

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

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

Plaintiffs,

v.

THE FLORIDA BAR; JOHN F. HARKNESS, in his official capacity as Executive Director of The Florida Bar; KENNETH L. MARVIN, in his official capacity as Director of Lawyer Regulation of the Legal Division of The Florida Bar; MARY ELLEN BATEMAN, in her official capacity as Director of Ethics and Advertising of the Legal Division of The Florida Bar; 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

Civil Action No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

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.

INTRODUCTION

1. This is a suit under 42 U.S.C. § 1983 against The Florida Bar and Bar officials responsible for enforcing the attorney advertising provisions of the Florida Rules of Professional Conduct. Plaintiffs challenge provisions of the rules that prohibit common and innocuous advertising techniques that have no potential to deceive consumers. These provisions generally prohibit techniques that are widespread in other industries but that the Bar characterizes as either irrelevant to the decision whether to retain a lawyer or factually unverifiable, and therefore unfit for consumption by Florida consumers. The state's restrictions on these commonplace advertising techniques—without which it would be nearly impossible to produce an interesting or effective advertisement—are vague, arbitrary, and

contrary to U.S. Supreme Court precedent holding that attorney advertising is a form of protected speech that the state can restrict only in furtherance of an important government interest. Plaintiffs seek a declaration that the portions of the rules restricting these techniques violate the First and Fourteenth Amendments to the U.S. Constitution, and an injunction against enforcement of these rules.

JURISDICTION

2. The Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

PARTIES

3. Plaintiff William H. Harrell, Jr. is a resident of Jacksonville, Florida. He was admitted to The Florida Bar in 1974 and since then has actively practiced law in the state. Harrell is a trial lawyer with substantial jury trial experience and is rated “AV” by Martindale-Hubbell. Harrell is the majority shareholder and managing partner of the firm Harrell & Harrell, P.A.

4. Plaintiff Harrell & Harrell, P.A. is a law firm in Jacksonville, Florida. The firm employs sixteen attorneys licensed in Florida and is one of the largest personal-injury law firms representing plaintiffs in the state. Harrell & Harrell advertises its services to the public through broadcast

media, print advertisements, and other forms of public media. The firm also operates a website from within Florida, available at both <http://www.harrellandharrell.com/> and <http://251-1111.com/>.

5. Plaintiff Public Citizen, Inc. is a nonprofit public interest organization with approximately 90,000 members nationwide, including nearly 5000 in Florida. Public Citizen Litigation Group (PCLG) is a division of Public Citizen that conducts litigation in state and federal courts. Since its founding in 1972, PCLG has litigated for the public interest in cases concerning consumer rights, health and safety regulation, access to the civil justice system, freedom of speech, and other topics.

6. Defendant The Florida Bar is an arm of the Florida Supreme Court. It is responsible for approving lawyer advertising, issuing advisory opinions related to lawyer advertising, and investigating and prosecuting alleged violations of the rules related to lawyer advertising.

7. Defendant John F. Harkness is Executive Director of The Florida Bar.

8. Defendant Kenneth L. Marvin is Director of Lawyer Regulation of the Legal Division of The Florida Bar.

9. Defendant Mary Ellen Bateman is Director of Ethics and Advertising of the Legal Division of The Florida Bar.
10. Defendant Elizabeth Tarbert is Chief Ethics Counsel of the Legal Division of The Florida Bar.
11. Defendant James N. Watson, Jr. is Chief Disciplinary Counsel of the Tallahassee Branch of the Legal Division of The Florida Bar.
12. Defendant Susan V. Bloemendaal is Chief Disciplinary Counsel of the Tampa Branch of the Legal Division of The Florida Bar.
13. Defendant Jan K. Wichrowski is Chief Disciplinary Counsel of the Orlando Branch of the Legal Division of The Florida Bar.
14. Defendant Adria E. Quintela is Chief Disciplinary Counsel of the Fort Lauderdale Branch of the Legal Division of The Florida Bar.
15. Defendant Arlene K. Sankel is Chief Disciplinary Counsel of the Miami Branch of the Legal Division of The Florida Bar.
16. Defendant state officials are jointly responsible for the investigation, prosecution, and discipline of attorneys throughout the state.

FACTUAL ALLEGATIONS

A. The Rules Governing Lawyer Advertising in Florida

17. Members of The Florida Bar are required to comply with restrictions on the content of attorney advertising set forth in the Florida Rules of Professional Conduct. Violations of the rules are grounds for discipline, including public reprimand, suspension, and disbarment. Rules Regulating the Fla. Bar §§ 3-4.2, 3-5.1.

