



**ASSOCIATION OF
PROFESSIONAL RESPONSIBILITY LAWYERS
2015 REPORT OF THE
REGULATION OF LAWYER ADVERTISING COMMITTEE**

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ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

REGULATION OF LAWYER ADVERTISING COMMITTEE

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Report of the APRL Regulation of Lawyer Advertising Committee

I. Executive Summary

The rules of professional conduct governing lawyer advertising in effect in most jurisdictions are outdated and unworkable in the current legal environment and fail to achieve their stated objectives. The trend toward greater regulation in response to diverse forms of electronic media advertising too often results in overly restrictive and inconsistent rules that are under-enforced and, in some cases, are constitutionally unsustainable under the Supreme Court's *Central Hudson* test. Moreover, anticompetitive concerns, as well as First Amendment issues, globalization of the practice of law, and rapid technology changes compel a realignment of the balance between the professional responsibility rules and the constitutional right of lawyers to communicate with the public.

In 2013, the Association of Professional Responsibility Lawyers ("APRL")¹ created the Regulation of Lawyer Advertising Committee to analyze and study the ABA Model Rules of Professional Conduct and various state approaches to regulating lawyer advertising and to make recommendations; the goal being to bring rationality and uniformity in the regulation of lawyer advertising and disciplinary enforcement. The Committee consists of both former and current bar regulators, law school professors, authors of treatises on the law of lawyering, and lawyers who are experts in the field of professional responsibility and legal ethics. The Committee also received valuable input from Committee liaisons from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel ("NOBC").²

The Committee's fundamental premise is that the proper and constitutional purpose of regulating advertising is to assure that consumers of legal services receive factually accurate, non-misleading information about available services. The Committee obtained, with NOBC's assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules by state disciplinary authorities. The Committee received survey responses from 34 of 51 jurisdictions. The Committee also considered consumer surveys, state bar reports, and other materials regarding the attitudes of consumers toward lawyer advertising, and the effects of advertising regulations on the public's understanding about legal services. It gave particular attention to the impact of evolving technology and innovations in the marketing of legal services. The Committee considered the constitutional standards for regulating commercial speech, the proliferation of legal ethics opinions, and the paucity of disciplinary decisions on lawyer advertising. The Committee analyzed the legitimate public policies underlying lawyer advertising regulations and the effectiveness of current enforcement efforts in achieving these policy objectives.

Based on the survey results, anecdotal information from regulators, ethics opinions, and case law, the Committee concludes that the practical and constitutional problems with current state regulation of lawyer advertising far exceed any perceived benefits associated with protecting the public or maintaining the integrity of the legal profession, and that a practical solution to these problems is best achieved by having a single rule that prohibits false and misleading communications about a lawyer or the lawyer's services. The Committee

¹ APRL is a national association of lawyers who provide advice and representation in all aspects of legal ethics and professional responsibility. APRL's members include practicing lawyers, academics, judges, corporate counsel, risk management attorneys, and government lawyers. For the past two decades, APRL has taken public positions on the rules governing lawyers, as well as professional discipline regulations, legal malpractice statutes, and other developments in professional responsibility matters, including holding twice yearly conferences on ethics topics, submitting public statements, reports and amicus curiae briefs in pending state and federal litigation and rule amendment proceedings.

² Attachment 1 is a brief biographical statement of the members of the Committee and the Committee liaisons.

believes that state regulators should establish procedures for responding to complaints regarding lawyer advertising through non-disciplinary means. Professional discipline should be reserved for violations that constitute misconduct under ABA Model Rule 8.4(c).³ The Committee recommends that violations of an advertising rule that do not involve dishonesty, fraud, deceit, or misrepresentation under Rule 8.4(c) should be handled in the first instance through non-disciplinary means, including the use of advisories or warnings and the use of civil remedies where there is demonstrable and present harm to consumers.

The Committee decided to focus initially on advertising activities regulated under ABA Model Rules 7.1 ("Communications Concerning a Lawyer's Services"), 7.2 ("Advertising"), 7.4 ("Communications of Fields of Practice and Specialization") and 7.5 ("Firm Names and Letterheads"). The proposed revisions to these rules are set forth in Attachment 2. The proposed revisions to ABA Model Rules 7.1., 7.2, 7.4, and 7.5 retain the standard of prohibiting "false and misleading" communications in Rule 7.1 as the all-encompassing criterion for the regulation of lawyer advertising. Commentary from Rules 7.2, 7.4, and 7.5 has been merged into the Comments in Rule 7.1 to provide additional guidance to practitioners about what types of communications involving advertising, marketing, use of the terms "certified specialist," and firm names do and do not comport with the Rule 7.1 standard. The remainder of Rules 7.2, 7.4, and 7.5 were deleted, given the consensus that Rule 7.1 establishes a sufficient basis for the regulation of legal services advertising. The Committee reserved consideration, for a later time, of issues related to the regulation of direct solicitation of clients (Model Rule 7.3) and communications transmitted in a manner that involves intrusion, coercion, duress, or harassment.⁴ The Committee also deferred consideration regarding the effect of certain forms of lawyer advertising and marketing on the regulation of lawyer referral services.⁵

In submitting these recommendations, the Committee is not advocating that states abdicate their regulators' authority over lawyer advertising. Instead, the proposed amendments to the ABA Model Rules on advertising and the proposed enforcement procedures are a common sense response to the major practical and constitutional problems that the Committee has identified with the current approach to regulating lawyer advertising.

II. Identifying the Problem and the Need for Change

³ ABA Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

⁴ The U.S. Supreme Court has identified other considerations related to direct solicitation that are outside the scope of this report. *E.g.* The Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (holding that Florida's 30-day ban on direct mail solicitation in accident or disaster cases materially advances, in a manner narrowly tailored to achieve the objectives, the state's substantial interest in protecting the privacy of potential recipients and in preventing the erosion of public confidence in the legal system); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (holding that a state may not totally prohibit targeted direct mail to prospective clients known to face specific legal problems where the state's interest in preventing overreaching or coercion by an attorney using direct mail can be served by restrictions short of a total ban); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding a total ban of in-person solicitation when the primary motivation behind the contact is the attorney's pecuniary gain); *In re Primus*, 436 U.S. 412 (1978) (holding that direct in-person solicitation is entitled to greater constitutional protection against state regulation when the attorney is motivated by the desire to promote political goals rather than pecuniary gain). *See also* The Fla. Bar v. Herrick, 571 So.2d 1303 (1990) (holding that a state can constitutionally regulate and restrict direct-mail solicitations by requiring personalized mail solicitation to be plainly marked as an "Advertisement."); "Commercial Speech Doctrine," THE FLORIDA BAR, [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3BC6699A524B477B85257283005D415D/\\$FILE/Information%20on%20the%20Commercial%20Speech%20Doctrine.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3BC6699A524B477B85257283005D415D/$FILE/Information%20on%20the%20Commercial%20Speech%20Doctrine.pdf?OpenElement).

⁵ See, e.g., Geeta Kharkar, *Googling for Help: Lawyer Referral Services and the Internet*, 20 GEO. J. LEGAL ETHICS 769 (2007).

Simply stated, current regulations of lawyer advertising are unworkable and fail to achieve their stated objectives. Survey results show that there are too many state deviations from the ABA Model Rules, actual formal lawyer discipline imposed for advertising violations is rare, lawyers are disheartened by the burden of attempting to determine which regulations apply to the ever-changing technological options for advertising, and consumers of legal services want *more*, not less, information about legal services. The basic problem with the current state patchwork of lawyer advertising regulations lies with the increasingly complex array of inconsistent and divergent state rules that fail to deal with evolving technology and innovations in the delivery and marketing of legal services. The state hodge-podge of detailed regulations also present First Amendment and antitrust concerns in restricting the communication of accurate and useful information to consumers of legal services.

Lawyer advertising rules in most jurisdictions are overly restrictive and, in some instances, are incapable of compliance given today's technology and sophisticated methods of marketing and advertising. The jurisdictions do not uniformly enforce many regulations and sometimes do not enforce them at all. This inconsistent or non-existent enforcement gives a competitive disadvantage to law firms that do not violate the rules. Moreover, the rules vary significantly from state to state on both substantive and technical (if not hyper-technical) issues. The ABA Model Rules have not been uniformly adopted and ABA Ethics 20/20's recent effort to modernize the advertising rules has been enacted by only a few states.⁶ Conflicting state advertising regulations create a significant barrier to practice and unreasonably impede innovation in marketing and delivering legal services.

The realities of on-line and other forms of electronic media advertising reflect the advent of e-commerce, competition, and changes in market forces. Innovations in technology that enhance the speed of communication, as well as increasing globalization, have resulted in ineffective regulation of lawyer advertising by state regulatory agencies. The legal profession today is an integral part of the Internet-based economy, and advertising regulations should enable lawyers to effectively use new on-line marketing tools and other innovations to inform the public.⁷ The sharp increase in mobile technology and Internet marketing options have resulted in borderless forms of marketing and advertising. Virtual law practice and web-based delivery of legal services, as well as the public's increased reliance on and use of the Internet and mobile technology, mandate a reexamination of how the legal profession views lawyer advertising and what can or should be effectively regulated.

A realignment of the balance between the core values of professional responsibility and effective lawyer advertising designed to communicate accurate information about the availability of legal services for consumers in the twenty-first century is essential. In the Committee's view, the overarching goals are two-fold: (1) establishing a uniform and simplified rule that prohibits false and misleading advertisements; and (2) ensuring that consumers have access to accurate information about legal services while not being deceived by members of the Bar.

⁶ Arkansas, Delaware, Idaho, Iowa, Kansas, North Carolina, Pennsylvania, West Virginia and Wyoming have adopted the Ethics 20/20 advertising rule amendments. ABA CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct: Rule 7.1*, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_1_authcheckdam.pdf (last updated May 4, 2015).

⁷ Statistics and available data indicate that there is a serious disconnect between the way lawyers are expected to communicate with their clients in accordance with existing rules and the way that clients are communicating with everyone else and seeking information about legal services.

III. A Brief History of the Regulation of Lawyer Advertising

A. How We Got to Where We Are

Over the years, the regulation of lawyer advertising has swung from one extreme to another and come to a sudden halt at its current position where it ambivalently hovers between the two. At the one extreme, the regulation once consisted of a longstanding blanket prohibition on *all* lawyer advertising. At the other extreme, and with the blink of an eye, the nationwide ban was lifted and the U.S. Supreme Court expressed its decisive recognition of lawyer advertising as commercial free speech protected under the First Amendment. Nevertheless, the Supreme Court left the authority in the states' hands to continue regulating lawyer advertising, and the state regulators have pursued that mandate without much consistency. With ever-changing technologies, which allow for instantaneous and global communication, regulation has become challenging for regulators and practicing attorneys alike who strive to assure that attorney advertising is compliant under both evolving rules and new technology. Lawyers wanting to embrace these new technologies have been reluctant to do so out of concern that they will not comply with lawyer advertising regulation.

B. Regulation Prior to *Bates v. Arizona*

The regulation of lawyer advertising goes as far back as the nineteenth century in Great Britain, where it was a rule of etiquette, not of ethics, based on the view that law was a form of public service and not a means of earning a living.⁸ As such, lawyers looked down on advertising as unseemly.⁹ This “rule” was neither enforced nor considered “law” in the general sense of the word; instead, it was merely understood.

In 1908, the American Bar Association (the “ABA”) adopted the *Canons of Professional Ethics* (the “Canons”) and established a general prohibition of all advertising.¹⁰ The logic behind this categorical ban was that advertising was unprofessional; and therefore, lawyer advertising would threaten the requisite of professionalism in lawyering.¹¹ As Robert Boden, Dean and Professor of Law at Marquette University states, “[h]igh standards and advertising did not mix.”¹² Thus began a half-century-long tradition as three generations of lawyers in the United States deemed advertising to be unprofessional and therefore strictly prohibited.

In 1969, the ABA enacted its 1969 *Code of Professional Responsibility* (the “Code”), which maintained the general prohibition of attorney advertising.¹³ However, shortly thereafter the adherence to a blanket ban on advertising began to unravel. In 1975, the U.S. Supreme Court decided *Goldfarb v. Virginia State Bar*, and posited that lawyers provide services in exchange for money and thus engage in “commerce.”¹⁴ Though this case did not deal directly with the question of lawyer advertising, it nonetheless suggested that the practice of law is not just a profession—it is also a business. As the Court explained, “[i]t is no disparagement of the

⁸ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371 (1977).

⁹ *Id.*

¹⁰ The general prohibition contained a few limited exceptions called a “laundry list” of permitted advertising activity. Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 549 (1982).

¹¹ *Id.* at 554.

¹² *Id.* at 550.

¹³ *Id.*

¹⁴ *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787-88 (1975).

practice of law as a profession to acknowledge that it has this business aspect, . . . [i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse.”¹⁵

One year later in *Virginia State Pharmacy Board. v. Virginia Citizens Consumer Council*, the U.S. Supreme Court recognized that the First Amendment protects advertising, referred to as “commercial speech,” based on the public’s right to receive the free flow of commercial information.¹⁶ The Court held that “speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another” and, “speech likewise is protected even though it is carried in a form that is ‘sold’ for profit . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money.”¹⁷

Finally, in 1977, the U.S. Supreme Court directly upheld the legitimacy of lawyer advertising in *Bates v. State Bar of Arizona*.¹⁸ In this case, two Arizona lawyers, John R. Bates and Van O’Steen, opened a law office with the aim of providing “legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid.”¹⁹ After two years of conducting their practice with this goal in mind, the lawyers came to the stark realization that their concept was unattainable unless they did something to attract clients.²⁰ Accordingly, they placed an advertisement in their local daily newspaper, announcing that they were offering “legal services at very reasonable fees” and listing their fees for certain routine legal services.²¹ The State Bar of Arizona found that the advertisement violated the rule in Arizona’s Code of Professional Responsibility banning lawyer advertising and, consequently, the Arizona Supreme Court censured the lawyers for their conduct.²²

On appeal to the U.S. Supreme Court, Justice Blackmun held that lawyer advertising, as a form of commercial speech, could not be subjected to blanket suppression and that the specific advertisement at issue was protected under the First Amendment.²³ The Court carefully considered and dismissed each of the State Bar of Arizona’s claims—namely, that (i) advertising will have an adverse effect on the legal profession; (ii) advertising of legal services will be misleading; (iii) advertising will have the undesirable effect of stirring up litigation; (iv) advertising will increase the overhead costs of the profession which will in turn be passed along

¹⁵ *Id.* at 788.

