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# Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising

Jan L. Jacobowitz

*University of Miami School of Law*, [jjacobowitz@law.miami.edu](mailto:jjacobowitz@law.miami.edu)

Gayland O. Heathcote II

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# ENDLESS PURSUIT: CAPTURING TECHNOLOGY AT THE INTERSECTION OF THE FIRST AMENDMENT AND ATTORNEY ADVERTISING

*Jan L. Jacobowitz & Gayland O. Hethcoat II\**

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## I. INTRODUCTION

The elusive Roadrunner flashes past Wile E. Coyote as Coyote ceaselessly pursues the bird, undaunted by Roadrunner's trademark "Beep! Beep!" In one episode of the cartoon featuring the two characters, Coyote convinces Roadrunner to reverse course, back through a long pipe. At long last, it appears, Coyote will catch Roadrunner. When Roadrunner emerges from the pipe, though, it is a giant incarnation of itself, dwarfing Coyote in size. Staring at the audience in frustration, Coyote holds up two signs: "Okay, wise guys,—you always wanted me to catch him—"; "Now what do I do?"<sup>1</sup>

Coyote and Roadrunner first appeared in 1949, long before the "beeping" of today's technology. The phenomenon of endless pursuit to control that which continues to evolve and elude capture, however, renders these characters a compelling metaphor to describe the legal profession's ongoing attempts to revise its professional code of conduct to incorporate technological and cultural changes.

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\* Jan L. Jacobowitz is a Lecturer in Law and the Director of the Professional Responsibility and Ethics Program at the University of Miami School of Law. Gayland O. Hethcoat II is a 2011 graduate of the University of Miami School of Law.

1. Rommelbacs, *Coyote Catches Road Runner*, YOUTUBE (June 11, 2006), <http://www.youtube.com/watch?v=KJJW7EF5aVk>.

The law sometimes compels society forward and at other times lags behind a rapidly changing aspect of society. The Internet, for example, has revolutionized communication and created a global community, impacting international relations, commerce, education, and politics—generally every sphere. The law, no less, has tried to “catch up” with these changes. Copyright and privacy are just a couple of areas that are morphing to adjust to a different set of circumstances.

The legal profession itself is no exception. Technology and globalization have fueled the long-running debate whether the practice of law is a profession or business. Laurel Terry’s astute observations as to the inception of the term “service providers” as applied to lawyers in international agreements, and Christopher Whelan’s description of the revamping of England’s approach to the legal profession in the Legal Services Act lend credence to the argument that the practice of law has become, at a minimum, a business that maintains aspirational goals.<sup>2</sup>

Regardless of whether a “winner” may be declared in the profession-versus-business debate, legal advertising indisputably has grown with the advent of firm websites and social media. Since 1977, when the U.S. Supreme Court deemed attorney advertising constitutionally protected commercial speech in *Bates v. State Bar of Arizona*,<sup>3</sup> the American Bar Association (ABA) and its state counterparts have debated and enacted various regulations of attorney advertising.<sup>4</sup> The tension between the First Amendment’s protection of advertising for the “business” of law and the view of advertising as demeaning to the “profession” of law and exploitive of the public often has driven the regulatory process.<sup>5</sup>

This tension has heightened since the days when most advertising appeared in the Yellow Pages, on benches and billboards, or on the more costly media of radio and television. Now, the Internet and social media provide virtually unlimited avenues for low-cost, far-reaching advertising. The 2010 ABA Legal Technology Survey found that approximately 87% of attorneys in the United States have a website, and 56% of attorneys in private practice have a presence on an online social network as compared to 15% in 2008.<sup>6</sup> The general user statistics

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2. See Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”* 2008 PROF. LAW 189 (2008); Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT’L L. REV. 465 (2008).

3. 433 U.S. 350 (1977).

4. See, e.g., R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953 (2007).

5. See, e.g., Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437 (2006).

6. Press Release, Am. Bar Ass’n, ABA Legal Technology Survey Results Released (Sept. 28, 2010), <http://www.abanow.org/2010/09/aba-legal-technology-survey-results-releas>

reported by social-networking sites are perhaps more compelling: Facebook claims more than 400 million users; LinkedIn, more than 65 million users; and Twitter, more than 105 million users.<sup>7</sup> As these figures suggest, a state bar association attempting to stay abreast of technology to regulate attorneys in its jurisdiction is much like Coyote in pursuit of Roadrunner: Even if the bar association corrals the current technology, the technology is always changing and therefore eluding ultimate capture. The regulators are left to ponder Coyote's query: "Now what do I do?"

This Article focuses on the Florida Bar's attempt to wrestle with this question in regulating attorney advertising. Among state bars, the Florida Bar has been a pioneer in regulating advertising, especially with respect to new technology. The Bar's efforts have been years in the making, but only until recently did constitutional considerations percolate to the forefront as the Bar faced litigation threats, and federal courts issued opinions expounding on attorneys' First Amendment rights.<sup>8</sup> With the release of a proposed new code of advertising rules that is sure to draw the attention of other bars across the country, moreover, questions have arisen anew as to whether the Bar has drafted rules that will prove relevant and effective in vindicating the public interest while simultaneously respecting attorneys' constitutional rights.

This Article offers an early analysis of the proposed rules and submits that, although they are an improvement over the current rules, they still retain features that attorneys are bound to attack in testing the rules' constitutionality under the First Amendment commercial speech and void-for-vagueness doctrines. This conclusion follows from an overview of the Bar's protracted decisions to regulate, deregulate, and reregulate attorney advertising, particularly on the Internet, and a summary of recent federal court cases that call into question some of the Bar rules in both their current and proposed forms.

