IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR:
PETITION TO AMEND THE
RULES REGULATING THE
FLORIDA BAR -
ADVERTISING ISSUES

CASE NO. 74,987

BRIEF OF THE FLORIDA BAR

On Petition To Amend The Rules Regulating Lawyer Advertising

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PRELIMINARY STATEMENT

Petitioner, The Florida Bar, is sometimes referred to in this Brief as "the Bar." The amended rules which are the subject of this petition are referred to as the "proposed rules" or the "new rules." Specific amendments are referred to as "proposed Rule ____" or "new Rule ____." The rules as they currently exist are referred to as the "existing rules" or "existing Rule ____." The Table of Authorities includes an index to the existing and proposed rules cited in this Brief. Both the existing and proposed rules are reproduced in their entirety in the Appendix to this Brief.

The Record in this case was filed on December 13, 1989. It consists of appendices tabbed A through L, with subparts. The Record is referred to in this Brief by its appendix designation: "App. ____"

Because the Record is so voluminous, the Bar has prepared a Summary of the Record and filed it simultaneously with this Brief. The Summary provides, without argument, a brief synopsis of the Record, with citations to the Record itself for each statement in the Summary. Like the Record, the Summary is tabbed A through L, and it is referred to in this Brief by the appendix designation. Thus, the summary of Appendix C(14) would be referred to in this Brief as "Summary of App. C(14)."

All emphasis within quoted material is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

By its petition dated November 7, 1989, The Florida Bar requested this Court to make certain changes in the rules governing lawyer advertising and solicitation. The facts giving rise to the Bar's request are set forth below.

1. The Bar's Study Of Advertising And Solicitation

In January, 1987, the rules regulating The Florida Bar were amended to allow the direct mail solicitation of prospective clients. See The Florida Bar re Rules Regulating The Florida Bar, 494 So.2d 977 (Fla. 1986). Since then, the use of direct mail solicitation by lawyers in Florida has risen dramatically -- in 1989, direct mail solicitations climbed to the rate of approximately 700,000 annually. App. H(4). Advertising in the Yellow Pages and other media similarly exploded. See App. B, New York Times, July, 1989; App. G(2) and (3). Unfortunately, abuses in lawyer advertising became pervasive.

In June, 1987, the Bar created a Special Board Committee on Solicitation and a Commission on Advertising to study what changes, if any, were appropriate to the rules regulating lawyer advertising and solicitation. The two committees were subsequently merged into a single Commission on Advertising and Solicitation. Between 1987 and 1989, the committees gathered information relating to lawyer advertising and solicitation and met repeatedly to review that information. App. A(1). Public surveys and opinion polls were performed during those years and the results analyzed. Prior surveys of the public were studied as well. Public comment was received, and four public hearings were held around the state. See App. C, App. I, App. J, App. K.

During this process, the abuses prevalent in current lawyer advertising became apparent. Much lawyer advertising was not fulfilling its very reason for being -- the conveyance of useful factual information to consumers so they can make informed and rational decisions relating to legal services -- and was often disserving that goal. Many advertisements affirmatively misled consumers. Others relied purely on uninformative media techniques, thereby injecting irrational factors into consumer decisions in the selection of counsel. Perhaps most importantly of all, current lawyer advertising -- primarily television commercials and direct mail solicitation of personal injury and wrongful death claims -- was negatively affecting the administration of justice.

The Bar's study of lawyer advertising resulted in proposed rule amendments which were approved by the Board of Governors in September, 1989 and submitted to this Court on November 7, 1989. See App. A(1) at 7. These rule changes are intended to correct the abuses found to exist under the old rules.

2. Abuses Identified By The Study, And The Proposed Rule Changes

(a) Advertising That Does Not Convey Full And Useful Factual Information

The Bar's study demonstrated that current lawyer advertising generally does not contain the information necessary for informed and reliable decisionmaking by consumers. The only information that many lawyer advertisements convey is that an injured person should sue for damages and that the advertising lawyer is available to file a lawsuit. See generallv App. E(3) and G. As a result, most of the public believe that current lawyer advertising is not informative, does not increase awareness of legal

problems, does not allow consumers to judge a lawyer's competence, and does not aid in selecting a lawyer. App. C(1) at 7; App. C(4) at 11; App. C(8) at 5, 8, 17; App. C(9) at 52-53; App. C(10) at 17. In short, the information consumers need in making those decisions is not conveyed by much current lawyer advertising. See App. C(8) at 5; App. C(9) at 17; App. C(14) at 8.

The study pinpointed several areas where a lack of information caused specific problems. In each of these areas, the missing information either was essential to informed decisionmaking or created consumer confusion because of its omission. For example, the identity and location of the lawyer who will perform the work obtained through an advertisement is obviously important. Indeed, the attorney-client relationship is uniquely personal and founded upon a special trust, as recognized by the very existence of the attorney-client privilege. Yet lawyer advertisements often do not include that critical information.

Some advertisements do not even identify a lawyer at all.[1] Other ads do not identify the lawyer most likely to perform the legal services.[2] Numerous Yellow Pages

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[1] In television commercials that run in Florida, the nationwide Injury Helpline asks viewers to call an "800" number to "discuss your case with an attorney near you for free," but does not identify any lawyer. Viewers who call the 800 number are simply referred to the lawyer who at that time owns the right to the calls originating from the viewer's zip code. See App. E(3) at No. 15 and 21; App. D(2) at 3.

[2] Some advertising lawyers appear to have become "public adjustment firms" which routinely settle cases for 25¢ on the dollar without actually working on the case and, if required to perform legal work, broker it to other lawyers. See App. J(2) at 63-65, 77, 118, 121-22; App. J(3) at 52; App. J(5) at 17, 62-64. See also App. B at Hollywood Sun-Tattler, July 21, 1989 and The Orlando Sentinel, July 31, 1989; App. C(6) at 15.

(continued...)

advertisements give no geographic location for the lawyer, but instead give a local phone number, which leads consumers to believe they will be dealing with a local lawyer when the office is actually located in another city. See Summary of App. G(2) at (vi).

An especially common abuse occurs when lawyers distort their identity in an effort to place themselves at the front of the Yellow Pages listings. They create Yellow Pages identities like "A ABA," " A Ability," "A Affordable," and "A Aachen Aardvark Aaron ABA Attorneys." See Summary of App. G(2) at (ii) and Summary of App. *G(3)* at (ii). In sum, many lawyers are creating aliases for themselves -- one name for purposes of advertising, another name for actually engaging in the practice of law.