¹⁶ In this case, there was a challenge against a state statute that prohibited pharmacists from advertising prescription drug prices. Though *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* did not deal directly with advertising in the professional practice of law, it looked at the state of advertising in the professional practice of pharmacy, where the concern was similarly focused on the preservation of high professional standards in a professional services industry. *Va Pharmacy Bd. v. Va Consumer Council*, 425 U.S. 748, 765 (1976).

¹⁷ *Id.* at 761 (internal citations omitted). Accordingly, in holding that commercial speech is protected and could not be absolutely prohibited, the Court overturned *Valentine v. Christensen*, 316 U.S. 52, 55 (1942), which was the then-existing precedent holding that commercial speech was *not* constitutionally protected.

¹⁸ *Bates*, 433 U.S. at 384.

¹⁹ *Id.* at 353-54.

²⁰ *Id.* at 354.

²¹ *Id.*

²² *Id.* at 356-58.

²³ *Id.* at 383. It is interesting to note that Justice Blackmun, the author of *Bates*, later said, “I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to ‘dampen’ demand for or use of the product.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 574 (1980) (Blackmun, J., concurring, joined by Brennan, J.) (citing Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. LAW FORUM 1080, 1080–83 (1976)).

to consumers in the form of increased fees; (v) advertising will lead to poor quality of service; and (vi) the problems of enforcement justify wholesale restrictions.²⁴ The Court rejected the “highly paternalistic” approach that the state must protect citizens from advertising because it potentially could manipulate them, and concluded that barring lawyer advertising only “serves to inhibit the free flow of commercial information and to keep the public in ignorance.”²⁵ The Court explained that even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that *some* accurate information is better than *no* information at all.²⁶ Put differently, the Court stated that “the preferred remedy is more disclosure, rather than less.”²⁷ Thus, out of this decision came the birth of a revolutionary concept that lawyers may have a general constitutional right to advertise.

C. Regulation Since *Bates v. Arizona*

Although the *Bates* court invalidated an absolute prohibition on lawyer advertising, it nonetheless left the door open for states to regulate advertising. For example, states retained the authority to prohibit false, deceptive, or misleading advertising, and to place reasonable restrictions on time, place, and manner of advertising.²⁸ In declining to consider the full range of potential problems for lawyers when advertising, the Court defaulted to the state bars to apply *Bates* and revise existing regulations accordingly.²⁹ This undefined scope of regulation bolstered the longstanding reluctance to permit lawyer advertising. Most state bars narrowly construed *Bates* and thereby preserved as much of the traditional view of advertising as unprofessional as could withstand constitutional challenge.³⁰

Two years after the decision, the state bars’ reaction to *Bates* was “hesitant and inconsistent,” as fifteen states had not drafted any new lawyer advertising standards.³¹ By 1983, however, the ABA adopted its Model Rules of Professional Conduct (“Model Rules” or “RPCs”).³² In the Model Rules, the ABA expressly permitted advertising, as Rule 7.2(a) stated, “subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.”³³ Many states then followed suit, enacting various advertising regulations and attempting to straddle the fine line between advertising as a constitutionally protected speech and misleading advertising.³⁴

²⁴ *Id.* at 368-79.

²⁵ *Id.* at 365.

²⁶ *Id.* at 374-75.

²⁷ *Id.* at 375.

²⁸ *Id.* at 383-84.

²⁹ “Underlying all of the post-*Bates* amendments is the theory that *Bates* declared a general right to advertise, leaving to the states a regulatory power to prescribe the form, content, and forum of lawyer advertising.” Boden, *supra* note 10, at 555.

³⁰ *Id.*; see also *In re R.M.J.*, 455 U.S. 191, 200 (1982) (“the decision in *Bates* nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated.”).

³¹ Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1086.

³² *Id.* at 1087.

³³ MODEL RULES OF PROF’L CONDUCT R. 7.2 (AM. BAR ASS’N 1983).

³⁴ Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising*, 17 J. TECH. L. & POL’Y 63, 64 (2012); R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO J. (footnote continued)

D. The *Central Hudson* Standard and Application to Lawyer Advertising Rules

Though the *Bates* court embraced the importance of the “commercial speech” doctrine— “[commercial] speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. . . . [S]uch speech serves individual and societal interests in assuring informed and reliable decisionmaking”³⁵—it nonetheless failed to establish a clear standard for assessing the constitutionality of a regulation on commercial speech. In 1980, however, the U.S. Supreme Court articulated a clearer standard in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.³⁶ The question was whether a regulation of the Public Service Commission of the State of New York violated the First and Fourteenth Amendments because the regulation completely banned promotional advertising by an electrical utility.³⁷ The Court’s test included a four-part analysis: if the first two inquiries yield positive answers, the Court then turns to the third and fourth inquiries:

1. whether the expression is protected by the First Amendment because it concerns lawful activity and is not misleading;
2. whether the asserted governmental interest is substantial;
3. whether the regulation directly advances the governmental interests; and
4. whether it is not more extensive than is necessary to serve that interest.³⁸

Following the *Central Hudson* decision, several First Amendment cases dealing with individual lawyer advertising and state regulation were decided based upon the *Central Hudson* test. In each of these cases, the regulations in question failed to satisfy *Central Hudson*’s four-part analysis and thus violated the First Amendment. These cases are considered next.

1. Examples of State Regulations That Do Not Satisfy *Central Hudson*

a. *In re R.M.J.*

In 1982, the U.S. Supreme Court decided *In re R.M.J.*, which involved a lawyer’s appeal of a disciplinary reprimand based upon “four separate kinds of violation of Rule 4 [of the Missouri Supreme Court]:

ARTS & ENT. L. J. 953 (2007); Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK L. REV. 437 (2006). See also *In re R.M.J.*, 455 U.S. at 193 (“the Committee . . . revised that court’s Rule 4 regulating lawyer advertising. . . . [and] sought to ‘strike a midpoint between prohibition and unlimited advertising,’ and the revised regulation of advertising, adopted with slight modification by the State Supreme Court, represents a compromise. Lawyer advertising is permitted, but it is restricted to certain categories of information, and in some instances, to certain specified language.”).

³⁵ *Bates*, 433 U.S. at 363-64.

³⁶ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

³⁷ *Id.* at 558.

³⁸ *Id.* at 566. Through application of this four-step analysis for commercial speech to the Commission’s arguments supporting its ban on promotional advertising, the Court found that the first three inquiries yielded affirmative answers; turning to the fourth inquiry, however, the Court concluded that the Commission’s *complete* suppression of speech was far more extensive than necessary to further the State’s interest in energy conservation. As such, the test in its totality could not be satisfied, and the Court held that the Commission’s order violated the First and Fourteenth Amendments.

listing the areas of his practice in language or in terms other than that provided by the Rule, failing to include a disclaimer, listing the courts and States in which he had been admitted to practice, and mailing announcement cards to persons other than ‘lawyers, clients, former clients, personal friends, and relatives.’”³⁹ Specifically, the lawyer had listed in his advertisements areas of law not explicitly approved by the Missouri Bar’s Advisory Committee, including the words “personal injury” and “real estate” instead of the Bar-approved words, “tort law” and “property law,” respectively.⁴⁰ He also listed in his advertisements other areas of law, such as “contract” and “zoning & land use” that were not found on the Advisory Committee’s list at all.⁴¹ His advertisements in local newspapers and the Yellow Pages also stated that he was licensed in Missouri and Illinois, and contained in large capital letters a statement that he was “Admitted to Practice Before THE UNITED STATES SUPREME COURT.”⁴²

On the issues of listing the areas of law and licensed jurisdictions, the U.S. Supreme Court found that the lawyer’s advertisements were not misleading.⁴³ The Court also found that the answer to the second inquiry of the *Central Hudson* test—whether the asserted governmental interest was substantial in this case—was no.⁴⁴

The Court determined that the state interest was unclear as to enforcing an absolute prohibition.⁴⁵ This led the Court to posit that the fourth factor of the *Central Hudson* test could not be met, as there was room for a “less restrictive path” instead of absolute prohibition.⁴⁶ Thus, applying *Central Hudson*, the Court found unconstitutional the Missouri rules that provided an absolute prohibition on the advertising of descriptive practice areas, licensed jurisdictions, and the mailing of announcements to persons other than lawyers, clients, former clients, friends, and relatives.

Notably, in his appeal, the lawyer did not challenge the constitutionality of the rule requiring disclaimers.⁴⁷ As such, the Court permitted that requirement to stand and explained that “warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”⁴⁸ The Court would consider the issue of when disclaimers are too burdensome in later cases.

b. *Zauderer v. Office of Disciplinary Council*

Zauderer v. Office of Disciplinary Council involved two different local newspaper advertisements: the first advertisement stated that the attorney would represent defendants in drunk driving cases and that his clients’ “full legal fee would be refunded if they were convicted of DRUNK DRIVING”; and the second

³⁹ *In re R.M.J.*, 455 U.S. at 204.

⁴⁰ *Id.* at 197.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 205.

⁴⁴ *Id.*

⁴⁵ “Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards.” *Id.* at 206.

⁴⁶ *Id.*

⁴⁷ *Id.* at 204.

⁴⁸ *Id.* at 201.

advertisement offered representation to women injured by the Dalkon Shield Intrauterine Device.⁴⁹ The Dalkon Shield was depicted in the form of a line drawing and the advertisement included legal advice, general information, and the statement that “[i]f there is no recovery, no legal fees are owed by our clients.”⁵⁰ The Supreme Court of Ohio found First Amendment protection to be inapplicable and reprimanded the attorney for violating Ohio’s Disciplinary Rules.⁵¹

On appeal, the U.S. Supreme Court, citing *Central Hudson*, found that because the statements regarding the Dalkon Shield were not false or deceptive, it was the State’s burden to establish that “prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest.”⁵² The Court also determined that the State’s interests—of protecting the public from advertisements that both invade the privacy of the reader and may be subject to claims of overreaching and undue influence, as well as preventing lawyers from stirring up litigation—were not sufficient justifications for the discipline imposed on the lawyer.⁵³ The Court explained that the State’s interest in propounding a prophylactic rule “to ensure that attorneys . . . do not use false or misleading advertising to stir up meritless litigation against innocent defendants”⁵⁴ was “in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State’s purposes.”⁵⁵ Thus, the Court concluded that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding the legal rights of potential clients.⁵⁶

Regarding the illustration of the Dalkon Shield, the Court noted that the use of illustrations or pictures in advertisements serves an important communicative function, and “[a]ccordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test.”⁵⁷ The Court found that the illustration at issue was an accurate representation of the Dalkon Shield, bearing no features that were likely to deceive, mislead, or confuse the reader.⁵⁸ The burden once again shifted to the State to both present a substantial governmental interest justifying the restriction as applied and to demonstrate that the restriction vindicated the state interest through the least restrictive available means.⁵⁹ The State was unsuccessful in carrying its burden, as the State’s interest—to ensure that attorneys advertise “in a dignified manner,” maintain

⁴⁹ *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 629-30 (1985).

⁵⁰ *Id.* at 630-31. In full, this advertisement related the following information: "The Dalkon Shield Interuterine [*sic*] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience, do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."

⁵¹ *Id.* at 636.

⁵² *Id.* at 641.

⁵³ *Id.* at 642-43.

⁵⁴ *Id.* at 643.

⁵⁵ *Id.* at 644.

⁵⁶ *Id.* at 647.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

their dignity in their communications with the public, and behave with decorum in the courtroom—was not convincingly “substantial enough to justify the abridgment of [the attorneys’] First Amendment rights.”⁶⁰ Moreover, the Court opined that the State’s restrictions amounted to an impermissibly broad prophylactic rule in the form of a blanket ban on the use of illustrations, especially given that the State could police the use of illustrations in advertisements on a narrower, more tailored, case-by-case basis.⁶¹

Nonetheless, the Court did uphold Ohio’s disclosure requirements relating to the terms of contingent fees. The Court found that the State’s interest in preventing deception of consumers was substantial because the attorney’s advertisement, which stated, “[i]f there is no recovery, no legal fees are owed by our clients,” would mislead and deceive the public and potential clients who do not necessarily understand the distinction between the technical meanings of “legal fees” and “costs.”⁶² The Court concluded that the disclosure requirements were not more extensive than necessary to serve the state interest where Ohio has “not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.”⁶³ Accordingly, the attorney’s “constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal . . . [as] disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech.”⁶⁴

c. *Peel v. Attorney Registration & Disciplinary Commission*

Five years later, in *Peel v. Attorney Registration & Disciplinary Commission*, the U.S. Supreme Court considered whether an Illinois attorney’s letterhead, stating that he is a National Board of Trial Advocacy (“NBTA”) certified civil trial specialist, was First Amendment protected speech.⁶⁵ The Illinois regulations stated that “no lawyer may hold himself out as ‘certified’ or a ‘specialist’” and that “communication shall contain information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive.”⁶⁶ Accordingly, the Attorney Registration and Disciplinary Commission of Illinois (“Commission”) and the Illinois Supreme Court deemed the attorney’s letterhead—referring to his NBTA certification and his licensure in three jurisdictions—*inherently misleading* and thus unprotected by the First Amendment.⁶⁷

However, the U.S. Supreme Court held that the contents of the attorney’s letterhead were neither misleading nor deceptive because the certification and licensure were both true and verifiable facts.⁶⁸ Rejecting the argument that the attorney’s listing of certification constituted an implicit assertion as to the quality of his legal services, the Court reasoned that there is no evidence that a claim of NBTA certification suggests any

⁶⁰ *Id.* at 647-48.

