of results obtained by the lawyer, and a prospective client's individual facts and circumstance may differ from the matter in which the [results] are provided." Quite significantly, Internet advertising would be

63. See The Proposed Attorney Website Advertising Rule, FLA. BAR NEWS, Feb. 15, 2007, at 24 (attributing these comments to the justices during oral arguments regarding other advertising rule amendments).
64. See supra note 26 and accompanying text.
66. Id.
67. Id. R. 4-7.6(b)(1)-(2).
68. Id. R. 4-7.6(b)(2)(A)-(C).
69. Id. R. 4-7.6(b)(2)(A) cmt.
exempt from the filing requirement and filing fee imposed on print advertising. It is not immediately clear why these types of information would be less misleading in the Internet context than in print, although the comment to the proposed rule notes that the Bar chose an "intermediate level"\textsuperscript{71} of regulation for Internet advertising because viewers must take some affirmative actions to access Internet advertising. The comments also do not explain why the potential to mislead in print could not be cured with similar disclaimers, although obviously web sites and other computer-accessed communications make it easier and less costly for advertising attorneys to provide extra information.

The intermediate level of regulation is presumably a compromise between the difficulty of fitting Internet advertising into existing paradigms and the Bar's desire to regulate advertising in all media. As the comments to the new rule note, "[W]ebsite[s] cannot be easily categorized as either information at the request of the prospective client, which is subject to no regulation under this subchapter . . . or as advertising in a medium that is totally unsolicited and broadly disseminated to the public, such as television . . . ."\textsuperscript{72}

5. Special Restrictions in Personal Injury and Wrongful Death Cases

An attorney cannot send an unsolicited written communication if the communication concerns an action for personal injury or wrongful death unless the accident occurred more than thirty days prior to the mailing.\textsuperscript{73} This restriction is designed to protect the privacy of accident victims and their families, to prevent abuse and overreaching, and to ensure attorney accountability. This rule's comment suggests, "[a] prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest."\textsuperscript{74}

C. Attorney Advertising and the First Amendment in the U.S.

Supreme Court

Commercial speech is protected by the First Amendment of the U.S. Constitution. Supreme Court cases defining the scope of the First Amendment protection of commercial speech, and specifically attorney advertising, reveal two related themes relevant to assessing Florida's

\textsuperscript{71} Id. R. 4-7.6 cmt.

\textsuperscript{72} Id.

\textsuperscript{73} Id. R. 4-7.4(b)(1)(A) (2007).

\textsuperscript{74} Id. R. 4-7.4 cmt.
existing and proposed Rules of Professional Conduct governing attorney advertising. The first theme is that consumers have a strong First Amendment right to receive information about the products and services offered in our free-market economy because such information assists informed and rational decision-making. The second theme is that the regulation of commercial speech must be based on consumer protection rather than on the government’s desire to withhold information from the public to shape consumption preferences or to enforce government standards of taste.

The U.S. Supreme Court first held that commercial speech is protected by the First Amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, although its holding at the time was limited to the pharmacy industry. 75 The Court emphasized that the First Amendment protects the rights of consumers to receive truthful, non-deceptive commercial speech to assist them in making informed and reliable decisions. 76 Moreover, the Court explicitly rejected taste as a basis for regulation of commercial speech:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." 77

One year later, the Supreme Court extended the First Amendment’s mantle to attorney advertising in *Bates v. State Bar of Arizona*, which struck down Arizona’s total ban on attorney advertising. 78 The Supreme Court rejected the State’s argument that price advertising by attorneys was "[i]nherently [m]isleading." 79 Nor was the Court persuaded that attorney advertising was detrimental to the standards of the legal community or would undermine the public’s image of attorneys. 80 Instead, the Court

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76. *Id.* at 765, 771, 781.
77. *Id.* at 765.
79. *Id.* at 372.
80. *Id.* at 368-69.
found the legal profession to be similar to any other commercial business and noted that other "[dignified]" professions advertised. Moreover, the Court was concerned the lack of advertising by attorneys could leave the public, especially those of low and moderate incomes, poorly equipped to seek the services of an attorney. Even so, the Court conceded that reasonable time, place, and manner regulations could be placed on attorney advertising, and it limited its holding to advertising for "routine legal services." The Court also limited its holding to print media, explaining that "the special problems of advertising on the electronic broadcast media will warrant special consideration."

The Court later stressed, in *Ohrahlik v. Ohio State Bar Association*, that its decision in *Bates* does not insulate attorney communications that interfere with a potential client's ability to make "informed and reliable decision[s]" about legal services. In *Ohrahlik*, the Supreme Court distinguished between attorney advertising, which is protected by the First Amendment, and solicitation, which is not. *Ohrahlik* involved an attorney who had been disciplined for soliciting employment from a woman lying in traction at the hospital after a traffic accident. The Court distinguished this situation from the general advertising at issue in *Bates*: "Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." Moreover, in-person solicitation "disserve[s] the individual and societal interest, identified in *Bates*, in facilitating 'informed and reliable decisionmaking.'" As a result, in-person solicitation by attorneys lacks First Amendment protection.

The Supreme Court's most definitive decision addressing the scope of First Amendment protection for commercial speech came in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, which articulated the test still used by the Supreme Court to evaluate

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81. *Id.* at 369-70.
82. *Id.* at 370.
84. *Id.*
86. *Id.* at 455.
87. *Id.* at 467.
88. *Id.* at 457.
89. *Id.* at 458 (citing *Bates*, 433 U.S. at 364).
regulation of commercial speech, including attorney advertising. The Central Hudson intermediate scrutiny test has four prongs. First, as a threshold matter, the regulated speech qualifies for First Amendment protection only if it concerns lawful activity and is not false or misleading. Second, a regulation will be struck down unless the State can show its interest in restricting the speech is substantial. Third, the regulation chosen by the State must directly and materially advance the substantial interest. Fourth, the regulation must not be more extensive than necessary to serve the government’s interest.

