No. 09-11910-BB

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WILLIAM H. HARRELL, JR.; HARRELL & HARRELL, P.A.; and PUBLIC CITIZEN, INC.,

Plaintiffs-Appellants,

v.

ELIZABETH TARBERT, in her official capacity as Chief Ethics Counsel of the Legal Division of The Florida Bar; JAMES N. WATSON, JR., in his official capacity as Chief Disciplinary Counsel, Tallahassee Branch, of the Legal Division of The Florida Bar; SUSAN V. BLOEMENDAAL, in her official capacity as Chief Disciplinary Counsel, Tampa Branch, of the Legal Division of The Florida Bar; JAN K. WICHROWSKI, in her official capacity as Chief Disciplinary Counsel, Orlando Branch, of the Legal Division of The Florida Bar; ADRIA E. QUINTELA, in her official capacity as Chief Disciplinary Counsel, Fort Lauderdale Branch, of the Legal Division of The Florida Bar; and ARLENE K. SANKEL, in her official capacity as Chief Disciplinary Counsel, Miami Branch, of the Legal Division of The Florida Bar,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

REPLY BRIEF FOR APPELLANTS WILLIAM H. HARRELL, JR.; HARRELL & HARRELL, P.A.; AND PUBLIC CITIZEN, INC.

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The Bar's arguments regarding standing, ripeness, and mootness ultimately boil down to the same contention—that plaintiff William H. Harrell is not injured by the challenged advertising rules and therefore that the federal courts lack jurisdiction over his claims. For purposes of standing, the requirement that a plaintiff show actual injury ensures that there is a "case" or "controversy" under Article III. *See United States v. S. Fla. Water Mgmt. Dist*., 28 F.3d 1563, 1569 (11th Cir. 1994). Here, establishing an injury also establishes the other requirements of standing—causation and redressability—because Harrell's First Amendment injury results from the challenged rules and an injunction against enforcement of those rules would remedy that injury. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 159-60 (5th Cir. 2007) (holding that "causation and redressability [were] easily satisfied" in a commercial speech case where an injury had been shown).

Ripeness and mootness present "time-bound perspective[s] on the injury inquiry of standing." *Kelly v. Harris*, 331 F.3d 817, 819 (11th Cir. 2003) (quoting 13 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3531 (1984)). Ripeness asks whether an injury exists at the start of litigation. Thus, "[i]f no injury has occurred, the plaintiff might be denied standing or the case might be dismissed as not ripe." *Ala. Power Co. v. U.S. Dept. of Energy*, 307 F.3d

1300, 1310 n.9 (11th Cir. 2002) (quoting Chemerinsky, *Federal Jurisdiction* § 2.4.1 (3d ed. 1999)). Conversely, mootness requires that the "personal interest that must exist at the commencement of the litigation . . . must continue throughout its existence." *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1282 (11th Cir. 2004) (internal quotation omitted). As to each, the key question for this case is whether Harrell can show that he suffers an injury from the challenged rules. Harrell has amply demonstrated such an injury.[1]

I. The Challenged Rules Injure Harrell.

Harrell is an advertising lawyer in Florida, and his day-to-day business is therefore minutely regulated by the state's advertising rules. (DN 29-1 ¶¶ 1-4). Harrell has set forth the ads that he would run if not prohibited from doing so and has described in detail how those ads would violate the rules. (DN 29-1 ¶¶ 24-29; Pls.' Br. Part I.A.2). Indeed, as Harrell has explained, the rules are so restrictive that it is difficult or impossible for him to develop professional advertising without violating at least one of the challenged rules. Nearly any modern advertisement

[1] Ripeness also includes a prudential dimension, which asks whether claims are fit for judicial review and whether the plaintiff would suffer hardship from postponement of adjudication. *Konikov v. Orange County*, 410 F.3d 1317, 1322 (11th Cir. 2005). In his opening brief, Harrell explained that the case is fit for review because the questions at issue are purely legal and can be decided without reference to any particular advertisement. Pls.' Br. Part II.A. He also established that the district court's failure to decide the case subjects him to substantial hardship because it forces him to continue complying with unconstitutional restrictions on his speech. *Id.* Part II.B. The Bar does not dispute these points.

would contain statements of quality, comparisons, and statements that the Bar would classify as "manipulative" or "promises of results." (DN 29-1 ¶¶ 25-26).