⁶¹ *Id.* at 649.

⁶² *Id.* at 652.

⁶³ *Id.* at 650.

⁶⁴ *Id.* at 651 (Emphasis Added).

⁶⁵ *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 93-94 (1990).

⁶⁶ *Id.* at 97.

⁶⁷ *Id.* at 98-99.

⁶⁸ *Id.* at 101.

greater degree of professional qualification than reasonably may be inferred from an evaluation of its rigorous requirements.⁶⁹

Moreover, the Court recognized that information about certification and specialties “facilitates the consumer’s access to legal services and thus better serves the administration of justice.”⁷⁰ Thus, the attorney’s statements on his letterhead were protected under the First Amendment.⁷¹ The Court also concluded that the State’s concern about the *possibility* of deception was “not sufficient to rebut the constitutional presumption favoring disclosure over concealment . . . [which, in this case] both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys.”⁷²

d. Recent Federal Court Cases

Since *Peel*, federal courts have continued to apply the *Central Hudson* test to balance a lawyer’s First Amendment rights with the state’s interest in regulating lawyer advertising and preventing deception of the public. Five notable cases have been brought in the last decade: *Alexander v. Cahill*,⁷³ *Public Citizen v. Louisiana Attorney Disciplinary Board*,⁷⁴ *Harrell v. The Florida Bar*,⁷⁵ *Searcy et al. v. The Florida Bar*,⁷⁶ and *Rubenstein v. The Florida Bar*.⁷⁷

In *Alexander v. Cahill*, the advertisements at issue were those of a personal injury firm that contained dramatizations, comical scenes, jingles, special effects like wisps of smoke and blue electrical currents

⁶⁹ *Id.* at 102.

⁷⁰ *Id.* at 110.

⁷¹ The Court limited this holding by stating: “A lawyer’s truthful statement that ‘XYZ Board’ has ‘certified’ him as a ‘specialist in admiralty law’ would not necessarily be entitled to First Amendment protection if the certification was a sham.” *Id.* at 109. In 1990, the Florida Supreme Court addressed unsolicited letters in *The Florida Bar v. Herrick*, where an attorney mailed an unsolicited letter to a couple upon learning that the couple had an interest in a vessel that had been seized by customs and, in the letter, stated: “Our law firm *specializes in* Customs laws relating to vessel seizures. If you have any questions, please call.” 571 So.2d 1303, 1304 (1990) (emphasis added). In *Herrick*, the attorney was not certified or designated in any area of law, let alone Customs Law as the advertisement stated because it was not even an area recognized under the Florida Certification Plan or the Florida Designation Plan. The Supreme Court of Florida ruled that permitting Herrick to state that he is a specialist in Customs law “runs the risk of misleading the public into believing that he has been qualified under the Bar’s designation or certification program. The state’s interest here in preventing the public from being misled is strong and the regulation is narrowly drawn. This is not a case where the attorney truthfully advertises that he has been certified as having met the standards of a recognized organization which tests the proficiency of lawyers in certain areas of the law.” *Id.* at 1307 (citing *Peel*).

⁷² *Peel*, 496 U.S. at 111. The Court also stated that even if it assumed for the sake of argument that the attorney’s letterhead was *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.” *Id.* at 109. The Court pointed out that the State’s complete ban on statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA, were far too extensive, and therefore, did not meet the *Central Hudson* test, where the State could have imposed lesser restrictions such as “screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty.” *Id.* at 110.

⁷³ 598 F.3d 79 (2d Cir. 2010) (New York Bar Rules).

⁷⁴ 632 F.3d 212 (5th Cir. 2011) (Louisiana Bar Rules).

⁷⁵ 915 F. Supp. 2d 1285, 1311 (M.D. Fla. 2011) (Florida Bar Rules).

⁷⁶ Complaint, No. 4:13CV00664, 2013 WL 6493683 (N.D. Fla. Dec. 11, 2013). (Florida Bar Rules). *See also Florida Law Firm Challenges Bar’s New Advertising Restrictions*, 23 NO. 8 WL J. PROF’L LIAB. 4 (Jan. 23, 2014).

⁷⁷ No. 14-CIV-20786, 2014 WL 6979574 (S.D. Fla. Dec. 9, 2014) (Florida Bar Rules).

surrounding the firm’s name, and slogans such as “heavy hitters” and “think big,” among other gimmicks.⁷⁸ After New York’s Appellate Division adopted “content-based” lawyer advertising rules to regulate *potentially* misleading advertisements consisting of “irrelevant, unverifiable, and non-informational” statements and portrayals, the attorney filed a complaint, contending that the new rules infringed upon his First Amendment rights because the rules prohibited “truthful, nonmisleading communications that the state ha[d] no legitimate interest in regulating.”⁷⁹

The Second Circuit agreed after scrutinizing the regulation’s categorical bans on (i) the endorsement of or testimonial about a lawyer or law firm from a client regarding a matter that is still pending, (ii) the portrayal of a judge, (iii) the irrelevant “attention-getting techniques unrelated to attorney competence,”⁸⁰ such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and (iv) the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter. The court found that this type of information is not inherently misleading or even likely to be misleading.⁸¹ Therefore, this kind of advertising did not warrant the State’s general sweeping prohibition contained in the new rules and so the regulations failed the *Central Hudson* test and were adjudged unconstitutional.⁸²

Public Citizen v. Louisiana Attorney Disciplinary Board presented the Fifth Circuit with issues similar to those decided upon in *Alexander v. Cahill*. Here, six subparts of the Louisiana Supreme Court’s new attorney advertising Rule 7.2(c) faced constitutional attack: (i) the prohibition of communications that contain references or testimonials to past successes or results obtained; (ii) the prohibition of communications that promise results; (iii) the prohibition of communications that include a portrayal of a client by a non-client, or the depiction of any events or scenes or pictures that are not actual or authentic, without disclaimers; (iv) the prohibition of communications that include the portrayal of a judge or a jury; (v) the prohibition of communications that employ a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter; and (vi) the requirement of disclosures and disclaimers that are clear and conspicuous and of a certain format, size, and visual/auditory display.⁸³ The Fifth Circuit found that these subparts of the rule, with the exception of

⁷⁸ *Alexander*, 598 F.3d at 84.

⁷⁹ *Id.* at 84-86.

⁸⁰ *Id.* at 93. This categorical ban was similar in substance to several of the Florida Bar’s advertising rules at issue in *Harrell v. The Florida Bar*: Rule 4-7.1, which was a “general prefatory rule, the comment to which limits permissible advertising content to ‘only useful, factual information presented in a nonsensational manner,’” Rule 4-7.2(c)(3), which prohibited the use of “‘visual and verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events’ that are ‘manipulative, or likely to confuse the viewer,’” and Rule 4-7.5(b)(1)(A), which similarly prohibited “any television or radio advertisement that was “‘deceptive, misleading, manipulative, or that is likely to confuse the viewer.’” *Harrell v. Fla. Bar*, 608 F.3d 1241, 1250 (11th Cir. 2010). There, on remand, the district court struck down these rules on the ground that they were impermissibly vague, indeterminate, and exerted a chilling effect on a lawyer’s proposed commercial speech that had a right to constitutional protection. *Harrell*, 915 F. Supp. 2d 1285, 1311 (M.D. Fla. 2011). See also Jacobowitz & Hethcoat, *supra*, note 34, at 72-73.

⁸¹ *Alexander*, 598 F.3d at 96.

⁸² *Id.*

⁸³ This subpart of the rule provided:

“Any words or statements required by these Rules to appear in an advertisement or unsolicited written communication must be clearly legible if written or intelligible if spoken aloud. All disclosures and disclaimers required by these Rules shall be clear and conspicuous. Written disclosures and disclaimers shall use a print size at least as large as the largest print size used in the advertisement or unsolicited written communication, and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and read the disclosure or disclaimer. Spoken disclosures and disclaimers shall be plainly audible and spoken at the same or slower rate of speed as the other spoken

(footnote continued)

the prohibition of communications that promise results,⁸⁴ were capable of being communicated in a non-deceptive and non-misleading way and were therefore not *inherently* likely to deceive.⁸⁵

Applying the *Central Hudson* analysis, the court found that the Louisiana Attorney Disciplinary Board had at least two substantial government interests: protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession.⁸⁶ The Fifth Circuit then aligned with the Second Circuit and found that the categorical prohibitions of communications that contain references or testimonials to past successes or results obtained, or that include the portrayal of a judge or a jury, were not directly advancing or reasonably related to the State's interests, and were more extensive than was reasonably necessary.⁸⁷

On the other hand, the Fifth Circuit departed from the Second Circuit precedent by finding that the prohibition of communications that employ a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter, was materially advancing the State's interests and narrowly tailored to meet those ends.⁸⁸ It distinguished *Alexander v. Cahill* because, in that case, this same rule was struck down due to "a dearth of evidence in the present record" to support a "prohibition on names that imply an ability to get results."⁸⁹ Here, the court held, the State "provided the necessary evidence . . . that the Second Circuit found to be absent from *Alexander*."⁹⁰

The court applied the lower standard of rational basis review upon the requirement for disclaimers when communications include a portrayal of a client by a non-client, or depict any events, scenes, or pictures that are not actual or authentic.⁹¹ It concluded that the requirement was reasonably related to the substantial governmental interests and thus, constitutional.⁹² Upon considering the requirement for disclosures of a certain format and style, however, the court again applied the lower standard of rational basis review, but held that this requirement was overly burdensome and therefore violated the First Amendment.⁹³

content of the advertisement. All disclosures and disclaimers used in advertisements that are televised or displayed electronically shall be both spoken aloud and written legibly."

Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 228 (5th Cir. 2011).

⁸⁴ The court explained that "[a] promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results. Because these communications are necessarily misleading, LADB may freely regulate them and [this] Rule . . . is not an unconstitutional restriction on commercial speech." *Id.* at 218-19. *See also Harrell*, 915 F. Supp. 2d at 1299 (prohibiting statements that "promise results" is facially valid because it is not impermissibly vague).

⁸⁵ *Pub. Citizen, Inc.*, 632 F.3d at 19.

⁸⁶ *Id.* at 220.

⁸⁷ *Id.* at 224.

⁸⁸ *Id.* 225-26.

⁸⁹ *Id.* at 226.

⁹⁰ *Id.*

⁹¹ *Id.* at 227.

⁹² *Id.* at 228.

⁹³ *Id.* at 229.

In *Harrell v. The Florida Bar*, the United States District Court for the Middle District of Florida examined “as-applied” First Amendment challenges to an attorney’s marketing campaign featuring the slogan, “Don’t settle for less than you deserve.”⁹⁴ The Bar initially advised him to change the slogan to, “don’t settle for anything less,” explaining that his slogan would create unjustified expectations.⁹⁵ The Bar, however, later revoked acceptance of any version of the new slogan, finding that it improperly characterized his services in violation Rule 4-7.2(c)(2), which bans all “statements describing or characterizing the quality of the lawyer’s services.”⁹⁶ The attorney then filed suit challenging this rule, as well as other Florida advertising rules that allegedly prohibited various marketing strategies and chilled commercial speech in violation of his First and Fourteenth Amendment rights.⁹⁷ Specifically under review, in addition to Rule 4-7.2(c)(2), was Rule 4-7.5(b)(1)(C), which contained the Florida Bar’s categorical ban on all background sounds.⁹⁸ The prohibition included all background sounds in television and radio advertisements except instrumental music: such as the background noises caused by the attorney-plaintiff’s dogs, gym equipment, and other activities in his law firm that were part of his proposed advertisements.⁹⁹

Applying the *Central Hudson* test, the district court concluded that the two advertising rules impermissibly restricted the attorney’s First Amendment rights.¹⁰⁰ First, the court found that both the slogan and intended use of background sounds were neither actually nor inherently misleading.¹⁰¹ Next, the court concluded that the State had two substantial interests: first, an interest in “ensuring that the public has access to information that is not misleading to assist the public in the comparison and selection of attorneys,” and second, an interest in “preventing the erosion of the public’s confidence and trust in the judicial system and curbing activities that negatively affect the administration of justice.”¹⁰²

Finally, upon applying the third prong of *Central Hudson*, the court found that neither rule directly or materially advanced the Bar’s asserted interests.¹⁰³ In particular, the court found that there was insufficient concrete evidence to justify the Bar’s categorical ban on background sounds, stating that “[i]n the absence of any evidence that prohibiting the type of innocuous non-instrumental background sounds as those proposed by Harrell here will protect the public from being misled or prevent the denigration of the legal profession, the Bar has failed to satisfy the third prong of the *Central Hudson* test.”¹⁰⁴ Thus, the regulations as applied to Harrell were deemed unconstitutional.

Florida’s amended regulations are currently facing another First Amendment challenge under the *Central Hudson* test. In *Searcy et al. v. The Florida Bar*, a personal injury law firm filed a lawsuit against the Florida Bar, attacking regulations that prohibit statements of quality and past results unless such statements are

⁹⁴ Harrell v. Fla. Bar, 915 F. Supp. 2d 1285, 1289 (M.D. Fla. 2011).

⁹⁵ Harrell v. Fla. Bar, 608 F.3d 1241, 1249 (11th Cir. 2010)..

⁹⁶ *Id.*

⁹⁷ *Id.* at 1250.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1251.

¹⁰⁰ Harrell, 915 F. Supp. 2d at 1309-10.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1302.

¹⁰³ *Id.* 1308-10.