18. Some of the advertising rules are designed to serve the state's legitimate interest in protecting consumers from false and misleading advertising. Other rules, however, prohibit harmless advertising techniques that are prevalent in the media and that consumers are accustomed to seeing. As to this second category of rules, the Bar has taken the position that any statement that is not both objectively relevant to the selection of a lawyer and factually verifiable is categorically prohibited by the rules. Among other things, the rules contain the following restrictions.

- a) The rules require that lawyer advertisements "provide only useful, factual information presented in a nonsensational manner" and include no "slogans or jingles." Florida Rule of Professional Conduct § 4-7.1, cmt.

- b) The rules provide that a lawyer advertisement is “misleading”—and therefore prohibited—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.* § 4-7.2, cmt.
- c) The rules prohibit advertisements that “describ[e] or characteriz[e] the quality of the lawyer’s services.” *Id.* § 4-7.2(c)(2). The Florida Supreme Court has interpreted this rule to prohibit statements about a lawyer’s “character and personality traits,” *The Florida Bar v. Pape*, 918 So. 2d 240, 244 (Fla. 2005).
- d) The rules prohibit advertisements that are “unsubstantiated in fact,” *id.* § 4-7.2(c)(1)(D), including statements that “compare[] the lawyer’s services with other lawyers’ services,” *id.* § 4-7.2(c)(1)(I), or “promise results,” § 4-7.2(c)(1)(G). A comment to the rules states that these rules prohibit not only false statements, but also inherently subjective statements and statements of opinion, such as the statement that a lawyer is

“one of the best,” or “one of the most experienced” in a field of law. *Id.* § 4-7.2, cmt.

- e) The rules prohibit “visual and verbal descriptions” that are “manipulative, or likely to confuse the viewer.” *Id.* §§ 4-7.2(c)(3), 4-7.5. A comment to the rules explains that “manipulative” advertisements include advertisements that “create suspense, or contain exaggerations or appeals to the emotions, [or] call for legal services.” *Id.* § 4-7.2, cmt. As an example, the comment states that “a drawing of a fist, to suggest the lawyer’s ability to achieve results” is prohibited. *Id.* The rules also contain a list of content that is acceptable, including:

An illustration of the scales of justice not deceptively similar to official certification logos or The Florida Bar logo, a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), diploma(s), or a photograph of the lawyer or lawyers who are members of or employed by the firm against a plain background consisting of a single solid color or a plain unadorned set of law books.

Id. § 4-7.2(b)(1)(L).

f) The rules prohibit television and radio advertisements that contain “any background sound other than instrumental music.” A comment provides, as examples, that “the sound of sirens or car crashes and the use of jingles” are prohibited. *Id.* § 4-7.5(b)(1)(C).

19. The Florida Bar strictly applies and enforces these rules, consistently prohibiting, for example, 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.

20. In addition to the restrictions on the content of lawyer advertisements, the rules include procedural requirements that impose a prior restraint on television and radio advertisements. The rules require that these advertisements be submitted to the Bar for approval at least fifteen days before they are aired and prohibit submitting lawyers from running the advertisements before obtaining Bar approval. *Id.* § 4-7.7(a)(1).

21. None of these rules is adequately supported by studies, factual findings, or other evidence demonstrating that they directly advance a legitimate state interest.

22. The rules are too vague to provide guidance about what kinds of advertisements are prohibited and invite arbitrary and discriminatory enforcement in violation of the First Amendment to the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

B. The Rules' Application to Plaintiffs William H. Harrell, Jr. and Harrell & Harrell, P.A.

23. On May 10, 2002, plaintiff Harrell submitted for review by The Florida Bar a transcript of a proposed television advertisement for plaintiff Harrell & Harrell, P.A. that included the statement "Don't settle for anything less."

24. In a letter dated May 17, 2002, staff counsel for the Bar advised Harrell that the phrase did not comply with Rule 4-7.2(b)(1)(B) because it could "create unjustified expectations about results the lawyer can achieve." However, the Bar also stated that it was approving use of the phrase "Don't settle for less than you deserve" as an alternative to the proposed language.

25. Based on the May 17, 2002, letter, Harrell changed his advertisements from the phrase "Don't settle for anything less" to "Don't settle for less than you deserve." Since then, Harrell has consistently used the revised phrase in television, radio, billboard, print, and Internet

advertisements, and the phrase has acquired significant public recognition. Harrell has submitted, and the Bar has approved, multiple advertisements in different media since 2002 that prominently feature the phrase.