Even if the proposed rules become law and overcome legal challenge, the process by which the Bar enacted them is one that other bars may want to learn from and avoid. Bureaucratic obfuscation and paternalism have been staple features of this process and at the cost of certainty, time, and resources. A better approach to follow is one where constitutional principles play a prominent role early on in regulators' efforts to respond to the public policy challenges that accompany new

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7. Dustin B. Benham, *The State Bar of Texas Provides New Guidance to Attorneys Regarding the Proper Use of Social Media and Blogs for Advertising Purposes*, 52 *ADVOCATE* (Tex.) 13, 14 (2010) (citations omitted).

8. See, e.g., Catherine J. Lanctot, *Does Legalzoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 *TEMP. POL. & CIV. RTS. L. REV.* 255 (2011).

innovations in society.

## II. FLORIDA: A CASE STUDY IN ATTORNEY ADVERTISING REGULATION

Florida is a terrific case study of a state bar's striving to navigate the tension between the First Amendment's protection of attorneys' freedom of speech and the legal profession's desire to regulate attorney advertising. A close look at the history of regulation in the state reveals that as Florida has exceeded many other states in the extent to which it has addressed attorney advertising, it has invited major constitutional challenge.

After the *Bates* decision in 1980, the Florida Bar amended its advertising rules to allow advertising in accordance with the Supreme Court's opinion to prohibit fraudulent, deceptive, or misleading advertising.<sup>9</sup> Because computers and the Internet were not yet considerations, the Bar premised its rules on traditional media, such as newspapers, television, and radio.<sup>10</sup> The Florida Board of Governors voted in 1985 to maintain its regulatory jurisdiction over advertising, and the Bar continued to study and amend its advertising rules throughout the 1980s and 1990s.<sup>11</sup>

Fast forward to 1999. That year, the Florida Supreme Court adopted rule 4-7.6, governing "computer accessed-communications," to acknowledge and regulate Internet advertising.<sup>12</sup> Rule 4-7.6 provides that an attorney has to provide some basic information about office location and licensure, but generally deems a website "information upon request."<sup>13</sup> The comment to the rule elaborates:

The specific regulations that govern computer-accessed communications differ according to the particular variety of communication employed. For example, a lawyer's Internet web site is accessed by the viewer upon the viewer's initiative and, accordingly, the standards governing such communications correspond to the rules applicable to information provided to a

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9. Fla. Bar Amendment to Fla. Bar Code of Prof. Responsibility (Adver.), 380 So. 2d 435, 436-37 (Fla. 1980).

10. *Id.* at 437-38.

11. *See, e.g.*, Fla. Bar: Petition to Amend the R. Regulating the Fla. Bar—Adver. Issues, 571 So. 2d 451 (Fla. 1990).

12. Amendments to R. Regulating the Fla. Bar—Adver. Rules, 762 So. 2d 392 (Fla. 1999) [hereinafter *Amendments*].

13. R. Regulating Fla. Bar 4-7.6(b)(3) (2009).

prospective client at the prospective client's request.<sup>14</sup>

When the Supreme Court adopted rule 4-7.6 in 1999, the rule was understood by reference to then rule 4-7.9, which defined information upon request as information subject to the general advertising rules with the exception of the prohibitions of statements characterizing the quality of legal services and referring to past results.<sup>15</sup>

As the use of new technology proliferated, the Bar petitioned the Supreme Court in 2005 to delete rule 4-7.9 and exempt "information upon request" from the advertising rules by amendment of rule 4-7.1.<sup>16</sup> The court adopted that proposal and declined to address rule 4-7.6 because the Bar informed the court that a committee was studying proposals for future website regulation.<sup>17</sup> As a result of the deregulation of "information upon request," websites were no longer subject to the general advertising rules; an attorney remained bound only to the specific provisions of rule 4-7.6 and the general prohibition of dishonesty, fraud, deceit, and misrepresentation in rule 4-8.4.<sup>18</sup> Consequently, websites could presumably contain testimonials and references to past results on the theory that the attorney was not reaching out to the client, but rather the client was seeking and requesting the information.<sup>19</sup>

This result, however, became the flashpoint for an ongoing debate over website regulation that could be seen as a battle between the economic realities of practicing law in the digital age and an overarching concern about protecting the public. Discussion about the *Bates* case and the First Amendment seemed to slip into the background as law firms expanded their websites, and concern about the impact on the public grew. One of the parties to the debate was the Florida Bar Advertising Task Force, established in 2004 to investigate website advertising.<sup>20</sup> The Task Force deemed websites to be "information upon request" because individuals had to actively search for the information, unlike other advertising that one encounters passively when it appears

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14. *Id.* cmt.

15. *Amendments*, 762 So. 2d at 425.

16. *In re Amendments to the R. Regulating the Fla. Bar—Adver.*, 971 So. 2d 763, 763-64 (Fla. 2007).

17. *Id.* at 764.

18. *See* R. Regulating Fla. Bar 4-7.1(h)-(i), 4-8.4 (2010).

19. FLORIDA BAR, *History of Website Regulation*, [www.Florida bar.org](http://www.Florida bar.org) (type in search box "History of Website Regulation") (last visited Mar. 2, 2011) [hereinafter *History of Website Regulation*].