As the Supreme Court wrote in *Lujan v. Defenders of Wildlife*, when a plaintiff is directly subject to the challenged government action, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." 504 U.S. 555, 561-62 (1992). Because Harrell's speech is directly restricted by the rules, he has suffered a First Amendment injury. Moreover, the rules also injure him financially by requiring him to develop ads that are less effective at attracting clients to his firm. (DN 29-1 ¶¶ 24, 31).

Harrell's showing is more extensive than the plaintiff's showing in *Jacobs v. Florida Bar*, 50 F.3d 901, 903 n.8 (11th Cir. 1995), which this Court held sufficient for standing. There, the plaintiff alleged that he wished to "produce and use new advertisements which are, or may be violative of the [challenged] Rules," including, "inter alia, non-misleading dramatizations, testimonials with truthful commentary, more than a single voice, spokespersons who are not full-time employees of his firm, voices which may be recognizable to the public, [and] music accompanied by words." *Id.* The Bar argues that *Jacobs* was the result of the Bar's admission in that case that the plaintiff's ads would violate the rules. Defs.' Br. 31. However, there were no specific advertisements before the court in *Jacobs*,

so the Bar never conceded that any specific advertisements would violate the rules. Given the plaintiff's vague description of his proposed ads, the Bar's "admission" in *Jacobs* was only that the challenged rules prohibited what they appeared to prohibit on their face—in other words, that the rule against dramatizations prohibited dramatizations and the rule against testimonials prohibited testimonials. Here, the Bar has never disputed that the challenged rules mean what they say, stating that the rules "speak for themselves" and that violating them is grounds for discipline, including public reprimand, suspension, and disbarment. (DN 1 ¶ 17; DN 11 ¶¶ 17-18).

In any case, a plaintiff's standing cannot depend on an admission by the defendant. Otherwise, a defendant could avoid federal jurisdiction by refusing to concede anything—a strategy that the Bar appears to be pursuing here. Harrell has shown in substantially more detail than the plaintiff in *Jacobs* why his proposed ads would be prohibited by the rules, and the Bar has offered no response to that showing. For example, the Bar does not explain how it could find an advertisement with background sounds to comply with the rule against "any background sound." *See* Pls.' Br. Part I.A.2.e. Harrell has therefore met his burden.

The Bar's primary argument is that Harrell has not shown that he will be prosecuted if he violates the challenged advertising rules. Defendants' argument misconstrues the nature of Harrell's injury. On their face, the rules appear to

prohibit advertising that Harrell wishes to run, and Harrell is thus forced to refrain from running those ads. When violating the rules risks professional discipline, "any probability of enforcement, however small, may deter even a genuinely interested plaintiff." *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 819 n.6 (5th Cir. 1979). Although Harrell can never know for sure whether he would have been prosecuted if he had chosen to flout the rules rather than obey them, the relevant injury—"one of self-censorship"—is "realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988); *see also Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1988) (holding that plaintiffs have standing where they would be "chilled from exercising [their] right to free expression or forgo[] expression in order to avoid enforcement consequences") (internal quotation omitted). When, as here, a statute "facially restrict[s] expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996).

The Bar's argument that a specific threat of enforcement is necessary to show injury was rejected by *Eaves*, 601 F.2d 809. There, the plaintiffs sued for declaratory and injunctive relief against a restriction on fundraising at a city-owned airport. *Id.* As here, the defendant argued that the federal courts lacked jurisdiction

because there was no evidence that the relevant authorities had specifically threatened to enforce the challenged law. *Id.* at 821. The court disagreed, holding that the plaintiffs needed to show only a "credible threat of prosecution"—i.e., a "*probability* that the challenged provisions . . . will be enforced against the [plaintiffs] if they violate it." *Id.* (emphasis added). The plaintiffs met that standard by alleging that they wished to engage in practices that appeared to be prohibited by the regulation, and thus had at least "some reason [for] fearing prosecution." *Id.* (internal quotation omitted).[2]

