

**COMMENTS OF PUBLIC CITIZEN, INC., ON PROPOSED REGULATIONS OF THE ATTORNEYS' ADVERTISING COMMISSION PURSUANT TO SCR 3.130-7.03(5)(a)**

**INTRODUCTION**

Public Citizen, Inc., hereby submits comments on the regulations that the Attorneys' Advertising Commission proposes to promulgate to implement SCR 3.130-7.15, which prohibits false, deceptive, or misleading advertising by attorneys. Some of the proposed regulations, in our view, are unobjectionable. However, others — in particular, the prohibitions on the use of actors, props, testimonials, and references to particular matters, as well as the mandate of “disclosure of legal requirements” — would prevent advertising that is not misleading, would violate the First Amendment, and would unjustifiably inhibit the dissemination of truthful information about the availability of legal services to Kentucky consumers. The anticompetitive effect of these regulations could also render their promulgation a violation of federal antitrust laws. We urge the Commission to reconsider and withdraw these proposed restrictions.

Public Citizen is a national, nonprofit advocacy organization with over 120,000 members nationwide, including some 724 in Kentucky. Among Public Citizen's longstanding interests are protection of consumers against commercial fraud and deception and enhancing the access of citizens to the legal system. Regulation of the professional conduct of attorneys directly implicates both interests. As a result, Public Citizen has long been concerned with and involved in issues of legal ethics generally and, in particular, issues arising from regulation of legal advertising. Among other things, attorneys from Public Citizen's Litigation Group argued the landmark Supreme Court cases of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which struck down regulation of attorney advertising containing truthful information about the legal rights of consumers; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which established that the First Amendment

protects commercial speech; and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which held that anticompetitive bar rules violate the Sherman Act. Public Citizen was also among the plaintiffs who successfully challenged Mississippi’s restrictive advertising rules in *Schwartz v. Welch*, 890 F. Supp. 565 (S.D. Miss. 1995).

We recognize that the Attorneys’ Advertising Commission’s notice concerning the new regulations solicited comments only from members of the Kentucky Bar Association, and that SCR 3.130-7.03(5)(a) only refers to comments by members of the Association. Nothing in the rules, however, precludes the Commission from considering comments from others, and we assume that it will do so. Sound public policy suggests that the Commission should be receptive to thoughtful comments from any source, particularly given that the regulation of attorney advertising is ostensibly intended to protect not members of the bar, but consumers and potential consumers of legal services — among whom are Public Citizen’s Kentucky members. Indeed, Public Citizen, on behalf of its members, has been held to have standing to challenge attorney advertising restrictions on First Amendment grounds, *see Schwartz v. Welch*, 890 F. Supp. at 569, and the same considerations that support our standing in court would suggest that an administrative body should receive and consider our comments.

#### **APPLICABLE CONSTITUTIONAL STANDARDS**

The Commission’s proposed regulations are derived from its authority to implement Kentucky Rule of Professional Conduct 7, governing advertising by attorneys. Proposed Regulation No. 1, entitled “False, Deceptive, and Misleading Advertising,” purports to implement Rule 7.15 by “identif[ying] certain types of content that render an advertisement false, deceptive or misleading within the meaning and intent of SCR 3.130-7.15.” Proposed Reg. (“PR”) No. 1(A)(2). Because SCR 3.130-7.15 flatly prohibits false, deceptive, or misleading

advertising, the effect of Proposed Regulation No. 1 would be to ban all advertisements that fall within its scope. The regulation would apply to advertisements in virtually any form, including television and radio advertisements, print advertisements, internet sites, and law firm brochures and newsletters.

Attorney advertising is commercial speech protected by the First Amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). As the U.S. Supreme Court has explained, the general principle applicable to attorney advertising, in common with other forms of commercial speech, is that truthful advertising concerning lawful activities is presumptively permissible and may be regulated only as demonstrably necessary to serve a substantial governmental interest:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). Thus, as the Court has put it more recently, “only false, deceptive, or misleading commercial speech may be banned.” *Ibanez v. Florida Dep’t of Business & Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994). By contrast, “[c]ommercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.” *Id.*

The distinction between truthful and deceptive speech is critical in the realm of commercial speech. As the Supreme Court has emphasized, restrictions on speech that is truthful and not misleading are disfavored:

[W]hen a state entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

\* \* \*

Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth.

*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501, 503 (1996).

Here, the Commission’s proposed Regulation No. 1 claims to rest on the conclusion that the prohibited forms of advertising are false or misleading. But although the First Amendment allows the prohibition of false or misleading commercial speech, the mere assertion that such speech is false or misleading is not enough to justify banning it: “A State may not ... completely ban statements that are not *actually* or *inherently* false or misleading.” *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 110 (1990) (emphasis added). Thus, the Supreme Court has repeatedly subjected claims by bar authorities that particular forms of attorney advertising are “misleading” to rigorous and skeptical scrutiny, and has, for the most part, rejected those claims. *See, e.g., Ibanez*, 512 U.S. at 143-45; *Peel*, 496 U.S. at 101-10; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 639-49 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates*, 433 U.S. at 381-82.

Importantly, a state may not ban attorney advertising simply because it contends that a particular form of advertising is “potentially misleading.” The Supreme Court has repeatedly warned that “[i]f the ‘protections afforded commercial speech are to retain their force,’ we cannot allow rote invocation of the words ‘potentially misleading’ to supplant the [State’s] burden to ‘demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’” *Ibanez*, 512 U.S. at 146 (citations omitted). Thus, even if

a specific type of advertising is assumed to be “potentially misleading to some consumers, that potential does not satisfy the State’s heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public.” *Peel*, 496 U.S. at 109. In particular, “the 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.” *In re R.M.J.*, 455 U.S. at 203.