In In re R.M.J., the Court applied the Central Hudson test to restrictions on attorney advertising and clarified that the mere potential for deception is not a basis for prohibiting attorney advertising. In re R.M.J. held that the State could not limit attorney advertisements to listed categories of information, and the Supreme Court struck down state prohibitions on mailing of advertisements as more extensive than necessary to prevent consumer deception. The Court conceded that attorney advertising may create more “potential for deception and confusion” than other types of advertising. As a result, “States retain the authority to [ban] advertising that is inherently misleading or that has proved to be misleading in practice.” However, the Court held that states cannot place “an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.” In other words, a disclosure requirement to

91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
97. Id.
98. Id.
99. Id. at 207 (emphasis added).
100. Id. at 203.
alert consumers to the fact that a communication is in fact advertising is constitutionally preferable to a blanket ban on general mailings of truthful and accurate information. Therefore, the regulation at issue in In re R.M.J. failed the final prong of the Central Hudson test because it was "broader than reasonably necessary to prevent the deception."101

The Supreme Court again emphasized that the mere potential for deception or confusion could not justify a ban on attorney advertising in Zauderer v. Office of Disciplinary Counsel.102 In Zauderer, the Court struck down Ohio's ban on illustrations in attorney advertisements in a case involving an attorney advertisement containing an accurate drawing of a Dalkon Shield intrauterine device.103 The Court refused to find that the illustrations were inherently misleading or created an "unacceptable risk[] that the public [would] be misled, manipulated, or confused."104 The Court stated: "Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising . . . The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail."105 As in In re R.M.J., the Court seemed suspicious of regulations that would label broad categories of attorney advertising as potentially misleading without resort to individualized analysis.

The Zauderer decision is also noteworthy for recognizing the First Amendment value of nontextual information in attorney advertisements. The Zauderer Court emphasized "[t]he use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message[s], and it may also serve to impart information directly."106 Significantly, these communicative functions stem in part from their emotional or non-cognitive impact on the viewer, which suggests that the First Amendment protection of commercial speech is not limited to purely factual information.

Moreover, the Zauderer Court again rejected taste, or attorney "dignity," as a basis for regulating attorney advertising:

103. Id. at 655-56.
104. Id. at 648.
105. Id. at 646.
106. Id. at 647.
The State's desire that attorneys maintain their dignity in their communications with the public is [not] an interest substantial enough to justify the abridgment of their First Amendment rights. . . . [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.107

The lesson to be drawn from these cases is that states may not regulate attorney advertising on the grounds that it is potentially misleading or that it is distasteful, but instead must provide evidence that the communications are actually misleading and that the misleading portion cannot be cured by disclosure requirements. These cases give significant guidance on what kinds of state interests are insufficient to satisfy Central Hudson's intermediate scrutiny test.

Even so, it was not until the Court's decision in Florida Bar v. Went For It, Inc. that the Court indicated clearly what state interests, other than preventing deception, are sufficient to satisfy Central Hudson.108 Florida Bar v. Went For It, Inc. is one of the few Supreme Court victories (by a 5-4 margin) for a state regulation of attorney advertising. The Florida Bar regulation at issue was a narrow one. It prohibited attorneys from sending targeted, direct mail in personal injury and wrongful death cases for a period of thirty days after the accident or death.109 The majority referred to the case as involving "targeted direct-mail solicitations to victims and their relatives" and applied Central Hudson's intermediate scrutiny test.110

The Supreme Court first determined that the attorney mailings were truthful and not misleading. Next, the Court found that the Florida Bar had a substantial interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers."111 The substantial interest was the privacy and emotional sanctuary during a time of grief, although the Supreme Court also noted that the Bar's regulation was "an effort to protect the flagging reputations

107. Zauderer, 471 U.S. at 648; see also Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (noting, in striking down a ban on targeted direct-mail advertising by attorneys, that the potential "for isolated abuses or mistakes does not justify a total ban."); Peel v. Attorney Regulation & Discipline Comm'n, 496 U.S. 91, 96, 109-10 (1990) (finding that the mere potential for a misleading communication is not a substantial state interest where attorney truthfully stated on letterhead that he was certified a civil trial specialist by the National Board of Trial Advocacy).


109. Id. at 620.

110. Id. at 620, 623 (emphasis added).

111. Id. at 624.
of Florida lawyers" by preventing such privacy invasions. The Court thus validated Florida's interest in policing privacy invasions by attorneys as a threat to the profession, rather than any interest in policing taste. Moreover, the regulation was consistent with the rationale underlying protection of commercial speech; the thirty-day delay allowed potential clients to make informed and rational decisions not clouded by immediate grief.

The *Went For It* decision provided some clarity regarding how state bars may satisfy the burden of demonstrating that their advertising regulations address "real harm[s]." The Court concluded that the Florida Bar had presented sufficient evidence that its regulation directly and materially advanced its interest in protecting the privacy of accident victims and their families. The evidence included a collection of empirical studies and anecdotal information "supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." Finally, although the Court found the moratorium was not the least-restrictive means available, the regulation satisfied the final prong of the *Central Hudson* inquiry because the regulation was "in proportion to the interest served."

The *Went For It* Court distinguished *Shapero*, where a ban on targeted direct-mail advertising was held unconstitutional, on two grounds. First, Florida's regulation in *Went For It* was not a broad ban, but was limited in duration. Second, the state in *Shapero* had shown no actual harm it was attempting to alleviate, while the Florida Bar had shown, through its study and anecdotal research, a real harm it was attempting to address through its study and anecdotal research.

The U.S. Supreme Court has not yet addressed other issues specifically related to attorney advertising. However, the Supreme Court has produced a robust body of law concerning prior restraints. This body of law is relevant to attorney advertising when state bars attempt to regulate attorneys' commercial speech before they are permitted to disseminate it.

112. Id. at 625.
114. Id. at 641 (Kennedy, J., dissenting).
115. Id. at 626.
116. Id. at 632.
117. Id. at 629-30.
D. First Amendment Restrictions on Prior Restraints on Commercial Speech

The classic definition of a prior restraint is an administrative system (commonly called a licensing system) that operates to grant or deny permission to persons seeking to publish a statement prior to the statement’s dissemination. Prior restraints today can also include injunctions against future speech. By the end of the eighteenth century in both England and America, licensing schemes had become associated with government tyranny, and a primary motivation for the Framers of the First Amendment was to eliminate government licensing of the press. Professor Thomas Emerson succinctly described the special dangers of licensing schemes as follows:

A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; ... suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.