Even when advertisements clearly identify the lawyer, it was apparent from the Bar's study that they generally failed to educate the consumer to the lawyer's background and experience. Although lawyers often advertise their availability in specialized areas and proclaim their experience in those areas, they infrequently include ~~factual~~ information relating to their background and experience. See ~~generally~~ App. E(3); App. G(2); App. G(3); App. I(1); App. I(4). The fact that a lawyer limits his practice obviously does not guarantee competence or even experience in the area. Implicitly

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*(...continued)
This practice has become so notorious that a prominent columnist for the Miami Herald and best-selling author patterned a character after such lawyers for his latest book. The character advertises on billboards at busy intersections and on the air with an "800" phone number, but always brokers his cases to other lawyers. When an interviewer on National Public Radio expressed incredulity over this character, the author assured her that this practice is very prevalent in Miami. See App. L(1) at 2.

recognizing this, consumers desire specific information relating to a lawyer's background and experience. See App. C(4) at 11; App. C(8) at 5, 7-8, 17.

Other advertising creates consumer confusion because it does not fully disclose all material facts. Sample fee contracts included with direct mail solicitations confuse consumers because they are not identified as being for advertisement purposes only. See App. J(2) at 125. Yellow Pages advertisements mislead consumers by stating that the lawyer is a Juris Doctor or a member of The Florida Bar without disclosing that virtually every lawyer practicing in Florida possesses the same qualifications. See Summary of App. G(2) at (iv). And, most consumers mistakenly believe that advertisements offering "no recovery, no fee" mean "no costs" either, unless the advertisement states that costs are the client's responsibility[3] App. C(14) at 21, 25.

Having identified the problems resulting from the lack of information to consumers, the Bar reviewed various ways to correct the abuses. After careful consideration, the Bar developed two types of rule changes to increase the flow of full and factual information in lawyer advertisements and curb or eliminate advertising that is confusing or misleading.

First, to encourage advertising which provides the public with useful, factual information, and to provide advertisers with basic guidance in complying with the rules, the Bar proposes a "safe harbor" for lawyer advertisements. New Rule 4-7.2(n) lists nine categories of information which are "presumed not to violate" the rules prohibiting

[3] In 1989, there were approximately 200 advertisements in the Yellow Pages that offered "no recovery, no fee" without stating whether the client would be liable for costs. See Summary of App. G(2) at (i) and Summary of App. G(3) at (i); App. E(3).

deceptive advertising -- information such as date of admission to the Bar, identification of jurisdictions where the lawyer is licensed to practice, technical and professional licenses, foreign language ability, fields of law in which the lawyer is designated or certified, and fee information: All of this information is material to the selection of a lawyer; because it is subject to verification, it poses little risk of misleading the consumer.

Second, the Bar developed a series of disclosure requirements **to** remedy the problems created by advertisements which fail to disclose material information. To at least allow consumers to know who they would be hiring, the new rules require that advertisements disclose whether the advertising lawyer will actually handle the matter, the relationship between the advertising lawyer and any other lawyer who might handle the matter, and the geographic location of the lawyer who will actually perform the services advertised. See Rule 4-7.2(b), (l), and (m); Rule 4-7.4(c)(1)(i). In addition, new Rule 4-7.7(c) provides that a lawyer shall not advertise under a trade name unless he actually practices under that name. These rules will provide consumers with the most fundamental information they need and, in particular, prevent the brokering of legal services without the prior knowledge of the consumer.

Moreover, to promote informed selection of a lawyer, the proposed rules would require specific disclosures relating to a lawyer's background and experience. New Rules

[4] Another rule expands where a lawyer may advertise to include billboards, signs, and recorded phone messages. See Rule 4-7.2(a).

4-7.3(b) and 4-7.4(c)(1)(e) require that any written communication to prospective clients include a factual statement in this regard.[5]

Because it would be infeasible to provide such information in certain types of advertising, some advertisements must instead disclose: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you written information about our qualifications and experience." Rule 4-7.2(d). This additional disclosure requirement applies only to electronic media commercials, where the danger of unthinking, emotional reaction is greatest,[6] and to advertisements in the print media which are not limited to the safe harbor information of Rule 4-7.2(n). In those particular types of advertising, the disclosure is reasonably designed to reduce the likelihood that consumers will make rash and irrational decisions based on insufficient, incomplete, or misleading information.

Separate disclosure requirements address the specific problem areas where confusion is created because of incomplete information. New Rules 4-7.3(c)(4) and 4-7.4(c)(1)(f) require that fee contracts included with written solicitations be marked "SAMPLE." The new Comment to Rule 4-7.1 makes it clear that representations that a lawyer is a Juris Doctor or member of The Florida Bar are misleading. And, Rule 4-7.2(h) now requires that any representation regarding a lawyer's fee disclose whether

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[5] Under existing rules, lawyers who advertise their services must have available such a factual statement in written form, and must state in advertisements and written communications that such information will be made available upon request. <u>See</u> Rule 4-7.3(a) and (d).

[6] See discussion in subsection (c) below.

the client will be liable for costs and whether contingency fees will be computed before costs are deducted. This new rule will allow consumers to better understand their liability for fees and costs, and minimizes the possibility that they will believe they are getting something without risking something, unless that is in fact the case.

(b) Advertising That Misleads Consumers Or Elevates Emotional Factors Over Rational Decisionmaking

During its two-year review process, the Bar also became aware of the increasingly common use of certain types of advertising which discourage informed decisionmaking. Some of this advertising is misleading by its nature; some is deceptive by its manner of communication, often elevating nonrational emotional appeals over rational decisionmaking. Typically, this form of advertising contains little, if any, factual or verifiable information.

For example, a review of Yellow Pages advertisements showed that some lawyers advertise under trade names like "Academy," implying the firm is something more than a law firm. See App. G(2) at Exh. 105, 153. The Yellow Pages review also revealed a great many self-laudatory representations relating to quality of services which cannot be substantiated factually -- for example, "I am your creditors' worst nightmare," "when the best is simply essential," and "the lawyer you can trust." See Summary of App. *G(2)* at (iv). Similar self-laudatory representations are inherent in many illustrations used in lawyer advertisements, such as an ad drawn in the shape of a dollar bill, with the lawyer's picture where Washington's would be. See Summary of App. *G(2)* at (v) and Summary of App. G(3) at (v).

Like all representations as to quality of services, such self-laudatory representations and illustrations are inherently misleading because they make unverifiable claims that create unrealistic expectations of successful results. *As* such, they encourage emotional reaction rather than informed and deliberate consideration.

Likewise, the dramatizations used in lawyer advertising often have little or no useful informational content and rely instead on emotional appeals -- shock, sex, sympathy, greed. Bloody car wrecks are popular. App. E(3) at No. 3, 22, 23, 36. Others use sex appeal; for example, one shows two women "strutting" around a swimming pool in bathing suits "three sizes too small." App. B, Sun-Sentinel, July 24, 1989. See id., New York Times, July, 1989. One that appeals to plain greed features a check and asks "How much is your pain worth?" App. D(4) at 15. Such dramatizations encourage selection of a lawyer not for his qualifications or abilities, but because of "a T.V. image that is bold, brilliant, elegant, irresistible." App. D(3) at 1. Indeed, by their very nature, dramatizations are misleading since their whole purpose is to "confuse viewers about where reality ends and the re-creations begin." App. E(6).