As the authorities cited above make clear, whether the rationale for a given restriction on attorney advertising is that an advertisement is “misleading” or that it is “potentially misleading,” the state’s burden of justifying the regulation cannot be satisfied by conclusory assertions. Rather, the state must be prepared to “back up its alleged concern” that particular statements “would mislead rather than inform.” *Ibanez*, 512 U.S. at 146. Restrictions may not be upheld on the basis of “little more than unsupported assertions” without “evidence or authority of any kind.” *Zauderer*, 471 U.S. at 648-49. And if the state’s concern is a mere *potential* to mislead, it must establish that a ban on speech is the least restrictive means of preventing the potential harm to consumers. *Id.* at 647.

Finally, the Supreme Court has rejected the idea that attorney advertising presents such distinctive concerns that it may be subjected to restrictions that would be unwarranted as applied to other forms of commercial speech. “The State’s contention that the problem of distinguishing deceptive and nondeceptive legal advertising is different in kind from the problems presented by advertising generally is unpersuasive.” *Id.* at 644. Accordingly, “[p]rophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to [attorney] advertising.” *Id.* at 647.

We have discussed these principles at some length because — as discussed in detail below with respect to specific features of the Commission’s proposed regulations — some of the prohibitions in Proposed Regulation No. 1 (as well as Proposed Regulation No. 5) plainly fail to satisfy them. The regulations would bar lawyers from using advertisements that are neither actually nor inherently false or misleading. The suggestion that the prohibited practices are misleading seems premised on the unsupported (and offensive) notion that consumers will respond irrationally to entirely truthful information. And even if it is assumed that some of the prohibited practices may have some potential to mislead if they are misused, the regulation improperly bans those practices entirely even though they “may be presented in a way that is not deceptive.” *In re R.M.J.*, 455 U.S. at 203. Moreover, we are not aware of any body of *evidence* that would support the conclusion that the prohibited practices are misleading or that the broad bans of the regulation constitute the least restrictive means of attacking any problems they may pose. And, contrary to the Supreme Court’s admonition in *Zauderer* that attorney advertising may not be subjected to broad prophylactic restraints that would be unacceptable for advertisements of other goods and services, the regulation would bar standard advertising practices (for example, the use of actors, props, and testimonials) whose prohibition would be unthinkable in other fields of commerce.

### **SPECIFIC FEATURES OF THE PROPOSED REGULATIONS**

#### **1. The Ban on Use of Actors (Proposed Reg. No. 1(B)(5)&(6))**

Proposed Regulation No. 1 would forbid any advertisement that “includes an appearance by a non-lawyer in a manner that suggests or implies that he or she is a lawyer” (PR 1(B)(5)) or “includes an appearance by an actor in a manner that suggests or implies that he or she is an actual client of the advertising lawyer or law firm” (PR 1(B)(6)). The blanket prohibition on

these uses of actors would bar speech that is neither actually nor inherently misleading. Indeed, there is very little *potential* for deception in such uses of actors, and a broad prohibition is by no means narrowly tailored to get at whatever potential for deception there may be.

With respect to portrayals of lawyers, one can envision any number of scenarios in which an advertisement could feature non-lawyer actors portraying lawyers without posing any genuine risk of misleading consumers. For example, an actor could be cast as the advertising attorney's opposing counsel (or even a judge) in a generic courtroom or conference-room scene. Nothing about such a portrayal could possibly mislead consumers, as the physical appearance or other specific personal attributes of attorneys *other than the advertising attorney* could not possibly be material to them. Similarly, a scene in which an actor portraying a lawyer was depicted listening sympathetically to an actor portraying a client would not be likely to mislead consumers as to any consideration relevant to their decision whether to retain an attorney. In this regard, it is worth recalling the Supreme Court's observation in *Zauderer* that "because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising." *Zauderer*, 471 U.S. at 649. Moreover, consumers are, after over a half-century of acculturation to television and radio commercials for all manner of products and services, accustomed to the notion that actors appear in commercials, and thus they are particularly unlikely to make the credulous assumption that everyone appearing in a television commercial is in fact the character he or she is portraying.

Different considerations might apply if a commercial featured an actor explicitly identifying herself as one of the specific attorneys whose services were being offered. Rational

consumers probably would not expect someone claiming to be one of the principal attorneys sponsoring an advertisement to be an actor, and they could possibly be misled into making a choice they would not otherwise make if they were deceived into thinking that the lawyer they were selecting was significantly better looking or better spoken than he really was. Even then, of course, consumers would quickly be disabused of their confusion when the handsome, articulate attorney they saw on television turned out to be homely, ill-dressed and poorly spoken; thus, it would seem unlikely that many lawyers would persist in a strategy so obviously calculated to backfire. In any event, the bare and undocumented possibility that a few such potentially misleading commercials might be aired cannot, under the principles discussed above, justify a broad prophylactic ban on all ads using actors to portray attorneys. In the unlikely event that an attorney hires Robert Redford to impersonate him in an advertisement and a consumer is deceived as a result, the existing prohibition on false advertisements could handle the situation.