The Supreme Court has called prior restraints, whether in the form of licensing schemes or injunctions on expression, the “least tolerable infringement on First Amendment rights,” and has held that they are presumptively unconstitutional. In fact, the Supreme Court has contemplated prior restraints on core First Amendment speech only in the cases of dire threats to national security, obscenity, and incitement to acts of violence. Even under those circumstances, the proponent bears a heavy burden to overcome that presumption by demonstrating it is an exceptional case justifying such a restraint.


123. See Stuart, 427 U.S. at 559; see also Bantam Books, 372 U.S. 58, 70 (1963); see also Vance v. Universal Amusement Co., Inc., 446 U.S. 947 (1980) (referencing University Amusement
However, the Supreme Court has not automatically included licensing schemes on "non-core" speech, such as commercial speech, within its general prohibition against prior restraints. Instead, the Court has deemed a licensing scheme for "non-core" speech, such as obscenity, to be an impermissible prior restraint in two instances. First, a licensing scheme that gives unlimited discretion to the government official determining whether to issue the license, or to permit the speech, will not be tolerated because of the risks of censorship. Indeed, the Supreme Court observed in Shuttlesworth v. Birmingham, that:

It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Second, a licensing system that fails to incorporate stringent procedural safeguards to obviate the dangers of a censorship system is an unconstitutional prior restraint.

The stringent procedural safeguards a licensing system must include to be constitutional are defined in Freedman v. State of Maryland. The licensing scheme must have 1) strict time limits leading to speedy administrative decision and minimizing any prior restraint-type effects, 2) burden of proof rules favoring speech, and 3) a procedure that will "assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." Under this test, "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled
discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.\textsuperscript{129}

E. Attorney Advertising and the First Amendment in Florida

Because "a state may ban false, deceptive, or misleading commercial speech without infringing on First Amendment rights,"\textsuperscript{130} the Florida Bar has skirted the First Amendment by labelling some categories of attorney advertising as "misleading" because they contain information not verifiable as true or false.\textsuperscript{131} The Florida Supreme Court has been receptive to the Bar's increasingly aggressive regulation of attorney advertising. For example, in Florida Bar v. Pape, the Florida Supreme Court affirmed the discipline of two attorneys who used the image of a pit bull and the number 1-800-PIT-BULL in two television advertisements.\textsuperscript{132} The Pape court found the ads were "inherently deceptive" in violation of the rules because "there is no way to measure whether the attorneys in fact conduct themselves like pit bulls so as to ascertain whether this logo and phone number convey accurate information."\textsuperscript{133} The Pape court held that the ads fell outside of First Amendment protection because "[l]awyer advertising enjoys First Amendment protection only to the extent that it provides accurate factual information that can be objectively verified."\textsuperscript{134} The Pape court emphasized that:

[P]ermitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice. Prohibiting advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system . . . . For the good of the legal profession and the justice system, and


\textsuperscript{130} Fla. Bar v. Gold, 937 So. 2d 652, 656 (Fla. 2006).

\textsuperscript{131} See Fla. Bar v. Lange, 711 So. 2d 518, 521 (Fla. 1998) (holding attorney ad stating "When the Best is Simply Essential" was misleading and violated the rule against self-laudatory statements as well as the rule prohibiting descriptions of the quality of a lawyer's services).

\textsuperscript{132} Fla. Bar v. Pape, 918 So. 2d 240, 242 (Fla. 2005).

\textsuperscript{133} Id. at 244.

\textsuperscript{134} Id. at 247.
consistent with our Rules of Professional Conduct, this type of non-factual advertising cannot be permitted.\textsuperscript{135} 

The \textit{Pape} court gave no support for the assertion that the advertisement at issue would undermine public confidence in the legal system, and this assertion seems dubious in light of an ABA study indicating that regulation of attorney advertising “is not likely to have an impact on the public’s perception of the legal profession.”\textsuperscript{136} Moreover, the \textit{Pape} decision relies on attorney dignity as a basis for regulation of attorney advertising in contravention of U.S. Supreme Court case law summarized above.

Despite its regulatory success in \textit{Pape}, there is strong reason to believe that the Florida Bar’s strict restrictions on attorney advertising would not pass constitutional muster in federal court. In \textit{Mason v. Florida Bar}, the Bar disciplined an attorney for violating its rule against characterizing or describing the quality of legal services when he placed a yellow page ad stating that he was “AV Rated, the Highest Rating Martindale-Hubbell National Law Directory.”\textsuperscript{137} Although the Bar contended the statement was inherently misleading, the Eleventh Circuit held that the speech was squarely within the confines of the First Amendment and applied the \textit{Central Hudson} test.\textsuperscript{138} After agreeing the Bar had a substantial interest in both ensuring attorney advertisements are not misleading and ensuring the public has access to relevant information, the court determined the Bar had failed the second prong of the \textit{Central Hudson} test. “A state cannot satisfy its burden to demonstrate the harms it recites are real and that its restrictions will alleviate the identified harm by rote invocation of the words ‘potentially misleading.’”\textsuperscript{139}

Although the Bar did not seek to ban the ad, but instead to impose a disclaimer upon it, the Eleventh Circuit ruled “[e]ven partial restrictions on commercial speech must be supported by a showing of some identifiable harm[,]” and the Bar had failed to satisfy its burden “of producing concrete evidence that Mason’s use of the words AV Rated, the

\textsuperscript{135} \textit{Id.} at 246-47 (emphasis added) (footnote omitted).

\textsuperscript{136} AM. BAR ASS’N COMM’N ON ADVER., THE IMPACT OF ADVERTISING ON THE IMAGE OF LAWYERS 30 (1995); see also Andrew M. Perlman, \textit{Toward a Unified Theory of Professional Regulation}, 55 FLA. L. REV. 977, 1012 (2003) (demonstrating that existing studies “do not offer much support for the idea that trust in the legal profession (generically defined) has a significant impact on trust in the justice system.”).