Finally, the Bar's study revealed abuses in the use of testimonials in lawyer advertising. Like dramatizations and self-laudatory statements, testimonials by their nature are misleading, emotional appeals. See App. E(1) at 105. Even a cursory review of advertisements shows that the very reason they include testimonials is to suggest -- unrealistically -- that results purportedly obtained in the past for one client can be obtained for clients in the future. See App. E(3) at No. 12.

For example, one commercial has a man arrested for DUI saying "They wanted to put me in jail for a year. . . . That's when I called the lawyer at the Ticket Clinic. They got my case thrown out of court." App. **E(3)** at No. **13.** Another commercial consists of testimonials by clients who all purportedly got quick settlements. Id. at No. **37.** See also id. at No. **12, 34.** One Tampa lawyer uses a generic endorsement by a celebrity (John Madden) hired by lawyers nationwide. See **App. B,** St. Petersbure Times, Jan. **14, 1987.** None of these commercials paint the full and true picture by offering testimonials by dissatisfied clients, though no lawyer is 100% successful for all clients.

In considering possible solutions to these abuses, the Bar determined to stop the flow of misinformation and thereby promote informed and rational decisionmaking. The Bar first reinforced the existing rule prohibiting false or misleading communications by adding that communications may not be "deceptive" or "unfair." See Rule **4-7.1.** Separate rules then were developed for each area of abuse -- trade names, unverifiable self-promotion, non-informational illustrations, dramatizations, and testimonials.

Accordingly, new Rule 4-7.7(b) and its Comment provide guidance as to when a trade name is deceptive. Thus, the terms "Legal Clinic" and "Legal Services" might be deceptive in a firm's name if that firm did not provide routine legal **services** ***at*** low ***fees.***

To restrain unverifiable self-promotion, new Rule 4-7.2(j) prohibits statements which are "merely self-laudatory" or characterize the quality of the lawyer's services. The new Comment to existing Rule 4-7.1*(c)* ***makes it clear*** that ***a lawyer*** may not represent that he is "the best," "one of the best," or "one of the most experienced." New Rule 4-7.2(f) similarly provides that illustrations shall present information which can be

factually substantiated and is not merely self-laudatory. In practical effect, these are a natural extension of the prohibition in existing Rule 4-7.1(c) against comparing one lawyer with another, unless the comparison can be factually substantiated.

To limit emotional and misleading appeals, new Rule 4-7.2(e) prohibits the use of dramatizations in any advertising medium, and new Rule 4-7.1(d) prohibits the use of testimonials in advertisements. These new rules are simply an explication of existing Rule 4-7.1(b), which prohibits representations likely to create unjustified expectations about the results a lawyer can achieve. Indeed, the existing Comment to Rule 4-7.1(b) already specifically notes that endorsements are prohibited by the rule.

(c) Overreaching And Coercive Advertising -- The Unique Problems Of Electronic Broadcast Media

It is widely acknowledged that television advertising presents special opportunities for abuses because, among other things, "the potential for evoking viewers' emotional response is much greater because the message becomes both an aural and visual communication." App. E(2) at **433.** **As** such, it presents a unique opportunity to induce consumers to "call your office within a short span of time following the broadcast."' App. C(5) at 117.

[7] For instance, lawyers create catchy phone numbers like "573-AUTO," present those numbers repeatedly in the commercials both aurally and visually, and ask the viewer to call "today" and "right now." See App. **E(3)** at No. **1,** 4, **8,** **11,** 13, 14, 15, 21, 22, 23, 26, **33, 36,** 39, **40,** 42, and **47.** Coupled with the sounds and pictures of car crashes and other sensationalism, the message is irresistible -- "Call us NOW!"

Lawyers advertising on television recognize that opportunity and try to exploit it through a variety of media techniques. Marketing consultants tell lawyers they will provide the "finest actors" with the highest "believability quotients." App. D(3) at 1; App. D(4). They promise they will create a "dream lawyer image" that "draws tort victims . . . like moths to flame." App. **D(3)** at 2. One marketing consultant advises lawyers who advertise on television to "recognize that a large segment of the public will manifest blind faith in your advertising messages, simply because of the method -- and medium -- of communication." App. C(5) at 5.

That unique power to induce viewers to respond immediately, without reflection, is the anathema of informed and reliable decisionmaking. In fact, it is widely believed to be the cause of much unnecessary tort litigation. In particular, the record shows that the public perceives television advertising by personal injury lawyers as promoting frivolous lawsuits and as suggesting that the justice system can be manipulated by lawyers. App. C(2) at 41; App. C(9) at 37-38, 57-58; App. C(13) at 11; App. C(14) at 1, 5-7, 15, 22. As a result of this perception, when the public serve as jurors they are predisposed against parties represented by television lawyers. App. C(6) at 1, 11-16; App. C(8) at 17; App. C(9) at 43-44. Thus, restrictions on the emotional techniques of electronic advertising are essential not only to assure reliable decisionmaking but also to prevent an improper interference with the jury system.

Restrictions are also necessary because neither the **Bar nor** this Court have the resources to monitor the escalating use by lawyers of the electronic broadcast media. A 1989 survey of 25 industries showed that lawyers were increasing advertising on television

at three times the rate of the other industries. App. H(3), Wall Street Journal, Oct. 4, 1989. In 1984, lawyers nationwide spent $28 million on television advertising. App. C(5) at 3. The figure had more than doubled by 1987, to $59 million. App. H(3), New York Times. In 1988, lawyers in Florida alone spent *$6.5* million on television. App. B, New York Times, July, 1989 and St. Petersburg Times, July 12, 1989.

In view of the special problems created by this skyrocketing use of electronic advertising, the Bar determined that certain limited restrictions on advertising techniques were warranted for lawyer commercials on the electronic broadcast media. New Rule 4-7.2(b) provides that such commercials shall be articulated by a single voice, with no background sound other than instrumental music. Only a lawyer in the advertising firm may appear in the commercial, and dramatizations and testimonials are prohibited.

These limited restrictions on advertising techniques are designed to prevent the abuses in electronic media advertising while encouraging commercials to convey useful factual information. To that end, the rules specifically allow electronic broadcast advertisements in which the lawyer personally appears to explain a legal right, the services the lawyer is available to perform, his fees, and his background and experience.