The same principles hold true with respect to the ban on the portrayal of clients by actors. In the great majority of advertisements, whether the role of a client was played by an actor or by an actual client of the lawyer would be completely immaterial to consumers. For example, if an advertisement showed a scene of a lawyer sitting down to meet with or shaking hands with a client, whether the client was a “real” client or an actor could be of no possible interest to consumers. Simply put, it is irrelevant to consumers what a lawyer’s clients look like. Similarly, if an actor portraying a specific client of the lawyer said something about the lawyer that the real client would also say (for example, “He handled my uncontested divorce for a flat fee of \$X”), the mere fact that the statement was made by an actor would not render the commercial misleading. There would be no possibility of deception unless some statement made by the actor-client was false or misleading (for example, “She won me a million dollars” if there was in

fact no such recovery) — and if that were the case, the advertisement would be equally deceptive if the false or misleading statement were made by an *actual* client. Eliminating the use of actors therefore does not directly or even indirectly address the potential for deception.

## **2. The Ban on Props (Proposed Reg. No. 1(B)(7))**

The Commission’s proposed regulations would also ban any commercial that “displays any ‘prop’ (including any motor vehicle, product or other tangible item not actually involved in a legal matter) in a manner that suggests or implies that it was actually involved in a particular legal matter.” Like the ban on use of actors, the proposed rule on props would broadly prohibit the use of advertising techniques that are neither actually nor inherently misleading.

The rule would, for example, apparently bar an attorney who represented individuals involved in automobile accidents from running commercials showing wrecked cars or depicting simulated accidents, unless the automobiles involved were the very same ones involved in actual court cases. Similarly, it would appear to bar an attorney who practiced product liability litigation from using props depicting standardized commercial products (whether automobiles, appliances, prescription drugs, or medical devices) unless the particular individual items displayed had been the subject of litigation. What purpose does such a prohibition serve? Does it matter to consumers whether this *particular* car, or this *particular* bottle of medication, was the exact one involved in a lawsuit that related to the same type of product or the same type of accident? Of course not. Thus, the use of props generally poses no risk of deceiving consumers as to any matter material to their choice of an attorney.

The regulation’s premise that the use of props is necessarily false, deceptive or misleading is not only factually unsupported, but also irreconcilable with binding Supreme Court precedent. In the *Zauderer* case, the U.S. Supreme Court held that an attorney’s print

advertisement containing a drawing accurately depicting the Dalkon Shield IUD, and informing women that they might have a legal claim if they had used such an IUD, was not misleading to consumers and hence was protected by the First Amendment. Suppose that instead of running a print ad, the attorney in the *Zauderer* case had appeared on television holding an example of a Dalkon Shield (or a visually indistinguishable *model* of a Dalkon Shield) and asking, as did the print ad in *Zauderer*, “Did you use this IUD?” Would the logic of the Supreme Court’s decision permit him to be disciplined simply because the prop he used was not the *specific* Dalkon Shield that had injured a particular plaintiff in one of the prior cases involving the product? The answer is obviously no. What mattered to the Supreme Court in *Zauderer* was that the drawing could not mislead consumers because it was “an accurate *representation* of the Dalkon Shield.” 471 U.S. at 647 (emphasis added). Precisely the same would be true of the prop in the hypothetical commercial.

Together with the ban on use of actors, the ban on props appears to be an effort to make it difficult or impossible for lawyers to make effective use of advertising techniques that are widely used and accepted in other areas of commerce, where any suggestion that they could be banned as inherently misleading would be laughable. Would anyone seriously suggest, for example, that the famous “Please Don’t Squeeze the Charmin” advertising campaign misled consumers because the man claiming to be “Mr. Whipple” was, in fact, an actor, there really was no Mr. Whipple, and the rolls of toilet paper he squeezed on camera were “props” that were not the *very same rolls* that had *actually* been squeezed by real store managers in real grocery stores? The Commission’s attempt to enact a flat ban on the use of similar techniques in the context of attorney advertising cannot stand in light of the Supreme Court’s insistence that “[p]rophylactic

restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to [attorney] advertising.” *Zauderer*, 471 U.S. at 647.

### **3. “Fair Disclosure of Legal Requirements” (Proposed Reg. No. 1(C)(2)(a)&(b))**

Proposed Regulation No. 1 also provides that an advertisement is materially misleading if it “refers to the recovery of money” without including “an appropriate explanation of the legal requirements for such recovery” or if it “refers to the defense of a claim for the recovery of money” without including “an appropriate explanation of the legal requirements for such defense.” These rules would impose vague and burdensome requirements on attorney advertisements that are wholly unwarranted by any concern over actual or potential deception of consumers.

The notion that any reference to a claim for money damages (or a defense to such a claim) is materially misleading unless it includes a complete explanation of the legal requisites of such a claim is both speculative and implausible. To survive a constitutional challenge, the Commission would have to produce *proof* that advertisements that lack such detailed explanations are materially misleading. Such proof is unlikely to be forthcoming. We believe it is far more likely that consumers neither expect that legal advertising will provide them a complete tutorial on their rights, nor assume based on a mere reference to a claim for money damages that they will necessarily be entitled to succeed on such a claim without satisfying whatever requirements the law imposes. It is therefore difficult to understand how consumers could be misled or deceived merely because an advertisement “referred” to a claim for money damages without providing a full explanation of the legal requirements for such a claim. Indeed, we think it likely that what consumers expect is that they will receive whatever explanation of the law is necessary to determine whether to proceed with a possible claim when they *consult* a

lawyer, not simply when they view his or her television commercials. In fact, the type of explanation of “legal requirements” that the Commission’s regulations would require attorneys to provide in their commercial messages could actually increase the likelihood that consumers would be misled into thinking that they had enough information to determine on their own whether they had a claim.

