UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

WILLIAM H. HARRELL, JR., et al., Plaintiffs, v. THE FLORIDA BAR, et al., Defendants.	)	Civil Action No. 3:08-cv-00015-VMC-TEM

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT OF MOTION

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MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move for an order granting them summary judgment under Federal Rule of Civil Procedure 56 and declaring unconstitutional and permanently enjoining enforcement of the following provisions of the Florida Rules of Professional Conduct: Rule 4-7.1, to the extent it limits advertisements to only "useful, factual information presented in a nonsensational manner;" Rule 4-7.2(c)(1)(B)-(E), to the extent these provisions prohibit statements that are not actually false or misleading; Rule 4-7.2(c)(1)(F), (G), & (I); Rule 4-7.2(c)(2)-(3); Rule 4-7.5(b)(1)(C); and Rule 4-7.7(a)(1).

MEMORANDUM IN SUPPORT OF MOTION

In 2002, the Florida Bar informed Jacksonville attorney William H. Harrell, Jr. that his proposed advertising slogan—"Don't settle for anything less"—was impermissible under the Florida Rules of Professional Conduct. Second Harrell Decl. ("Harrell Decl."), ¶¶ 8-9. At the same time, the Bar suggested an alternative slogan, "Don't settle for less than you deserve," which it advised would be permissible. *Id.* ¶ 9. Although the Bar did not explain why one slogan was preferable to the other, Harrell nevertheless followed the Bar's suggestion and adopted "Don't settle for less than you deserve" as the centerpiece of his firm's new marketing campaign. *Id.* ¶¶ 9-10. After five years of investment in the slogan, however, the Bar informed Harrell that "Don't settle for less than you deserve" improperly characterized the quality of his services and therefore was prohibited, relying as the basis for its decision on the fact that "Don't settle for anything less" and similar slogans had previously been rejected. *See* Harrell Decl. Exh. 5 at 2; Exh. 6. Then, more than four months later, Harrell was informed that the Bar's Board of Governors had decided that the slogan did not characterize the quality of his services after all. Harrell Decl. Exh. 7.

The Bar's shifting and arbitrary application of its rules to Harrell's slogan is typical of its

enforcement of the state's system of content-based advertising restrictions. These restrictions prohibit stock advertising devices that are widespread in other industries but that the Bar characterizes as either factually unverifiable or irrelevant to the decision whether to retain a lawyer and, therefore, unfit for consumption by Florida consumers. In an effort to promote its own ideas of dignity and professionalism, the Bar has applied its rules to prohibit advertisements containing everything from pit bulls to three-legged dogs, from Muhammad Ali to old women with walkers, from squealing breaks to the sound of a light switch turning off. *See Fla. Bar v. Pape*, 918 So. 2d 240 (Fla. 2005); Harrell Decl. Exh. 12 at 44, 45, 46; Exh. 20 at 1; Exh. 21. Even worse, the Bar enforces its advertising restrictions through a system of prior restraint, requiring lawyers to submit their ads for pre-screening in a process that leaves nearly standardless discretion in the hands of Bar administrators and provides no opportunity for judicial review.

The Bar's vague and flexible rules allow its regulators, as this Court has observed, to "engage in any pattern of decision that they find to be suitable at any time." Order, Feb. 29, 2008 ("Order"), at 23. To name just a few of countless inconsistencies resulting from this system, the Bar has prohibited images of tigers but allowed images of panthers, prohibited images of fortune tellers but allowed images of wizards, prohibited a firm from calling itself "Freedom Law" but allowed "Liberty Law," and prohibited a claim to "fight insurance companies" while allowing a claim to "stand up" to them. *See* Harrell Decl. Exh. 11 at 12; Exh. 12 at 17, 26, 31, 57, 61, 66, 79, 80. The Bar typically offers no explanation for these inconsistencies, leaving lawyers like Harrell to wonder why the public needs protection from the slogans "Don't settle for anything less" and "Don't let your family settle for less" but not from "Don't settle for less than you deserve," "To everyone their due," and "You deserve results!" *See* Harrell Decl. Exh. 1; Exh. 5

at 2; Exh. 7; Exh. 12 at 35; Exh. 22 at 1.

It would be incomprehensible for a state to apply Florida's restrictions on advertising content to any other industry—to prohibit, for example, Coca-Cola from using polar bears in its commercials because the state considers them to be "irrelevant," the slogan "Catch the Wave!" because it is "manipulative," or "Can't Beat the Real Thing" because it is "unverifiable." Moreover, no other industry imposes a comparable prior restraint on advertising, and there is no justification for restricting lawyer advertising even more than advertising for products, such as alcohol and pharmaceuticals, that pose a serious potential danger to consumers.

Florida's rules impose an intolerable and unnecessary burden on commercial speech in the state, and, for this reason, the Court should grant summary judgment to plaintiffs.