(d) Advertising That Has Negatively Affected The Administration Of Justice -- Television And Direct Mail Solicitation Of Accident Victims

It became clear during the Bar's two-year review that certain restrictions on lawyer advertising were necessary for yet another reason. The record before the Bar established that the current use of television commercials by personal injury lawyers and

direct mail solicitation of accident victims has adversely impacted upon the administration of justice.

The public believes such advertising is driven by a singleminded obsession with money untempered by competing values. See App. C(1) at 9-14; App. C(10) at 15, 17, 20, 24; App. C(13)(b) at 3 and (c) at 11; App. C(14) at i, 18.[8] They believe those advertising lawyers rely on emotional appeals which imply unrealistic results regardless of the merits of the individual circumstances? App. C(14) at i, 5-7, 11. **As** the public sees it, television advertising and direct mail solicitation promote meritless lawsuits. See App. C(2) at 41; App. C(9) at 37-38, 57-58; App. C(13) at 11; App. C(14) at i, 15, 22.

A recent Florida study showed that the perception of lawyer advertising as creating unnecessary lawsuits went up after viewing television commercials, from 70% to 82%.[10] App. C(14) at 22. The perception that justice is bought and sold also increased, from 36% to 45%. Id. at 15-22. Indeed, the study concluded that the respondents

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[8] ~~See also~~ App. C(1) at 9-14, 17-18; App. C(2) at 37, 41, 196, 210; App. C(4) at 4-5, 9, 11; App. C(13)(b) at 2-3; App. C(14) at i-ii, 5-7, 15-18, 21-22, 25; App. E(5); App. I(1); App. J(2) at 55, 60. Throughout Florida, persons killed or seriously injured in accidents, or their families, are receiving numerous solicitation letters soon after the tragedy. See App. 1(1) at Sept. 28, 1987; App. J(2) at 9-10; App. J(3) at 31, 35-36; App. J(4) at 10-13, 19. See also App. H(4); App. I(1) at Mar. 10, 1987, Sept. 23, 1987, Oct. 16, 1987, and Dec. 30, 1987; App. J(3) at 77. In fact, children as young as one-year old have been solicited. App. B. at St. Petersburg Times, Oct. 26, 1987; App. I(1) at May 27, 1987; App. J(2) at 44-46; App. J(5) at 9, 23-24.

[9] The solicitation letters arrive regardless whether the recipient was even injured in the accident. See App. B at St. Petersburg Times, Oct. 26, 1987 and at Sun-Sentinel, June 23, 1987; App. I(1) at Dec. 4, 1987; App. J(5) at 65-66.

[10] A 1983 Iowa survey of television advertising and a 1987 Florida telephone survey of direct mail recipients likewise concluded that the public believes these practices promote unwarranted and frivolous lawsuits. See App. C(1) at 9-14; App. C(4) at 4-5, 9, 11. See also App. C(14) at 25.

"showed consistent alienation from the legal system in response to each advertisement."[11] Id. at ii.

Even more disturbingly, the public takes this perception with them when they are involved in a trial, thereby diminishing the effectiveness and impartiality of the judicial system. See App. E(4). A 1988 survey of Florida Circuit Judges revealed that **23%** of them recalled a potential juror, witness, or party expressing an opinion during trial about lawyer advertising, and 78% of the judges have concluded that such advertising has negatively impacted the administration of justice. App. C(6) at 1. See also App. J(2) at 10. Their views in this respect are striking. Judge Fuller of the Eleventh Circuit commented: "One juror felt [advertising] lawyers were like vultures, preying on the misfortunes of others." App. C(6) at **13.** Judge Sturgis of the Fifth Circuit commented: "Like the entozoa that destroys an animal, advertising in the legal profession unrestricted can tear the guts out of public confidence in us and what credibility we still maintain." App. C(6) at 12. See generally App. C(6) at 11-16.

Studies confirm that negative attitudes toward lawyer advertising negatively predispose jurors. A 1988 Nevada poll of jurors showed that in a trial where neither party's lawyer advertises on television, **40%** of the jurors favored the defense; on the other hand, where the plaintiffs lawyer advertised on television, **83%** favored the defense. App. C(9) at **43-44.** Where the plaintiffs lawyer advertised on television the

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[11] The only commercial which received a positive reaction was of a lawyer whose message was that accident victims have four years to file a claim and that he would consult with them personally to see if they had a claim. App. C(14) at **8.** This type of informational advertising is clearly permitted under the proposed rules.

plaintiffs evidence was' rated significantly lower than if the lawyer did not advertise, and the defense lawyer's credibility was rated significantly higher. Id. at **43-46.** A 1988 Iowa study reached a similar result. App. C(8) at 17.

Perhaps most disturbing of all, a 1987 survey of direct mail recipients in Florida revealed that 11% of them are willing to admit that receiving such a solicitation would affect them if they were called as jurors. App. **C(4)** at **6.** Since direct mail letters soliciting personal injury and death cases alone were being mailed in Florida in 1989 at the rate of nearly 300,000 annually, this has an enormous adverse impact on the very foundation of this state's judicial system. See App H(4). The Bar thus determined that it was appropriate to place certain restrictions on television advertising and direct mail solicitation which will assure that the public understands they are what they are -- advertisements.

Accordingly, new Rule 4-7.4(c)(1) regulates the manner of direct mail solicitation, both through restrictions and disclosure requirements. For example, to allow recipients to recognize direct mail as an advertisement, the rule would now require that letters and envelopes be marked "Advertisement" in red and that the communications not resemble legal documents, not be sent by restricted forms of mail, and not imply they are sanctioned by The Florida Bar. The record shows that these regulations are necessary to prevent abuses and consumer confusion. See App. ***C(8)*** at **14;** App. 1(1) at Mar. 10, 1987; App. **1(4)** at Nov. 11, 1987 at 2; App. **J(2)** at 12-13, 99-100; App. **J(4)** at **14,** 70.

Moreover, to lessen the emotional impact on the recipient and any misleading impression as to the lawyer's actual knowledge of the recipient's circumstances, any

communication prompted by a specific occurrence involving the recipient or the family must explain how the lawyer obtained the information, and the nature of the problem may not be identified on the outside of the envelope.[12] Finally, because existing Rule 4-7.4(b)(2)(a), which provides that a lawyer shall not send direct mail to persons reasonably believed already to have counsel, is unworkable, new Rule 4-7.4(c)(1)(g) simply requires that direct mail state that the recipient should disregard the letter if he already has counsel for the matter.

The Bar determined that additional restrictions were necessary in the area where direct mail poses the greatest harm to the legal system -- the solicitation of personal injury and wrongful death suits. The public views that practice as promoting frivolous and unnecessary lawsuits, and it carries that perception into the courtroom as jurors. The Bar concluded, based on the record before it, that new Rule 4-7.4(b)(1), which prohibits the use of written solicitation in the personal injury and wrongful death areas, is necessary to prevent further alienation of the public from the legal system.