\textsuperscript{137} \textit{Mason v. Fla. Bar}, 208 F.3d 952, 954 (11th Cir. 2000).

\textsuperscript{138} \textit{Id.} at 955.

\textsuperscript{139} \textit{Id.} at 956 (quoting Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, 512 U.S. 136, 146 (1994)).
Highest Rating, threatened to mislead the public." As a result, the court found Florida's rule impermissibly curtailed non-misleading commercial speech. Despite the Florida Bar's success in Pape, its contention that much of attorney advertising is inherently misleading, especially advertising that appears on television, radio, or the Internet, is on shaky constitutional ground, as the following discussion will demonstrate.

III. DISCUSSION

A. Florida's New and Proposed Restrictions on Attorney Advertising Violate the First Amendment

The U.S. Supreme Court has been expanding the reach of the First Amendment's protections in the area of commercial speech.

The arc of the Supreme Court's commercial speech decisions in recent years has been unmistakable: in case after case the Court has enforced the First Amendment protections set forth in Central Hudson with increasing rigor, expanding protection for commercial speech, and expressing ever-heightening skepticism and impatience for governmental restrictions on advertising grounded in protectionism and paternalism.

140. Id. at 958.
141. Rodney A. Smolla, Lawyer Advertising and the Dignity of the Profession, 59 ARK. L. REV. 437, 452 (2006) (emphasis added). Smolla cited the following cases:


Id. n.50. Additionally, Smolla cited the 44 Liquormart case in which the Court struck down liquor advertisement restrictions, noting:

[A] State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it . . . . [B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. The First Amendment directs us to be especially
Yet, the Florida Bar has been moving in the other direction, tightening its control over attorney advertising. Moreover, the Bar attempts to bypass the First Amendment by banning some categories of attorney advertising under the auspices it is misleading even where the statements are true or where they are not factual in nature. Additionally, the Bar has tightly skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.

Id. (citing 44 Liquormart, 517 U.S. at 497, 503) (citation omitted). Finally, Smolla cited the following cases:


Id.
restricted attorneys' efforts at marketing on television, radio, and the Internet. As a result, several sections of the Florida Rules of Professional Conduct regulating advertising are likely unconstitutional. These rules include those banning truthful speech and nonmisleading appeals to the emotions, the mandatory prior approval scheme for television and radio ads, as well as the proposed rule regulating Internet communications.

B. The Licensing Scheme for TV and Radio Ads is an Unconstitutional Prior Restraint Lacking Requisite Procedural Safeguards

The Florida Bar's system for mandatory prior review of attorney advertising on television and radio is a prior restraint lacking the safeguards needed to satisfy the First Amendment. 142

A prior restraint is the "least tolerable infringement on First Amendment rights" and is thus presumptively unconstitutional. 143 This presumption of unconstitutionality may be overcome only in exceptional cases, such as dire threats to national security. 144 However, prior restraints in the form of licensing systems are permissible in some limited contexts, such as the regulation of adult businesses, and the Supreme Court has stated that a licensing system for commercial speech might not violate the First Amendment, because commercial speech is less susceptible to being "'chilled'" than other types of speech. 145 However, even in the case of commercial speech, a licensing system is unconstitutional if it gives unbridled discretion to the government officials administering it, or if it fails to provide procedural safeguards to obviate the dangers of government censorship. 146

Florida's new rule regarding television and radio advertising is clearly a prior restraint in the form of a licensing system, and it lacks the procedural safeguards necessary to pass constitutional muster. To risk stating the obvious, the rules impose a prior restraint because they require

142. The U.S. Supreme Court has not addressed regulations of attorney advertisements on television or radio. On two occasions, the Court refused to decide the scope of permissible advertising outside of print media. In Bates v. Arizona, the Court expressly limited its decision to advertisements of routine legal services in print, explaining, "the special problems of advertising on the electronic broadcast media will warrant special consideration." Bates, 433 U.S. at 384. The Court likewise limited its holding in Zauderer to print media. Zauderer, 471 U.S. at 655-56.


145. See Central Hudson, 447 U.S. at 564 n.6, 571 n.13, 578.

146. See N.Y. Mag., Inc. v. Metro. Transp. Auth., 136 F.3d 123 (2d Cir.1998) (applying "the requirement of procedural safeguards in the context of a prior restraint" on commercial speech, and citing similar decisions from other circuits).
attorneys to file television and radio ads they wish to run with the Florida Bar at least fifteen days prior to their dissemination. The Bar then examines the ads for compliance with its advertising regulations and notifies attorneys whether they can disseminate the advertisements. This licensing system is mandatory, as is the payment of $150 per submission. If an attorney runs an ad without approval, the attorney is subject to discipline. Taken together, it is easy to see how this system threatens to chill attorney advertising on television and radio, and its structure even raises the specter that chilling, or perhaps even freezing, such ads is its main purpose.

Indeed, the structure of this system belies the Supreme Court’s assumption in Central Hudson that commercial speech will not be chilled by licensing because it is profit-motivated. Here, an attorney must spend money—perhaps substantial amounts of money—to develop a radio or television advertisement. If the ad runs afoul of the Bar’s censors, the attorney will not be able to air it; so there is every incentive to include only the most innocuous and bland content in the ad. Yet, if the only option is innocuous and bland advertising, the attorney may decide it is simply not profitable to advertise on radio or television. And if the Bar’s censors do not approve the ad, the attorney’s speech will certainly be chilled, probably permanently, because airing the ad may result in discipline or disbarment.

More alarming from a First Amendment standpoint is the fact that the rules give the officials who administer them no clear-cut, objective criteria for approving or disapproving an advertisement. A licensing system that gives an administrator unlimited discretion is a patently unconstitutional prior restraint because of the potential for official censorship of unpopular speech. The Florida Rules of Professional Conduct apparently give Bar

148. Id. R. 4-7.7(a)(1)(E).
149. Id. R. 4-7.7(a)(1)(A), (b)(7).
150. Id. R. 4-7.7(a)(1)(E).

It is settled by a long line of recent decisions of this Court that an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.
officials absolute discretion to disallow an attorney’s advertisement for lack of compliance with the rules, even if compliance is judged by the standard articulated in Rule 4-7.5(b)(1)(A), prohibiting advertising that is “deceptive, misleading, manipulative, or that is likely to confuse the viewer.”