26. In 2006, Harrell began developing a new, updated advertising campaign to be used in television, radio, billboard, print, and Internet advertising for Harrell & Harrell. Harrell retained an advertising agency, developed several possible campaigns, prepared storyboards, and conducted various forms of focus groups. The proposed advertisements featured Harrell's family and dogs, emphasized the family-friendly nature of the firm and its charitable contributions, and showed the firm's facilities, including an on-site gymnasium established to promote the health of its employees. However, because of the Bar's rules against use of scenes, props, background noises, and other standard advertising techniques, Harrell was forced to discard these potential campaigns and instead select a minimalist campaign featuring a black background, instrumental music, and pictures of lawyers from the firm.

27. Like Harrell's past campaigns, the selected advertising campaign featured the phrase "Don't settle for less than you deserve." Harrell believed that this campaign, although less effective than he would

have preferred, was permissible under the rules because the Bar had previously approved the phrase. However, pursuant to the prior-restraint provision of Rule 4-7.7, Harrell was nevertheless required to submit his new advertisements for pre-approval. Accordingly, on September 10, 2007, Harrell submitted the advertisements for approval by the Bar.

28. On September 21, 2007, staff counsel for The Florida Bar informed Harrell by letter that the submitted advertisements did not comply with Rule 4-7.2(c)(2) because the phrase “Don’t settle for less than you deserve” improperly “characterizes the quality of the services being offered.”

29. Harrell responded by letter on September 26, 2007, noting that the Bar had previously approved the exact phrase and that it had been in continuous use for several years. Nevertheless, on October 4, 2007, the Bar reaffirmed its decision that the phrase violated the rules and that running the advertisement could subject Harrell to discipline.

30. On October 10, 2007, Harrell asked the Bar’s Standing Committee on Advertising to review the staff decision. In a letter to the committee, Harrell again pointed out that the phrase had previously been

approved by the Bar and argued that the rules constituted a prior restraint on speech and violated the First Amendment to the U.S. Constitution.

31. By letter of November 28, 2007, The Florida Bar informed Harrell that the standing committee had sustained the Bar's prior opinion because the phrase "Don't settle for less than you deserve characterizes the quality of legal services being offered in violation of Rule 4-7.2(c)(2)." The Bar again advised Harrell to revise the advertisements and warned him that running them could subject him to discipline.

32. Because all the firm's advertisements since 2002 have featured the phrase "Don't settle for less than you deserve," Harrell & Harrell found itself confronted with an insoluble dilemma. Even if it reverted to its previously approved advertising campaign in an effort to comply with the Bar's decision, it would still run afoul of the Bar's new position that the phrase is prohibited. The firm had already invested a substantial amount of time and money in designing and implementing its new campaign, and it would have been extremely expensive for the firm to design another campaign without the prohibited phrase. Moreover, the phrase had developed a significant amount of public recognition, and the firm could not stop using it without suffering a substantial loss of name recognition,

goodwill, and, consequently, loss of client business. Nor could the firm pull its ads entirely without facing almost certain bankruptcy, since it depends on daily advertising to bring in new clients.

33. Harrell & Harrell continues to run its new advertising campaign on television and on its website and therefore faces an imminent risk of discipline by the Bar. Harrell also intends to extend the new campaign to radio, billboards, and printed advertisements, but has refrained from doing so because the ads would inevitably be rejected by the Bar under its pre-clearance rule.

34. The rules prohibiting ads that are not objectively relevant to the selection of a lawyer and factually verifiable are too vague to provide plaintiffs with notice as to what kinds of advertisements could subject the firm to discipline. Because of the broad and ambiguous scope of the rules and the Bar's history of strict enforcement, plaintiffs have a reasonable fear that the Bar will take enforcement action against use of the phrase "Don't settle for less than you deserve" not only under the rule prohibiting statements regarding quality of services, but also under the rules disallowing comparison of services, promises of success, "unsubstantiated"

and “manipulative” statements (as those terms are broadly defined by the Bar), and other rules.

35. Moreover, plaintiffs have a reasonable fear that, even if Harrell were to remove the phrase “Don’t settle for less than you deserve,” the Bar will use other aspects of the ads as the basis for disciplinary action.