Furthermore, the Bar believes that anything short of a total ban on this type of solicitation is unworkable. Existing Rule 4-7.4(b)(2)(e) prohibits the use of written communications when the lawyer "reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer." The difficulties of applying, much less enforcing, such a standard have become apparent. See App. J(4) at 19, 20-21. The soliciting lawyer

[12] Recipients of communications identifying their problem on the outside for all to see have expressed their outrage at this. See App. 1(1) at Jan. 8, 1988. See also App. J(5) at 54.

often cannot determine from the accident reports whether a person was even injured, and letters are accordingly sent to anyone having an accident, however minor." Id. See also App. **J(2)** at 73. The Bar simply lacks the resources to enforce this rule, and it would be an intolerable burden on this Court to attempt to do so.

That is especially true given the enormous volume of solicitation letters being sent in the personal injury and wrongful death area. **As** of June, 1989, direct mail communications were being mailed to accident victims and their survivors at the rate of nearly 300,000 per year. App. H(4). Only a blanket prohibition on this particular form of solicitation, leaving available other means of advertising, can effectively curb abuses. **As** with all of the other proposed rules, the Bar believes that this rule is reasonably designed to limit the abuses currently occurring in lawyer advertising.

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[13] The abuses were so severe that the Florida Legislature enacted a law (effective Oct. 1, 1989) prohibiting the use of accident reports for commercial solicitation purposes. See App. L(5). However, lawyers already are looking for ways to circumvent that law. See App. H(4).

SUMMARY OF THE ARGUMENT

The test established by the Supreme Court in Board of Trustees of State University of New York **v. Fox,** 109 S.Ct. **3028** (1989) ("SUNY"), requires only a "reasonable fit" between a rule regulating commercial speech and the state interest it advances. The comprehensive record gathered by the Bar conclusively shows that much of the current lawyer advertising fails to fulfill its purpose of educating the public and instead relies on nonrational and often misleading advertising techniques. Such advertising not only misleads the public and promotes irrational decisionmaking, but creates negative public attitudes which carry over into the jury system. The Bar's rules are crafted to curb those abuses and encourage advertising which provides consumers with the information they need to make decisions regarding legal services.

These rules clearly withstand scrutiny under the Supreme Court's test. Indeed, they not only constitute a "reasonable fit" but, given the record, would meet the "least restrictive means" analysis applied by earlier Supreme Court lawyer advertising decisions, a test which SUNY subsequently expressly rejected. None of those earlier lawyer advertising decisions had the kind of record present in this case, a record which Shows the actual abuses and the necessity of the proposed rules. Indeed, each of those cases suffered from the virtual absence of any record giving rise to the rules. Moreover, those cases typically involved rules totally banning particular forms of advertising, whereas the proposed rules here impose no such bans except in the one narrow area that was found to be necessary. Given the record and the Supreme Court's articulation of the "reasonable fit" test in SUNY, these rules clearly are permissible.

ARGUMENT

Lawyer advertising, like other forms of advertising, is commercial speech entitled to only limited First Amendment protection. Last year, in SUNY, the United States Supreme Court reaffirmed that commercial speech occupies a "'subordinate position in the scale of First Amendment values.'" 109 S.Ct. at *3033*.

The reason for this is clear. "[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, **447** U.S. **557, 564** n.6 (1980). Thus, "'commercial speech [enjoys] a limited measure of protection' **. . .** and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" SUNY, 109 S.Ct. at *3033*. See Sakon v. Pepsico. Inc., **14** FLW 584, 584 (Fla. Nov. *30,* 1989).

I. TEST FOR EVALUATING RESTRICTIONS ON LAWYER ADVERTISING -- A "REASONABLE FIT"

In SUNY, the Supreme Court substantially relaxed the test for evaluating restrictions on commercial speech such as lawyer advertising. Prior to SUNY, lawyer advertising and other commercial speech cases were subject to the test set forth in Central Hudson. That test was "whether the regulation directly advances **the** governmental interest asserted" and "is not more extensive than is necessary to serve that **interest."**[14] Central Hudson, **447 U.S.** at **566.** Justice Rehnquist dissented in part in

[14] The test has two other prongs: whether the speech concerns lawful activity and (continued...)

Central Hudson because the latter half of that test "elevates the protection accorded commercial speech . . . to a level that is virtually indistinguishable from that of noncommercial speech." Id. at **591.**

The lawyer advertising cases subsequent to Central Hudson confirmed Justice Rehnquist's concern that this strict test would, as a practical matter, impede state regulation of such commercial speech. For example, in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, **471 U.S. 626 (1985),** the Court required the "least restrictive available means" and accordingly struck down a blanket ban against any use of illustrations in lawyer advertisements. See **471** U.S. at **647, 651 n.14.** Similarly, in Shapero v. Kentucky State Bar Association, **486 U.S. 466,** 108 S.Ct. **1916 (1988),** the Court invalidated a rule banning all forms of direct mail solicitation in part because the state had "less restrictive and more precise" means of regulation. See 108 S.Ct. at 1923.

In SUNY, the Court recognized that those holdings, "interpreted strictly, . . . would translate into the 'least restrictive means' test," and the Court further noted that it had "assumed in dicta the validity of the 'least restrictive means' approach in Zauderer. See SUNY, 109 S.Ct. at 3032-33. However, with the majority now aligned with Chief Justice Rehnquist, the SUNY Court squarely held that the "least restrictive means" test does not apply to commercial speech. **As** the Court recognized, the "heavy burden"

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[14](...continued)
whether the state has a substantial interest in regulating the speech. Central Hudson, **447 U.S.** at **566.** Courts have consistently recognized that those prongs are both met in the context of lawyer advertising.

imposed by that test would make the state's authority to regulate commercial speech "illusory." Id. at **3033.** The Court instead required only a "reasonable fit" between the governmental interest and the regulation: "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" Id. at **3035.**

Under the test formulated in SUNY, The Florida Bar's proposed rules on lawyer advertising clearly pass constitutional muster because they advance the State's interests and there is a "reasonable fit" between the rules and the ends they are designed to achieve. See id. at **3032, 3035.** It is not enough for opponents of the new rules to seize upon "hypothetical 'better ways'" to regulate lawyer advertising. Central Hudson, **447 U.S.** at **600** (Rehnquist, J., dissenting). **A** state need only construct a reasonable fit: "Within those bounds we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed." SUNY, 109 S.Ct. at **3035.**