If the Bar were correct that a direct threat of enforcement is required for standing, Florida lawyers would never have a chance to challenge the rules in federal district court. As the Bar notes, enforcement actions by the Bar's disciplinary arm "are not instituted against a lawyer unless or until a complaint is received by the Bar's disciplinary arm regarding a published advertisement." Defs.' Br. 35. The first time a lawyer hears about a potential enforcement action is thus when the Bar begins its inquiry in response to a complaint. But the Bar also consistently argues that, once the disciplinary inquiry has begun, the federal courts

[2] *See also Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 762, 764 n.6 (11th Cir. 1991) (holding that a plaintiff need only show that he "seriously want[s] to pursue a specific course of action which [he knows is] *at least arguably forbidden* by the pertinent law") (emphasis added); *Graham v. Butterworth*, 5 F.3d 496, 499 (1993) (holding that the plaintiff has to show that he "intended to engage in arguably protected conduct, which the statute *seemed to proscribe*") (emphasis added).

should abstain in favor of the ongoing state proceedings, even if the matter has not yet been referred to a grievance committee. *See*, *e.g.*, *Mason v. Fla. Bar*, No. 6:05-CV-627-28JGG, 2005 WL 3747383, at *4 (M.D. Fla. Dec. 16, 2005). Under the Bar's view, a plaintiff filing a complaint in federal court will thus always be either too early or too late. *See Schwartz v. Welch*, 890 F. Supp. 565, 570-71 (S.D. Miss. 1995) (noting that, if plaintiffs were "not able to bring an action for declaratory and injunctive relief before proceedings were instituted against a particular lawyer Plaintiff, they effectively would be deprived of a federal forum to hear their case, short of appeal from the Mississippi Supreme Court to the United States Supreme Court").

Tellingly, the Bar never contends that it does not intend to enforce the rules as written or to enforce them against Harrell. On the contrary, the Bar has responded to this constitutional challenge by arguing that the rules would be constitutional if applied to Harrell's ads. Moreover, the Bar has rigorously enforced the rules, prohibiting advertisements containing harmless background noises, such as the sounds of traffic or children laughing; innocuous props and scenes; and subjective statements of the sort that routinely appear in other forms of advertisements. (DN 29-1, Exh. 12; Pls.' Br. Part I.A.2). For example, the Bar has applied its rule against statements regarding quality of services to harmless and unobjectionable statements 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." (DN 29-1, Exh. 12 at 15, 38, 60, 69). The Bar interprets the rules literally even when doing so defies common sense. The Bar's advertising handbook, for example, states that "EXPERIENCE MAKES THE DIFFERENCE!" is misleading "[b]ecause experience of the attorneys may not affect the outcome of a particular case." It also concludes that it would be misleading for an attorney's ad to say "Injured? Then you need an attorney" because "an attorney is not always required." (DN 29-1, Exh. 8 at 58, 60). Harrell has provided other examples of the Bar's pattern of enforcement, which the Bar has not disputed. (DN 29-1, Exh. 12; Pls.' Br. Part I.A.2).[3]

To be sure, the Bar's application of some of the challenged rules can be difficult or impossible to predict, especially with regard to the rules that prohibit promises of results and "manipulative" ads. *See* Pls.' Br. Part I.A.4. That problem forms the basis of Harrell's vagueness argument, an independent standing ground to which defendants do not respond. *See CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1275 (11th Cir. 2006) ("[I]t is the existence, not the imposition, of standardless requirements that causes [the] injury."). The inherent

[3] Thus, this is not a case where the challenged rules have never been enforced or have fallen into disuse. *See Poe v. Ullman*, 367 U.S. 497 (1961) (no injury where the challenged statute had been invoked once over the previous forty years and the prosecutor refused to enforce the law).

vagueness of the rules is not a reason to deny plaintiffs a federal forum—it is another powerful reason why the rules are unconstitutional.