It is not even clear whether information that would be permissible in print advertisements would survive the Bar’s official gauntlet. To cite recent evidence of the breadth of discretion the decision-maker is given in Florida, compare three recent cases. In one, the Board of Governors reversed a decision by the Bar staff and Standing Committee on Advertising to disallow a television ad showing a mock courtroom; however, the Board of Governors denied appeal in a case involving an ad that used the language “legal firepower when you need it most” and in another case involving an image of model cars crashing into each other.152

It is far from clear how these ads would dupe potential legal services consumers; nor is it clear why the two denied ads were somehow more misleading or manipulative than the permitted one. These nebulous and ill-defined standards raise the specter of official censorship that the First Amendment forbids, even in the case of commercial speech. This specter threatens to materialize even more in a situation, such as this, where Bar leaders have repeatedly expressed hostility to attorney advertising and where the Bar has attempted to aggressively regulate potentially misleading information based on concerns for the dignity of the profession.

Even if Florida’s licensing scheme included less arbitrary standards for restraining radio and television advertising, it still lacks the procedural safeguards that the First Amendment demands. The Florida Bar’s censorship scheme does not meet _Freedman’s_ requirements.153 First, it lacks strict time limits. How long must the time limit be? _Freedman v. State of Maryland_ is instructive in this regard. _Freedman_ involved a statute making it unlawful to exhibit a motion picture without a license. Although preclearance of motion pictures is constitutionally permissible, any restraint must be for “the shortest fixed period compatible with sound judicial resolution.”154 Under _Freedman_, challenges to a movie censorship

__Id. at 151.__

152. _Bar Says Lawyers in Different Areas May Share 800 Numbers_, FLA. BAR NEWS, Jan. 15, 2007, at 2 [hereinafter _Bar Says_].

153. See supra text accompanying notes 128-29.

decision must be heard within one day, and a decision must be rendered within two more days.  

In comparison, the Florida Bar’s fifteen-day time frame for initial review of radio and television ads seems much too long to suppress constitutionally protected speech, at least when weighed against any potential harm. Second, there is no indication that the government bears the burden of proof to justify suppression of the attorney’s speech. In fact, while an attorney may request an advisory opinion prior to the television or radio ad’s dissemination, the opinion is not binding on the bar and the attorney can still be disciplined for running the ad. Finally, the process for review of the denial of the attorney’s right to air an advertisement does not appear to assure a prompt final judicial decision. If Bar staff or the Bar’s Standing Committee on Advertising determines that an advertisement fails to comply with the rules, the attorney wishing to advertise may appeal to a seven-member subcommittee of the Board of Governors, known as the Board Review Committee. The Board Review Committee will review the decision at the next regularly scheduled meeting of the Board of Governors, or, in some instances, the following meeting. The Board Review Committee then reports its decision to the Board of Governors to approve, deny, or modify, and it then becomes a final board opinion. Although this process gives an attorney several chances to get a second opinion on the permissibility of his advertisement, it does not appear to meet the strict procedural requirements of Freedman. As a result, Florida’s licensing scheme for attorney ads on radio and television is unconstitutional and should be repealed or struck down.

155. Id. In Freedman, the Supreme Court indicated that its decision in Kingsley v. Brown, 354 U.S. 436 (1957), provided guidance as to permissible procedures. Id. at 60. Kingsley upheld a New York injunctive procedure designed to prevent the sale of obscene books. Id. The Court approved the New York procedure because it “postpone[d] any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing.” Id. New York “provide[d] for a hearing one day after joinder of issue” and required the judge to “hand down his decision within two days after termination of the hearing.” Id. (referencing Kingsley, 354 U.S. at 439).


158. See generally Rules Regulating the Fla. Bar, Review of Lawyer Advertisements and Solicitations, Ch. 15, available at http://www.floridabar.org; see Advertising Rules, supra note 157, § 1 (providing “Staff opinions, standing committee on advertising opinions, and opinions of the board of governors are advisory only and shall not be the basis for action by grievance committees, referees, or the board of governors except upon application of the respondent in disciplinary proceedings.”).
C. Florida's Content-Based Restrictions on TV and Radio Advertising Cannot Survive Intermediate Scrutiny

Even if Florida's licensing scheme could surmount these obstacles, the specific content restrictions it imposes are unconstitutional under the intermediate scrutiny test of Central Hudson.

1. Television and Radio Ads are Not Inherently Misleading

As a threshold matter, it is important to note that Florida has not, and doubtless cannot, establish that all radio and television advertising by Florida attorneys is inherently misleading so as to be outside the scope of First Amendment scrutiny.\(^\text{159}\)\(^\text{159}\) The comments to Florida's new rules appear to make such an argument by asserting that radio and television advertisements create "incorrect public perceptions . . . about the manner in which our legal system works."\(^\text{160}\)\(^\text{160}\) Moreover, the comments attempt to justify regulations by reference to unique features of radio and television ads, including "the numbers of viewers reached . . . and the inability of the bar to patrol the airwaves."\(^\text{161}\)\(^\text{161}\) It is certainly not self-evident that the nature of the broadcast (or cable or satellite) medium makes information presented there inherently more misleading than advertising in print. Nor does the First Amendment allow more rigorous regulation of television and radio advertising simply because it has a broader reach or is a more effective means of communication than print.

2. The Content Restrictions are More Extensive than Necessary

Because television and radio ads are not inherently misleading, Florida must show that a substantial state interest supports the specific content prohibitions it has chosen to impose, and that these prohibitions are not more extensive than necessary to achieve that purpose. Although protecting consumers from misleading legal advertisements—unlike protecting attorney dignity—is a substantial state interest, Florida's content prohibitions are tangential at best and inimical at worst to the goal of assisting consumers to make informed and intelligent decisions. Florida's Rule 4-7.5 forbids the "use of scenes creating suspense, . . . exaggerations, or situations calling for legal services, [and] scenes creating


\^160. FLA. RULES OF PROF'L CONDUCT R. 4-7.5 cmt. (2007).