¹⁰⁴ *Id.* at 1310.

“objectively verifiable.”¹⁰⁵ Searcy Denney Scarola Barnhart & Shipley PA (“Searcy Denney”) had advertisements on its website, blog, and social media accounts containing statements of opinion, such as “the days when we could trust big corporations . . . are over,” and truthful but subjective descriptions of the firm’s services and record, such as, “we have 32 years of experience resulting in justice for clients . . .”¹⁰⁶ The Bar held that these statements and descriptions violated the “objectively verifiable” requirement in Florida’s lawyer advertising rules.¹⁰⁷ Searcy Denney then challenged the rules in federal court, claiming that the “objectively verifiable” requirement violates the First Amendment because the requirement prohibits commercial speech for which there is no evidence that it is misleading or harmful to consumers, and Florida has no legitimate interest in prohibiting the speech.¹⁰⁸ The firm further asserted that the rules do not directly advance, and are far more extensive than necessary to serve, any interest Florida might claim.¹⁰⁹

Finally, *Rubenstein v. The Florida Bar* involved yet another personal injury law firm that similarly confronted the “objectively verifiable” requirement in Florida’s lawyer advertising rules;¹¹⁰ but Rubenstein distinguished itself by focusing on the requirement as applied to past results, and the Florida Bar’s Guidelines interpreting the requirement. At the time, the lawyer advertising rules permitted attorney advertisement of past results where “objectively verifiable,” but the Bar had interpreted and enforced the rules, as stated in its Guidelines, to prohibit all reference to past results on indoor and outdoor display, television and radio media, because these “specific media . . . present too high a risk of being misleading.”¹¹¹ On the plaintiff’s motion for summary judgment, the court found that the plaintiff was challenging “only that narrow and specific blanket prohibition” as violating its First Amendment rights.¹¹² Applying *Central Hudson*, the court first found that the State had three substantial governmental interests in promulgating the Rules and Guidelines: (i) to protect the public from misleading or deceptive attorney advertising, (ii) to promote attorney advertising that is positively informative to potential clients, and (iii) to prevent attorney advertising that contributes to disrespect for the legal system and thereby degrades the administration of justice.¹¹³ The court then stated, however, that the Bar had presented “no evidence to demonstrate that the restrictions it has imposed on the use of past results in attorney advertisement support the interests its Rules were designed to promote.”¹¹⁴ The court concluded its *Central Hudson* analysis by expressing that the Bar additionally failed to demonstrate how the restrictions on attorney speech, which amounted to a blanket restriction on the use of past results in attorney advertising in certain mediums, were no broader than necessary to serve the interests they purported to advance.¹¹⁵ The court emphasized that the Bar never demonstrated that “lesser restrictions—e.g., including a disclaimer, or required

¹⁰⁵ Complaint, *Searcy v. Fla. Bar*, No. 4:13CV00664, 2013 WL 6493683, at *12 (N.D. Fla. Dec. 11, 2013), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/D0EE8F4E3167003D85257C58005BDD01/\\$FILE/131211%20Complaint%20-%20Orig.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/D0EE8F4E3167003D85257C58005BDD01/$FILE/131211%20Complaint%20-%20Orig.pdf?OpenElement).

¹⁰⁶ *Id.* at *17.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *20.

¹⁰⁹ *Id.*

¹¹⁰ No. 14-CIV-20786, 2014 WL 6979574, at *2 (S.D. Fla. Dec. 14, 2014).

¹¹¹ *Id.* at *20.

¹¹² *Id.* at *23.

¹¹³ *Id.* at *23-24.

¹¹⁴ *Id.* at *25.

¹¹⁵ *Id.* at *29.

language—would not have been sufficient.”¹¹⁶ Thus, Rubenstein succeeded on the merits of its First Amendment challenge.

The clear direction in which the United States Supreme Court has taken the regulation of commercial speech emphasizes that government must prove that the regulation it is defending does in fact advance an important regulatory interest, refusing to accept mere “common sense” or speculation as a sufficient basis for restrictions on advertising.¹¹⁷ In other words, the government must present objective evidence to support a ban or restriction on truthful commercial speech and cannot simply ban or restrict speech by fiat grounded in subjective intuition that the advertising is “potentially misleading.” For example, in *Florida Bar v. Went For It, Inc.*,¹¹⁸ the Court went out of its way to compare the empirical evidence presented to support a thirty-day ban on targeted direct mail solicitation of accident victims to the lack of similar data in *Edenfield v. Fane*,¹¹⁹ in which the Court invalidated a Florida ban on in person solicitation by certified public accountants.

In sum, there is no shortage of cases in which lawyer advertising regulations has failed the *Central Hudson* test, leading the Committee to conclude that attorney advertising regulations are, in many cases, unconstitutional and unsustainable.

IV. The Diverse Forms of Electronic Communication & The Explosion of Social Media

According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet:

- 52% of online adults now use two or more social media sites;
- 71% are on Facebook;
- 70% engage in daily use;
- 56% of all online adults 65 and older use Facebook;
- 23% use Twitter;
- 26% use Instagram;
- 49% engage in daily use;

¹¹⁶ *Id.* at *30.

¹¹⁷ See, e.g., *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 503 (1996) (“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.”); *Ibanez v. Fla. Dep’t of Bus. and Prof’l Regulation*, 512 U.S. 136, 147 (1994) (striking down requirement of a disclaimer because the state failed “to back up its alleged concern that the [speech] would mislead rather than inform.”); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (rejecting state’s asserted harm because the state had presented no studies nor even anecdotal evidence to support its position); *Peel v Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 108 (1990) (rejecting a claim that lawyer’s truthful claim of specialization certification was potentially misleading for lack of empirical evidence); and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985) (striking down restrictions on attorney advertising where “[t]he State’s arguments amount to little more than unsupported assertions.”).

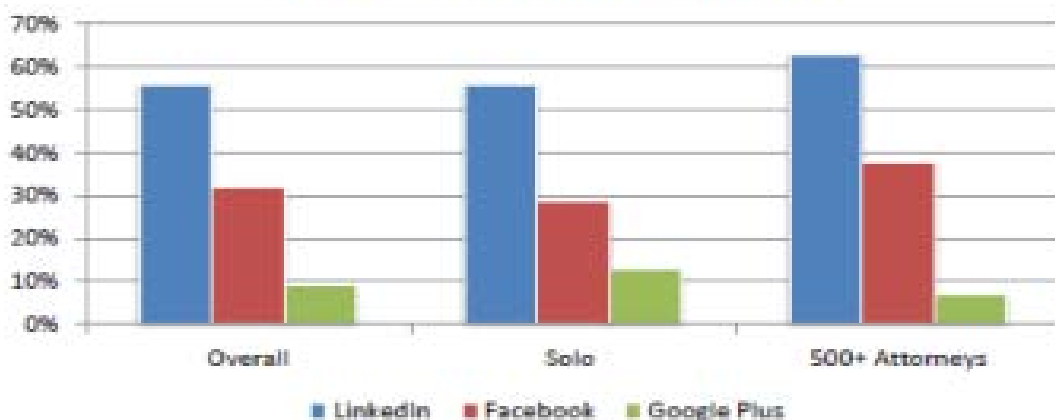
¹¹⁸ 515 U.S. 618 (1994).

¹¹⁹ 507 U.S. 761 (1993).

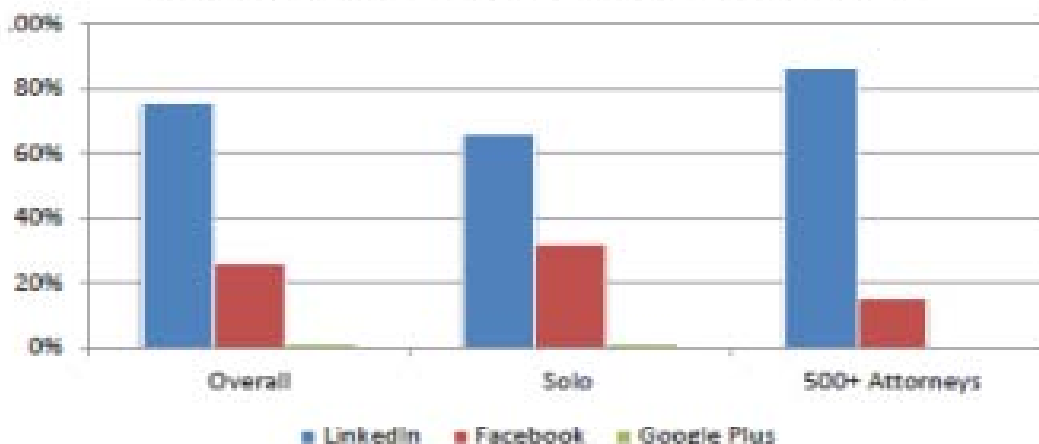
- 53% of online young adults (18-29) use Instagram; and
- 28% use LinkedIn.

Given these statistics that reflect the general population’s use of social media, it is not surprising that in recent years there has been a vast increase in diverse forms of communication regarding lawyers and lawyer services. These include websites, attorney blogs, microblogs (such as Twitter), YouTube® infomercials, webinars, postings on social media such as Facebook and LinkedIn, online review sites, text messaging, the use of smart phones, "apps", links, video technology and tag lines. The graphs below illustrate the increasing use of LinkedIn and Facebook by lawyers and law firms.¹²⁰

Firm Use of Social Networks



Individual Professional Use of Social Networks



¹²⁰ Images supplied by Allison Shields, *Blogging and Social Media*, ABA TECHREPORT 2014, available at <http://www.americanbar.org/publications/techreport/2014/bloggng-and-social-media.html>.

Additionally, in response to innovation and increased competition, lawyers and law firms are engaging in much more sophisticated forms of marketing and advertising, including "advertorials," cooperative lawyer ads, retargeting, search engine optimization, online referral and lead-sharing sites, and "pay-per-click" or "pay-per-deal" arrangements.¹²¹ For example, Google's AdWords (one of Google's advertising services) gives lawyers an opportunity to capitalize on Google's vast market. The Google AdWords process is a highly efficient marketing device where lawyers may choose keywords in creating text advertisements. When an Internet user types these keywords into Google's search engine, the lawyer's advertisement appears in a list of "sponsored links" on the results page.¹²²

Lawyers are also increasingly involved, either voluntarily or involuntarily, in online lawyer rating services, such as Avvo.com, Yelp, "Super Lawyers," and "Best Lawyers." These online companies post ratings and reviews of lawyers and offer consumers help in finding lawyers. Avvo.com, for example, posts ratings and reviews for lawyers in every state and offers a free legal Q&A service for finding the right lawyer. Justia.com offers free case law, legal resources, and a "Find a Lawyer" feature. Premium services provide websites, blogging, and on-line marketing to law firms. LegalMatch.com helps users find prescreened lawyers, and offers attorneys leads that match their legal specialty. Pro-se-litigation.com connects self-represented litigants with lawyers who offer unbundled legal services. Upcounsel.com helps businesses connect with lawyers to an on-line bidding service where users post requests for specific work and attorneys respond with quotes for fixed fees or hourly rates.

There is also a growing number of social networking websites for lawyers, including Avvo, JD Oasis, Legal OnRamp, WireLawyer, and Foxwordy. Social networking sites for lawyers typically include discussion boards, private messaging, profiles, connections, document libraries, and ratings. Even further, large law firms frequently use marketers, public relations personnel, and sales forces to develop leads and pursue business opportunities.

V. Other Deficiencies in Current Regulations Warranting Change

In addition to the foregoing, there are other difficulties with the current approach to regulating lawyer advertising that further demonstrate the need for change.

A. Many Current Rules are Outdated

State rules on lawyer advertising are largely based on print and other forms of traditional advertising such as announcements, business cards, mailers, newsletters, yellow pages, billboards, television and radio ads, newspaper advertisements, and listings in Martindale Hubbell or other print directories. Lawyer advertising

¹²¹ The ABA Commission on Ethics 20/20 studied the issue of the use of the Internet in client development in a paper entitled "Issues Paper Concerning Lawyer's Use of Internet Based Client Development Tools" in September 2010. For more information see http://www.americanbar.org/content/dam/aba/migrated/2011_buildethics_2020/clientdevelopment_issuespaper.authcheckdam. LinkedIn is a social media network that is fast becoming an indispensable tool used by legal professionals and those with whom they communicate. As a social networking website, LinkedIn allows people in professional occupations of all kinds to list their work experience and educational background and share that information, or in other words, "connect" with other professionals, in an effort to obtain employment. LinkedIn currently has approximately 300 million users, with a geographical reach of 200 countries and territories, and it continues to grow. A blog is an Internet-based forum that offers opinions or information, sometimes on a particular issue, and is usually freely accessible by anyone with an operating Internet connection. Many lawyers and law firms have taken to blogging to showcase their knowledge, explore legal issues, and voice their perspectives on specific areas of law.