BACKGROUND

I. The Florida Bar's Restrictions on Lawyer Advertising

Before 1990, the Florida Supreme Court followed the lead of the American Bar Association in broadly permitting lawyer advertising in the state, prohibiting only ads that were false or misleading. *See In re Rules Regulating The Fla. Bar*, 494 So. 2d 977, 1071 (Fla. 1986). Although a comment to the rules generally encouraged lawyer advertisements to "comport with the dignity of the profession," the comment also disclaimed any intent to regulate advertisements based on "[q]uestions of effectiveness and taste." *Id.* at 1072. The rules recognized that such questions are "matters of speculation and subjective judgment," and that regulating them would "assume[] that the bar can accurately forecast the kind of information that the public would regard as relevant." *Id.* The rules required attorneys to keep advertisements on file for a period of time, but explicitly rejected a requirement of "review prior to dissemination," noting in a comment that such a requirement "would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality." *Id.*

The status of lawyer advertising dramatically changed in 1990, when the Florida Supreme Court completely rewrote its advertising rules "in response to the proliferation of attorney advertising in the wake of *Bates*," the Supreme Court decision in which the Court first recognized that lawyer advertising was protected by the First Amendment. Harrell Decl. Exh. 10 at 19-20. The amendments expanded the scope of the existing rules by replacing the exclusion of "questions of taste and effectiveness" with a requirement that lawyer ads "provide only useful, factual information presented in a nonsensational manner." *See In re Petition to Amend the Rules Regulating the Fla. Bar*, 571 So. 2d 451, 454, 463 (Fla. 1990) ("*In re 1990 Amendments*"). This change effectively reoriented the rules away from advertisements with the potential to mislead consumers and instead toward regulation of harmless advertising techniques, such as slogans and dramatizations, that consumers are used to seeing every day. The amendments also required lawyers to file a copy of their advertisements with the newly created Standing Committee on Advertising, and, although they did not require lawyers to obtain preclearance before running their ads, nevertheless deleted the comment noting that such a preclearance requirement would be burdensome and probably unconstitutional. *Id.* at 464, 467.

Several of the amendments created general prohibitions on advertisements that the Bar considers "misleading" because they contain inherently subjective statements or statements of opinion. The amendments added a general prohibition on statements that are "unsubstantiated in fact." *Id.* at 466. At the same time, a new comment expanded the meaning of "unsubstantiated" to include statements that could *never* be factually substantiated because they are inherently subjective, such as the statement that a lawyer is "one of the best" or "one of the most experienced" in a field of law. *Id.* at 452, 461; *see Pape*, 918 So. 2d at 244 (holding that a logo was "inherently deceptive" because there was "no way to measure" whether it "convey[ed]

accurate information"). In addition, a new rule prohibited advertisements that "describ[e] or characteriz[e] the quality of the lawyer's services," *In re 1990 Amendments*, 571 So. 2d at 462, a provision that the Florida Supreme Court has interpreted to prohibit statements about a lawyer's "character and personality traits." *Pape*, 918 So. 2d at 244.

Other provisions of the rules prohibit as misleading any advertising technique that the Bar determines not to be "relevant" to the selection of counsel. To this end, a new rule created a prohibition on television and radio advertisements that contain any background noises other than instrumental music. *In re 1990 Amendments*, 571 So. 2d at 452, 461. A comment added that an advertisement is "misleading" when it states that a lawyer possesses a qualification that is common to most or all other lawyers in Florida, such as the statement that a lawyer is a member of the Florida Bar. *Id.* at 460. The Florida Supreme Court, in a later amendment, added a prohibition against "visual and verbal descriptions" or illustrations that are "manipulative," or "likely to confuse" the viewer. *In re Amendments to Rules Regulating the Fla. Bar*, 762 So. 2d 392, 409-10 (1999). A comment explained that "manipulative" advertisements include advertisements that "create suspense, or contain exaggerations or appeals to the emotions, [or] call for legal services." *Id.* at 415.

In 2004, the Florida Supreme Court asked the Bar to do a complete review of the advertising rules to examine whether amendments were needed to "clarify the meaning of the rules and provide notice to Florida Bar members of the rules' requirements," and to consider the possibility of "mandatory review prior to dissemination of advertisements." Harrell Decl. Exh. 10 at 2. A Bar-appointed a task force, despite the objection of members who complained that the task force had neither a clearly defined purpose nor empirical evidence on which to base its decisions, responded by recommending changes to the rules based on several stated goals,

including "protection of the justice system and profession from denigration by improper advertising." *Id.* at 2, 5; *see id.* at 23, 46-47, 66, 142-45. Among other things, a majority of the task force voted to create a new prohibition on advertisements that "guarantee results." *Id.* at 7. Several task force members also supported deleting the prohibition on "manipulative" ads, but that amendment failed by one vote after others objected it would "run[] the risk of significantly lowering the standard for attorney advertising." *Id.* at 74. In response to the Florida Supreme Court's charge that the task force consider a prescreening requirement, the Bar unanimously rejected the imposition of prior review. *Id.* at 13-14. Task force members expressed concern that such a restriction would likely be an unconstitutional prior restraint on speech, and concluded that the Bar's goals could be achieved by encouraging voluntary submission of ads and stricter enforcement of existing rules. *Id.* at 13-14, 36, 54-55.

The Board of Governors voted to accept most of the task force's recommendations, with two important exceptions. First, the Board, without explanation, replaced the proposed restriction on ads that "guarantee results" with one on ads that "promise[] results." Harrell Decl. Exh. 9 at 6, 7; Rule 4-7.2(c)(1)(G). Second, the Board voted to disregard the task force's recommendation against a prior restraint provision and adopted one anyway. Harrell Decl. Exh. 9 at 1, 12-15. The Florida Supreme Court adopted the Board's recommendations. *In re Amendments to The Rules Regulating The Florida Bar*, 971 So. 2d 763 (Fla. 2007).

II. Plaintiffs William H. Harrell, Jr. and Harrell & Harrell, P.A.

Plaintiff William H. Harrell, Jr. is an attorney in Jacksonville, Florida, and managing partner of the law firm Harrell & Harrell, P.A. Harrell Decl. ¶ 1. Harrell's firm advertises to the public using television, radio, billboards, a website, and other public media. *Id.* ¶ 4. The Bar has repeatedly rejected Harrell's ad submissions for containing harmless elements such as an illustration of stick people, a statue of Lady Justice, the scenery outside a window behind him, a

picture of one of his already-approved telephone-book advertisements, and the slogan "You Need an Attorney Fighting for Your Rights" (in the last case because, "[w]hile an attorney can certainly be most helpful to injured individuals, they do not have to have an attorney to bring or settle a civil negligence claim"). *Id.* ¶ 5.