\^161. Id. R. 4-7.7 cmt. (2007).
consumer problems through characterization and dialogue."\textsuperscript{162} It also forbids the use of spokespersons "recognizable to the public" or "background sounds other than instrumental music."\textsuperscript{163}

The burden is on Florida to show that these content restrictions address a real harm, and that its regulatory scheme "will in fact alleviate them to a material degree."\textsuperscript{164} Florida has not carried this burden, probably because it is impossible to do so. The U.S. Supreme Court recognized in \textit{Zauderer} that consumers are used to attention-getting devices in commercial advertisements.\textsuperscript{165} Florida residents are routinely exposed to television advertising containing such devices by out-of-state attorneys and even non-lawyers.\textsuperscript{166} It thus seems implausible that the Bar's strict prohibitions on common marketing devices bears any relation to, much less directly advances, its goal of protecting Florida consumers of legal services; instead, the only effect seems to be to put Florida attorneys at a competitive disadvantage in informing clients about their services.\textsuperscript{167} To illustrate, the Bar recently denied approval for an ad by a Florida attorney containing model cars crashing into each other.\textsuperscript{168} This ad may be memorable (or not), but it hardly seems manipulative, because Florida residents would be unlikely to mistake it for a real case result obtained by the advertising lawyer. The fact that Florida has chosen to target such common advertising devices not only undercuts the argument that the rules are narrowly drawn to protect consumers; it also leads to the conclusion that the content prohibitions rest on constitutionally discredited justifications for regulation: either official distaste for these advertising

\textsuperscript{162} \textit{Id.} R. 4-7.5 cmt. (2007).
\textsuperscript{163} \textit{Id.} R. 4-7.5(b)(1)(B)-(C).
\textsuperscript{166} \textit{See, e.g.}, \textit{Personal Injury Advertisement}, Stamatakis & Thaljl, P.L., at www.1800askgary.com (previously showing an ad of a group of non-lawyers who urge auto accident victims to make use of their services using dramatizations and testimonial). The web site is currently under construction and unavailable.
\textsuperscript{167} The Federal Trade Commission (FTC), which is charged with protecting consumers from deceptive advertising, has rejected the notion that the presence of attention-getting devices makes advertising per se misleading. In a letter criticizing New York Bar rules similar to those in Florida, the FTC asserted that the Bar should not regulate dramatizations and other "common methods that advertising firms have used to make their messages memorable" because such devices "are unlikely to hoodwink unsuspecting consumers, because consumers are usually familiar with them." \textit{See} Letter from the FTC's Office of Policy Planning, Bureau of Consumer Protection, and Bureau of Economics to Michael Colodner, Office of Court Administration (Sept. 14, 2006).
\textsuperscript{168} \textit{Bar Says}, \textit{supra} note 152.
devices as "beneath the[] dignity" of the profession,\textsuperscript{169} or the "paternalistic assumption" that consumers of legal services "are no more discriminating than the audience for children's television."\textsuperscript{170}

One final feature confirms that the television and radio advertising rules are more extensive than necessary. The rules contain no exemption for advertising about pro bono legal services by nonprofit political organizations. The U.S. Supreme Court has held that legal solicitation by such groups is core political speech, and regulation of it is subject to strict scrutiny.\textsuperscript{171} Clearly, a prior restraint on core political speech, with its attendant filing and fee requirements, is unconstitutional.\textsuperscript{172} Just as clearly, Florida's content-based restrictions on such speech cannot survive strict scrutiny.\textsuperscript{173}

3. Disclosure Requirements are Constitutionally Preferable to Prohibiting Speech

Even if Florida justifies its content restrictions based on the dubious argument that the regulated content is misleading because it is not factual in nature or because it is not literally true,\textsuperscript{174} simple disclosure requirements could cure any potential deception. For example, a dramatization could be accompanied by a disclaimer stating that it did not depict an actual attorney-client interaction. As the Supreme Court stated in \textit{In re R.M.J.},\textsuperscript{175} the states may not "place an absolute prohibition on certain types of potentially misleading information . . . if the information

\textsuperscript{169}. \textit{Zauderer}, 471 U.S. at 648.
\textsuperscript{172}. \textit{See N.Y. Times Co. v. United States}, 403 U.S. 713 (1971) ("Pentagon Papers" case) (striking down prior restraint on political speech even in the face of an alleged threat to national security).
\textsuperscript{173}. \textit{See Primus}, 436 U.S. at 439 (striking down ban on solicitation by ACLU).
\textsuperscript{174}. Florida appears to have taken the position that it can regulate any speech that is not demonstrably truthful, but this is a reversal of the constitutional equation. The First Amendment permits Florida to regulate speech that is false and misleading; this does not mean that speech that is not demonstrably truthful, perhaps because it is satirical or is a dramatization of a truthful event, is inherently misleading. \textit{See N.Y. Comm. on Prof'l Ethics Formal Op.} 661 (1994) (rejecting the argument that dramatizations are inherently misleading); \textit{Grievance Comm. v. Trantolo}, 470 A.2d 228, 234 (Conn. 1984) (holding that a TV ad depicting a humorous dramatization was informative rather than misleading).
also may be presented in a way that is not deceptive." Incidentally, this preference for disclosure suggests the absurdity of a denial of approval to an ad showing crashing model cars; it seems ludicrous to suggest that this ad should be accompanied by a disclaimer that "it does not depict a real case," because consumers would be well aware of that fact and could not possibly be misled even without the disclaimer.

D. The Florida Bar’s Proposed Rule Regulating Internet Communications Violates the First Amendment

Currently, Florida’s Rules of Professional Conduct regulating computer-accessed communications treat attorney homepages and web sites as information provided upon request of a potential client. This approach removes them from the purview of the general advertising rule, Rule 4-7.2, although they are subject to a few special disclosure requirements not applicable to other information provided upon request. It is not clear that any untoward consequences have resulted from this approach, and indeed an Advertising Task Force appointed by the Bar recommended that attorney web sites continue to be governed by this approach. The Bar rejected this recommendation, and several Florida Supreme Court justices have asked for strong regulation of Internet advertising. After four years of debate, the Bar adopted changes to its existing rules on computer-accessed communications at its meeting on March 30, 2007.