¹²² Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835, 838 (2007).

regulations have even been applied to law firm give-away items such as coffee mugs and baseball hats. A number of states are attempting to apply existing rules to new methods of electronic advertising.¹²³ For example, Maryland Rule 7.2(b) requires that “[a] copy or recording of an advertisement or such other communication shall be kept for at least three years after its last dissemination along with a record of when and where it was used.” For lawyers that use websites, blogs, and other social media, compliance with the rule is problematic because the content of such media is not static, but constantly changing. Lawyers and law firms, as well as bar regulators, frequently raise questions about whether or how to apply pre-electronic era standards to continuously evolving technologies.¹²⁴

Twitter is a prime example of the struggle to apply old rules to new technology. For example, in Florida, Rule 4-7.12 governs required content of advertisements and stipulates that, among other things, all advertisements for legal employment must include the lawyer’s or law firm’s full name and office location.¹²⁵ Perhaps at first blush this rule does not appear burdensome; however, the rule “makes [a lawyer’s or law firm’s] use of *Twitter* an impossibility because there is a limit of 140 characters.”¹²⁶ Peter Joy, an ethics professor at the Washington University School of Law in St. Louis, caustically remarked, “Pity the lawyer trying to use *Twitter* in . . . Little Harbor on the Hillsboro, Fla.”¹²⁷ Similarly, lawyers could not use *Twitter* to announce a specific case outcome in states that require a disclaimer to accompany the statement.¹²⁸

B. The Spread of Over-Regulation

The trend in recent years has been toward greater regulation in an effort to respond to (or perhaps dampen) lawyer advertising in the electronic age. California, for example, now regulates lawyer advertising more than at any time in the past. In addition to an elaborate rule on advertising and solicitation that includes fifteen “advertising standards” that are presumptive violations of the rule,¹²⁹ California’s State Bar Act restricts the use of certain forms of lawyer advertising, including “computer networks” and provides for injunctive and

¹²³ Some states single out electronic media for special treatment or significantly restrict advertising in electronic media. *See e.g.*, NYSBA, *Social Media Ethics Guidelines* (Mar. 18, 2014), available at https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html [hereinafter *Social Media Ethics Guidelines*].

¹²⁴ A number of states have found that advertising rules apply to an attorney’s activity on the Internet, including law firm websites. *See, e.g.*, Cal. State Bar Formal Op. 2001-155, N.Y. State Bar Formal Op. 709, Ala. State Bar Formal Op. 1996-07, N.C. Ethics Comm. RPC 239, N.D. Bar Ass’n Formal Op. 1999-02, R. REGULATING FLA. BAR 4-7.11.

¹²⁵ R. REGULATING FLA. BAR 4-7.12(a).

¹²⁶ David L. Hudson Jr., *Firm Challenges Florida Bar Over Website Ad Limits*, ABA JOURNAL (Mar. 1, 2014, 9:49 AM), http://www.abajournal.com/magazine/article/firm_challenges_florida_bar_over_website_ad_limits/; *You Cannot Be Serious, Law Firm Tells Florida Bar*, COURTHOUSE NEWS SERVICE (December 13, 2013, 7:25 AM), <http://www.courthousenews.com/2013/12/13/63717.htm>.

¹²⁷ Hudson, *supra* note 126.

¹²⁸ V.A. R. OF PROF’L CONDUCT 7.1(b): “A communication violates this rule if it advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.”

¹²⁹ CAL. R. OF PROF’L CONDUCT 1-400.

declaratory relief, civil penalties, attorney's fees and discipline for violations.¹³⁰ Other California statutes and rules provide additional regulation of lawyer advertising.¹³¹

As in California,¹³² the trend in many states has been toward greater micromanagement of on-line advertising to ensure technical compliance with traditional rules. For instance, Model Rule 7.2(c)'s requirement that all advertising contain an "office address" causes more confusion than clarity when lawyers practice through "virtual" offices that do not have a "bricks and mortar" location. By requiring a physical office address, regulations may inadvertently cause more confusion to consumers who then travel to that physical address only to find a post office box or executive suite where the advertising lawyer receives his/her mail.

Another example of over-regulation is the Florida Bar's adoption of new attorney advertising rules in May 2013 that specifically apply to *all* forms of communication in any print or electronic forum.¹³³ Whereas lawyer websites, blogs, and social media sites such as LinkedIn, Facebook, and Twitter were previously exempt from the rules as "information provided upon request,"¹³⁴ social media advertising is now subject to the advertising regulations.¹³⁵ The Florida Supreme Court issued an opinion approving the revised rules, but the dissenting opinions questioned whether applying the rules to websites was an "improvement" to the regulatory scheme. Justice Pariente rejected what she categorized as a "one-size-fits-all approach," and explained, "I would exempt websites and information upon request from advertising restrictions, and I question whether the entire revamped approach to regulating traditional forms of advertising is a beneficial change."¹³⁶ Similarly, Justice Canady expressed that he found the new rules "unduly restrictive" and explained, "I am particularly concerned about the impact of the application of the advertising rules to lawyer websites."¹³⁷ Nonetheless, the Florida Bar embraced and continues to embrace the application of the rules to a panoply of communication mediums and specifically requires disclaimers and disclosures in all advertisements where testimonials and past results are used.

In addition to increased regulation, some states issued ethics opinions that apply existing rules to social media, attorney blogs, and other Internet communications.¹³⁸ While these opinions may be technically correct, they often pose impractical obligations on lawyers and can deter lawyers from making communications that are not fraudulent or deceptive.

¹³⁰ CAL. BUS. & PROFESSIONS CODE §§6157-6159.2.

¹³¹ See, e.g., CAL. INS. CODE §1871.7 (unlawful solicitation of business), CAL. LABOR CODE §§139.45, 5430-5434 (advertisements with respect to workers' compensation, CAL. PENAL CODE §549 (penalties for certain solicitations and referrals).

¹³² See Cal. State Bar Formal Interim Op. 12-0006 (discussing the circumstances under which "blogging" is regulated under the attorney advertising rules).

¹³³ R. REGULATING FLA. BAR 4-7.11(a). This includes but is not limited to "newspapers, magazines, brochures, flyers, television, radio, direct mail, *electronic mail and Internet, including banners, pop-ups, websites, social networking, and video sharing media.* *Id.* (emphasis added).

¹³⁴ *In re Amendments to the Rules Regulating the Fla. Bar – Subchapter 4-7, Lawyer Adver. Rules*, 108 So. 3d 609, 612-13 (2013) (Pariente, J., dissenting). See also Hudson, *supra* note 126; *You Cannot Be Serious*, *supra* note 126.

¹³⁵ See, e.g., *In re Amendments*, 108 So. 3d at 611, 616 (Appendix).

¹³⁶ *Id.* at 612 (Pariente, J., dissenting).

¹³⁷ *Id.* at 616 (Canady, J., dissenting).

¹³⁸ See, e.g., Cal. State Bar Formal Op. 2012-186 (2012) (characterizing various innocuous Facebook communications as commercial speech subject to California's advertising rules); N.Y. Cnty. Bar Ass'n Formal Op. 748 (2015) (warning lawyers that certain features of LinkedIn present risks of ethics violations); N.C. Formal Op. 2013-10 (2013) (contrasting group lawyer ads and lawyer referral services).

LinkedIn is one example where regulations have caused difficulty and dissension. A central feature of LinkedIn has long been that (i) users can list their abilities and areas of practice in a preset and pre-defined section entitled, “Specialties,” or “Skills and Expertise,” and, (ii) users probably *should* do so if they want to stay current with the social networking platform, enhance their professional profiles, and get discovered for more opportunities. According to some ethics opinions, however, these headings constitute potentially misleading advertising in violation of the rules. In Florida, for example, Rule 4-7.14 provides “[a] lawyer may not engage in potentially misleading advertising.”¹³⁹ This means that a lawyer may not state that he or she is “board certified, a specialist, an expert, or other variations of those terms” because it could be potentially misleading to prospective clients.¹⁴⁰ Rule 4-7.14 has thus made attorney participation on LinkedIn seem unduly difficult.

On September 11, 2013, however, the Florida Bar issued an advisory opinion stating that a lawyer may not list his or her practice area under the “Skills & Expertise” heading on LinkedIn unless he or she is board certified in that practice area.¹⁴¹ The New York State Bar Association (“NYSBA”) used similar reasoning in advising that a lawyer or law firm may not use the LinkedIn heading, “Specialties,” to describe its areas of practice because such activity would inappropriately allow that lawyer or law firm to claim recognition as a “specialist” without certification.¹⁴² Moreover, the NYSBA recently released Social Media Ethics Guidelines, and Guideline No. 1.B discusses the “prohibited use of ‘Specialists’ on social media.”¹⁴³ The Comment focused on LinkedIn in particular, stating, “if the social media network, such as LinkedIn, does not permit otherwise ethically prohibited ‘pre-defined’ headings, such as ‘specialist,’ to be modified, the lawyer shall *not* identify herself under such heading unless appropriately certified.”¹⁴⁴

Because LinkedIn’s headings raised serious concerns for various state bars and caused uncertainty for lawyers, LinkedIn, agreed to modify its website and headings.¹⁴⁵ LinkedIn first removed the “Specialties” heading; then, in early 2014, LinkedIn changed the “Skills and Expertise” heading to, “Skills and Endorsements,” removing the problematic, potentially misleading word, “Expertise”; and today, the heading, “Skills and Endorsements,” has been amended so that it now simply reads, “Skills.”

The new heading, “Skills,” contains none of the problematic words like “Expertise,” or “Specialties,” or other variations thereof. However, LinkedIn may have simply taken the problem and put it in another place and format: upon editing an account, LinkedIn still asks the user the problematic question, “[d]o you have any of

¹³⁹ R. REGULATING FLA. BAR 4-7.14.

¹⁴⁰ R. REGULATING FLA. BAR 4-7.14(a)(4). The Comments add that “a lawyer can only state or imply that the lawyer is “certified,” a “specialist,” or an “expert” in the actual area(s) of practice in which the lawyer is certified.”

¹⁴¹ Fla. Bar Advisory Op. (Sept. 11, 2013), *available at* <http://it-lex.org/wp-content/uploads/2013/09/Florida-Bar-Opinion-re-LinkedIn-Redacted.pdf> (citing NYSBA Formal Ethics Op. 2013-972 (2013)).

¹⁴² NYSBA, Formal Ethics Op. 2013-972 (2013).

¹⁴³ *Social Media Ethics Guidelines*, *supra* note 123, at 3. *See also* Pa. Bar Ass’n, Formal Op. 2014-300 (2014) [hereinafter *Ethical Obligations for Attorneys Using Social Media*].

¹⁴⁴ *Social Media Guidelines*, *supra* note 123, at 4 (emphasis added).

¹⁴⁵ The Florida Bar, *Update: Complying with Bar Rules on LinkedIn May be Easier Than Thought*, FLA. BAR NEWS (Jan. 1, 2014), <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/0e9ba4af36b1dbb785257c4a004c633e!OpenDocument>.

these skills or areas of expertise?” Additionally, LinkedIn permits endorsements and recommendations, but does not allow for the addition of disclaimers to statements that many state bars would no doubt consider to be testimonials—another issue that is far from resolved.¹⁴⁶

There is a lack of empirical research showing a correlation between the proliferation of regulation and consumer harm. For example, the Florida Bar’s survey of Floridians’ attitude toward the increased regulation of attorney advertising found that while 22% of the respondents felt that advertisements for professional services were misleading, 22% also believed such advertisements were accurate.¹⁴⁷ Moreover, whereas about 25% of the respondents indicated that after seeing attorney advertising on television and the Internet, their view of the Florida court system had changed, more than 50% of the respondents indicated that their view had not changed, and 10% of the respondents even reported that their view had *improved*.¹⁴⁸ Thus, the survey results fail to show a real harm to the public, as is required to restrict commercial speech.¹⁴⁹

Additionally, the data collected in 1997 by a Task Force convened by the Florida State Bar revealed that consumers wanted *more* “useful” and “factual” information to help them choose an attorney and the supporting survey results explained that large majorities of consumers were interested in attorney “qualifications,” “experience,” “competence,” and “professional record (i.e. wins/losses).” The supporting survey results also showed that negative attitudes about legal system and lawyers consistently declined over the relevant period, despite the increase in quantity and breadth of attorney advertising. For example, “the number of people who strongly agreed that lawyer advertisements ‘play more on people’s emotions and feelings than on logic and thoughtfulness’ was down from 56% to 43%; the number of people who felt that attorney advertisements ‘encouraged people with little or no injury to take legal action’ was down from 55% to 35%, and those who thought advertisements increased the propensity to engage in frivolous lawsuits was down from 55% to 35%; those who believed that attorney advertisements were at least somewhat truthful and honest increased from 51% to 69%; and those who strongly agreed that attorney advertisements lessened the respect for the fairness and integrity of the legal process was cut nearly in half, from 32% to 17%.”¹⁵⁰

The jurisdictional differences are more likely to inhibit the spread of important legal information and create barriers to competition than to inform or protect consumers. Rampant dissimilarity exists among state rules that seek to regulate potentially misleading communications or specific content such as past results, listing lawyer specialties, including endorsements and testimonials and use of symbols, dramatizations, rankings, slogans, and even background music (sometimes referred to as “attention getting techniques”). For example, Arkansas, Nevada, Pennsylvania, South Carolina and Wyoming have prohibitions against the use of testimonials and endorsements.¹⁵¹ Other states allow the use of testimonials and endorsements with appropriate

¹⁴⁶ See, e.g., *Ethical Obligations for Attorneys Using Social Media*, *supra* note 143.

¹⁴⁷ Jacobowitz & Hethcoat, *supra* note 34, at 77.

¹⁴⁸ *Id.* (emphasis added).

¹⁴⁹ *Id.*

¹⁵⁰ Rubenstein v. Fla. Bar, No. 14-CIV-20786, 2014 WL 6979574, at *26, n. 6 (S.D. Fla. Dec. 14, 2014) (discussing The Florida Bar Joint Presidential Advertising Task Force, *Final Report & Recommendations* (May 1997)).

¹⁵¹ Am. Bar Ass’n, *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, at 9 (May 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rules_differences_update.authcheckdam.pdf.

disclaimers.¹⁵² Still other states have rules containing no provision governing endorsements and testimonials at all.¹⁵³

In addition to the over-regulation of lawyer advertising that does not serve the legitimate public policy of assuring accurate information about legal services, state regulators (most often Bar associations) spend hundreds of thousands of dollars attempting to defend the regulations in various lawsuits brought by members. The waste of bar dues and licensing fees to defend the regulations without any quantifiable evidence of the need for the regulations to support a legitimate state purpose is yet another reason the current framework of lawyer advertising regulation is failing.