II. THE PERMISSIBLE SCOPE OF LAWYER ADVERTISING REGULATION

In its landmark decision allowing lawyer advertising, the United States Supreme Court struck down a state rule which totally prohibited all price advertising by lawyers because the Court concluded that the public had a strong interest in receiving that type of information. That blanket prohibition accordingly had to fail because it disserved the "individual and societal interests in assuring informed and reliable decisionmaking." See Bates v. State Bar of Arizona, **433 U.S. 350, 364 (1977).** Since Bates, the Court has encouraged rules which increase the flow of information to consumers through disclosures or disclaimers. See Zauderer, **471** U.S. at **650, 651 & n.14.**

At the same time, the Court has also recognized that advertising which disserves the societal interest in facilitating informed and reliable decisionmaking is subject to regulation. See Ohralik v. Ohio State Bar Association, **436 U.S. 447, 458 (1978).** Misleading advertising may be prohibited entirely, and advertising may be regulated "to avoid false hopes." In re R.M.J., **455 U.S. 191, 200 n.1, 203 (1982).** For the same reason, the states may regulate lawyer advertising which is overreaching or coercive or otherwise unduly influences consumers. Ohralik, **436 U.S.** at **457-58, 461, 464-65.**

The Supreme Court has recognized two other state interests distinct from the interest in promoting informed decisionmaking. The states have a strong interest in facilitating the fair and effective administration of justice. Accordingly, they may regulate lawyer advertising which negatively affects the justice system. Ohralik, **436 U.S.** at **460-61.** The Court has also acknowledged that broader restrictions are justified where narrower restrictions would be difficult to police because of the finite enforcement resources of the state. See Ohralik, **436 U.S.** at **466-67.**

A. Lawyer Advertising May Be Regulated To Promote Full And Fair Disclosure To Consumers

Lawyer advertising is extended some limited constitutional protection because it is seen "to inform the public of the availability, nature, and prices of products and services" and assure "informed and reliable decisionmaking" by the consumer. Bates, **433 U.S.** at **364.** Because the very justification for lawyer advertising is the flow of useful information to consumers, the Supreme Court repeatedly has stated that the "preferred remedy" for advertising abuses is "more disclosure rather than less." Bates, **433 U.S. at 374-75.** See Zauderer, **471 U.S.** at **650-51;** Central Hudson, **447 U.S.** at **570-71.**

Thus, in Zauderer the Court upheld a rule requiring a lawyer who advertises a contingency fee to include a disclosure concerning liability for costs: "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." **471 U.S.** at **650.** The Court wrote that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." Id. at **651** n.14. The Court went on to note that "in virtually all our commercial speech decisions to date" it has held warnings or disclaimers can be required. Id. at 651.

Similarly, in In re R.M.J. the Court wrote that the states can require warnings, explanations, or disclaimers in advertisements "to dissipate the possibility of consumer confusion or deception" or "to avoid false hopes." 455 **U.S.** at 200 n.11, 201. See also Bates, **433 U.S.** at **384, 387;** Central Hudson, 447 **U.S.** at **565;** The Florida Bar re Amendment to The Florida Bar Code of Professional Responsibility (Advertising), **380** So.2d **435, 436** (Fla. **1980);** In re Felmeister & Isaacs, **518** A.2d **188, 194** n.10, 207 (N.J. **1986).** In short, the Supreme Court not only allows states to regulate lawyer advertising with disclosure requirements, but encourages it.[15]

[15] **It** is fundamental that "half-truths" and material omissions can constitute actionable misrepresentations. See Johnson v. Davis, **480** So.2d 625, 628 (Fla. **1985).** Plainly, there is nothing unusual in a requirement of full and complete disclosure.

B. Lawyer Advertising That Disserves The Interest In Promoting Informed And Reliable Decisionmaking May Be Regulated

1. Misleading Advertising And Emotional Appeals May Be Regulated

It is clear that the states can prohibit false, misleading, or deceptive advertising entirely. See In re R.M.J., **455 U.S.** at **203;** The Florida Bar v. Fetterman, **439** So.2d **835, 840** (Fla. **1983).** Such advertising prevents informed and reliable decisionmaking. Hence, "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the State may impose appropriate restrictions." In re R.M.J., **455** U.S. at **203;** Fetterman, **439** So.2d at **840.**

Moreover, what constitutes a "misleading" representation is expanded in the context of lawyer advertising. "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates, **433 U.S.** at **383.** This is especially true with respect to "the peculiar problems associated with advertising claims relating to the quality of legal services" since such claim are "not susceptible of precise measurement or verification" and so "might well be deceptive or misleading to the public." Id. at **366** (emphasis in original).

Even advertising which contains no misrepresentations may be regulated in furtherance of a substantial state interest. See In re R.M.J., **455** U.S. at **203.** Thus, in upholding some of the same rules as are proposed here, the Iowa Supreme Court

specifically distinguished between advertising which informs the public and advertising which is purely self-laudatory or self-promotional. Self-promotion "makes no contribution to informed decision making" and so may be prohibited. Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Humphrey, 355 N.W.2d 565, 570-71 (Iowa 1984) ("Humphrev I"), remanded for further consideration in light of Zauderer, 472 U.S. 1004 (1985), prior decision ratified on remand, 377 N.W.2d 643 (Iowa 1985) ("Humphrev II"), appeal dismissed, 475 **U.S.** 1114 **(1986).**[16]

For similar reasons, advertising techniques that have a peculiar propensity to create illusions that mislead or deceive are subject to regulation. In prohibiting lawyers from using dramatizations, music, and other special effects on television, the New Jersey Supreme Court held that such manipulative techniques fail to educate the consumer but, instead, "affirmatively inject[ ] other factors into the process." In re Felmeister, 518 A.2d at 193, 198, 200. Indeed, "when an ad persuades the consumer to select a particular lawyer for reasons that have absolutely nothing to do with those qualities that are rationally related to the lawyer's competence, it may be interesting, but it performs a public &service." Id. at 193 (emphasis in original).

[16] The appeal was dismissed for want of a substantial federal question. Under the doctrine enunciated in Hicks v. Miranda, 422 U.S. **332 (1975),** such an action **is** considered a holding on the merits and binding on lower courts (though not the United States Supreme Court itself). 422 U.S. at 343-44. **See** Metromedia. Inc. **v.** City of San Diego, 453 U.S. 490, 500 (1981); C. Wright, The Law of Federal Courts at 551 & n.25 (4th ed. 1983).