Four times, Harrell appealed the Bar's rejection of his ads, arguing to the Standing Committee on Advertising that the ads were harmless to consumers and the restrictions were unconstitutional. *Id.* ¶¶ 6, 14. Each time, the committee affirmed the decision without addressing his arguments. *Id.* ¶¶ 6, 15. After spending seven to nine months appealing to the Board of Governors, two of the rejections were eventually reversed, and one—a depiction of Harrell in front of his own office building—was affirmed. *Id.* ¶ 7. On Harrell's fourth appeal to the standing committee, the committee affirmed Bar staff's decision that "Don't settle for less than you deserve" was prohibited, even thought the Bar had itself suggested that slogan five years earlier. *Id.* ¶ 15. Again, the Bar did not address any of Harrell's constitutional arguments. *Id.* Harrell then filed this action, arguing that the Bar's arbitrary system of prior restraint and content-based restrictions on his speech violated his First Amendment rights.

III. Plaintiff Public Citizen, Inc.

Plaintiff Public Citizen, Inc. is a national, nonprofit public interest organization with approximately 70,000 members nationwide, including approximately 3700 in Florida. Stoshak Decl. ¶ 2. The state's restrictions on attorney advertising injure Public Citizen's Florida members, who are consumers of legal services, by preventing them from receiving information that they have an interest in receiving. As an organization devoted to defending the First Amendment and the rights of consumers, Public Citizen has an interest in ensuring that its members are not restricted from receiving communications regarding their legal rights and the availability of legal services. *Id.* ¶ 3; *see also* Pls.' Resp. to Defs.' Mot. to Dismiss, Feb. 14,

2007; Order at 7-16. Public Citizen is particularly interested in the availability of truthful legal advertising because speech in this context not only encourages beneficial competition in the marketplace for legal services, but can also educate consumers about their rights, inform them when they may have a claim, and enhance their access to the legal system. Wolfman Decl. ¶ 3.

ARGUMENT

"[T]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Edenfield v. Fane,* 507 U.S. 761, 770 (1993) (internal quotation marks and alteration omitted). Because the state bears the burden here, to survive summary judgment it "must either point to evidence in the record or present additional evidence" sufficient to carry its burden. *Riley v. Newton,* 94 F.3d 632, 638-39 (11th Cir. 1996). The state cannot satisfy that burden for two reasons. First, the challenged rules impose a prior restraint on speech without, at a minimum, providing the precise guidelines, prompt decisionmaking, and judicial review that the First Amendment requires. Second, the state restricts the content of commercial speech without meeting its burden of demonstrating—with actual evidence—"that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield,* 507 U.S. at 770-71. Because the state has no valid interest in regulating the sorts of truthful, non-misleading information about legal services that are the subject of the disciplinary rules, the Court should grant summary judgment to the plaintiffs.

I. The Bar's Preclearance Rule Is an Unconstitutional Prior Restraint on Commercial Speech.

The Bar's requirement that attorneys obtain preclearance before running an advertisement is a system almost unheard of in this country—a full-blown censorship regime in which an administrative committee is entrusted with the power to review speech and decide whether, in its subjective judgment, the content of that speech is suitable for public consumption. Such a

system, which gives "public officials the power to deny use of a forum in advance of actual expression," is a prior restraint on speech. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Prior restraints come with a heavy presumption against their constitutional validity and are the "most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).[1]

A. Florida Has No Demonstrated Interest Sufficient to Overcome a Prior Restraint's Heavy Presumption of Unconstitutionality.

Because prior restraints put speech at the mercy of state decisionmakers, they have a great capacity to chill expression. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58 (1988). Lawyers, for example, are unlikely to invest in the expensive process of writing and producing an advertisement if there is a risk that it will be disapproved by the Bar, and therefore have a strong incentive to include only the most innocuous content to avoid the possibility of censorship. Harrell Decl. ¶ 27. Moreover, prior restraints make it easy for state officials to discriminate surreptitiously on prohibited grounds. *See Lakewood*, 486 U.S. at 759-60. Here, Bar officials may use the preclearance system to enforce their own conceptions of good taste, a motive that the Supreme Court has held to be unconstitutional. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-48 (1985).

The Bar has no justification for imposing these burdens on attorney advertising. Indeed, the 2004 task force unanimously voted *against* imposing a prior restraint rule, instead

[1] Although the Supreme Court in *Central Hudson* left open the question whether prior restraint applies to commercial speech, the circuits that have examined the question have held that it does. *See, e.g., N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998); *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996); *Kitty's East v. United States*, 905 F.2d 1367, 1371-72 (10th Cir. 1990); *Bosley v. Wildwett.com*, 2004 WL 2169179, at *1 (6th Cir. 2004). Moreover, the Supreme Court and Eleventh Circuit apply prior-restraint analysis to other areas of "non-core" speech, such as nude dancing. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir. 1999).

recommending that lawyers "should be encouraged, but not required to obtain prior approval." Harrell Decl. Exh. 10 at 13-14. Moreover, until the Bar began adding advertising restrictions in 1990, the rules themselves recognized that "review prior to dissemination would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality." *In re 1990 Amendments*, 571 So. 2d at 464. The Bar cannot claim that its prescreening protects consumers from false advertising because the Bar does not investigate the truth or falsity of claims in attorney ads. *See, e.g.*, Harrell Decl. Exh. 11 at 78 ("It is presumed that all representations made in the advertisement and supporting documentation are not false, misleading or deceptive."). Rather, as explained in the following sections, the rules are more about protecting the perceived dignity of lawyers than protecting consumers from being misled.