- a) The firm’s ads contain stock advertising elements such as lighting effects, fades, moving text and images, slogans, upbeat music, and a faint whooshing sound that plays as text moves across the screen. Although all these effects are subdued when compared to other sorts of advertisements that routinely run on television, the Bar could nevertheless seek to restrict them under the rules prohibiting background noises and requiring advertisements to contain “only useful, factual information.”
- b) Some of the advertisements contain statements that the Bar, because of the breadth and vague nature of the rules, would likely characterize as promises of success (“we can help”); calls for legal services (“don’t give up”); characterizations of quality of services (“you need strong legal representation”); appeals to emotion (“it is wrong that loved ones in nursing homes are

neglected”); “unsubstantiated” or “manipulative” statements, as the Bar broadly defines those words (“we help accident victims fight for justice every day”); or statements that are common to most or all lawyers in Florida (“one goal: justice for all our clients”). All these statements are true or, at most, subjective and unquantifiable statements of opinion, and are not misleading to consumers. Nevertheless, plaintiffs have a reasonable fear that the Bar will take disciplinary action against the ads under these broad and vague provisions.

C. The Rules’ Application to Plaintiff Public Citizen’s Members in Florida

36. The rules’ burdensome prohibitions on speech unconstitutionally restrict a wide range of useful and informative advertising by plaintiffs and by other lawyers and law firms that has no potential to confuse or deceive consumers. The rules therefore injure Florida consumers, including Florida members of plaintiff Public Citizen, by preventing them from receiving truthful, non-misleading information about legal services and legal rights.

37. The advertising techniques prohibited by the rules serve the important function of attracting consumers’ attention and communicating

information to consumers who may need legal representation. Some of the prohibited practices, such as statements about quality of services and statements of comparison, are among the most useful information for consumers who may be looking for a lawyer.

38. Consumers of moderate means, who may not be sophisticated consumers of legal services and who depend on television and radio advertisements to learn about legal services, are the most seriously affected by the restrictions on attorney advertisements, as are consumers who are illiterate, do not speak English, or, because of an injury or disability, cannot read or understand other sorts of advertisements.

39. Public Citizen has an interest in protecting the right of its Florida members to receive useful, non-misleading communications from lawyers about their legal rights and the availability of legal services.

WHEREFORE, plaintiffs request that this Court

1. Declare unconstitutional and issue a preliminary and permanent injunction against enforcement of
 - a) Florida Rule of Professional Conduct § 4-7.1, to the extent it requires advertisements to provide only “useful, factual information presented in a nonsensational manner;”

- b) Florida Rule of Professional Conduct § 4-7.2(c)(1), to the extent it classifies a truthful statement as “misleading” because the statement would also be true for many other lawyers;
- c) Florida Rule of Professional Conduct § 4-7.2(c)(1)(D), to the extent the rule prohibits statements that are “unsubstantiated in fact” but that are unquantifiable, statements of opinion, or otherwise not false or misleading;
- d) Florida Rule of Professional Conduct § 4-7.2(c)(1)(G), which prohibits statements that “promise results,” to the extent the rule prohibits statements that are unquantifiable, statements of opinion, or otherwise not false or misleading;
- e) Florida Rule of Professional Conduct § 4-7.2(c)(1)(I), which prohibits any communication that “compares the lawyer’s services with other lawyers’ services,” to the extent the rule prohibits statements that are unquantifiable, statements of opinion, or otherwise not false or misleading;
- f) Florida Rule of Professional Conduct § 4-7.2(c)(2), which prohibits statements “describing or characterizing the quality of the lawyer’s services,” to the extent the rule prohibits

statements that are unquantifiable, statements of opinion, or otherwise not false or misleading;

- g) Florida Rule of Professional Conduct § 4-7.2(c)(3), which prohibits “visual and verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events” that are “manipulative, or likely to confuse the viewer,” to the extent the rule prohibits statements that are not false or misleading; and § 4-7.5(b)(1)(A), to the extent it also prohibits such statements;
 - h) Florida Rule of Professional Conduct § 4-7.5(b)(1)(C), which prohibits the use of “any background sound other than instrumental music;”
 - i) Florida Rule of Professional Conduct § 4-7.7(a)(1), which imposes a prior restraint on attorney advertising;
2. Award plaintiffs their costs, including reasonable attorney’s fees, pursuant to 42 U.S.C. § 1988; and
 3. Grant any additional relief to which plaintiffs are entitled.

Dated: Jan. 7, 2008

Respectfully submitted,

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