20. Mark D. Killian, *Court Says Lawyer Web Sites Are Subject to the Advertising Rules*, FLA. B. NEWS (Dec. 1, 2009), <http://www.floridabar.org> (type in search box "Court says lawyer web sites").

in a mailbox or on a television screen.<sup>21</sup> Thus, the Task Force distinguished Internet advertising and concluded that it did not require the same level of scrutiny.<sup>22</sup>

The Board of Governors entered the debate and registered its disagreement with the Task Force.<sup>23</sup> The Board of Governors analogized Internet advertising to the Yellow Pages to support its position that the public would be best protected by regulation of websites.<sup>24</sup> Because the interpretations of the Task Force and the Board of Governors were diametrically opposed, the Bar established the Special Committee on Website Advertising to gain further insight into the regulatory issues at stake.<sup>25</sup>

In 2008, based upon the recommendation of the Special Committee, the Bar filed a petition with the Supreme Court that offered a compromise.<sup>26</sup> The Bar proposed that the homepage of an attorney's website be governed by the advertising rules but that limited exceptions exist for the rest of the website.<sup>27</sup> Under these exceptions, statements characterizing the quality of legal services, references to past results, and testimonials would be permissible if truthful and, in regard to the latter two exceptions, if accompanied by a disclaimer.<sup>28</sup> The court, however, rejected the Bar's proposal in February of 2009.<sup>29</sup> Rule 4-7.6, therefore, was unchanged; websites remained virtually unregulated.<sup>30</sup> The Bar then filed a motion for clarification in which it emphasized that the court's rejection of the Bar's proposal left websites subject to minimal regulation.<sup>31</sup>

The court granted the Bar's motion for clarification and in November of 2009 issued a revised opinion in which it held that information on attorney websites would be governed by all the advertising rules, including those prohibiting statements containing past results, references to the quality of legal services, and testimonials.<sup>32</sup> The court noted that these types of statements are "extremely troubling"

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *History of Website Regulation, supra* note 19.

27. *Id.*

28. *Id.*

29. *In re* Amendments to the R. Regulating the Fla. Bar—Rule 4-7.6, Computer Accessed Comm'ns, 34 Fla. L. Weekly S261 (Fla. 2007).

30. *Id.*

31. *Id.*

32. *In re* Amendments to the R. Regulating the Fla. Bar—Rule 4-7.6, Computer Accessed Comm'ns, 24 So. 3d 172, 172-73 (Fla. 2009).

because they have the highest ability to mislead consumers.<sup>33</sup> Moreover, according to the court, these statements have the greatest potential for “further denigrating the justice system and the legal profession in the minds of the public.”<sup>34</sup> The court saw no convincing rationale for effectively loosening the rules for a medium that the Bar could not adequately monitor or control.<sup>35</sup>

The flashpoint now gave birth to a firestorm. Only days before the court issued its November 2009 opinion, the Bar reached a settlement with attorney Joel Rothman, who sued to challenge on First Amendment grounds the Bar’s application of the advertising rules with respect to his profile on *avvo.com*, a website that rates attorney services using client testimonials.<sup>36</sup> The stipulation stated that the Bar:

will consider a lawyer’s online profile to be a communication at the prospective client’s request under rule 4-7.1(f) if it appears on a Web site that allows creation of public or private profiles as part of a legal or business directory, or ratings site, and if the lawyer’s profile may be reached by searching for or selecting the lawyer’s name under circumstances where it is reasonably clear that the user is accessing information about the lawyer. This stipulation is not intended to cover information that would otherwise be prohibited by rules if that information is automatically displayed within the result of a general search inquiry not designed to produce information about the particular advertising lawyer.<sup>37</sup>

Rothman bemoaned his triumph as fleeting because the Supreme Court’s November 2009 opinion was to take effect on January 1, 2010.<sup>38</sup> The court’s opinion did not go into effect, however, because of an initial moratorium on enforcement and then a stay. More study, additional proposals, and considerable discussion and debate ensued.<sup>39</sup>

As these developments occurred, the economic stakes became enormous. Many Florida law firms with websites would be in violation of the court’s November 2009 order if it became effective and enforceable. In fact, eight large law firms that invested considerable

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33. *Id.* at 174.

34. *Id.*

35. *Id.*

36. Gary Blankenship, *Bar Will Not Apply Ad Rules to Web Rating Service Pending Review*, FLA. B. NEWS (Dec. 15, 2009), [www.floridabar.org](http://www.floridabar.org) (type in search box “Bar Will not apply ad”).

37. *Id.*

38. *Id.*

39. *History of Website Regulation*, *supra* note 19.



funds into their websites filed a sixty-page comment arguing, based upon their First Amendment rights, against any amendments to the rules that the Bar proposed to effectuate in the November 2009 opinion.<sup>40</sup> The conflict between the economic impact of the court's opinion and the state interest in protecting the public thus caused the discussion to refocus on the First Amendment as the Bar proposed an entirely revamped set of advertising rules. It now appears that perhaps the Bar's efforts have concluded where they might have more properly begun in 2005: with an analysis of the constitutional safeguards that protect attorney advertising.