The notion that an advertisement is inherently misleading whenever it refers to a claim without describing all the legal principles applicable to it is contrary not only to common sense, but also to binding case law. Once again, the *Zauderer* opinion provides a telling example. There, the attorney’s advertisements advised the reader that if she had used the Dalkon Shield, she might have a claim, and she should not assume it was too late to pursue it. The advertisements did not inform the reader what she would have to prove to establish that her claim was not time-barred, let alone what she would have to prove to establish liability. Nonetheless, the Court squarely rejected the suggestion that advertisements that provided limited information about legal matters were inherently misleading, and held instead that the ads were “neither false nor deceptive: in fact, they were entirely accurate.” *Zauderer*, 471 U.S. at 639. *Zauderer* forecloses any suggestion that an advertisement can be categorically banned as misleading simply because it does not describe the requirements for establishing (or defending against) a claim for money damages.

The flaws in the Commission’s proposed regulation on this point are compounded by the vagueness of the requirement that attorneys provide an “appropriate” explanation. The regulation specifies that the explanation must include, “at a minimum,” “information that liability must be proven, that recovery of money is related to damages suffered by the plaintiff that are recoverable by law, and that recovery may be dependent on the ability to collect from the

responsible part[ies].” To the extent that such an abstract and general explanation would satisfy the rule, the rule is completely useless, because such information is a matter of common sense and common knowledge even among clients. Consumers are unlikely to suffer under the misunderstanding that they will be able to recover money without proving their case (and if they do, they will promptly be disabused of the misunderstanding when they show up at the office of a plaintiffs’ attorney who is interested only in cases with a genuine prospect of recovery). To the extent something more is required — and the rule makes it unclear *what* that might be — the regulation seeks a level of detail that is unnecessary and inappropriate for advertising and appears intended less to prevent consumer misunderstanding than to prevent effective lawyer advertising. Requiring an elaborate description of complex legal principles (that is at the same time presented “in reasonably understandable language directed to the consumer”) threatens to impose unreasonable burdens on attorney advertisers, particularly those who seek to advertise effectively within the space constraints of, say, a Yellow Pages ad or the time (and expense) constraints of a television commercial. Surely, such an “unjustified or unduly burdensome disclosure requiremen[t]” would “offend the First Amendment by chilling protected commercial speech.” *Zauderer*, 471 U.S. at 651. Where “[t]he detail required in the disclaimer ... effectively rules out” the advertisement, the First Amendment does not permit a disclaimer requirement unless the advertisement would be actually misleading without it. *Ibanez*, 512 U.S. at 146.

It is also hard to see what real-life problem this proposed rule is aimed at. Does the Commission believe that consumers are frequently beguiled into retaining lawyers to pursue meritless claims (or claims against judgment-proof defendants) because advertisements have led them to believe that they can obtain and collect damages without satisfying the legal requirements for damages claims (or without a defendant who has the ability to pay)? The

possibility that consumers are deceived in this manner seems remote in light of the fact that plaintiffs' attorneys, whose payment in most cases depends on the success of a claim, have every economic incentive *not* to undertake such cases. In addition, lawyers are already under ethical duties not to bring frivolous litigation, and to the extent that *some* lawyers may disregard that duty, requiring burdensome disclosures in advertising is very unlikely to address that problem. The Commission, therefore, will likely be unable to carry its substantial burden of providing something beyond mere speculation to "back up its alleged concern" (*Ibanez*, 512 U.S. at 146) that advertisements without the required disclosures are misleading. Moreover, "the Bar is not relieved of its burden to identify a genuine threat of danger simply because it requires a disclaimer, rather than a complete ban on ... speech." *Mason v. Florida Bar*, 208 F.3d 952, 958 (11th Cir. 2000). Thus, absent demonstrable support for the rule, the state "is not justified in placing, on a television advertiser, the burden of the cost of educating the public" to avoid the speculative problem of the filing of meritless claims. *Tillman v. Miller*, 133 F.3d 1402, 1403 (11th Cir. 1998); *see also Zauderer*, 471 U.S. at 645 n. 12 (The "suggestion that even completely accurate advice regarding the legal rights of the advertiser's audience may lead some members of the audience to initiate meritless litigation against innocent defendants ... is unavailing.").

Finally, the notion that it is "materially misleading" to refer in an advertisement to a claim for the recovery of money, or the defense of such a claim, without explaining the "legal requirements" applicable to such a claim or defense would condemn the standard practices of many attorneys of unimpeachable ethics. For example, the websites of some of Louisville's largest law firms are replete with examples of statements that would plainly violate the regulation (which would be fully applicable to such websites) if it were to go into effect. For example, the "Litigation and Dispute Resolution Practice Group" page of the website of

Greenebaum Doll & McDonald refers, among other things, to the firm's "defense of all products liability actions brought against members" of a "nationwide industry group," the firm's "experience in handling complex securities class action litigation for national corporations," its "defense of a \$13 million claim for breach of contract," and its defense of banks against "substantial monetary claims under Articles 3 and 4 of the Uniform Commercial Code."

[http://www.greenebaum.com/practice/Litigation/Prac\\_litigat\\_main.asp](http://www.greenebaum.com/practice/Litigation/Prac_litigat_main.asp). Nowhere does the page explain the "legal requirements for such defense," including "an appropriate discussion of liability and damages." Similarly, the website of Woodward Hobson & Fulton, on its "Commercial and Business Litigation" page, relates the firm's "experience handling business torts including claims for interference with existing and prospective business relationship, product defamation, unfair consumer practices, breach of fiduciary duty, breach of non-competition agreements, and trademark and copyright infringement."