C. The Questionable Objectives of Certain State Regulations

Upholding “professionalism” and “the dignity of the profession” sneak into various state versions of Model Rules 7.1 and 7.2. Justification for these variants include concern on how lawyers hold themselves out to the public, the lack of decorum and respect for the judicial system, the negative image of lawyers and the legal profession, and the loss of respect and lack of trust in lawyers.¹⁵⁴ For example, in the 2011 Report on The Lawyer Advertising Rules, the Florida Bar stated that the primary goals of lawyer advertising regulation include “protection of the public from advertising that contributes to disrespect for the judicial system, including disrespect for the judiciary” and “protection of the public from advertising that causes the public to have an inaccurate view of the legal system, of lawyers in general, or of the legal profession in general.”¹⁵⁵

This purported public policy basis for regulating lawyer advertising needs to be reexamined. The traditional reason for prohibiting lawyer advertising was that it was “unprofessional.”¹⁵⁶ Yet, today under the *Central Hudson* test,¹⁵⁷ regulation of taste, dignity, and professionalism is outside the permissive scope of regulation. Nevertheless, many state regulations continue to prohibit tasteless and unseemly content in the name of misleading or potentially misleading advertisements.

Leaving aside the fact that these tests for “tastelessness,” “unseemliness,” and the like are vague, the reason for forbidding them appears to be the theory that if lawyers advertise the way they want to, the public would think less of us, so we must forbid lawyers from doing that and metaphorically dress them up in a three-piece suit. If that is true, the problem should be self-correcting — it will be the rare client who hires a lawyer that he or she thinks is “tasteless.”

D. Anti-Competitive Concerns With Lawyer Advertising Regulation

During the past twenty years, the Office of Public Policy, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics of the Federal Trade Commission also have weighed in on the regulation of lawyer advertising. The FTC submitted advisory letters to several state supreme courts and lawyer regulation

¹⁵² These states include California, Florida, Georgia, Louisiana, Missouri, Montana, New York, Rhode Island, South Dakota, and Wisconsin. *Id.*

¹⁵³ *E.g.*, VA. R. OF PROF’L RESPONSIBILITY 7.1.

¹⁵⁴ *See* Jacobowitz & Hethcoat, *supra* note 34; Smolla, *supra* note 34.

¹⁵⁵ *Rubenstein*, 2014 WL 6979574, at *4 (discussing the Report on the Lawyer Advertising Rules by the Board Review Committee on Professional Ethics (May 27, 2011)).

¹⁵⁶ ABA CANON ON PROF’L ETHICS, CANON 27 (1908).

¹⁵⁷ For discussion of the *Central Hudson* test, see *supra* Part III.D.

offices when various states considered amending their advertising regulations that the FTC perceived could restrict consumer access to factually accurate information that might be useful in making an informed decision about hiring a lawyer. For example, the FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may not only reduce competition and violate federal antitrust laws, but also restrict truthful information about legal services.¹⁵⁸

Restrictions on accurate information about legal service, imposed by competing law firms that function as part of the regulatory governing body, restrain trade and hinders the public's access to useful information.¹⁵⁹

Not all “state actions” are immune from antitrust laws such as the Sherman Act and FTC Act. If the state action has a significant impact on interstate commerce, it will be subject to Sherman Act scrutiny and will be immune from antitrust compliance only if the action protects a sovereign right. Moreover, when a non-sovereign actor comprised of market participants, such as a unified Bar with quasi-governmental functions, engages in anticompetitive conduct, its actions will be immune from antitrust laws *only if* (1) there is a clearly articulated and affirmative state policy (i.e., the state has to anticipate anticompetitive result as necessary consequence of policy goal); and (2) there is active state supervision of the actor.¹⁶⁰ “Active” state supervision of a non-sovereign actor requires that (a) the state supervisor must actually review the anticompetitive decision (not just the policies and procedures used to come to the decision); (b) the state supervisor must have the ability to veto the decision as inconsistent with state policy goals; and (c) the state supervisor cannot be an active market participant.¹⁶¹

Thus, state lawyer regulation offices that impose restraints on truthful lawyer advertising restrain competition, hinder the public's access to useful accurate information about legal services, and may run afoul of antitrust laws. The recent U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. F.T.C.* is illustrative.¹⁶² The Supreme Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anticompetitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that the Board was not actively supervised by a state entity because a controlling number of the Board members who were decision makers were “active market participants” (i.e., dentists) and there was no state entity supervision of the decisions of the non-sovereign board.¹⁶³ Many lawyer regulatory entities are carefully monitoring the application of this precedent as the same analysis could be applied to lawyer disciplinary authorities – especially if it appears that the lawyers making decisions on “permissible” lawyer advertising are competitors and there are no clearly articulated objective criteria to determine if the advertising of their competitors violates the Rules of Professional Conduct.

¹⁵⁸ ABA Center for Professional Responsibility, *FTC Letters Regarding Lawyer Advertising* (2015), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html.

¹⁵⁹ *Id.*

¹⁶⁰ *F.T.C. v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

¹⁶¹ *North Carolina State Board of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1116 (2015).

¹⁶² 135 S. Ct. 1101 (2015).

¹⁶³ *Id.* at 1117.

E The Consequences of Inconsistent Enforcement of Excessive Regulations

The results of APRL's survey and other data demonstrate the lack of consistent enforcement of existing rules and regulations. In particular, state bars have insufficient resources to monitor *all* lawyer advertising and maintain consistent enforcement. Lawyer advertising is viewed by many bar regulators as a low-level problem.¹⁶⁴ There is a general lack of consumer complaints and virtually no empirical data demonstrating actual consumer harm caused by lawyer advertising. Instead, the greater perceived harm is to the profession. Most complaints about lawyer advertising are made by other lawyers.¹⁶⁵ In addition, many regulators acknowledge that compliance with the lawyer advertising rules is better achieved by more effective non-disciplinary measures. Finally, state regulators by and large have had a poor "win" record in the few cases in which enforcement of the advertising rules have been challenged in federal court or sought through discipline.

Inconsistent enforcement of existing rules has significant consequences. A 2002 law review article by Professor Fred C. Zacharias, a former member of APRL, provides a case study of the ramifications of under-enforcement of advertising rules, including engendering confusion and lack of respect and confidence by lawyers and the public.¹⁶⁶ Other articles also discuss the negative consequences of inconsistent enforcement.¹⁶⁷ And the advertising regulations as currently enforced have done little, if anything, to improve the image of the legal profession.

Inconsistent enforcement of inharmonious regulations has also had a negative effect on the dissemination of useful information. Lawyers are unclear as to how to interpret incompatible state regulations and how regulators may apply the rules in the event of a complaint. The effect is to discourage lawyers from communicating with the public in the way that the public (and lawyers themselves) generally communicate with one another.

The time-worn advice that lawyers should comply with the most restrictive rule when faced with competing state regulations is not always practical and does not advance the legitimate goals of regulating lawyer advertising.¹⁶⁸ The requirements of each state may greatly vary such that compliance with each jurisdiction may not be possible.¹⁶⁹

The deterrent effect of inconsistent advertising rules and enforcement on cross-border practice is well-known. The complex choice of law problems that confront lawyers and state regulators adds to the confusion

¹⁶⁴ See discussion of APRL's Survey results, *infra*, Part VI.

¹⁶⁵ In the APRL Survey, discussed *infra*, Part VI, one State Bar regulator reported that between 2002 and 2008, only eight complaints about lawyer advertising were opened and all involved lawyers complaining about other lawyers. During the same period, the office received about 4,000 complaints per year and opened roughly over 1,000 investigations.

¹⁶⁶ Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1005 (2002).

¹⁶⁷ See generally Nia Marie Monroe, *The Need for Uniformity: Fifty Separate Voices Lead to Disunion in Attorney Internet Advertising*, 18 GEO. J. LEGAL ETHICS 1005, 1015-16 (2005); Fred C. Zacharias, *What Direction Should Legal Advertising Regulation Take?*, 2005 PROF. LAW. SYMP. 45 (2005).

¹⁶⁸ See Pa. Bar Ass'n Comm., *Legal Ethics and Prof'l Responsibility*, Informal Op. 98-85 (1998) (defining the test as the "least common denominator approach."). See also Anthony E. Davis, *Ethics and Etiquette of Lawyering on the Internet*, 224 N.Y. L.J. 1, 6 (2000).

¹⁶⁹ Daniel Backer, *Choice of Law in On-Line Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, 70 FORDHAM L. REV. 2409, 2418 (2002); Monroe, *supra* note 167.

and uncertainty.¹⁷⁰ For example, each state has different labeling, disclosure, record-keeping and filing requirements, and the rules "vary greatly as to what materials and information need to be retained, and in what form."¹⁷¹ The lack of predictability on how a particular bar regulator will view a given advertisement is an increasingly difficult problem for lawyers and law firms. This lack of predictability is further compounded by inconsistent and selective enforcement and constantly evolving state bar policy and ethics advisory opinions as a result of new technologies.

VI. The Committee's Survey

In 2014, the Committee sent questionnaires to fifty-one U.S. lawyer regulation offices requesting information regarding the enforcement of advertising rules in their jurisdiction.¹⁷² With the assistance of James Coyle, the Committee's liaison from NOBC, thirty-six of fifty-one jurisdictions responded to the survey. The responses confirm that:

- Complaints about lawyer advertising are rare;
- People who complain about lawyer advertising are predominantly other lawyers and not consumers;
- Most complaints are handled informally, even where there is a provable advertising rule violation;
- Few states engage in active monitoring of lawyer advertisements; and
- Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c).

In response to the question, "Who are the predominant complainants in lawyer advertising charges," 78% responded that it was other lawyers and only 3% responded that it was consumers.

In regard to how often complaints about lawyer advertising are received: 56% responded, "rarely," 17% responded, "almost never," and 8% responded, "frequently."

The majority of the responding jurisdictions reported that complaints about lawyer advertising that involve a potential advertising rule violation are handled informally, such as through a call or letter requesting changes. Where complaints about lawyer advertising involve a provable advertising rule violation, the majority are still handled informally, in some cases with warning letters, diversion, dismissal of formal charges, changes in advertising language, and other dispositions. Only 17% of the jurisdictions responding reported that they actively monitor lawyer advertisements.

In response to the question – "How often do formal advertising complaints alleging false or misleading communications result in disciplinary sanctions, including diversion and probation?" – 50% responded, "rarely," 36% responded, "almost never," and 6% responded, "frequently."

¹⁷⁰ Backer, *supra* note 10.

¹⁷¹ J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 282 (2004).

¹⁷² Attachment 3 is the Committee's questionnaire to state regulators.

The survey showed that formal advertising complaints involving violations of the advertising rules other than false or misleading communications which result in disciplinary sanctions (including diversion and probation) are infrequent: with 50% responding this occurs, "rarely" and 43% responding this occurs, "almost never."

Finally, in response to the question of whether any formal disciplinary cases found consumer or client harm or confusion that did not violate Rule 8.4(c), 67% said "no" and 11% replied "yes."

VII. Other Survey Results

Donald R. Lundberg, a member of APRL and NOBC and a former executive secretary of the Indiana Supreme Court Disciplinary Commission, wrote a paper for the 24th ABA National Conference on Professional Responsibility in 2008 in which he reported the results of an informal survey he conducted among bar counsel on regulating lawyer advertising. The survey confirmed the low-level enforcement of lawyer advertising rules. Of the responses he received from twenty-two jurisdictions, Mr. Lundberg reported that three jurisdictions are at "the non-interventionist extreme," that is, they throw up their hands in resignation, save, perhaps, for rare third-party initiated forays into enforcement in strong meritorious cases. Eight jurisdictions were described as largely "non-interventionists" and yet responsive to highly meritorious consumer-generated complaints; four jurisdictions were neutral, meaning that there was some responsiveness to meritorious, consumer-generated complaints and occasional self-initiated enforcement actions on a selected case basis. Mr. Lundberg reported that two jurisdictions were "moderately interventionist" in being proactive in selectively reviewing advertising in a non-comprehensive way, and five jurisdictions responded that they examined lawyer advertising in some comprehensive fashion. Mr. Lundberg concluded based on his informal survey results that there is clearly no consensus among states about how advertising enforcement should be pursued, although most states align with the "non-interventionist" end of the spectrum. He also concluded that contrary to many other disciplinary actions, it is difficult to draw a straight line between regulation of lawyer advertising and protection of clients from tangible harm. Mr. Lundberg's informal survey also confirmed that one of the defining features of the advertising regulatory situation is a paucity of complaints originating from consumers.¹⁷³

VIII. A Commonsense Approach to Regulating Lawyer Advertising

A. Condensing Model Rules on Advertising Into One Practical Rule

A new approach to regulating lawyer advertising is long overdue. First, the disciplinary rules on lawyer advertising should be standardized. Second, regulators should focus more narrowly on prohibiting false and deceptive advertisements. Lawyers should not be subject to discipline for "potentially misleading" advertisements or advertisements that a regulator thinks are distasteful or unprofessional. Nor should they be subject to discipline for violations of technical requirements in the rules regarding font size, placement of disclaimer, or advertising record retention. Regulators should use non-disciplinary measures to address lawyer advertising and marketing that does not violate Model Rule 8.4(c).

APRL is not advocating a loosening or abandonment of regulating and enforcing strongly meritorious cases. Rather, APRL's solution addresses the inutility of the overregulation and under-enforcement of lawyer

¹⁷³ Donald R. Lundberg, *Some Thoughts About Regulating Lawyer Advertising*, 34 ABA Nat'l Conference on Prof'l Responsibility (May 28-31, 2008). Mr. Lundberg's paper includes an appendix of the specific results of the Bar Counsel survey.

advertising rules, the inconsistencies of the current regulatory scheme, and the practical challenges posed by evolving technologies.