II. Harrell Is Not Required to Obtain an Advisory Opinion from the Bar.

Rather than taking a position on whether Harrell's proposed ads would comply with the challenged rules, the Bar suggests that the Court should require Harrell to obtain an advisory opinion on each of his proposed ads before allowing him to proceed in a federal court. However, because Harrell has established an injury by showing "some reason [for] fearing prosecution," *Eaves*, 601 F.2d at 821, any additional requirement that he obtain the Bar's opinion before filing suit runs headlong into Supreme Court precedent holding that a state may not condition access to federal courts under 28 U.S.C. § 1983 on exhaustion of a state administrative process. *Patsy v. Board of Regents*, 457 U.S. 496 (1982). This Court's decision in *Digital Properties Inc. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997), on which the Bar relies, does not hold otherwise. There, the plaintiff's intended course of conduct facially *complied* with the challenged law. *Id.* at 590. In light of that fact, the Court held that a contrary off-hand statement by a clerical worker did not give rise to a reasonable fear of prosecution when the plaintiff had not bothered to obtain the opinion of anyone in authority. *Digital* does not hold that a plaintiff must also obtain an opinion as to conduct that would facially *violate* the challenged rules.

Defendants also rely on *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3d Cir. 1988), in which the court held that a lawyer could not bring a pre-enforcement challenge to advertising rules. Unlike this case, the lawyer plaintiff in *Felmeister* failed to describe his proposed advertisements or explain "how or why these ads would run afoul of the revised rule." *Id.* at 536. Moreover, *Felmeister* was based on the court's conclusion that pre-enforcement challenges were "distinguishable from Supreme Court decisions striking down attorney advertising regulations" because all the decisions up to that time had been appealed through the state court systems to the Supreme Court. *Id.* at 537 n.10. Since then, the Supreme Court and this Court have decided numerous anticipatory challenges to commercial speech restrictions brought in the federal district courts, and have repeatedly held that refraining from engaging in prohibited speech is enough to create standing. In *Edenfield v. Fane*, for example, the Supreme Court held unconstitutional Florida's restrictions on solicitation by accountants. 507 U.S. 761 (1993). Although the plaintiff had not engaged in the prohibited forms of commercial speech, he alleged that "but for the prohibition" he would have done so. *Id.* at 764. As noted in *Eaves*, "[t]he Supreme Court has been most willing to allow anticipatory claims by plaintiffs" in challenges to commercial speech regulations because the plaintiffs' interest in practicing a profession ensures "that a

constitutional challenge grows out of a genuine dispute and is not a contrivance prompted solely by a desire to enforce constitutional rights." 601 F.2d at 819.[4]

Harrell explained in his opening brief that this Court does not need the benefit of an advisory opinion to decide the legal questions in this case. Pls.' Br. Part II.A. The Bar does not respond to that point and offers no reason to subject Harrell to the expensive and time-consuming process of developing individual advertisements. (DN 29-1 ¶ 27). The Bar suggests that Harrell could save some of the cost of advertising development by submitting scripts for review before filming, but even the process of developing ideas, concepts, and scripts is expensive. Moreover, even if Harrell did obtain an opinion on a script, it would not be binding on the Bar. (DN 29-1, Exh. 2 (providing that an opinion regarding scripts is "preliminary only" and noting that "[a] final opinion will be issued once [advertisements are submitted] in final form")).

III. Harrell's Claims Regarding His Current Ads Are Not Moot.

As Harrell has explained, the rules' restrictions on his slogan and current ad campaign are just one aspect of his claims. Pls.' Br. Part III. As to these ads, the Bar argues that the case is moot because, after the complaint was filed, the Board

[4] *See also, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Fla. Bar v. Went For It*, 515 U.S. 618 (1995); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Byrum v. Landreth*, 566 F.3d 442 (5th Cir. 2009); *Speaks v. Kruse*, 445 F.3d 396 (5th Cir. 2006); *Mason v. Fla. Bar*, 208 F.3d 952 (11th Cir. 2000); *Jacobs v. Fla. Bar*, 50 F.3d 901 (11th Cir. 1995).

of Governors voted to reverse the Standing Committee on Advertising and approve Harrell's slogan. The Bar acknowledges that a defendant's voluntary cessation of allegedly unconstitutional action ordinarily does not deprive the court of jurisdiction, but argues that, as an "an arm of the government," it is entitled to a "presumption that the challenged conduct will not recur." Defs.' Br. 19-20.