### III. RECENT FEDERAL COURT CASES REGARDING ATTORNEY ADVERTISING

As pressures from the practicing bar have compelled the Florida Bar to reevaluate the constitutionality of its advertising rules, cases in the federal courts have further raised the stakes in regulatory reform. Two federal circuit courts of appeals, the Second and Fifth Circuits, recently revisited the First Amendment jurisprudence governing attorney advertising and overturned several rules in New York and Louisiana, respectively, the latter of which drew heavily from the rules in Florida.<sup>41</sup> Meanwhile, following an opinion by the Eleventh Circuit that focused largely on justiciability issues,<sup>42</sup> a Florida district court held that a number of the Florida Bar's advertising rules are unconstitutionally vague and infringe attorneys' commercial speech rights.<sup>43</sup>

The Second and Fifth Circuit cases—*Alexander v. Cahill*<sup>44</sup> and *Public Citizen v. Louisiana Attorney Disciplinary Board*,<sup>45</sup> respectively—are markedly similar in their holdings and rationales. Among the various rules the courts analyzed, both courts invalidated prohibitions of references to or testimonials about attorneys' services<sup>46</sup>—advertising techniques that, as Joel Rothman's experience demonstrates, have considerable potential in the new media landscape.

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40. See Comment of Eight Law Firms, In re: Fla. Bar's Petition to Amend R. Regulating the Fla. Bar—Rule 4-7.6, No. SC10-1014 (Fla. filed Aug. 14, 2010) (Computer Accessed Comm'ns).

41. See *Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir.), cert. denied, 131 S. Ct. 820 (2010).

42. See *Harrell v. Fla. Bar*, 608 F.3d 1241, 1253-54 (11th Cir. 2010).

43. See *Harrell v. Fla. Bar*, No. 3:08-cv-15-J-34TEM (M.D. Fla. Sept. 30, 2011), available at [http://pdfserver.amlaw.com/dbr/Harrell\\_v\\_Florida\\_Bar\\_District\\_Court\\_Order100311.pdf](http://pdfserver.amlaw.com/dbr/Harrell_v_Florida_Bar_District_Court_Order100311.pdf).

44. 598 F.3d 79.

45. 632 F.3d 212.

46. *Pub. Citizen*, 632 F.3d at 221-23; *Alexander*, 598 F.3d at 92.

To this end, both courts applied the test which the Supreme Court articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* to assess the constitutionality of a regulation on commercial speech:<sup>47</sup>

[The regulation] at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>48</sup>

Rejecting arguments proffered by the regulatory bodies that testimonials are “inherently misleading” and therefore not entitled to any constitutional protection, both courts concluded that testimonials could be protected commercial speech under *Central Hudson*.<sup>49</sup> The courts reasoned that testimonials could encompass verifiable facts, which are protected by the First Amendment.<sup>50</sup> As the Fifth Circuit pointed out, “[a] statement that a lawyer has tried 50 cases to a verdict, obtained a \$1 million settlement, or procured a settlement for 90% of his clients . . . are objective, verifiable facts,” as opposed to “statements such as ‘he helped me,’ ‘I received a large settlement,’ or ‘I’m glad I hired her’ . . . .”<sup>51</sup> Consequently, because testimonials were only “potentially misleading,”<sup>52</sup> the courts held that they were due some protection, which an outright ban did not afford.<sup>53</sup>

The Second and Fifth Circuits, furthermore, were skeptical toward paternalism as an undercurrent of Louisiana’s and New York’s respective rules. In its analysis of Louisiana’s testimonial rule, the Fifth Circuit explained that “[e]ven if, as [the Louisiana Attorney Discipline Board] argues, the prohibited speech has the potential for fostering unrealistic expectations in consumers, the First Amendment does not tolerate speech restrictions that are based only on a ‘fear that people would make bad decisions if given truthful information.’”<sup>54</sup> Ultimately, the court reasoned, the First Amendment reflects a greater concern

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

48. *Id.* at 566.

49. *Pub. Citizen*, 632 F.3d at 218–19; *Alexander*, 598 F.3d at 88–90–92.

50. *Pub. Citizen*, 632 F.3d at 221–22; *Alexander*, 598 F.3d at 92.

51. *Pub. Citizen*, 632 F.3d at 221.

52. *Id.* at 219.

53. *Id.* at 218–19; *Alexander*, 598 F.3d at 88–90, 95–96.

54. *Pub. Citizen*, 632 F.3d at 222 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 359 (2002)).

about suppression of information than poor decision-making.<sup>55</sup>

The Second Circuit expressed a similar rationale in scrutinizing a New York rule that prohibited advertisements that relied on “irrelevant techniques”—that is, “techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence.”<sup>56</sup> The court acknowledged that the rule advanced “an interest in keeping attorney advertising factual and relevant” but rejected this interest as sufficiently substantial under *Central Hudson*.<sup>57</sup> Further, the court distinguished this interest from “an interest in preventing misleading advertising” and noted that no evidence showed that the “irrelevant techniques” prohibited by the rule were,<sup>58</sup> in fact, “misleading and so subject to proscription.”<sup>59</sup> The court seemed to appreciate that as media has evolved, so too have notions of what the legal profession is, or should be, in the public’s view:

[T]he sorts of gimmicks that this rule appears designed to reach—such as [the plaintiff-attorneys’] wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that [the plaintiff-attorneys] are not giants towering above local buildings; they cannot run to a client’s house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as a matter of “common sense”—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve important communicative functions: they attract the attention of the audience to the advertiser’s message, and they may also serve to impart information directly.<sup>60</sup>

New York’s “irrelevant techniques” rule was similar to a prefatory Florida Bar rule at issue in *Harrell v. Florida Bar*.<sup>61</sup> The latter rule, rule 4-7.1, disallows all advertisements except those that provide “only

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55. *Id.* (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

56. *Alexander*, 598 F.3d at 93 (quoting N.Y. Comp. Codes R. & Regs. § 1200.50(c)(5)).