Even if the Bar were screening for advertisements that are genuinely false or misleading, it would not justify a preclearance rule. No other state has felt it necessary to resort to prior restraint to protect its citizens from false advertising by attorneys. Moreover, the potential for false advertising also exists in every other industry, but none tolerate restrictions such as those imposed by the Bar here. It is unthinkable, for example, that a state would require Coca-Cola to submit ads for administrative review before allowing them to air. Not even advertisements for potentially dangerous products like pharmaceuticals and alcohol are subjected to that kind of scrutiny. *See* 21 U.S.C. § 352(n) (providing that, "except in extraordinary circumstances, no regulation issued under this paragraph shall require prior approval by the [FDA] of the content of any [pharmaceutical] advertisement"); see also 21 C.F.R. § 202.1(j) (2007) (calling for FDA preclearance of proposed advertisements only if unexpected fatalities or other serious side effects come to light); 45 Fed. Reg. 83,530 (1980) (providing a *voluntary* preclearance system for alcohol ads). The Bar has not demonstrated that lawyer advertising in Florida poses a greater

threat to consumers than advertising in the other 49 states and in other industries, or to otherwise overcome the heavy presumption against a prior restraint's constitutionality.

B. The Bar's Prior Restraint System Lacks Required Procedural Safeguards.

In any event, Florida's prior restraint rule is also unconstitutional because it lacks procedural safeguards necessary to ensure that protected speech is not being burdened, including at least (1) a limit on the discretion of decisionmakers and (2) prompt decisionmaking and the availability of immediate judicial review. *Lady J. Lingerie*, 176 F.3d at 1361. The prior-restraint system in this case fails both these requirements.

1. Discretion

The Supreme Court has "[i]nvariably . . . felt obliged to condemn systems in which the exercise of [prior restraint] authority was not bounded by precise and clear standards." *Southeastern Promotions*, 420 U.S. at 553. The level of specificity that must govern decisionmakers in a system of prior restraint is very high—the Eleventh Circuit has held that "virtually any amount of discretion beyond the merely ministerial is suspect." *Lady J. Lingerie*, 176 F.3d at 1362. The standards governing the Bar's decisionmakers in this case fall far below that standard. The rules require staff attorneys, without the benefit of any education or training in advertising, written standards or guidelines, empirical evidence, or investigation of the facts, to determine whether an advertisement is misleading, unsubstantiated by fact, includes a promise of results, describes or characterizes the quality of a lawyer's services, or compares the lawyer with another lawyer, as the Bar broadly applies all these requirements. Bar staff must also decide whether an advertisement provides "objective information" that can be "objectively verified" as required by the Florida Supreme Court in *Pape*, or is inherently subjective and unverifiable, whether it is "useful" or "sensational," whether it is "manipulative" or "likely to confuse the viewer," and whether it "create[s] suspense," "contain[s] exaggerations," "calls for legal

services," or "appeal[s] to the emotions." These amorphous standards are a far cry from "merely ministerial" rules needed to satisfy the requirements of the First Amendment.

The rules are not only amorphous, they are shifting and unpredictable. The Bar's decision to prohibit Harrell's slogan even after having repeatedly approved it over the course of more than five years demonstrates that it considers itself free to change its position on the permissibility of particular advertising techniques at any time, regardless of its members' reliance on its prior decisions. The Bar's counsel in this case, in defending the Bar's change in position on Harrell's ad, explained that "the fact that something is approved does not mean that the bar is forever bound to it and cannot change its policy." Julie Kay, *Bar's Lawyer Ad Rules Disputed,* The National Law Journal, Feb. 4, 2008, at 4. That is apparently true, but the Bar's inability to consistently apply or explain its own methodology demonstrates the impossibly subjective nature of that methodology. *See Konikov v. Orange County*, 410 F.3d 1317, 1330-31 (11th Cir. 2005) (finding an inherent risk of discriminatory enforcement and striking down a prior restraint where two enforcement officials differed in their opinion of what would trigger a violation).[2]

The Bar's treatment of Harrell is just one example of a system marked by pervasive arbitrariness and unfair results. *See* Harrell Decl. Exh. 10 at 44-45 (comment by a Bar member that his ads had been approved when they contained the word "skilled" but not "talented" and "competent" but not "innovative," and that "[t]he answer depends on whose desk the ad arrives at"). To name just a few of many recent examples of the Bar's arbitrary decisionmaking:

[2] The Florida Supreme Court at one point seemed to agree. The 1990 amendments to the rules, which adopted many of the challenged restrictions, deleted from the comment to Rule 4-7.1 the statement that "[q]uestions of effectiveness and taste in advertising are matters of speculation and subjective judgment" and that "[l]imiting the information that may be advertised . . . assumes that the bar can accurately forecast the kind of information that the public would regard as relevant." *In re 1990 Amendments*, 571 So. 2d at 463.

Misleading Ads

- The Bar's advertising handbook states that "EXPERIENCE MAKES THE DIFFERENCE!" is misleading, because "[b]ecause experience of the attorneys may not affect the outcome of a particular case." However, the Board of Governors held that it would be permissible to say "Does experience matter when choosing a lawyer? You bet it does." Harrell Decl. Exh. 8 at 60; Exh. 22 at 1.
- In response to Bar staff's request for guidance, the standing committee in a split vote concluded that the firm name "The Cannabis Clinic, A Criminal Defense Firm" was misleading "because the firm handles many types of criminal matters other than the representation of those charged with cannabis offenses." *Id.* Two months later, after Bar staff had issued a decision accordingly, the committee voted 2-1 to reverse that decision because the firm name "clearly indicates that the firm handles criminal matters other than just those involving cannabis offenses." Harrell Decl. Exh. 12 at 70.