This Court, however, has not extended such a presumption except in cases where the challenged law has been "unambiguously terminated." *Troiano*, 382 F.3d at 1285. For example, the Court held that a government entity's repeal of a challenged law is an official act substantial enough to give rise to a presumption that the law will not be reinstituted. *See Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004) ("Generally, a challenge to the constitutionality of a statute is mooted by repeal of the statute."). In other cases, the Court has relied on different circumstances indicating that the government's policy has irrevocably changed. Thus, a case may be mooted if the government adopts a new policy that is "well reasoned," that "appears to have been the result of substantial deliberation on the part of the alleged wrongdoers," and that "has been consistently applied in the recent past." *Troiano*, 382 F.3d at 1284-85. The Court also has relied on the government's express disavowal of and promise not to enforce the challenged law. *See Coral Springs*, 371 F.3d at 1332-33 (express disavowal in a brief and at oral argument); *Graham v. Butterworth*, 5 F.3d 496,

500 & n.2 (11th Cir. 1993) (repeated representations in pleadings and at oral argument that the proposed campaign did not violate the statute precluded enforcement against the plaintiffs "or other judicial candidates engaging in the same conduct").

None of these circumstances are present here. The challenged rules have not been repealed. Nor is there any evidence that the decision was carefully considered or well reasoned. The decision was made in a closed session of the Bar's Board of Governors and there is no indication of the decision in the public record. The Bar offered no rationale for its decision and has made no attempt to reconcile it with other contradictory decisions disapproving materially indistinguishable slogans. Moreover, the Bar has never represented that it does not intend to continue enforcing the rules against Harrell's future ads, even if those ads are nearly identical to ads it has already approved, or against other lawyers in the state. On the contrary, it has responded to this constitutional challenge by arguing that it is impossible to know whether Harrell will face a future enforcement action, while defending the constitutionality of the rules as applied to Harrell's proposed conduct.

The Bar's continued defense of the rules sharply distinguishes the case from *Christian Coalition of Alabama v. Cole*, 355 F.3d 1288, 1292 (11th Cir. 2004). In *Cole*, the government's change of position was prompted by a Supreme Court

decision holding its prior conduct to be unconstitutional, giving this Court a reason for confidence that the change of position was genuine and not a result of litigation strategy. *Id.* In contrast, the Florida Supreme Court has repeatedly—and wrongly—*upheld* the constitutionality of the challenged rules even as applied to speech that is neither false nor misleading. *See Fla. Bar v. Pape*, 918 So. 2d 240, 244 (Fla. 2005) (holding that a logo was "inherently deceptive" because there was "no way to measure" whether it "convey[ed] accurate information"); *see also Fla. Bar v. Gold*, 937 So. 2d 652, 656 (Fla. 2006). This case thus more strongly resembles *ACLU v. Florida Bar*, in which this Court held that a challenge to a Florida judicial rule was not moot despite the defendant's admission in court papers that the rule could not constitutionally be applied against the plaintiff. 999 F.2d 1486, 1494 (11th Cir. 1993). As here, the final arbiter of the rule's meaning was the Florida Supreme Court, which had held the rule to be constitutional. *Id.*

Even if the Court could say that the challenged activity has ceased, the circumstances in this case would override any presumption that the Bar's change of heart was permanent. First, the Bar explicitly reserves the right to change its mind. (DN 29-1, Exh. 6 ("[T]he advertising rules and the Committee's interpretation of those rules may change over time, requiring revision and refiling of existing advertisements.")). In the past, the Bar "established new precedent" that Harrell's ads were "no longer in compliance." Defs.' Resp. Br. 9, 15. As this Court

noted in *Jews For Jesus v. Hillsborough County Aviation Authority*, such a history of past "'flip-flopping' would create a reasonable expectation that [a defendant] would reinstate the challenged practice at the close of the lawsuit." 162 F.3d 627, 630 (11th Cir. 1998).