57. *Id.*

58. *Id.*

59. *Id.* at 94.

60. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647 (1985)).

61. 608 F.3d 1241, 1250 (11th Cir. 2010).

useful, factual information presented in a nonsensational manner.”<sup>62</sup> Like the Second Circuit with respect to the New York rule, a district court struck down the Florida rule, but on the ground that it was impermissibly vague and chilled protected speech. Thus, the rule was invalid under the Fourteenth Amendment’s Due Process Clause.<sup>63</sup> Notably missing among the numerous rules that the *Harrell* plaintiffs contested, however, was rule 4-7.2, which prohibits advertisements that “contain[ ] any reference to past successes or results obtained” and that “contain[ ] a testimonial.”<sup>64</sup> Nevertheless, it seems, if a litigant could meet the standing and ripeness requirements that the Eleventh Circuit discussed in an opinion that remanded the *Harrell* case to the district court,<sup>65</sup> that litigant would have solid authority from sister circuits to challenge these bans.

The foregoing developments have crystallized the need for state bars to reconsider long-held assumptions about media and consumers as they embark on overhauling their advertising rules to respond to new technology. The threat of litigation over constitutionally questionable rules is real: Public Citizen—a pro-consumer advocacy group that was a party to all the above cases—has showed that it will file suit across the country to object to overreaching regulations of attorney advertising.<sup>66</sup> While the Florida Bar in particular has endeavored to construct a new, comprehensive code of advertising rules, whether those rules themselves could become the target of litigation depends on an important question: Has the Bar given constitutional considerations their due?

#### IV. AN EARLY ANALYSIS OF THE FLORIDA BAR’S PROPOSED ADVERTISING RULES

The Florida Bar purported to answer that question in the affirmative in its recent petition to amend its advertising rules, filed in the Florida Supreme Court in July of 2011.<sup>67</sup> The petition explains that the Bar rewrote the rules after extensive study, input from bar members and the public, public surveys, and a review of the U.S. Supreme Court’s

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62. R. Regulating Fla. Bar 4-7.1 cmt. (2010).

63. See *Harrell v. Fla. Bar*, No. 3:08-cv15-J-34TEM, slip op. at 22–23 (M.D. Fla. Sept. 30, 2011), available at [http://pdfserver.amlaw.com/dbr/Harrell\\_v\\_Florida\\_Bar\\_District\\_Court\\_Order100311.pdf](http://pdfserver.amlaw.com/dbr/Harrell_v_Florida_Bar_District_Court_Order100311.pdf).

64. R. Regulating Fla. Bar 4-7.2(c)(1)(F), (J) (2011).

65. See *Harrell*, 608 F.3d 1241 (11th Cir. 2010).

66. See *About Us*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=2306> (last visited Mar. 2, 2012).

67. See Fla. Bar: Petition to Amend the R. Regulating the Fla. Bar—Subchapter 4-7, Lawyer Adver. Rules (Fla. July 5, 2011).

attorney advertising case law.<sup>68</sup> The result of this information-gathering process was a slate of rules that mark a major transformation of the current rules. Designed with the goals to protect the public from “false, misleading, or deceptive information by lawyers” and to provide the legal community with “clear and simple guidelines,”<sup>69</sup> the rules cluster around principles from the Supreme Court’s commercial speech jurisprudence. The rules specifically create tiers of advertising that the Bar prohibits, which include “deceptive and inherently misleading advertisements” and “potentially misleading advertisements.”<sup>70</sup> The rules also include examples of the advertising assigned to each tier. Because the Bar was focused on “prohibiting only that which is misleading or unduly intrusive or manipulative,” the rules notably no longer distinguish among advertising media.<sup>71</sup> Perhaps more notably, the Bar concedes that its current rules are “too restrictive under constitutional law.”<sup>72</sup> Channeling the rationale of the recent Second and Fifth Circuit opinions, the Bar notes that the rules’ ban on advertisements that contain any references to past results or testimonials, for example, appear to run afoul of the First Amendment’s protection of truthful commercial information.<sup>73</sup>

The question remains: Do the proposed rules constitutionally suffice? At least facially, it seems that the rules are an improvement. Recognizing that the First Amendment protects accurate statements of facts, proposed rule 4-7.3 allows advertisements that contain references to past results unless such information is not “objectively verifiable” and also allows advertisements that contain testimonials that comply with certain enumerated criteria.<sup>74</sup> On the other hand, this rule deems advertisements with references to past results that are not objectively verifiable “deceptive or inherently misleading advertising” and accordingly subject to proscription.<sup>75</sup> This rule similarly disallows “comparisons of lawyers or statements, words or phrases that characterize a lawyer’s or law firm’s skills, experience, reputation or

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68. *Id.* ¶¶ 2, 4-5, 7.

69. Bd. Review Comm. on Prof’l Ethics, *Report on the Lawyer Adver. Rules*, Fla. Bar 1, 3-4 (May 27, 2011) [hereinafter *Advertising Report*].

70. See Fla. Bar News, *Amendments to the Pending Lawyer Adver. Rules*, at R. 4-7.3, 4-7.4 (proposed draft 2011) (last visited Mar. 2, 2012) [hereinafter *Pending Adver. Rules*].