Although *Central Hudson* and its progeny affirm the validity of the state's interest in protecting the public and the trustworthiness of the legal system by regulating deceptive and misleading advertising, the opinions also highlight the constitutional concerns when regulations contain restrictions without adequate evidence of a nexus to harm. Restrictions that are subject to inconsistent and subjective interpretation also raise constitutional concerns.

The Committee's proposed revisions to and deletions from ABA Model Rules of Professional Conduct 7.1, 7.2, 7.4, and 7.5, and their comments, set forth in Attachment 2, reflect a policy determination that the ABA should recommend that states adopt uniform regulatory rules for lawyer communications regarding legal services (outside the context of in-person solicitation) founded upon the constitutional limitation set forth in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny prohibiting "false and misleading" communications.

Supreme Court authority has left open the possibility that additional limited restrictions on lawyer communications regarding legal services, including advertising and marketing, may pass muster under the First Amendment. However, empirical data about enforcement of and compliance with the existing patchwork of state lawyer advertising regulations shows that the organized bar can better uphold the integrity of the profession with less restrictive rules. These rules will still promote access to justice: which in the modern age includes the dissemination of accurate information about the availability of professional legal services.

The ABA Model Rules in this area also need to reflect the fact that in an age of web-based and electronic communication, jurisdictional differences in regulatory standards simply are impractical and unworkable. Adopting a regulatory line of refraining from "false and misleading" lawyer communications is consistent with the prohibition in Rule 8.4(c), which prohibits lawyers from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," as well as with consumer protection statutory principles prohibiting unfair and deceptive acts and practices enacted in the vast majority of U.S. jurisdictions, as well as under federal law.

A simple "false or misleading" standard for lawyer communications about legal services best balances the important interests of access to justice, protection of the public and clients, integrity of the legal profession, and the uniform regulation of lawyer conduct.

The legitimate public policy considerations discussed above support removing the general prohibition against "giving anything of value to a person for recommending the lawyer's services" contained in Rule 7.2(b). Legitimate professional responsibility concerns regarding referral fees and the division of fees are adequately dealt with in other rules, including Rule 1.5(e) and Rule 5.4.

Specifically, the Committee proposes that the language in Rule 7.1 be retained, and that Rules 7.2, 7.4, and 7.5, and their comments, be deleted in their entirety.¹⁷⁴ The Committee proposes revising the comments to Rule 7.1 to reflect the language and principles contained in Rules 7.2, 7.4, and 7.5, which provide guidance on the general "false and misleading" standard in Rule 7.1. The incorporation into the comments to Rule 7.1 of

¹⁷⁴ As discussed above, APRL's committee deferred consideration of the rules on solicitation thus APRL has not addressed nor is it recommending any changes to Rules 7.3 and 7.6.

many of the concepts explained in the comments to Rules 7.2, 7.4, and 7.5 offers additional direction to lawyers in interpreting how to avoid “false and misleading” communications when describing specific skills (including specialization or expertise), receiving prospective client referrals from third parties, and in naming law firms.

The proposed streamlining of the Model Rules is the most practical approach to bring the Rules in line with technological changes and current enforcement practices, while still protecting consumers from false, misleading, or deceptive practices.

The comments to Rule 7.1 provide lawyers with practical guidance on what conduct or statements may fall within the prohibited category of “false and misleading” and what statements are *not* considered misleading. The proposed amendments set forth objective criteria to determine what constitutes “false and misleading” communications about a lawyer’s services, while preserving a lawyer’s constitutional right to disseminate accurate commercial speech. These revisions further support the fifty-one U.S. lawyer regulatory entities in enforcing the least restrictive means to achieve the public policies of maintaining confidence in the legal system and assuring consumers have access to accurate information about legal services.

B. Uniform Enforcement Protocols

The primary goal of regulating lawyer advertising is to protect the public and consumers of legal services from deceptive or fraudulent advertising and marketing by lawyers. This is consistent with the primary goal of lawyer discipline as a whole: protection of the public.

To accomplish this goal, the Committee explored whether complaints made about lawyer advertising may be better addressed in a non-disciplinary framework rather than as a disciplinary investigation and prosecution of an alleged advertising rule violation. The Committee considered that members of the general public rarely file a complaint about a lawyer’s advertising or marketing. It is believed that the overwhelming majority of complaints about a lawyer advertising are filed by other lawyers, not by clients or members of the general public. Frequently, the motivation for a lawyer to complain about another lawyer’s advertising is that the complaining lawyer sincerely believes that all lawyers should be on a “level playing field” as to advertising and solicitation. The complaint often arises from the complaining lawyer’s belief that he or she is suffering a competitive disadvantage.

Experience has shown that most of the reported breaches of the advertising rules are technical or minor in nature and do not involve actual deception of a consumer or client. Regulators can best remedy these kinds of breaches quickly and efficiently by diverting lawyer advertising complaints to regulatory staff that will communicate with the noncompliant lawyer on a more informal basis to obtain voluntary compliance. In other words, the regulatory staff should communicate with the lawyer who is the subject of a complaint to provide notice that the lawyer’s advertising does not appear to comply with an applicable advertising rules and should be afforded an informal opportunity to address the issue—either by fixing and avoiding the problem or by explaining why no problem is present. Experience has also shown that, with few exceptions, lawyers will take the necessary action to bring their advertising into compliance once when the matter is brought to their attention. If the lawyer makes a satisfactory correction or provides a satisfactory explanation, the public will be protected.

In contrast, processing all lawyer advertising complaints through the full lawyer disciplinary system takes far more time and expense. It also siphons bar resources and attention away from the investigation of more serious lawyer misconduct where the interests of the public and clients are at greater risk of injury; the public is less protected.

There will be circumstances in which diversion of a complaint is inappropriate and the machinery of formal discipline should be invoked. This will be true, for example, in situations involving apparent coercion, duress, harassment, or criminal or fraudulent conduct involving a risk of demonstrable harm. This also will include lawyers who have been notified of actual or apparent non-compliance, and who either fail to respond or continue to violate the cited rules. That there will be infrequent cases deserving of more serious consideration and a further expenditure of disciplinary resources does not justify treating all cases that way. This is especially true where, as here, experience shows that the vast majority of cases neither need nor require such efforts.

State regulators should consider a non-disciplinary framework for regulating lawyer advertising in which a lawyer is given notice that a complaint has been made about his or her advertising, including identification of the problem or non-compliance, and an opportunity to remedy the matter or offer an explanation. If the lawyer remedies the problem or provides a sufficient explanation supporting his or her advertising, the matter can be closed. These complaints can be handled on an informal basis without referral of the complaint into the disciplinary system. With rare exceptions, lawyers that are given fair notice of non-compliance will remedy the matter and the file can be closed. If a satisfactory correction and/or explanation of the materials is not received, the complaint should be processed as a standard disciplinary complaint. For five years, the Virginia State Bar has used a non-disciplinary process of this nature for handling lawyer advertising complaints. Formal lawyer advertising complaints received by bar counsel or the intake department of the disciplinary system are referred to Ethics Counsel's office for informal non-disciplinary disposition. Absent extraordinary factors, formal discipline based on RPC violations relating to advertising and marketing materials is limited to situations involving lawyers who continue to violate the RPCs even after being placed on notice of their violations and the need to stop them; situations involving criminal conduct, fraudulent conduct or material and demonstrable harm to identified persons; or situations involving coercion, duress or harassment. Complaints of that nature are processed as standard disciplinary complaints, as the alleged conduct will likely involve the application of Rule 8.4(c). Virginia's model is an example of one that may be refined and adopted by the ABA and state bar associations across the country.

IX. Conclusion

It is long past time for rationality and uniformity to be brought to the regulation of lawyer advertising. The Committee recommends that the ABA Model Rules governing communications about legal services be consolidated into a single disciplinary rule that simply prohibits false or misleading statements. Adopting this approach to advertising regulation, combined with reasonable uniform enforcement policies and protocols by state disciplinary authorities, is in the Committee's view the best way to ensure honest communication by lawyers while at the same time promoting the widest possible access by the public to legal services.

ATTACHMENT 1

MARK L. TUFT

Mark L. Tuft is a partner with Cooper, White & Cooper LLP in San Francisco. He serves as counsel to lawyers and law firms on professional responsibility, professional liability, law firm mergers and dissolutions, and State Bar disciplinary matters. Mr. Tuft is certified by the State Bar of California as a specialist in legal malpractice law. His practice includes legal malpractice defense, media law, and defense of individuals and businesses in civil and criminal matters. He also serves as an arbitrator, mediator, and special master in lawyer-client and law firm disputes. Mr. Tuft is a co-author of The California Practice Guide on Professional Responsibility (The Rutter Group, a division of Thomson Reuters). Mr. Tuft obtained his J.D. degree with honors from Hastings College of the Law in 1968. He also received an LL.M. degree with highest honors from George Washington University in 1972.

Mr. Tuft is a member of the California State Bar Commission on the Revision of the Rules of Professional Conduct and a former chair of the California State Bar Committee on Professional Responsibility and Conduct. Mr. Tuft is a member of the ABA Center on Professional Responsibility and is a member of the Center's Policy Implementation Committee and Editorial Board. Mr. Tuft is a past president of the Association of Professional Responsibility Lawyers. He has taught courses on legal ethics as an adjunct professor at the University of San Francisco School of Law and is a frequent lecturer and writer on professional responsibility. Mr. Tuft has received several teaching and bar association awards for his work in legal education.

GEORGE R. CLARK

George R. Clark is a solo practitioner in Washington, D.C. who represents lawyers, law firms, and their clients. With more than thirty years of experience in professional responsibility matters (over twenty of them as inside ethics partner at a 1000 lawyer firm), he advises law firms and lawyers on the full range of ethics and practice issues, including conflicts and disqualification. A trial lawyer for over thirty years, he frequently consults on litigation-related ethics matters. Mr. Clark also serves as an expert witness, and lectures regularly on ethics issues. Additionally, he often advises clients on their dealings with their lawyers, and acts for lawyers in discipline and admission matters.

Mr. Clark is past chair (2009-2012) of the District of Columbia Bar Rules of Professional Conduct Review Committee. He has been selected for inclusion in 2012 through 2015 Washington DC Super Lawyers. He is a 1969 graduate of the University of Notre Dame (B.S. Physics), earned his J.D. from the University of Illinois College of Law (1972), and began his legal career as law clerk to the late Judge William B. Jones of the U.S. District Court in Washington. He is a member of the Center for Professional Responsibility and the Business Law Section (Firm Counsel Connection and Professional Responsibility Committee) of the American Bar Association and Treasurer of the Association of Professional Responsibility Lawyers. He and his wife Mary live in Washington, D.C., where he was chair of the Committee of 100 on the Federal City (2009-2012) and three time past president of the Federation of Citizens Associations of DC.

JAN L. JACOBOWITZ

Jan L. Jacobowitz is a Lecturer in Law, Associate Director of the Center for Ethics & Public Service and the Director of the Professional Responsibility & Ethics Program (PREP) at the University of Miami's School of Law. Under Ms. Jacobowitz's direction, PREP was a 2012 recipient of the ABA's E. Smythe Gambrell Award—the leading national award for a professionalism program. Ms. Jacobowitz has presented over one hundred PREP Ethics CLE Seminars and has written and been a featured speaker or panelist on topics such as Legal Ethics in Social Media and Advertising, Lawyer's First Amendment Rights, Cultural Awareness in the Practice of Law, and Mindful Ethics.

Prior to devoting herself to legal education, Ms. Jacobowitz practiced law for over twenty years. She began her career as a Legal Aid attorney in the District of Columbia; prosecuted Nazi war criminals at the Office of Special Investigations of the U.S. Department of Justice; was in private practice with general practice and commercial litigation firms in Washington, D.C. and Miami; and served as in-house counsel for a large Miami based corporation. Ms. Jacobowitz has a J.D. from George Washington University and a B.S. in Speech from Northwestern University. She is admitted to practice in the District of Columbia, Florida, and California, and is a certified civil court mediator.

PETER R. JARVIS

Peter Jarvis is a partner in Holland & Knight's Portland office, where he practices primarily in the area of attorney professional responsibility and risk management. Mr. Jarvis advises lawyers, law firms, corporate legal departments and government legal departments about the law governing lawyers. This includes, but is not limited to, matters relating to conflicts of interest, duties of confidentiality, other legal or professional ethics issues, advice on the avoidance of civil or criminal liability, law firm breakups, and questions relating to law firm or legal department structure and operation. Mr. Jarvis also serves as an expert witness and is an avid lecturer for public and private/in-house continuing legal education seminars.

Mr. Jarvis has decades of experience as a trusted adviser to lawyers and also draws on his substantial background as a civil litigation attorney in matters involving antitrust, appellate, business tort, general contract, insurance, product liability, tax and Uniform Commercial Code concerns. Prior to joining Holland & Knight, Mr. Jarvis was the partner-in-charge of the Portland office of a multistate law firm and was co-leader of that firm's national professional responsibility/risk management practice group. He also served for many years as the in-house ethics counsel for a multistate law firm.

BRUCE E. H. JOHNSON

Bruce E. H. Johnson is a partner in the Seattle office of Davis Wright Tremaine LLP. A member of the Washington State and California Bars, Mr. Johnson's litigation practice focuses on internet, media, and professional liability defense. He also regularly advises lawyers, law firms, and legal departments on legal ethics, professional responsibility, and malpractice matters. He has defended many lawsuits involving social media websites, including *Browne v. Avvo, Inc.*, which held that lawyer evaluations and ratings are statements of opinion absolutely protected by the First Amendment. One of the leading national authorities on First Amendment commercial speech protections, Mr. Johnson is the co-author (with Steven G. Brody) of the Practising Law Institute treatise Advertising and Commercial Speech: A First Amendment Guide.