Finally, a key question in the cases on which the Bar relies was whether the change in behavior came "prior to the commencement of [the] litigation." *Coral Springs*, 371 F.3d at 1330 n.8. In *Coral Springs*, this Court found it "significant[]" and "notabl[e]" that the defendant city had amended the challenged law "before it had ever been sued." *Id.* at 1333. The Court wrote that "[t]he City's behavior stands in stark contrast to that of the defendant in *National I*, which did not change the offending law until six weeks after it had been sued, and moved to dismiss the day after the change." *Id.*; *see also Troiano*, 382 F.3d at 1285 ("LePore has not only ceased the allegedly illegal practice, she did so prior to receiving notice of the litigation."). Here, the Bar did not change its position until after this case had been filed, and even then only in reliance on the advice of its litigation counsel. *See* Tr. of Jan. 6, 2009 Hrg. at 85 (statement of Bar's litigation counsel that the Board of Governors reversed the Standing Committee's decision on his recommendation). There is thus no basis on which to conclude that the Bar's decision was anything other than a litigation tactic.

If the Bar can so easily moot a case, it could effectively immunize its rules from constitutional challenge "simply by changing the practice during the course of a lawsuit, and then reinstat[ing] the practice as soon as the litigation was brought to a close." *Jews for Jesus*, 162 F.3d at 629. That is precisely the problem that the voluntary cessation doctrine is supposed to prevent.

IV. The Bar's Preclearance Rule Is Unconstitutional.

In defending the constitutionality of its preclearance rule, the Bar devotes most of its argument to contending that the rule is not a prior restraint on speech—a proposition that, given the district court's narrow construction of the rule, Harrell no longer disputes. Even if the rule is not a prior restraint, however, it is still a restriction on speech, and the Bar thus must support it with actual evidence under the *Central Hudson* test. *See Went For It*, 515 U.S. 618 (upholding a 30-day solicitation restriction based on extensive record evidence); *Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403 (5th Cir. 2007) (holding unconstitutional a 24-hour solicitation ban under *Central Hudson*); *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997) (holding unconstitutional a thirty-day ban on solicitation of criminal and traffic defendants).

The Bar relies on two pieces of evidence in support of its preclearance rule but ignores the obvious flaws with this evidence identified in Harrell's opening brief. First, it points to a survey establishing that "[m]ost respondents believed that

it is important that lawyers be required to submit their advertisements for review." Defs.' Br. 39. As Harrell has explained, however, the Bar makes no effort to review the factual accuracy of advertisements in the review process. If consumers gain any sense of security from the review process, it is therefore a false one.

Second, the Bar points to existing high rates of noncompliance with the rules, arguing that prior review will allow lawyers to correct violations before ads are distributed to the public. Defs.' Br. 39. Considering the inherent vagueness of the rules and the arbitrariness of their application, however, it is not surprising that lawyers have a difficult time complying with them. Nearly twenty percent of appeals to the standing committee, and nearly half of appeals to the Board of Governors, result in a reversal of the Bar's prior decision, indicating that the Bar's opinions on compliance may not be substantially more accurate than the opinion of the submitting lawyer. (DN 33-3 ¶¶ 5, 9, 10). The inherent unreliability of the Bar's own review process is even more obvious considering that more than a third of recent standing committee decisions, and a large proportion of Board of Governors decisions, were decided by a split vote. (DN 29-1, Exhs. 12, 16-20, 22-23).[5]

[5] Out of the 382 recent ad decisions included in Exhibit 12 to the Second Harrell Declaration, 127, or about 33%, resulted in split votes by the standing committee. (DN 29-1, Exh. 12).

The Bar's reliance on the vague and arbitrary nature of the rules, which itself is a powerful reason to find the rules unconstitutional, to justify the imposition of even more restraints on speech is ironic. If the Bar really wanted to improve compliance with its rules, an obvious alternative to restricting speech would be to simplify the rules and to provide clear guidelines so that attorneys and Bar authorities would no longer be forced to guess which ads are likely to be found noncompliant. Moreover, rather than restraining publication while it considers whether submitted ads comply with the rules, the Bar could accomplish its purpose of getting noncompliant ads out of circulation more quickly by speeding up its review process. To be sure, expediting the time for review may require the devotion of additional resources. The Supreme Court, however, has made clear that the cost of review cannot justify blanket bans on speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985). The value of commercial speech, both to the speaker and to society, requires that the investment be made. *Id.*

CONCLUSION

The district court's decision should be reversed and remanded.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 4,537 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/Gregory A. Beck
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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2009, I caused two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on the following counsel:

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