<http://www.whf.com/practice/cblpg.htm>. A page on the same site describing the practice of William D. Grubbs, a senior lawyer at the firm, refers to his "defense of a wide variety of automobile and truck cases, including post-collision fuel-fed fire, crashworthiness, rollover, restraint and airbag litigation," as well as his defense of "aviation-related product liability cases," "toxic tort and asbestos-related litigation," "medical device and drug product liability cases," "agricultural, industrial machinery and consumer goods manufacturers," and "large commercial product liability cases." [http://www.whf.com/directory/william\\_grubbs.htm](http://www.whf.com/directory/william_grubbs.htm). The pages do not describe the "legal requirements" for the defense of any of these cases. To cite only one more example, the website of Frost, Brown, Todd, in its description of the extensive experience of partner Kathy P. Holder, refers to her significant role in the defense of "smoking and health litigation in various jurisdictions," litigation concerning "spinal fixation devices," and "national

breast implant litigation.” [http://www.frostbrowntodd.com/Bios/3032\\_1.pdf](http://www.frostbrowntodd.com/Bios/3032_1.pdf). Nowhere are the legal requirements for the defense of such claims described.

Are the websites of all these eminent Louisville attorneys “misleading” because they mention the defense of damages claims without describing the legal principles that govern the defense of such claims? Are the corporate clients of these attorneys and law firms being misled into retaining them because of the unwarranted assumption that such claims can be defended without regard to applicable legal principles? Hardly. Indeed, the information provided on these sites concerning the nature of the firms’ experience in defense of damages claims would likely be highly useful to potential clients. Yet all these attorneys and law firms would seemingly be guilty of professional misconduct under the Commission’s proposed regulation. These examples only underscore our fundamental point: An attorney advertisement can contain truthful and nonmisleading references to damages claims or their defense without explaining the legal requirements governing such claims. A rule that would ban as “misleading” all such advertisements cannot withstand First Amendment scrutiny.

#### **4. The Ban on Testimonials (Proposed Reg. No. 1(D)(1))**

The Commission’s proposed ban on “testimonials” — that is, statements by a person (or an actor portraying a person) concerning an attorney’s performance in a particular matter, the results obtained by the attorney in the matter, or the client’s satisfaction with the attorney’s services in the matter — raises First Amendment concerns that, if anything, are even more troubling than the provisions so far discussed. The regulation will deny consumers information that is not only completely accurate and nonmisleading, but may be of critical importance to their choice of a lawyer.

The rule would bar testimonials entirely, without regard to the accuracy of the information they conveyed. An advertisement containing a completely truthful statement by a client that an attorney represented her in a case, that the representation was successful, and that she was completely satisfied with the quality of the attorney's services and the result obtained would run afoul of the rule. The apparent basis for the ban on such statements is the Commission's view that they are somehow inherently misleading because they are "likely to create an unjustified expectation about the results the lawyer can achieve."

There is, however, no basis for the conclusion that a testimonial is inherently misleading or necessarily creates an "unjustified" expectation. Indeed, the Federal Trade Commission's "Guides Concerning Use of Endorsements and Testimonials in Advertising" (which are applicable to all forms of commercial advertising subject to FTC jurisdiction) specifically recognize that endorsements and testimonials in advertisements can be honest and nondeceptive. *See* 16 C.F.R. § 255.1. A truthful testimonial by the client of an attorney, like an attorney's certification as a specialist, simply reflects a *fact*: that the attorney has at least one happy client. It does not amount to an assertion that the attorney will do as good a job or achieve the same or comparable results in every other case. It is simply a fact "from which a consumer may *or may not* draw an inference of the likely quality of an attorney's work in a given area of practice." *Peel*, 496 U.S. at 101 (emphasis added). Moreover, it is a fact that a *rational* consumer making a decision about legal services would want to have in determining whether to retain a particular attorney. Indeed, in the absence of other objective benchmarks by which to judge competing providers of legal services, testimonials may be particularly important criteria for consumers in the legal services market.

The view that a testimonial is necessarily misleading because it creates an “unjustified expectation” assumes that consumers will attach undue importance to testimonials — for example, that they will irrationally conclude that because an attorney achieved a good result for one client, she will necessarily achieve the same result for another consumer without regard to differences between the facts of the cases and the applicable legal rules. In short, the objection to testimonials is based on the assumption that consumers will respond *irrationally* and *stupidly* to truthful information. The Supreme Court, however, has emphasized that the First Amendment generally does not tolerate restrictions on commercial speech that are premised “on the offensive assumption that the public will respond ‘irrationally’ to the truth.” *44 Liquormart*, 517 U.S. at 503. As the Court put it only last year, “[w]e have . . . rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.” *Thompson v. Western States Medical Center*, 535 U.S. 357, 374 (2002). More particularly, the Court has “reject[ed] the paternalistic assumption” that consumers of legal services “are no more discriminating than the audience for children’s television.” *Peel*, 496 U.S. at 105.

Moreover, the idea that testimonials are inherently misleading is contrary to the common experience of attorneys about how clients — including the most sophisticated clients — go about selecting attorneys. More often than not, a client with a major piece of business to bestow on an attorney (for example, a corporate general counsel seeking representation in a litigation matter in a jurisdiction where the corporation has no established relationship with a law firm) will rely on recommendations from other clients or, if the prospective client has not received such a recommendation, he or she will often ask the attorney under consideration for the business to supply the names of past clients who can discuss their level of satisfaction with the performance

of and results achieved by the attorney in previous matters — in other words, to use the terminology of the proposed regulation, clients who can offer *testimonials*. The evident reason sophisticated consumers of legal services seek this information is that it can provide useful insights into whether the attorney will provide satisfactory representation.