71. *Advertising Report*, *supra* note 69, at 5; *Pending Adver. Rules*, *supra* note 70, at R. 4-7.1(a) (“Unless otherwise indicated, this subchapter applies to all forms of communication in any print or electronic forum . . .”). The proposed rules do distinguish direct mail as a form of solicitation. *Advertising Report*, *supra* note 69, at 5.

72. *Advertising Report*, *supra* note 69, at 5.

73. *Id.* at 6-7.

74. *Pending Adver. Rules*, *supra* note 70, at R. 4-7.3(b)(2), (8).

75. *Id.* R. 4.7.3(b)(2).

record, unless such characterization is objectively verifiable.”<sup>76</sup> Additionally, it limits testimonials from qualified individuals (e.g., clients) to comments “on matters such as courtesy, promptness, efficiency, and professional demeanor.”<sup>77</sup>

In these instances, the Bar effectively proposes to prohibit or restrict advertisements that address the quality of an attorney’s legal services in a way that cannot be factually substantiated. The proposed comments try to illustrate. The comment on past results explains that a statement that, for example, “a lawyer has obtained acquittals in all charges in 4 criminal defense cases” is objectively verifiable and therefore permissible if true.<sup>78</sup> By contrast, “general statements such as ‘I have successfully represented clients’ or ‘I have won numerous appellate cases’ may or may not be sufficiently objectively verifiable” because the average prospective client may understand “successful” and “won” in absolute terms whereas an attorney may understand them in more nuanced terms.<sup>79</sup> Such statements thus may mislead the average prospective client to unjustifiably expecting similar results from a previous case.<sup>80</sup> Likewise, the comment on characterization of skills, experience, reputation, or record explains that the statement “our firm is the largest firm in this city that practices exclusively personal injury law” is objectively verifiable and thus permissible if true.<sup>81</sup> But descriptive statements such as “the best,” “second to none,” or “the finest” are not objectively verifiable and consequently are prohibited because they are “likely” to mislead prospective clients as to the quality of an attorney’s services.<sup>82</sup> The rule also has the effect of prohibiting client testimonials about the quality of an attorney’s legal abilities, regardless of the client’s legal insight or understanding to render such an opinion. Thus, for example, a client could seemingly testify that an attorney provided “prompt and courteous advice,” but not that an attorney “was prompt and courteous in providing cutting-edge legal advice.”<sup>83</sup>

Since the Supreme Court rendered *Bates*, the extent to which a governing body may restrict, as deceptive or misleading, “advertising claims relating to the *quality* of legal services . . . not susceptible of precise measurement or verification”<sup>84</sup> has remained a contentious

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76. *Id.* R. 4.7.3(b)(3).

77. *Id.* R. 4.7.3(b)(8) cmt.

78. *Id.* R. 4.7.3 cmt.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.*

84. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977).

issue. As the Fifth Circuit elaborated in *Public Citizen*, the *Central Hudson* test—specifically, the prongs mandating the government “to demonstrate that the challenged rules are narrowly drawn to materially advance the asserted substantial interests”—allows regulators to prohibit such claims but only if they show that the unverifiable statements are “likely to be misleading . . . .”<sup>85</sup> In *Public Citizen*, the attorney regulatory board relied on survey data about the public’s opinion on client testimonials and truthfulness in the legal profession to justify its ban on communications about past results.<sup>86</sup> The court dismissed the data, however, as “either too general to provide sufficient support for the rule’s prohibition or too specific to do so.”<sup>87</sup> According to the court, the more general data about the poor perception of attorneys and attorney advertisements “fail[ed] to point to any specific harms or to how they will be alleviated by a ban on testimonials or references to past results.”<sup>88</sup> And the more specific data about testimonials failed to “shed light on the rule’s prohibition of only those testimonials specifically discussing the attorney’s past results . . . .”<sup>89</sup>

The Fifth Circuit’s analysis is consistent with the district court’s analysis in *Harrell*. There, in defending against a challenge to the current Florida Bar rule restricting qualitative statements in attorney advertisements as applied to a slogan in a television commercial, the Bar put forward “data which purportedly show[ed] that television advertising ‘lowers the public’s respect for the fairness and integrity of the legal system and adversely affects the system.’”<sup>90</sup> The court, however, was not persuaded by the Bar’s characterization of the data.<sup>91</sup> In any event, the court reasoned, “evidence that the public dislikes

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85. *Pub. Citizen, Inc. v. La. Att’y Disciplinary Bd.*, 632 F.3d 212, 220, 222 (5th Cir. 2011) (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

86. *Id.* at 220–22.

87. *Id.* at 222.

88. *Id.* (citing *Edenfield*, 507 U.S. at 771).

89. *Id.* The survey results indicated that “83% of the interviewed public did not agree ‘client testimonials in lawyer advertisements are completely truthful.’” *Id.* The court noted that the results

might be read to show that a majority of the Louisiana public may be unswayed by testimonials—perhaps demonstrating that they are a poor advertising choice—but not that banning only those testimonials that relate to past results will “ensur[e] the accuracy of commercial information in the marketplace” or is required to uphold ethical standards in the profession.

*Id.* (quoting *Edenfield*, 507 U.S. at 771).

90. *Harrell v. Fla. Bar*, No. 3:08-cv-15-J-34TEM, slip op. at 35 (M.D. Fla. Sept. 30, 2011), available at [http://pdfserver.amlaw.com/dbr/Harrell\\_v\\_Florida\\_Bar\\_District\\_Court\\_Order100311.pdf](http://pdfserver.amlaw.com/dbr/Harrell_v_Florida_Bar_District_Court_Order100311.pdf).