Manipulative Ads

- The Bar prohibited as "manipulative" a close-up image of a tiger's eyes, a lawyer's claim to have the "strength of a lion in court," and a photograph of a lawyer's three-legged dog. The Board of Governors, however, held that an image of two panthers was permissible, and the Bar has also allowed the images of lions in a crest because, in that context, they were "mythical, stylized lions and not actual dangerous animals." The Bar prohibited an attorney from claiming to be a member of the "Law Dragon 3000 Leading Plaintiffs' Lawyers" because it was a "verbal portrayal that is manipulative," but allowed membership in the "Local Law Tigers." Relevant Decisions at 5; Harrell Decl. Exh. 14 (Letter from Gail E. Ferguson to Thomas S. Hudson, July 13, 2007). Exh. 12 at 53, 57, 66, 78, 79, 80; Exh. 21.
- The Bar classified an image of an elderly person looking out a nursing home window as "manipulative" but concluded that the photograph of a man looking out a window, representing victims of accidents caused by DUI, was not. Exh. 12 at 79; Exh. 16 at 15-16.

Quality of Services

- The Bar held that the slogans "MAKE THE RIGHT CHOICE!" and "When who you choose matters most" improperly characterized the quality of the lawyer's services, but allowed "Choosing the right person to guide you through the criminal justice system may be your most important decision. Choose wisely." Harrell Decl. Exh. 12 at 14; Exh. 14 at 3; Exh. 15 at 3.
- The Bar disciplined an attorney for advertising with the phrase "you need someone who you can turn to, for trust and compassion with this delicate matter," concluding that the advertisement improperly characterized the quality of the lawyer's legal services. The Bar's advertising handbook, however, provides that an essentially indistinguishable phrase would not violate the rules: "Caring Representation in Family Law Matters. I Want to Help You Through this Difficult Time." The Bar also held that the statement "let us take care of you" improperly promised results, though the handbook provides that "[a]n attorney who cares for your rights" is permissible. Harrell Decl. Exh. 8 at 56, 57;

Exh. 12 at 40, 51.

Promises of Results

- The standing committee held that the phrase "People make mistakes, I help fix them" improperly promises results but noted, without explanation, that it would be permissible if revised to say "People make mistakes, I help them." The standing committee also held that the statement "We'll help you get a positive perspective on your case and get your defense off on the right foot quickly" promised results, but "If an accident has put your drams on hold we are here to help you get back on track" did not. Harrell Decl. Exh. 12 at 2, 25, 29.
- The Bar held that the statement "Remember, your lawyer's knowledge of the law and talents in the courtroom can mean the difference between a criminal conviction and your freedom" improperly promised results, but that "The lawyer you choose can help make the difference between a substantial award and a meager settlement" was permissible. And the standing committee decided that "Hiring an attorney experienced in DUI law is an efficient and effective way to ensure that all possible measures are taken to protect your legal rights" promised results, but recommended that the lawyer change it to "Hiring an attorney experienced in DUI law is an efficient and effective way to protect your legal rights," which, if anything, appears to promise results more than the original slogan. Harrell Decl. Exh. 12 at 5, 71; Exh. 23 at 9-10.

* * *

Because the Bar does not provide written explanations of its decisions, attorneys in Florida are left to guess at how the Bar reaches these disparate results. The rules, vague on their face and arbitrarily applied, are far from the "ministerial" rules with "precise and objective" standards that are minimum requirements of any lawful system of prior restraint.

2. Procedural Safeguards

A system of prior restraint violates the First Amendment unless it requires "prompt decisions." *Lady J. Lingerie,* 176 F.3d at 1361. The Eleventh Circuit in *Lady J. Lingerie* found that the city of Jacksonville failed to satisfy this requirement where an adult-business licensing scheme, although requiring a hearing by the zoning board within sixty-three days, imposed no deadline by which the board was required to issue a final *decision* regarding the license. *Id.* at 1363. The rules at issue here work the same way. Although the rules require a single member of the Bar staff to issue an initial opinion on a submission within fifteen days, a filer whose

advertisement is rejected by staff must ask for further review by the standing committee, which meets approximately once per month, and then the Board of Governors, which generally meets on a bi-monthly basis, neither of which faces a deadline for issuing a decision. *See* Harrell Decl. Exh. 13 at 3, 5-6 (requiring only that the standing committee and Board of Governors schedule the matter for *consideration* at the next meeting). In Harrell's case, the entire process took up to nine months to complete, and even that depended on the relative promptness of the Bar decisionmakers. Harrell Decl. ¶ 7. As in *Lady J. Lingerie*, the rules here "fail to put any real time limits" on the state's decisionmaking process and, for this reason, are unconstitutional. 176 F.3d at 1363.

Moreover, any system of prior restraint must provide for "expeditious judicial review" of the decision to restrain in which "the censor must bear the burden of going to court to suppress the speech and . . . the burden of proof once in court." *FW/PBS, Inc. v. City of* Dallas, 493 U.S. 215, 227 (1990); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Under the Bar's system of prior restraint, however, the state can restrict speech without initiating or proving its case in court, putting the burden on the restricted speaker to initiate an action such as the one Harrell initiated here. Moreover, as explained in the following section, the state ordinarily has the burden of proving that its restrictions on speech are necessary and effective. The most troubling aspect of the rules is that they allow the state to bypass that burden by imposing restrictions on speech without the need to prove or even articulate an interest in doing so, and without showing that the restrictions are necessary or effective. The serious chill resulting from such a system renders it invalid under the First Amendment. *See FW/PBS, Inc.*, 493 U.S. at 227.