For the same reason, major law firms, no less than practitioners who advertise on television or in the Yellow Pages, are eager to provide this information to their clients. Thus, for example, the website of Wyatt Tarrant & Combs offers an entire page devoted to a listing of large companies that have been clients of the firm as “a sampling of our track record.” <http://www.wyattfirm.com/experience.html>. To underscore the implication that the companies listed had a good experience with the firm, the page reassures prospective clients that “[a]ll clients above have consented to having their names represented in this list.” In addition, the page highlights Wyatt Tarrant & Combs’s “long-term strategic ‘partnership’” with one of its clients, DuPont, and it provides a link to a website where DuPont describes its relationship with its law firm “partners” (including Wyatt Tarrant & Combs) and touts their “commitment to ... [c]ompetence, excellence, and getting results.” <http://www.dupontlegalmodel.com/files/plf.asp>. Obviously, there is nothing “misleading” about Wyatt Tarrant & Combs’s reliance on the implied testimonials of its clients.\* Rather, the law firm is providing prospective clients with information they have an interest in receiving because of its possible relevance to their decision whether to retain the firm.

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\* We note that the mere listing of clients, even with the statement that they had authorized the listing, might not run afoul of the text of the Commission’s proposed regulation on testimonials. The link to a website where the client extols the quality of the firm’s services treads closer to the prohibited territory, although it does not expressly refer to a particular matter. The point, however, is that the nature of the information and its usefulness to prospective clients is not meaningfully distinguishable from the testimonials that the rule prohibits.

The same is equally true of testimonials used in consumer advertising by attorneys. Indeed, truthful and accurate testimonials may have greater importance for the consumers to whom such advertising is directed because they may lack ready access to other means of determining whether an attorney they are considering hiring has performed satisfactorily for other clients. To be sure, some testimonials in commercials, even though truthful, may not be particularly informative or useful. Nonetheless, consumers are bombarded with commercial messages containing testimonials regarding a wide range of products and services, and therefore have considerable experience making judgments about how persuasive, credible and useful particular commercial testimonials may be. There is no particular reason to believe consumers will be any less capable of making judgments concerning testimonials about attorneys, and certainly no convincing basis for concluding that all testimonials are misleading and must be banned.

#### **5. The Ban on References to Results (Proposed Reg. No. 1(D)(2))**

The Commission's proposed regulations would bar lawyers from advertising the amounts of particular judgments, verdicts or settlements, the cumulative dollar value of claims prosecuted or defended, or "*any* result that the advertising lawyer or law firm obtained in any particular legal matter." PR 1(D)(2)(a) (emphasis added). The ban on references to particular matters or results is even more problematic constitutionally than the ban on use of testimonials: It prevents lawyers from making entirely truthful, objectively verifiable statements of historical facts about matters that are directly relevant to consumers of their services.

Once again, the apparent rationale of the regulation is that such statements are misleading because they create "unjustified expectations." The premise is apparently that consumers will draw the unjustified inference that if an attorney has achieved a favorable result for someone

else, she will necessarily be able to achieve the same results for them, without regard to the merits of their particular cases. In other words, the regulation assumes that consumers of legal services are naive, irrational, and lacking in common sense — a supposition that is directly contrary to the premise of the U.S. Supreme Court’s attorney advertising decisions, which is that such a paternalistic assumption is no more warranted with respect to legal services than with regard to other goods and services available in the marketplace. If the Commission’s reasoning were applied to commercial speech generally, it would permit proscription of a wide range of truthful commercial messages that rest on the past success of a product or service and that obviously cannot be banned based simply on the speculation that they may create “unjustified expectations” in some particularly credulous individuals. Restrictions that are unacceptable for other commercial messages do not become acceptable just because attorney advertising is involved.

Indeed, the suggestion that advertising truthful information about prior cases can be banned as “inherently misleading” is, again, directly contrary to *Zauderer*. There, the attorney’s advertising told readers that he had handled prior cases involving the Dalkon Shield and suggested that if a reader had used the Dalkon Shield, a similar claim filed on her behalf could be successful as well. Rejecting the argument that such advertising was “inherently misleading,” the Supreme Court noted that the advertisement “did not promise readers that lawsuits alleging injuries caused by the Dalkon Shield would be successful” and that any suggestion of particular expertise by the advertising attorney rested solely on “his employment in other such litigation.” 471 U.S. at 639-40. The same reasoning dictates that an advertisement that truthfully states the results of past cases but does not promise similar success in other cases is not necessarily

misleading. And if such advertisements *can* be nonmisleading, they cannot be banned across the board. *In re R.M.J.*, 455 U.S. at 203.

Moreover, the Commission's regulation overlooks that information about past results can be the basis for entirely *reasonable* judgments about whether to retain an attorney. Although past results do not guarantee continued future success in the law or in any other discipline, they are surely a benchmark that a rational consumer may decide to use as an indication of the likelihood that an attorney will provide competent and satisfactory services. In the Supreme Court's words, they represent objective *facts* "from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." *Peel*, 496 U.S. at 101.