91. *Id.* at 39.

television advertising *generally* does little to inform the Court as to any harms potentially caused by Harrell's slogan *specifically*.<sup>92</sup>

*Public Citizen* and *Harrell* beg whether the Bar has met its burden of showing why objectively unverifiable references to past results, comparisons, and certain characterizations (which may be in the form of a testimonial) are "deceptive and inherently misleading," and susceptible to prohibition in the proposed rules. Like the Louisiana Bar, the Florida Bar conducted a survey of Floridians' attitude toward attorney advertising, which it included in support of the proposed rules.<sup>93</sup> Although the survey appears to have ambitiously polled the public on many aspects of attorney advertising, the results may offer only limited support for restricting speech not subject to objective verification. For example, about 22% of the respondents thought that advertisements for professional services are misleading; on the other hand, the same percentage thought that such advertisements are accurate.<sup>94</sup> Additionally, more than half of the respondents indicated that their view of the Florida court system did not change after seeing attorney advertising on television and the Internet, while about a quarter of the respondents said that the advertisements negatively affected their view, and about 10% reported an improved view of the system.<sup>95</sup> The vast majority, however, did not rate advertisements as one of the most important factors in deciding upon whom to retain as counsel.<sup>96</sup> By contrast, 61% rated client endorsements as an important attribute to consider when hiring an attorney.<sup>97</sup> A plaintiff challenging the proposed rules, in sum, may assert that the survey results are inconclusive and thus fail to show a real harm to the public, as is required to restrict commercial speech.<sup>98</sup>

Even if the Bar could meet its legal burden with the survey data, it remains to be seen whether the proposed rules' proscription of unsubstantiated, qualitative statements are truly "clear and simple . . .".<sup>99</sup> The proposed ban on characterizations of an attorney's skills, experience, reputation, or record, for example, explains that "[s]tatements of a character trait or attribute," "[d]escriptive statements that are true and factually verified," and "[a]spirational statements" are permissible; yet descriptive statements that "cannot be objectively verified" and descriptive statements that are misleading are

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92. *Id.* at 35.

93. *See generally Advertising Report, supra* note 69.

94. *Id.* at 12.

95. *Id.* at 13.

96. *Id.* at 11.

97. *Id.*

98. *Cf. Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 222 (5th Cir. 2011).

99. *Advertising Report, supra* note 69, at 4.



impermissible.<sup>100</sup> Thus, based on the illustrations in the rule, it seems that an attorney could advertise that “I have obtained acquittals in all ten criminal cases that I have taken” and that “My legal philosophy is guided by careful reasoning and aggressive advocacy,” but not that “I have obtained acquittals in all ten criminal cases that I have taken because of my careful reasoning and aggressive advocacy.”<sup>101</sup>

As these illustrations suggest, enforcement of the proposed rules may turn on semantic splicing, “similar to the way rule 4-7.2, the current rule against qualitative characterizations, has been enforced.” In holding in *Harrell* that the plaintiffs could proceed to challenge this rule as unconstitutionally vague, the Eleventh Circuit noted the Bar’s apparently inconsistent determinations that the phrases “When who you choose matters most” and “MAKE THE RIGHT CHOICE!” characterized the quality of legal services, but that the phrase “Choosing the right person to guide you through the criminal justice system may be your most important decision. Choose wisely” did not.<sup>102</sup> Though the district court later held that this rule was not “unconstitutionally vague because it lacks enforcement standards resulting in the Bar’s broad interpretation . . . and arbitrary enforcement,” the court acknowledged that “the Bar’s application . . . to [various] carefully worded advertisements often appears to turn on fine, and at times almost imperceptible, distinctions.”<sup>103</sup> Indeed, in *Harrell* itself, the Bar initially concluded that the attorney’s television slogan “Don’t settle for less than you deserve” was a qualitative characterization but later reversed course during litigation—a change of position that was insufficient to deter the district court from holding that the Bar’s initial application violated the attorney’s First Amendment rights.<sup>104</sup> To this end, the court rejected the Bar’s claim that the proposed rules—pursuant to which the Bar argued the slogan would be permissible—mooted the challenge: “[T]he submission of the Revised Rules to the Florida Supreme Court [does not] make[] it ‘absolutely clear’ that the Bar will not change its position with respect to the slogan.”<sup>105</sup>

Despite implying that the proposed rules governing qualitative statements would at least survive vagueness attack, *Harrell* does indicate that one other proposed rule, rule 4-7.5, may be

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100. *Pending Adver. Rules*, *supra* note 70, R. 4-7.3 cmt.

101. *See id.*

102. *Harrell v. Fla. Bar*, 608 F.3d 1241, 1256 (11th Cir. 2010).

103. *Harrell v. Fla. Bar*, No. 3:08-cv-15-J-34TEM, slip op. at 16, 18 (M.D. Fla. Sept. 30, 2011), available at [http://pdfserver.amlaw.com/dbr/Harrell\\_v\\_Florida\\_Bar\\_District\\_Court\\_Order100311.pdf](http://pdfserver.amlaw.com/dbr/Harrell_v_Florida_Bar_District_Court_Order100311.pdf).

104. *See id.* at 36 n.23.