II. The Challenged Rules Unconstitutionally Restrict the Content of Commercial Speech.

A state that wishes to prohibit commercial speech, including lawyer advertising, must

carry the burden set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Under *Central Hudson*, the court must first determine whether the regulated speech is misleading or involves unlawful activity. *Id.* at 563-64. If not, the government must factually demonstrate the existence of three factors before it may impose restrictions: "(1) whether the state's interests in limiting the speech are substantial; (2) whether the challenged regulation advances these interests in a direct and material way; and (3) whether the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Mason v. Fla. Bar*, 208 F.3d 952, 955-56 (11th Cir. 2000). Here, the Bar has no evidence to meet its burden. *See* Task Force Report at 143. ("[T]he Task Force made no effort to obtain empirical evidence either to support retention of our present system of the regulation of advertising or to support acceptance or rejection of any proposed changes.").[3]

A. The State Has No Valid Interest in the Challenged Rules.

Although Florida's advertising rules are couched in the words "false" and "misleading," the state has made little effort to conceal the true motivation behind them. As a comment to the rules explains, their purpose is to prevent "the creation of *incorrect public perceptions* or assumptions about the manner in which our legal system works, and to promote the public's confidence in the legal profession and this country's system of justice." Rule 4-7.5, cmt. (emphasis added); *see also Pape*, 918 So. 2d at 246-47 ("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."); Task Force Report at 2, 5. In other words, the Bar's purpose is to prohibit advertisements that it thinks make lawyers, and by implication the

[3] The Bar has over the years produced various surveys and reports that it has asserted support some aspects of its rules. Nothing the Bar has produced, however, supports the rules at issue here. If the Bar asserts that a particular piece of evidence supports the challenged rules, plaintiffs will respond to it at that time.

system of justice, look bad. Justice Barkett summed up this purpose in her dissent to the Florida Supreme Court's order adopting the first advertising restrictions in 1990, stating that the rules "only regulate decorum." *In re 1990 Amendments*, 571 So. 2d at 475.

A state cannot restrict lawyer advertising, however, merely because it finds it undignified or in poor taste. *Zauderer*, 471 U.S. at 647-48. The Supreme Court has consistently held that attorneys have a First Amendment right to advertise even if the advertisements are "embarrassing or offensive" to some members of the public or "beneath [the] dignity" of some members of the Bar. *Id.* In this case, the state's attempt to prevent the development of "incorrect public conceptions" is no more than an effort to manipulate public opinion by suppressing speech. No justification for speech restrictions is more offensive to the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Even if the state did have a valid interest in protecting the dignity of the Bar, it has no evidence that lawyer advertising in general, and the targeted forms of advertising in particular, have a negative impact on the image of the Bar. As the Supreme Court wrote in *Bates v. State Bar of Arizona*, other professions such as bankers and engineers advertise (often using methods similar to those used by lawyers), "and yet these professions are not regarded as undignified." 433 U.S. 350, 369-70 (1977). Improving public opinion of a product or service is, after all, one of the main motivations for advertising, and advertising lawyers are not likely to invest in advertisements that turn off consumers and ruin their reputations.[4]

[4] If anything, the Bar's restrictions on common advertising elements make it more difficult for lawyers to produce advertisements that appear professional. Harrell Decl. ¶¶ 25-26. "Stylish" ads, of the sort that consumers are used to seeing, are likely to give consumers a better

B. The Rules Do Not Advance the State's Purported Interests.

In addition to demonstrating a valid interest in prohibiting the targeted forms of speech, a state must also "bear[] the burden of showing not merely that its regulation will advance its interest, but also that it will do so to a material degree." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). In this case, the state has asserted an interest in protecting consumers by prohibiting various advertising techniques that it considers to be irrelevant to the selection of counsel or inherently unverifiable. These regulations do nothing to protect consumers, and the state cannot show that they will advance any other legitimate interest. *See Alexander v. Cahill*, 2007 WL 2120024, at *4 n.1 (N.D.N.Y. 2007) (holding that the fact that attorney advertising is "irrelevant, unverifiable, and non-informational" does not "constitute a justification for banning commercial speech").

1. The Prohibitions on Subjective or Unverifiable Ads

The Bar enforces a variety of rules designed to prevent communications that it considers inherently subjective or unverifiable. *See supra*, at 4-5. First, the Bar enforces its rules against "misleading" and "unsubstantiated" ads to prohibit a wide range of statements that are either true or would not mislead any reasonable consumer. For example, the Bar prohibited

- "Injured? Then you need an attorney," because "an attorney is not always required." Harrell Decl. Exh. 8 at 58;
- "Like most businesses, insurance companies exist to make money" because it "leaves the viewer with the impression that all insurance companies exist solely for the purpose of making money;" *Id.* at 12;

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impression of lawyers than the bland "talking heads" ads of the sort required by restrictive ethics rules. William E. Hornsby, Jr., R*egulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 Geo J. Legal Ethics 325, 350-56 (1996) (reviewing an American Bar Association Study). Indeed, as the Court noted in *Bates*, the lack of lawyer advertising creates public disillusionment with the profession, because "[t]he absence of advertising may be seen to reflect the profession's failure to reach out and serve the community." 433 U.S. at 370-71.

- "Lawsuits against defective products force big companies to create safer products" because, "while one of the goals of product liability suits is to force companies to make safer products[,] that is not always the result of such suits." Harrell Decl. Exh. 11 at 64.