2, Advertising Which Coerces Or Unduly Influences Consumers Mav Be Regulated

Advertising that unduly influences consumers precludes rational decisionmaking and may be regulated. **As** the Supreme Court put it in Bates, "[a] rule allowing restrained advertising would be in accord with the bar's obligation to 'facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."' **433** U.S. at **377.** Applying such reasoning, the Supreme Court held in Ohralik that a state could discipline a lawyer for soliciting clients in person since such solicitation "demands an immediate response, without providing an opportunity for comparison or reflection." **436 U.S.** at **457-58.** That may unduly influence the decisionmaking process of a lay person, especially one whose distressed plight makes him even more vulnerable. Id. at **461, 464-65.** For those reasons, proof of actual coercion in the record was not required. Id. at **465-66.**

On the other hand, the Supreme Court held in Zauderer that a complete prohibition of illustrations in print advertising, including purely informational illustrations, was not justified by the state's interest in preventing undue influence. The Court determined that print advertising possesses less risk of "over-reaching or undue influence" than in-person solicitation because it does not "pressure" the potential client into an immediate yes-or-no answer. Zauderer, **471 U.S. at** ***642.*** Using the same reasoning, a sharply-divided Court in Shapero held that direct mail solicitation also lacks the inherently coercive force of in-person solicitation. **108** S.Ct. at **1922.**

Although the Supreme Court has not expressly considered whether lawyer advertising on the electronic media unduly influences consumers, the Court did note in Bates that "the special problems of advertising on the electronic broadcast media will warrant special consideration." Bates, **433 U.S.** at **384.** Accord The Florida Bar re Amendment to The Florida Bar Code of Professional Responsibility (Advertising.), **380** So.2d at **436.** Moreover, the Court has specifically recognized that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans." Federal Communications Commission v. Pacifica Foundation, **438 U.S. 726, 748 (1978).** See also Columbia Broadcasting System **v.** Democratic National Committee, **412 U.S. 94,** 127 **(1973)** ("viewers constitute a 'captive audience"').

Most importantly, perhaps, the Court dismissed an appeal in Humphrey II challenging special restrictions by Iowa on the emotional techniques of television advertising, a dismissal which amounts to controlling precedent.[17] See Humphrey II, **377** N.W. 2d at **647,** appeal dismissed, **475 U.S. 1114 (1986).** The Iowa Supreme Court had concluded that, in contrast to printed advertising, electronic media advertising is "immediate" and "elusive" and "tolerates much less deliberation by those at whom it is aimed." Humphrey II, **377** N.W.2d at **646.** "Lost is the opportunity accorded to the reader of printed advertisements to pause, to restudy, and to thoughtfully consider." Id. **As** a result, "electronic advertising lies closer to face-to-face solicitation. **. .** than to printed advertising." Id.

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[17] Like Iowa, New Jersey has imposed special restrictions on techniques used on the electronic media. See In re Felmeister, **518** A.2d at **188-89.**

C. Advertising May Be Regulated To Protect The Administration Of Justice

The role of lawyers as officers of the court is deep-rooted in the legal system.[18] See, e.g., The Florida Bar v. Murrell, 74 So.2d 221, 225 (Fla. 1954). As such, lawyers are a critical link between the courts and the public and a loss of confidence by the public in these officers of the court amounts to a loss of confidence in the system itself. Yet the viability of this judicial system depends on the consent of the public at large, which in turn depends on the public's confidence in the system. After all, courts have no army to enforce their judgments and decrees. See The Florida Bar v. McCain, 361 So.2d 700, 709 (Fla. 1978) (concurring opinion).

Because of the integral relationship between lawyers and the courts, the Supreme Court has recognized that regulation of lawyer advertising must be fashioned to accommodate the unique interests involved. On the one hand, there is a diminished Constitutional protection insofar as the lawyer is attempting to promote his own commercial interests. On the other hand, there is a heightened state interest as the state is not only protecting consumers but also assuring the integrity of its judicial processes.

In short, since lawyers are part and parcel of the administration of justice, their commercial interests are subservient to the interests of the state. Indeed, the United

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[18] By virtue of their admission to practice, lawyers actually exercise certain of the sovereign powers of the state, such as the power to issue subpoenas requiring persons to appear in court. Concomitantly, their obligations to the court are real and substantial and include the duty to insure the integrity of the judicial system, sometimes at the expense of the client. Lawyers are even required to "blow the whistle" on their client under certain circumstances. See Rule 4-3.3, Rules Regulating The Florida Bar.

States Supreme Court has specifically recognized that the state's interest in regulating lawyers is "especially great" because they "'are essential to the primary governmental function of administering justice."' Ohralik, 436 **U.S.** at 460. The state thus has a "special responsibility" to maintain high standards among lawyers. Id. at 460, 461. **See** Bates, 433 **U.S.** at 361-62; In re Primus, 436 **U.S.** 412, 422 (1978). **As** Justice Ehrlich wrote in The Florida Bar v. Schreiber, 420 So.2d 599, 599 (Fla. 1982):

> We are told . . . that [lawyer advertising] can be regulated by the state in fulfillment of the state's obligation to uphold professional standards for the protection of its citizens. I am certain that this Court will lend its every effort to this endeavor, to the end that the public be fully protected, that the practice of law not become a commercial enterprise, and that professionalism may yet survive.

420 So.2d at 599-600 (concurring opinion).

It is critical to recognize that, in most earlier lawyer advertising and solicitation cases, the Supreme Court was not presented with any record demonstrating a negative impact on the legal system which would be obviated by the proposed regulations. For example, in Bates the Court invalidated an Arizona rule prohibiting any advertising of legal fees because it found the state's postulated connection between price advertising and detriment to the legal system "severely strained." Bates, 433 **U.S.** at 368. The Court later emphasized that Bates held as it did "only" because no detriment to the legal system was shown. See Ohralik, 436 **U.S.** at 461. See also In re **R.M.J..,** 455 **U.S.** at **200** n.11 (Bates "might reach a different decision as to price advertising on a different record"). The Florida Bar firmly believes that the record before this Court overwhelmingly demonstrates the need for these proposed rule changes in order to

restore public confidence in this state's legal system and in the legal profession itself as an integral part of that system.

D. Enforcement Concerns Can Justify Regulations On Lawyer Advertising;

The Supreme Court has recognized that enforcement considerations may require restrictions on lawyer advertising and solicitation. For example, in banning in-person solicitation in Ohralik, the Court pointed out that it takes place out of public view, making it difficult to police on a case-by-case basis. In the absence of a prophylactic rule, in-person solicitation "would be virtually immune to effective oversight and regulation by the State."[19] Ohralik, **436** U.S. at **466-67.**

In other instances, the Court has found no record support to suggest enforcement difficulties. Thus, although the dissenting Justices in Bates would have upheld a total ban on all price advertising because they presumed the loosening of advertising restrictions would create enforcement difficulties, Bates, **433 U.S.** at **396-97, 403,** the majority was unwilling to presume that in the absence of a record. See Bates, **433** U.S. at **379.**

Likewise, in Shapero the Court found "no evidence" that a blanket prohibition against all forms of direct mail was appropriate because of enforcement difficulties.[20] 108

[19] The difficulties of policing lawyer advertising were addressed by Justice Reynoldson in Humphrey II. **As** he wrote, because of "the massive task" of regulating print advertising on a case-by-case basis, the states are abandoning the area "with mild admonitions to do nothing undignified or misleading." **377** N.W.2d at **649** (concurring opinion). "The task would loom even larger if the sights, color, sounds, subliminal messages, and not-so-hidden persuaders of commercial television advertising were added to the burden." Id.