105. *Id.*

unconstitutionally vague and chill protected speech.<sup>106</sup> That rule bans “unduly manipulative or intrusive advertisements,” such as the use of “an image, sound, video or dramatization in a manner that is designed to solicit legal employment by appealing to a prospective client’s emotions rather than to a rational evaluation of a lawyer’s suitability to represent the prospective client.”<sup>107</sup> The rule is similar to the prohibitions of manipulative radio or television advertisements in current rules 4-7.2 and 4-7.5, which the *Harrell* district court concluded are impermissibly vague.<sup>108</sup> As the court reasoned, “almost every television advertisement employs visual images or depictions that are designed to influence, and thereby ‘manipulate,’ the viewer into following a particular course of action, in the most unexceptional sense.”<sup>109</sup> Advertising, in other words, by definition aims to “manipulate” or “intrude” a consumer’s decision-making; it thus seems implausible that such manipulation or intrusion could be “undue,” at least in any way that attorneys could discern and regulators could measure. Therefore, *Harrell* suggests the proposed rule may not withstand a vagueness attack.<sup>110</sup>

Insofar as the “undue manipulation” rule further would restrict the kind of advertising techniques at issue before the Second Circuit in *Alexander*—“wisps of smoke, blue electrical currents, and special effects”<sup>111</sup>—the rule also may constrain attorneys’ First Amendment commercial speech rights. As the court explained there, *Central Hudson* demands that regulators put forward more than “an interest in keeping attorney advertising factual and relevant” to limit advertising they may find tasteless, and show through convincing evidence that such advertising actually misleads the public.<sup>112</sup> But, the court opined, meeting the latter requirement may be impossible in an era in which advertisements that push the envelope are the norm and may have the most communicative impact on the public.<sup>113</sup>

In sum, the proposed rules mark an ambitious attempt to regulate, in a constitutional manner, the continually changing means that attorneys use to advertise to the public. To the Bar’s credit, the rules are an improvement over the comparatively rigid rules that are still in effect as of this writing, especially when juxtaposed with recent case law. Nevertheless, the foregoing points show that the proposed rules are not foolproof to constitutional challenge. If the Florida Supreme Court

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106. *Harrell*, 608 F.3d at 1257.

107. *Pending Adver. Rules*, *supra* note 70, R. 4-7.5(a).

108. *See Harrell*, slip op. at 20–22.

109. *Id.* at 20 (quoting *Harrell*, 608 F.3d at 1255).

110. *See generally Harrel*, slip op. at 35.

111. *Alexander v. Cahill*, 598 F.3d 79, 94 (2d Cir. 2010).

112. *Id.* at 93.

113. *Id.* at 94.

adopts the rules as they are, the history of attorney advertising in Florida indicates that such a challenge is likely, if not inevitable.

## V. OBSERVATIONS AND CONCLUSION

The Florida Bar has built its reputation as an aggressive regulator of attorney advertising, particularly as it has evolved with new technology. Even with its less restrictive proposed advertising rules, the Bar endeavors to regulate, in great detail, advertising that it determined corrodes the public interest and the veracity of the legal system. Given the scope of this regulatory regime, attorneys are bound to test its constitutionality if the Florida Supreme Court enacts it.

The Bar's proposed rules are not the only template for regulating attorney advertising. The American Bar Association's latest policy position offers an alternative, suggesting that a "less is more" approach is better. In revealing proposals governing attorney "use of technology-based client development tools," the ABA Commission on Ethics 20/20 recently declined to amend or qualify the basic prohibition of false and misleading communications that is cross-referenced in ABA Model Rule of Professional Conduct 7.2.<sup>114</sup> "Though the Model Rules were written before these technologies had been invented," explained Commission Co-Chair Jamie Gorelick, "their prohibition of false and misleading communications apply just as well to online advertising and other forms of electronic communications that are used to attract new clients today."<sup>115</sup> The Commission proposed changes only to the comment to rule 7.2, which distinguishes the ABA's policy from more restrictive policies:

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

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114. See Am. Bar Ass'n, *ABA Commission on Ethics 20/20 Recommends No New Restrictions on Lawyer Adver.* (June 29, 2011), <http://www.abanow.org/2011/06/aba-commission-on-ethics-2020-recommends-no-new-restrictions-on-lawyer-advertising/> (last visited Mar. 2, 2012).

115. *Id.*

advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.<sup>116</sup>

Whichever approach a jurisdiction adopts, the decision-making process that it employs should be guided centrally by the constitutional principles that set the outer bounds of regulatory authority. Although the recent opinions of the Second, Fifth, and Eleventh Circuits reaffirm the validity of the state's interests in protecting the public and the trustworthiness of the legal system by regulating deceptive and misleading advertising, the opinions also highlight the constitutionally slippery slope that emerges when regulations contain restrictions for which there is inadequate evidence of a nexus to harm. Additionally, when these restrictions are subject to inconsistent, subjective interpretation, a void-for-vagueness challenge may arise.

Though the innovations of the day may warrant regulators to exercise the power with which they have been publically entrusted, these principles should not be lost in the bureaucratic fray, as they have been in Florida as regulators delegated tasks to advisory bodies whose policy prescriptions at times clashed. Constitutionally dubious rules create uncertainty for the practicing bar and the public that depends upon its services, and expose regulatory responses to criticisms of overreaction and shortsightedness. In sum, a bar association fares better if it ensures from the onset that its rules are constitutional and possess the flexibility to remain so in the face of evolving technology—considerations that reduce the risk of returning to the drawing board to wonder, “Now what do I do?”

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116. MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 3 (initial draft proposal 2011).