The Bar applies the rule against promises of results in an equally broad manner. Although *some* statements that promise results—such an attorneys' promise to win a case where the attorney has no way to guarantee that outcome—could be false or misleading, the Bar applies the rule without regard to truth or falsity. For example, the Bar has prohibited statements that are inherently subjective and unprovable, such as "Don't let an incident like this one ruin your life," "Don't allow the American dream to turn into a nightmare," and "Attorneys Righting Wrongs." Harrell Decl. Exh. 12 at 21, 28, 36. And the Bar holds that ads promise results when the only "result" promised is the provision of assistance to a client, such as in the statement "we'll steer you in the right direction." *Id.* at 38.

The Bar also applies the rule against characterizing the quality of a lawyers services to prohibit subjective and vague statements that no reasonable consumers could rely on, such as "The power of experience," "In any business, reputation is everything," "Experience & Innovation," and "Every lawyer must pass the bar. Few go on to raise it." *Id.* at 15, 38, 60, 69. Even *implicit* claims of quality are held prohibited, as in "Come and experience the Nation difference," "When Who You Choose Matters Most," and "You owe it to yourself." Harrell Decl. Exh. 11 at 134; Exh. 12 at 14, 36. Given that the purpose of advertising is to positively portray a particular good or service, almost *all* advertising contains at least some implicit claim of quality and would thus run afoul of this rule. If statements of quality and routine puffery were considered misleading, "the advertising industry would have to be liquidated in short order." *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 499 (5th Cir. 2000) (internal quotation marks omitted).

The Supreme Court has refused to credit "the paternalistic assumption" that consumers of

legal services "are no more discriminating than the audience for children's television." *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 105 (1990) (plurality opinion). Courts have repeatedly recognized that advertising is not misleading to consumers just because it contains "exaggerated, blustering, and boasting statements upon which no reasonable buyer would be justified in relying" or "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion." *Pizza Hut*, 227 F.3d at 496 (holding that Pizza Hut's slogan "Better Ingredients. Better Pizza" was not actionable as false advertising); *American Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004) (holding that the motto "America's Favorite Pasta" was unverifiable but neither false nor misleading). Contrary to the Bar's assumption, courts view a statement's inherent unverifiability not as something that is likely to mislead consumers, but as a factor *enhancing* protection under the First Amendment, because "a reader cannot rationally view an unverifiable statement as conveying actual facts." *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 229 (2d Cir. 1985) (internal quotation omitted).

Indeed, the Eleventh Circuit has already considered and rejected the Bar's ban on ads that it considers to be "unverifiable." In *Mason*, the court examined the same provision that the Bar invoked against Harrell's "Don't settle for less than you deserve" slogan—the prohibition on characterizations of the quality of a lawyer's services—and held it unconstitutional as applied to the lawyer in that case. 208 F.3d 952. The court rejected the Bar's contention that truthfully claiming to have received the "highest rating" from Martindale-Hubbell would "mislead the unsophisticated public," calling the argument a "non sequitur," and noting that the Bar had "presented no studies, nor empirical evidence of any sort" to back up its alleged concern. *Id.* at 957 (holding that the Bar's concerns were "mere speculation" and "unsupported conjecture").

Just as consumers are not likely to be misled by a claim to the "highest rating," they are not likely to take phrases like "Don't settle for anything less" as conveying some sort of objective and provably false statement about a lawyer's skills.

2. The Prohibitions on "Irrelevant" Advertising

Like the rules against unverifiable statements, the Bar's rules against "irrelevant" techniques has no relationship with whether a particular statement is false or misleading. The Bar has applied its rule against background sounds in broadcast advertisements, for example, to prohibit the sounds as children playing, a person exhaling, a computer turning off, footsteps, a light switch, and a seagull. Harrell Decl. Exh. 12 at 45, 46, 51. None of these sounds is even arguably deceptive to consumers. As for the rule against "manipulative" advertisements, the Bar prohibited an ad featuring members of a law firm sitting on a construction beam because it was "based on a well known 1932 photograph of construction workers in New York." Harrell Decl. Exh. 12 at 73. The Bar also concluded that a photograph of a shattered windshield that an attorney proposed to send to glass shop owners was manipulative "because persons other than the glass shop owners may see the advertisements," but noted that the advertisement would be permissible if it said "Attention Glass Shop Owners." *Id.* at 79.

As with "unverifiable" statements, the Supreme Court has rejected state efforts to protect consumers by, as Florida is doing here, banning advertising techniques that the state considers "irrelevant" to the selection of counsel. In *Bates*, the state bar argued that attorney advertising could be prohibited because of its potential to "highlight irrelevant factors" in the selection of a lawyer. 433 U.S. at 372. The Court did not accept the state's asserted interest, noting that it "assumes the public is not sophisticated enough to realize the limits of advertising." *Id.* at 374-75; *see also id.* at 376 (holding that the state could not limit advertising to a laundry list of generic information because "an advertising diet limited to such spartan fare would provide scant

nourishment"). Similarly, the Court in *Shapero v. Kentucky Bar Association* rejected the state's effort to ban an attorney solicitation designed to "catch the recipient's attention." 486 U.S. 466, 479 (1988). The state in *Shapero* argued that the solicitation "stat[ed] no affirmative or objective fact," constituted "pure salesman puffery," and was an "enticement for the unsophisticated, which committed [the lawyer] to nothing." *Id.* at 478 (internal quotation marks omitted). The Court, however, held that the state could not limit lawyer advertising to "a bland statement of purely objective facts," stating that "so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those [forms] least likely to [gain the attention of] the recipient." *Id.* at 479.