Proposed Rule 4-7.6 will no longer treat home pages as information provided upon request, but will instead subject them, along with other attorney web sites, to most of the rules regulating attorney advertising in print media. The proposed rule, however, does give more leeway to attorneys advertising on the Internet than in other media. It would permit factually verifiable statements concerning past results, testimonials, and factually verifiable statements describing or characterizing the quality of the lawyer’s services as long as these communications are not misleading


178. See supra note 63.

179. See supra note 63.

180. FLA. RULES OF PROF’L CONDUCT R. 4-7.6(b)(1) (2002) (amend. proposed Aug. 1, 2005); see supra note 63.
and contain specified disclaimers.\textsuperscript{181} Significantly, it appears that most Internet ads will not be subject to the filing requirements or fees applicable to print ads. Even with these exceptions for Internet advertising, the proposed rule violates the First Amendment.

The Supreme Court has given noncommercial Internet speech full First Amendment protection.\textsuperscript{182} Thus, commercial speech on the Internet ought to receive just as much First Amendment protection as commercial speech in any other medium. Any regulation of Internet commercial speech, including attorney advertising, must satisfy the intermediate scrutiny test of \textit{Central Hudson}.

Under this test, Florida's proposed rule governing computer-accessed communications fails constitutional muster. Whether or not the Florida Bar has a substantial interest in imposing more stringent regulations on Internet advertising than it has heretofore done, Florida has provided no evidence that the more stringent proposed regulations respond to any actual threat to Florida consumers of legal services. Florida bears the burden of showing that its regulation "directly advances" its interests.\textsuperscript{183}

To do so, it must show that "the harms it recites are real" and that its regulations will "alleviate them to a material degree."\textsuperscript{184} As of this point, its regulation appears to be based on "mere speculation" that its current regulations are insufficiently stringent to protect Florida consumers.\textsuperscript{185} In this regard, the advertising that the regulations leave unchanged casts grave doubts on the efficacy of the regulations in protecting Florida consumers of legal services.

The proposed rule regulates advertising by Florida attorneys. Yet, the Internet is a medium that crosses state, national, and international boundaries. Even if the proposed rule is effective in ridding the Internet of advertising by Florida attorneys deemed to be misleading, Florida consumers can still access speech by out-of-state attorneys not subject to the constraints of the proposed rule. Every state has its own bar, and unlike Florida, the vast majority of them do not consider marketing devices such as dramatizations to be misleading.

Thus, the proposed rule does not really prevent Florida consumers from being "misled" by dramatizations or other creative marketing devices; it


\textsuperscript{182} \textit{See generally} Reno v. ACLU, 521 U.S. 884 (1997).


\textsuperscript{185} \textit{See id.}
merely deprives Florida attorneys of potentially effective marketing
devices used by their out-of-state competitors.\textsuperscript{186} Moreover, the proposed
rule cannot prevent non-lawyers in Florida from using creative advertising
devices to lure potential consumers of legal services away from Florida
lawyers. For example, the television ad for 1-800-Ask-Gary targets victims
of auto accidents in Florida using a testimonial and a dramatization.\textsuperscript{187}
Potential consumers of legal services in Florida are constantly exposed to
marketing devices forbidden to Florida lawyers, making it difficult for the
Florida Bar to establish that its new restrictions are necessary to
accomplish a substantial state interest. The very ineffectiveness of these
regulations in protecting Florida consumers makes it more likely that they
were passed to serve an interest other than consumer protection.

Regardless of whether Florida can establish that its new restrictions on
Internet advertising directly advance its interest in protecting consumers,
the breadth of the new regulation trespasses much too far into the realm of
constitutionally protected speech. To satisfy the First Amendment,
Florida’s proposed rule must be “no more extensive than reasonably
necessary”\textsuperscript{188} to accomplish the goal of protecting Florida consumers;
Florida need not choose the least restrictive means of regulating speech,
but it must demonstrate a “reasonable fit” between its ends and means.\textsuperscript{189}
This Florida cannot do.

Florida’s proposed rule cut through a vast swath of attorney speech,
both commercial and non-commercial, under its definition of computer-
accessed communications. The proposed rule restricts all “information
regarding a lawyer’s or law firm’s services that is read, viewed, or heard
directly through the use of a computer.”\textsuperscript{190} Intentionally or not, the rule
thereby sweeps into its orbits many types of non-commercial speech. For
example, the proposed rule appears to govern the blogs of Florida

\textsuperscript{186} Depending on the circumstances, these out-of-state competitors might be subject to
punishment for unauthorized practice of law if they establish an attorney-client relationship with
a Florida resident, but there are many instances in which they could lawfully provide legal services
to a Florida resident.

\textsuperscript{187} Until recently, a companion 1-800-Ask-Gary web site used similar devices. The Ask Gary
ads are exempt from Bar Rules because they are sponsored by a “chain of accident clinics”
controlled by a chiropractor. However, the ads did in fact trigger a Bar investigation of lawyers who
may have received referrals from the 1-800-Ask-Gary ads. Michael Sasso, 1-800-Ask-Gary Get
article/20070623/NEWS/706230536/-1/.

\textsuperscript{188} Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989) (citing In re R.M.J., 455 U.S. 191, 207
(1982)).

\textsuperscript{189} Id. at 480.

\textsuperscript{190} FLA. RULES OF PROF’L CONDUCT R. 4-7.6(a) (2002) (amend. proposed Aug. 1, 2005).
attorneys that contain general discussion of Florida law, such as Matt Conigliaro’s blog (www.abstractappeal.com) or Janet Langjahr’s blog (www.fladivorcelawblog.com). These blogs can be “read . . . through the use of a computer,” and they include “information regarding [the] lawyer’s . . . services.” Although such blogs may indirectly garner clients for their authors, they are comprised predominantly of expression that lies at the core of the First Amendment. Even a law review or bar journal article written by a licensed Florida attorney, which is accessible online, may be covered by the proposed rule and regulated as advertising. After all, even a law review article includes information regarding a lawyer’s services, if only in its initial footnote noting the author’s institutional affiliation and (perhaps) area of practice. The Florida Bar and the Florida Supreme Court have absolutely no legitimate interest in regulating this type of attorney speech.