ARTHUR J. LACHMAN

Arthur J. Lachman practices in Seattle, Washington, focusing on legal ethics, professional liability, and law firm risk management issues. A 1989 graduate of the University of Washington School of Law, he clerked on the Ninth Circuit Court of Appeals, has practiced as a commercial litigation attorney, and has taught civil litigation and ethics subjects at both Puget Sound area law schools. Mr. Lachman has served as president of the Association of Professional Responsibility Lawyers and chair of the ABA Center for Professional Responsibility's National Conference Planning Committee. He is co-author of *The Law of Lawyering in Washington*, published by the Washington State Bar Association, and served as chair of the WSBA Rules of Professional Conduct Committee from 2008 to 2010. Mr. Lachman has also served as chair of the Ethics/Loss Prevention Committee and Director of Professional Development at Graham & Dunn in Seattle. He holds bachelors and graduate degrees in accounting from the University of Illinois at Urbana-Champaign.

JAMES M. McCAULEY

James M. McCauley is the Ethics Counsel for the Virginia State Bar. Mr. McCauley and his staff write the draft advisory opinions for the Standing Committees on Legal Ethics and Unauthorized Practice of law and provide informal advice over the telephone to members of the bar, bench, and general public on lawyer regulatory matters. Mr. McCauley teaches Professional Responsibility at the T.C. Williams School of Law in Richmond, Virginia and served on the American Bar Association's Standing Committee on Legal Ethics and Professionalism from 2008-2011. Mr. McCauley served on the faculty of the Virginia State Bar's Mandatory Professionalism Course from 2004-2010. He is a Fellow of the Virginia Law and the American Bar Foundations. Mr. McCauley also served on the Board of Governors of the Real Property Section of the Virginia State Bar from 2004-2010. Mr. McCauley is a member of the John Marshall Inn of Court in Richmond, Virginia. In 2013, he was appointed by the Chief Justice of the Supreme Court of Virginia to serve on its Special Committee on Criminal Discovery Rules. Mr. McCauley serves on the Board of Directors for Lawyers Helping Lawyers.

RONALD D. ROTUNDA

Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University. He joined the faculty in 2008. Before that, he was University Professor and Professor of Law at George Mason University, and the Albert E. Jenner, Jr. Professor of Law, at the University of Illinois. He is a magna cum laude graduate of Harvard College and a magna cum laude graduate of Harvard Law School, where he was a member of Harvard Law Review. He practiced law in Washington, D.C., and was assistant majority counsel for the Watergate Committee.

He has co-authored the most widely used course book on legal ethics, *Problems and Materials on Professional Responsibility* (Foundation Press, 12th ed. 2014) and is the author of a leading course book on constitutional law, *Modern Constitutional Law* (West Academic Co., 11th ed. 2015). He is the co-author of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-West/Thompson Reuters Publishing, St. Paul, Minnesota, 2014-15 ed.) (jointly published by the ABA and West/Thompson Reuters Publishing). Mr. Rotunda is also the co-author of the six-volume *Treatise on Constitutional Law* (West/Thompson Reuters Publishing, 5th ed. 2012), and a one volume *Treatise on Constitutional Law* (West Academic., 8th ed. 2010). He is also the author of several other books and more than 400 articles in various law reviews, journals, newspapers, and books in this country and in Europe. His works have been translated into French, German, Romanian, Czech, Russian, Japanese, and Korean and have been cited more than 2,000 times by law reviews and state and federal courts at every level, from trial courts to the U.S. Supreme Court. Professor Rotunda was rated in 2014 as one of "The 30 Most Influential Constitutional Law Professors" in the United States.

LYNDA C. SHELY

Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to lawyers and law firms. She also assists lawyers in responding to initial Bar charges, performs law office risk management reviews, trains law firm staff in ethics requirements, and advises on a variety of ethics topics including ancillary business ventures, conflicts of interest, fees and billing requirements, trust account procedures, multi-jurisdictional practice requirements, and ethics requirements for law firm advertising/marketing. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona for ten years. Before she moved to Arizona, Ms. Shely was an intellectual property associate with Morgan, Lewis & Bockius in Washington, DC.

Ms. Shely received her B.A. from Franklin & Marshall College in Lancaster, Pennsylvania and her J.D. from Catholic University in Washington, DC. She was selected as the State Bar of Arizona Member of the Year in 2007 and has received other awards from the State Bar for her contributions to Law Related Education and Outstanding Leadership in Continuing Legal Education. She also received the Scottsdale Bar Association's 2010 Award of Excellence. Ms. Shely is a former chair of the ABA Standing Committee on Client Protection and a past member of the ABA's Professionalism Committee and Center for Professional Responsibility Conference Planning Committee. She is the President-Elect of the Association of Professional Responsibility Lawyers and also serves on several State Bar of Arizona Committees. Ms. Shely was the 2008-2009 president of the Scottsdale Bar Association. She has also been an adjunct professor at all three Arizona law schools, teaching professional responsibility.

JAMES COYLE

Jim Coyle is Attorney Regulation Counsel for the Colorado Supreme Court. In that capacity, Mr. Coyle assists the Supreme Court with regulating the practice of law in Colorado, including attorney admissions, registration, discipline, disability, diversion, mandatory continuing legal and judicial education, unauthorized practice and inventory counsel functions. Mr. Coyle's office also acts as counsel for the Attorneys Fund for Client Protection and the Commission on Judicial Discipline. Mr. Coyle is an active member of the American and Colorado Bar Associations, National Conference of Bar Examiners, National Organization of Bar Counsel, ABA Center for Professional Responsibility, National Client Protection Organization, National Continuing Legal Education Regulators Association, Association of Judicial Discipline Counsel and ABA Commission on Lawyer Assistance Programs.

DENNIS A. RENDLEMAN

Dennis A. Rendleman is Ethics Counsel in the Center for Professional Responsibility at the American Bar Association where he provides expertise and research on legal and judicial ethics and professional responsibility law and professionalism. He is counsel to the ABA Standing Committee on Ethics and Professional Responsibility. Prior to joining the ABA, Mr. Rendleman was Assistant Professor of Legal Studies at the University of Illinois at Springfield and spent twenty-three years at the Illinois State Bar Association, leaving in 2003 as General Counsel. Mr. Rendleman has engaged in the private practice as a consultant and expert witness in professional responsibility and discipline matters. He is a former member of and current liaison to the Illinois Supreme Court's Committee on Professional Responsibility and has been a member of the Illinois Judicial Ethics Committee since its founding in 1998. He is a graduate of the University of Illinois and its College of Law.

ATTACHMENT 2

**APRL Proposed Changes to the
ABA Model Rules of Professional Conduct - 2015**

[CLEAN VERSION]

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comments

[1] This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional conduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching. *[from MR 7.2 Comments]*

[6] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[7] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. *[from MR 7.2 Comments]*

Areas of Expertise/Specialization

[8] A lawyer may indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services. A lawyer may state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification. *[from MR 7.4 Comments]*

Firm Names

[9] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. *[from MR 7.5 Comments]*

[10] Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. *[from MR 7.5 Comments]*

Rule 7.2 Advertising

Comments (*Comments 1, 2, and 3 moved to MR 7.1 Comments*)

Rule 7.3 Solicitation of Clients

No changes

Rule 7.4 Communication of Fields of Practice and Specialization

Comments (*Comments 1 and 3 were moved to MR 7.1 Comments*)

Rule 7.5 Firm Names And Letterheads

Comments (*Comments moved to MR 7.1 Comments*)

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

No changes

**APRL Proposed Changes to the
ABA Model Rules of Professional Conduct - 2015**

[REDLINE VERSION]

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comments

[1] This Rule governs all communications about a lawyer's services, ~~including advertising permitted by Rule 7.2~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

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[5] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching. [from MR 7.2 Comments]

[6] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[7] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. [from MR 7.2 Comments]

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[8] A lawyer may indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services. A lawyer may state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification. [from MR 7.4 Comments]

Firm Names

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[10] Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. [from MR 7.5 Comments]

Rule 7.2 Advertising

~~(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.~~

~~(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may~~

~~(1) pay the reasonable costs of advertisements or communications permitted by this Rule;~~

~~(2) pay the usual charges of a legal service plan or a not for profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;~~

~~(3) pay for a law practice in accordance with Rule 1.17; and~~

~~(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if~~

~~(i) the reciprocal referral agreement is not exclusive, and~~

~~(ii) the client is informed of the existence and nature of the agreement.~~

~~(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.~~

Comments *[\(Comments 1, 2, and 3 moved to MR 7.1 Comments\)](#)*

~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

~~[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.~~

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to~~

~~many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.~~

~~[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~

~~**Paying Others to Recommend a Lawyer**~~

~~[5] Except as permitted under paragraphs (b)(1)–(b)(4), lawyers are not permitted to pay others for recommending the lawyer’s services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).~~

~~[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)~~

~~[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false~~

~~or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.~~

~~[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(e). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.~~

Rule 7.3 Solicitation of Clients

No changes

Rule 7.4 Communication of Fields of Practice and Specialization

~~(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.~~

~~(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~

~~(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.~~

~~(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:~~

~~(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and~~

~~(2) the name of the certifying organization is clearly identified in the communication.~~

Comments ([*Comments 1 and 3 were moved to MR 7.1 Comments*](#))

~~[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.~~

~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~

Rule 7.5 Firm Names And Letterheads

~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

~~(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.~~

Comments [*\(Comments moved to MR 7.1 Comments\)*](#)

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

No changes

ATTACHMENT 3



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Mark L. Tuft

Re: **Regulation of Lawyer Advertising**

Dear Bar Counsel:

I am writing to you on behalf of the Committee on the Regulation of Lawyer Advertising created by the Association of Professional Responsibility Lawyers ("APRL"). As you may know, APRL is a national organization of lawyers and law professors specializing in the field of legal ethics and professional responsibility. APRL's committee is currently studying the enforcement of lawyer advertising regulations by bar regulators particularly in reference to the use of technology and electronic media. As you will note from the list below, our committee includes both APRL and non-APRL members.

Courts imposing lawyer discipline typically assert that the purpose of lawyer discipline is not to punish the lawyer but to protect the public. On the assumption that this is also the purpose behind discipline for violation of rules regulating advertising and marketing of lawyer services, the Committee would appreciate it if you could respond to the attached brief survey.

Please also indicate whether there have been any consumer surveys in your jurisdiction regarding lawyer advertising and, if so, whether you can provide us with the results of those surveys.

Thank you for responding to our request. We would appreciate receiving your response by email or letter in the next thirty days. If you have any questions or would prefer instead to discuss these matters over the phone, please let me know so that I can arrange a time and date for a call.

I look forward to hearing from you.

Very truly yours,

Mark L. Tuft
Chair, APRL Committee on the
Regulation of Lawyer Advertising

APRL Committee on the Regulation of Lawyer Advertising

George R. Clark Esq., Washington, D.C.

James M. McCauley, Virginia State Bar, Richmond, VA

Nicole Hyland, Frankfurt Kurnit Klein & Selz, NY., NY

Jan L. Jacobowitz, Professor, University of Miami School of Law, Coral Gables, FL

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Ronald D. Rotunda, Professor, Chapman University Law School, Orange, CA

Lynda C. Shely Esq., The Shely Law Firm, Scottsdale, AZ

Mark L. Tuft, Cooper, White & Cooper LLP., San Francisco

Liaisons:

Dennis A. Rendleman, Ethics Counsel, ABA Center on Professional Responsibility

James C. Coyle, Attorney Regulation Counsel, Colorado Supreme Court, Denver, CO.,

NOBC.

ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

2014 ADVERTISING REGULATION SURVEY

1. Who are the predominant complainants in lawyer advertising charges?
 - Other lawyers _____
 - Consumers _____
 - Judges _____
 - Public officials _____
 - Anonymous _____

2. How often do you receive complaints about lawyer advertising?
 - Frequently _____
 - Rarely _____
 - Almost never _____

3. How do you typically handle complaints about lawyer advertising where there is a potential advertising rule violation?
 - Informally
(e.g., call or letter requesting changes) _____
 - Formal investigation _____
 - Diversion _____
 - Peer Review _____
 - Dismissal with advertising language _____
 - Warning letter _____
 - Not at all addressed _____

4. How do you typically handle complaints about lawyer advertising where there is a provable advertising rule violation?
- Informally (e.g., call or letter requesting changes) _____
 - Formal charges _____
 - Diversion _____
 - Dismissal with advertising language _____
 - Warning letter _____
 - Other disposition (please explain) _____
 - Not at all addressed _____
5. Does the disposition of complaints where there is a provable advertising rule violation depend on the particular rule (e.g., ABA Model Rules 7.1 – 7.5)?
- Yes (please identify the advertising rules that receive the greatest attention) _____
 - No _____
6. Is your jurisdiction engaged in actively monitoring lawyer advertisements?
- Yes (please describe these activities) _____
 - No _____
7. How often do formal advertising complaints alleging false or misleading communications result in disciplinary sanctions (including diversion and probation)?
- Frequently _____
 - Rarely _____
 - Almost never _____

8. How often do formal advertising complaints alleging violations of the advertising rules other than false or misleading communications result in disciplinary sanctions (including diversion and probation)?
- Frequently _____
 - Rarely _____
 - Almost never _____
9. Are there any reported decisions involving or including violations of advertising regulations in which there is a finding of actual consumer or client harm or actual confusion?
- Yes _____
(please list names, years, and type of harm/confusion)
 - No _____
10. In those circumstances where discipline has been imposed, did the violation involve conduct that was partly or entirely based upon dishonesty, fraud, deceit or misrepresentation, whether by affirmative statement or concealment?
(see ABA Model Rule 8.4(c))
- Yes _____
(please explain, including what state of mind requirement was applied)
 - No _____
11. Have there been any formal discipline cases finding consumer or client harm or confusion that *did not* violate Rule 8.4(c)?
- Yes _____
(please explain what rule was violated and what harm was identified)
 - No _____

Thank you for responding by November 25, 2014

Please address your responses to:

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 APRL Regulation of Lawyer Advertising Committee
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