For this reason, eminent and highly respected lawyers often seek to make prospective clients aware of results they have obtained in particular legal matters. Once again, the websites of some of Louisville's largest law firms provide a host of examples. For instance, the website of Frost Brown Todd, on a page citing "representative matters" handled by its appellate practice group, begins by citing the case of *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), in which, "[r]epresenting the Governor of Kentucky, we successfully defended Kentucky's sweeping campaign finance reform law." [http://www.frostbrowntodd.com/practice\\_areas/appellate/cases.asp](http://www.frostbrowntodd.com/practice_areas/appellate/cases.asp). On the same website, the biography of one of the firm's experienced trial and appellate litigation partners, Charles S. Cassis, states that he:

- "has ... been before the U.S. Supreme Court for Marathon Pipeline Company in which the Court declared parts of the 1984 Bankruptcy Code unconstitutional";
- "successfully completed a four month trial involving five individual plaintiffs against the three major tobacco manufacturers";
- "successfully represented the cigarette industry before the Kentucky Supreme Court in a class action suit for intervention by individual plaintiffs in that litigation";

- “successfully defended a constitutional challenge to the Kentucky Product Liability Act in the Supreme Court of Kentucky”;
- “successfully defended several constitutional challenges to over \$2 billion worth of Kentucky bond issues before the Kentucky Supreme Court”;
- “[s]erved as regional trial counsel for Westinghouse Electric Corporation in cases stemming from alleged exposure to PCBs,” and “obtained summary judgment in all cases but one, which eventually settled for nuisance value”;
- “[s]erved as trial counsel in the successful defense of Northeastern Log Homes in pentacholophenol cases alleging contraction of non-Hodgkin’s lymphoma from exposure to penta”;
- “[s]erved as trial counsel for Marathon Oil Company in the successful defense of Robinson-Patman Act case”;
- “[s]erved as trial counsel for General Electric Company in successful defense of Kentucky Utility claim for precipitator failure.”

[http://www.frostbrowntodd.com/Bios/2959\\_1.pdf](http://www.frostbrowntodd.com/Bios/2959_1.pdf).

All these references to the “successful” results of particular legal matters would clearly violate the Commission’s proposed rule. But they are not misleading, or even potentially misleading. On the contrary, they are objectively verifiable statements of fact that the corporations who are prospective clients of Frost Brown Todd in general and Mr. Cassis in particular would have every reason to want to know. The First Amendment does not permit the prohibition of such truthful and nonmisleading advertising, whether by major law firms or by attorneys whose practice focuses on representing injured individuals.

## **6. Other Features of Proposed Reg. No. 1**

Certain other features of Proposed Regulation No. 1 are also troubling, depending in part on what their language may mean. For example, Proposed Regulation No. 1(C)(1) requires that advertisements contain information about the lawyer or lawyers who “will actually perform the services advertised.” In the case of lawyers who practice together as a firm, it is often impossible to say in advance which particular lawyer “will” perform services. As long as an

advertisement does not falsely or misleadingly state that a particular lawyer “will” perform services (resulting in a bait-and-switch situation), an advertisement that provides accurate information about the attorney or attorneys who would reasonably be expected to provide the services advertised should be protected.

Proposed Regulation No. 1(D)(3) prohibits advertising that “state[s] or impl[ies]” that the advertising lawyer has been more successful than other lawyers or firms in obtaining satisfactory results, unless that statement or implication is “factually substantiated.” Here the difficulty is what is meant by “implies.” Regulating advertisements that contain unsubstantiated express comparisons with other attorneys is one thing. But what about an advertisement that contains a positive statement about the advertising attorney, without actually stating that he or she possesses that positive characteristic to a greater degree than other attorneys (or to a degree that leads to better results than other attorneys achieve)? The Proposed Regulation is vague as to whether such a statement would be deemed to “imply” that the attorney is more successful in achieving satisfactory results than other attorneys. If the Proposed Regulation would bar such statements, we believe that it would have the effect of unconstitutionally restricting speech that is neither false nor misleading.

To take a concrete example: Suppose an attorney advertises that she has received an AV rating from Martindale-Hubbell, and the ad states that that is Martindale-Hubbell’s highest rating. Those factual statements are true, and can be objectively substantiated. But would the Commission deem them to *imply* without substantiation that the attorney is more successful in achieving positive results than other attorneys? The way the regulation is drafted leaves open that possibility, which would, in this hypothetical, have the effect of preventing the attorney from using advertisements containing statements that at least one federal appellate court has

specifically held to be constitutionally protected. *See Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000) (holding that the Florida Bar violated the First Amendment by prohibiting an advertisement stating that an attorney was AV rated and that this was Martindale-Hubbell's highest rating).

We are also troubled by Proposed Rule No. 1(D)(4), which purports to prohibit advertisements that suggest a likelihood of satisfactory results “irrespective of the merits” of the particular matter. Subpart (a) of this proposed regulation prevents an attorney from stating, implying, or suggesting that potentially adverse parties will be more likely to cooperate in resolving disputes if the advertising lawyer or law firm is retained. Again, part of the problem is the vague and open-ended nature of the use of the terms “imply” and “suggest.” For example, would an accurate statement that an attorney is respected by other members of the bar and has a good track record of amicably and satisfactorily resolving disputes be deemed to “imply” or “suggest” that “potentially adverse parties will be more likely to cooperate”? If so, the regulation would prevent advertising that is neither false nor misleading, and is constitutionally protected. Also unclear is what this regulation means by “more likely.” “More likely” than what? More likely than a client represented by another attorney, or than an *unrepresented* client? If an attorney is forbidden from advertising that clients may be better off in terms of cooperation of their adversaries if they retain the attorney instead of going without representation altogether, then the rule will, again, choke off accurate, nonmisleading, and, indeed, useful advertising.

Similarly, subpart (b) of the regulation, which prohibits advertisements that state, imply or suggest that the client will be likely to prevail if he hires a particular lawyer “irrespective of the merits” may be fine to the extent that it prohibits statements that *directly* encourage nuisance litigation. But the scope of “imply” and “suggest” is, again, quite troubling. Any advertisement that contains any positive information about the lawyer or his track record might be deemed by

someone to “suggest” that a client would be better off with that lawyer “irrespective of the merits,” and there would be nothing false or misleading about it. This subpart of the regulation thus also threatens to sanction constitutionally protected speech.