Even if the state had an interest in prohibiting "irrelevant" ads, "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Advertising techniques that the state may consider to be frivolous may nevertheless serve "important communicative functions," including "attract[ing] the attention of the audience to the advertiser's message" and, often, "impart[ing] information directly." *Zauderer*, 471 U.S. at 647. The ads at issue in *Zauderer*, for example, included the image of an intra-uterine device in the context of an offer to represent women injured by the device. The version of the ad that included the image attracted more than two hundred inquiries and led to 106 lawsuits, while another version of the ad lacking the image attracted no clients. *The Supreme Court, 1984 Term*, 99 Harv. L. Rev. 193, 198-99 (1985). As the Supreme Court has recognized, "[m]ost businesses . . . are unlikely to underwrite promotional advertising that is of no interest or use to consumers." *Central Hudson*, 447 U.S. at 567 (holding that ads were protected by the First Amendment even

if they "convey[] little useful information"). Thus, although the state may consider certain information to be "of slight worth," it is for "the speaker and the audience, not the government, [to] assess the value of the information presented." *Edenfield*, 507 U.S. at 767.

The impossibility of the line-drawing task that Florida has created for itself is demonstrated by its application of the Supreme Court's decision in *Zauderer*. The Bar implements *Zauderer* with a comment to the rules that specifically allows an image of an intra-uterine device to advertise for cases involving that device, noting that the image would be "informational and not misleading." Rule 4-7.2, cmt. At the same time, however, the Bar prohibits as "manipulative" almost any conceivable image with which a lawyer could convey a willingness to take accident cases, including not only actual scenes of accidents but also images such as a man with crutches, a child in a wheelchair, toy race cars crashing into each other on a toy race track, and even a drawing of a man's head with stars floating around it, as in a Road Runner cartoon. Harrell Decl. Exh. 8 at 58; Exh. 12 at 43, 79; Exh. 16 at 15-16. Similarly, the Bar has prohibited images of handcuffs, police cars, and just about anything else with which a lawyer could express willingness to take on a criminal case without regard to whether the images are "informational" or "misleading." Harrell Decl. Exh. 12 at 9, 11, 34, 50, 76.

C. The Rules Are Not Narrowly Drawn

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U. S. 357, 373 (2002). The state here, however, appears to have adopted its chosen regulations as a *first* resort, without any attempt to tailor them to the purported harms or consideration of readily available alternatives.

1. The Rules Are Vastly Overbroad.

To survive the final prong of the *Central Hudson* test, a restriction on allegedly deceptive speech must not be "broader than reasonably necessary to prevent the [targeted] deception." *In re*

RMJ, 455 U.S. 191, 203 (1982). The rules here, however, prohibit essentially all the most common methods of advertising and sweep in many forms of advertising that are not likely to harm any consumer, or, for that matter, even to be distasteful to them. Almost all advertisements in other industries use at least one of the techniques prohibited by the Bar, and many of them are done tastefully in a way that appeals to consumers. Harrell's ads, for example, are restrained when compared to many other ads that routinely run on television. Harrell Decl. ¶ 11. As Chief Justice Shaw noted in his dissent to the original adoption of the rules: "[I]t appears to me that the majority, out of frustration and annoyance, is swatting at a troublesome and persistent Bar fly with a sledgehammer." *In re 1990 Amendments*, 571 So. 2d at 474.

Moreover, by focusing the Bar's attention on meaningless distinctions between slogans like "Don't settle for anything less" and "Don't settle for less than you deserve," the rules leave unregulated many techniques that the Bar would undoubtedly consider to be undignified. The standing committee approved, for example, one lawyer's proposal to fly around a stadium in a blimp dropping $1 and $5 bills on spectators. Harrell Decl. Exh. 12 at 11. If the Bar really did have an interest in broad, vaguely defined rules meant to foster a sense of dignity, it would be better served by a rule—equally unconstitutional, to be sure—that prohibits "undignified" speech.

2. The State Has Ignored Readily Available Alternatives to Address Its Alleged Interests.

"[I]f the government [can] achieve its interests in a manner that does not restrict speech or that restricts speech less, it must do so." *Thompson*, 535 U. S. at 371. Here, even if the Bar could show that consumers are somehow misled by unverifiable or irrelevant information, it could address the problem with disclosure or disclaimer requirements. *See RMJ*, 455 U.S. at 203 ("[T]he States may not place an absolute prohibition on certain types of potentially misleading

information . . . if the information may be presented in a way that is not deceptive."); *This That and Other Gift and Tobacco, Inc. v. Cobb County,* 285 F.3d 1319 (11th Cir. 2002) (striking down a restriction on advertising for sexual devices where the ban was more extensive than necessary and a disclaimer would have been feasible). The Bar, however, did the opposite in its most recent round of amendments, *deleting* a disclosure requirement that required lawyer advertisements to state: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements." Harrell Decl. Exh. 9 at 7-8. Given that consumers already understand the function of advertising, it is doubtful that such a disclaimer would survive constitutional scrutiny, but it would at least be preferable to the Bar's broad-based ban on all "irrelevant" advertising techniques.

Even better, the Bar could educate consumers about the factors on which it thinks consumers should rely in selecting an attorney. A basic tenet of our First Amendment is that allegedly distasteful speech is best dealt with in the marketplace of ideas, through *more* speech aimed at providing a better or more balanced point of view. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). As the Supreme Court wrote in *Bates*, "[i]f the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." *Bates,* 433 U.S. at 375.

CONCLUSION

The Court should declare unconstitutional and permanently enjoin enforcement of the provisions of the Florida Rule of Professional Conduct set forth in plaintiffs' motion, above.

Respectfully submitted,

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