E. The Florida Bar’s Prohibitions on Truthful and Non-Misleading Speech Violate the First Amendment

The Florida Bar appears to have misapprehended the scope of its power to regulate attorney advertising. The First Amendment protects truthful, non-misleading commercial speech. To the extent that Florida wishes to regulate truthful, non-misleading commercial speech, it must establish that its regulation directly advances a substantial state interest and is no more extensive than necessary to accomplish that interest. Speech may not be regulated merely because it has the potential to mislead. Nor may it be regulated because some might find it tasteless or offensive. Nor may speech be labeled misleading base purely on paternalistic assumptions about its audience.

Yet the Florida Rules of Professional Conduct governing attorney advertising assume that an attorney advertisement may be banned, unless an attorney can verify to the Bar’s satisfaction that the advertisement is truthful and non-misleading. Indeed, some of the rules go further and ban completely truthful speech that seems unlikely to mislead any but the most sheltered and credulous of Florida residents. The Florida Rules of Professional Conduct completely ban (in some media) references to past results, testimonials, comparisons with other lawyers’ services, statements that characterize the quality of an attorney’s services, and completely ban (in all media) depictions that create suspense or appeals to the emotions

191. Id.
under the theory these statements are "misleading." Thus, statements in print or on television or radio that an attorney received a million-dollar damage award, that an attorney prevailed in ninety percent of cases that went to trial, or that an attorney is experienced in tax law are all considered misleading by the Florida Bar, whether they are verifiably true or not. The Florida Bar justifies its ban by asserting these prohibited statements "are inherently misleading to a person untrained in the law." However, labeling truthful speech as misleading does not make it so, especially when Florida residents are bombarded daily with similar advertising by out-of-state attorneys and non-lawyers. As the esteemed First Amendment scholar Rodney Smolla has noted,

To grant bar regulators carte blanche to label advertising "inherently misleading," releasing them of the burdens of supporting evidence or the consideration of regulatory alternatives, is to put the fox in guard of the coop. These are the exercises that give the Central Hudson test its bite, and if they may be pretermitted by the recitation of the phrase "inherently misleading," the First Amendment safeguards embedded in the Central Hudson test are entirely bypassed.

Truthful speech may not be regulated based on the unsupported argument that it might mislead someone somewhere. Thus, Florida's attempt to prohibit truthful speech by labeling it misleading based on no evidence whatsoever bypasses the dictates of the First Amendment.

The rules also exceed the scope of permissible regulation by attempting to restrict advertising merely because it appeals to the emotions of its audience. The rules appear to rely on a false corollary: Just because false and misleading advertising may be regulated does not mean that all speech that is not demonstrably true may be regulated. The U.S. Supreme Court has expressly rejected the idea that speech which does no more than gain attention is inherently misleading. The Court recognizes that non-factual elements of advertising have First Amendment value: "The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's

194. Id. R. 4-7.2 cmt. (2007).
195. Smolla, supra note 141, at 466 (emphasis added).
messages, and it may also serve to impart information directly." Thus, the Florida Bar's total ban on depictions that create suspense or appeals to the emotions is actually an attempt to ban speech protected by the First Amendment.

In conclusion, the Florida Bar's total prohibition on references to past results, testimonials, comparisons with other lawyers' services, statements that characterize the quality of a lawyer's services, and depictions that create suspense or appeals to the emotions is unconstitutional and should be repealed.

F. The Florida Bar's Strict Policing of Attorney Advertising is Bad Public Policy and Should Be Repealed

Even if Florida’s tight restrictions on attorney advertising could satisfy the demands of the First Amendment, the restrictions are bad public policy and should be repealed.

First, Florida Bar’s stringent rules limit access of the poor to the legal system. Tight advertising rules “foster economic interests at the expense of broader access to legal services . . . .” “For those in lower income and less well connected classes, however, advertising is fresh information about serious legal needs that people may have right now. Stifling lawyer advertising is class legislation in the name of professional dignity.” In fact, a 1993 study found that one-fifth of low income people found counsel based on television ads, a number that is almost certainly higher today.

Second, restrictions on attorney advertising limit the ability of the market to effectively operate. Advertising by attorneys allows consumers to find affordable legal services and makes consumers aware of the option of legal services. The Federal Trade Commission has concluded “the two principal reasons why consumers do not consult lawyers are the result of inadequate information: consumers believe they will be unable to afford legal counsel; and consumers do not know how to find a lawyer . . . .” Moreover, the Federal Trade Commission found prices for legal services were highest in jurisdictions with the most stringent advertising rules and lowest in jurisdictions where regulation on attorney advertising was

197. Id. (emphasis added).
198. Hornsby, supra note 10, at 256.
Thus, "[c]ompetition among lawyers, in the form of commercial advertising, has resulted in lower prices to consumers."203

Third, the Rules are unduly paternalistic. Empirical evidence shows an increase in "consumers' confidence in lawyers" with increased attorney advertising.204 Moreover, "[t]he advertisements inform the listener of the value of professional legal assistance . . . . If some members of the audience find them distasteful, such consumers might very well react by shunning the service offered, thereby imposing an informal sanction more effective than any formal regulation."205

Fourth, the legal environment has drastically changed from the period when attorneys could simply rely on word-of-mouth to market their services. In an increasingly urbanized environment with shifting patterns of using information technology, competition is much more fierce, requiring firms to try to find new avenues of advertising and marketing.206 Many attorneys are attempting to market their law practices in new, different, and creative ways.207 They should not be hamstrung in their attempts by misguided regulators operating on unfounded assumptions about attorney advertising.

IV. CONCLUSION

The new Florida Rules of Professional Conduct governing attorney advertising on radio and television, and the proposed rule governing Internet advertising, violate the First and Fourteenth Amendments of the U.S. Constitution and should be repealed and rejected, respectively.

202. Id.
203. O'Steen, supra note 199, at 251.