#### **7. Review of Video Advertisements (Proposed Reg. No. 5)**

The Commission’s Proposed Regulation 5 provides that in the case of television commercials, the thirty-day period for consideration of an advertisement under SCR 3.130-7.05(2) runs only from the date an attorney submits the actual videotape of a commercial; submission of a transcript of the commercial is not enough. Thus, except in cases where the Commission specifically approves a transcript submitted without a videotape, the Proposed Regulation, together with SCR 3.130-7.05(2), effectively prohibits an attorney from running a television commercial unless he or she goes to the expense of producing it, submits the finished product for review, and waits thirty days. The regulation thus requires an attorney to run the risk that the substantial expenditure involved in producing a commercial will be wasted if the Commission rejects the advertisement.

We believe that this regulation violates the First Amendment by imposing an excessive burden on attorneys who wish to run truthful and nonmisleading television commercials. Because visual content is rarely central to the substantive message of attorney advertising (*see Zauderer*, 471 U.S. at 649), a transcript will in most cases suffice to serve as the basis for a determination whether an advertisement is truthful, deceptive, or misleading. Requiring an attorney to go to the additional expense of producing a commercial before receiving a decision on whether he can go forward thus contributes little to the goal of protecting consumers, but will substantially burden attorney advertisements. Moreover, even if in some cases the visual content of a commercial may transform a nondeceptive script into a misleading video, the existing rules

provide an adequate remedy, for approval of a commercial does not immunize an attorney from a finding of a violation of the rules if the commercial is in fact false, deceptive, or misleading. Thus, the burdensome requirement of submitting a videotape to trigger the 30-day consideration period is not narrowly tailored to serve the State's interest and violates the First Amendment under the balancing analysis of *Central Hudson*.

#### **8. The Antitrust Issue.**

All the First Amendment problems objections above would be just as applicable if the regulations proposed by the Commission had instead been promulgated directly by the Kentucky Supreme Court. That the regulations are the work of a commission of lawyers answerable to the Board of Governors of the Kentucky Bar Association and have not been approved by the Kentucky Supreme Court does, however, potentially make a difference with respect to another issue: the susceptibility of the regulations to a federal antitrust challenge.

Bar associations are not state actors for purposes of immunity from federal antitrust laws, and they can be subject to a treble damages lawsuit under Section 1 of the Sherman Act if they promulgate rules that have the effect of inhibiting competition among lawyers. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Anticompetitive attorney advertising rules are immune from antitrust challenge *if they are approved by a state supreme court*. See *Bates*, 433 U.S. at 362. But absent such approval, they fall within *Goldfarb's* holding that an antitrust challenge is available where "it cannot fairly be said that the State ... through its Supreme Court Rules required the anticompetitive activities ...." *Goldfarb*, 421 U.S. at 790.

Here, the Commission's authority to promulgate rules does not depend on approval or even supervision by the Supreme Court, but only by the Board of Governors of the Bar. See SCR 3.130-7.03. The Commission's rulemaking notice recites that the Commission has

promulgated regulations “which were approved by the Board of Governors on January 17, 2003,” subject only to “review and consideration of comments from the membership.” It is therefore evident that the regulations, should they go into effect, are the product only of the Commission and the Bar Association, not of the Supreme Court. Nor can it be said that the regulations reflect any “clearly and affirmatively expressed” state policy. *Bates*, 433 U.S. at 362. The Supreme Court’s rules clearly articulate only a state policy against advertising that is actually false, deceptive, or misleading. They do not clearly and affirmatively express a policy of stifling competition by suppressing advertising that is not in fact false or misleading.

To the extent that the regulations are anticompetitive and are the product of concerted activity among the members of the Bar, who are competitors in the provision of legal services, they may violate Section 1 of the Sherman Act (as well as the Federal Trade Commission Act). *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). In light of the probable absence of state action exemption from the antitrust laws for the promulgation of these regulations, the Commission should consider carefully whether to proceed with their implementation.

### **CONCLUSION**

The portions of the Commission’s proposed regulations to which we object share certain common features. They forbid attorneys from using advertisements that contain statements that are truthful and can be presented in ways that are not deceptive or misleading. They assume that consumers are ignorant, naive, or stupid and will draw irrational inferences when presented with accurate statements about legal services. They proscribe types of advertising that employ techniques that are conventional in commercial advertising generally and/or in legitimate marketing by attorneys, including attorneys in large firms catering to corporate defendants. And

they are likely to have their greatest impact on attorneys who need to market their practices through mass advertising and are less capable of relying on other means of conveying the same information to prospective clients through other means (such as word-of-mouth references passed among well-connected corporate clients).

The cumulative effect of the proposed regulations would greatly magnify their individual flaws. *Collectively*, the regulations would result in the virtual prohibition of television advertising by attorneys that is interesting visually and in its substantive content. The regulations would handcuff attorneys who seek to employ television commercials by virtually requiring that the commercials be dull, ineffective, uninformative, and unpersuasive. The underlying impetus appears to be not protection of consumers but hostility to advertisers.

Thus, both individually and collectively, the features of the proposed regulations discussed above are misguided as a matter of policy and will impede the free flow of accurate commercial information that is protected by the First Amendment of the United States Constitution. The government may not suppress “truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising.” *Zauderer*, 471 U.S. at 646. And it cannot sidestep that principle by issuing regulations that purport to classify categories of truthful advertising as “misleading” when they are in fact *not* inherently misleading. We therefore believe that the Commission’s proposed regulations will be highly vulnerable to a constitutional challenge, and perhaps an antitrust suit as well, if they are put into effect in their current form. We strongly urge the Commission to withdraw those parts of the proposed regulations discussed above.