[20] No one would have dreamed that direct mail solicitation in the wake of Shapero (continued...)

S.Ct. at 1923. The Court emphasized that the state had "less restrictive and more precise means" of regulation than a total ban, specifically mentioning disclosure and disclaimer requirements. Id. at 1923-24. The Court also relied on the "least restrictive means" test in Zauderer. See 471 **U.S.** at 644. However, the **SUNY** Court's subsequent rejection of the least restrictive means test provides the state with more latitude in crafting its rules on lawyer advertising. **A** state no longer must regulate through the least restrictive means, especially if those means present enforcement problems.

E. Summary

Over the years, a number of justices of the Supreme Court have warned of the harms certain types of lawyer advertising would inevitably cause, as well as the difficulties of policing abuses on a case-by-case basis.[21] The differences between the majority decisions in cases like Zauderer and Shapero and the strong dissents expressed by Chief Justice Rehnquist, Justice O'Connor, and others can be stated simply. The dissents urged the Court to presume the harm that flows from certain types of lawyer advertising, and allow the states the latitude they need in regulating it. The majority insisted on

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[20](...continued)
would number 700,000 letters per year in Florida alone. See App. H(4). Accident cases alone accounted for some 300,000 letters in Florida last year.

[21] See Zauderer, 471 U.S. at 674, 678 (Justice O'Connor dissenting, with Chief Justice Burger and Justice Rehnquist); Shapero, 108 S.Ct. at 1927-31 (Justice O'Connor dissenting, with Chief Justice Rehnquist and Justice Scalia). See also Bates, 433 **U.S.** at 387 (Chief Justice Burger dissenting) and at 396-97, 403 (Justice Powell dissenting, with Justice Stewart).

record proof that such advertising causes actual harm and regulation of such harm through the least restrictive means.

In the Supreme Court's recent decision in **SUNY,** the Court specifically disavowed the "least restrictive" test used in Zauderer and Shapero and made it clear that the states are afforded more "leeway" to "judge what manner **of** regulation may best be employed." **SUNY,** 109 S.Ct. at 3035. SUNY makes it clear that, in determining whether the rule changes proposed by The Florida Bar should be adopted, this Court must simply determine whether these proposed regulations are a "reasonable fit" which is "'in proportion to the interest served.'" Id. at 3035.

The record before this Court establishes that the proposed rule changes are eminently appropriate to protect the State of Florida's interests. Indeed, it is critical to recognize that, unlike Zauderer and Shapero, this case has an extensive record that fully demonstrates the harm that the Bar proposes to be corrected by these proposed rules. That record shows that the prediction by Justices Burger, Powell, and Stewart in Bates, that lawyer advertising would encourage a great many lawyers to advertise on a competitive basis and create an enforcement nightmare for an already overburdened disciplinary system, has been fulfilled. The record also establishes that the expressed hope of the Bates majority that advertising lawyers would "abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system," **433 U.S.** at 379, has unfortunately not proven to be the case.

In sum, the record in this case confirms that certain advertising disserves consumers and the State's judicial system. Even under the very strict standard applied in

Zauderer and Shapero; that record justifies the rule amendments proposed by the Bar. Moreover, those changes certainly are justified as a "reasonable fit," a reasonable solution to the harms identified during the two-year study. They focus on the abuses while leaving the flow of information alone -- indeed, they encourage it. It will not be enough for the opponents of these rules to cite hypothetical better ways to curb the abuses -- SUNY will not allow that. Moreover, given the finite resources of the Bar and this Court, rules less restrictive than those proposed would not be workable.

III. THE BAR'S NEW RULES ENCOURAGING THE FLOW OF FULL AND USEFUL FACTUAL INFORMATION TO CONSUMERS REASONABLY PROMOTE INFORMED AND RELIABLE CONSUMER DECISIONMAKING

A. The "Safe Harbor" Rule

The very purpose for allowing lawyer advertising is to promote the flow of useful factual information to consumers so they can make informed and reliable decisions. Bates, 433 U.S. at 364. The new safe harbor rule -- Rule 4-7.2(n) -- does just that. It lists nine types of useful, factual, verifiable information that lawyers can include in advertisements, and it encourages lawyers to advertise pursuant to the rule by excluding many such ads from disclosure and filing requirements. See Rules 4-7.2(d) and 4-7.5(c)(2).

Rule 4-7.2(n) is similar to the approach taken in Iowa and New Jersey, though less restrictive. An Iowa rule lists 19 areas of information useful to the public and provides that only those matters may be advertised. Humphrey I, 355 N.W.2d at 568. The New Jersey rule requires that all advertisements be "predominantly informational." In re Felmeister, 518 A.2d at 188-89. See also In re Zang, 741 P.2d 267, 279 (Ariz.

1987). According to the New Jersey Supreme Court, its rule furthers the state interest in assuring that consumer decisions about the need for and selection of counsel "are rationally rather than emotionally determined." In re Felmeister, 518 k 2 d at 198. Rule 4-7.2(n) is appropriate for the same reason.

In short, the safe harbor rule suppresses no speech, and does not require anything of advertisements. It merely allows lawyers to advertise safely under it, and provides guidance for complying with the rules.

B. Disclosure Requirements

It is settled that disclosures and disclaimers can be required as part of the state's regulation of lawyer advertising. As the Supreme Court has emphasized, the First Amendment interests implicated by disclosure requirements are "substantially weaker" than when speech is suppressed. Zauderer, 471 U.S. at 651 n.14.

The disclosure requirements proposed by this petition clearly will dissipate confusion presently caused by omitted information. Several of the new rules simply require the advertisement to identify for the consumer who he would be hiring if he responded to the ad. See Rules 4-7.2(b), (l), and (m), and 4-7.4(c)(1). A decision to hire a lawyer cannot be "informed" if consumers do not even know who they are hiring or in what town the lawyer resides. The requirement that a lawyer practice under the same name he advertises (Rule 4-7.7(c)) similarly will assure that consumers know who they are hiring.

Next to a lawyer's identity and location, perhaps no information is as essential to informed decisionmaking as a lawyer's background and experience. Yet advertisements

often merely inform consumers that lawyers are willing to handle certain types of cases, without any meaningful explanation of the lawyer's qualifications. See generally App. E and App. G. Consumers may well infer that a lawyer has certain expertise merely because he advertises for particular types of cases. See Lyon v. Alabama State Bar, 451 So.2d 1367, 1373 (Ala.), cert. denied, 469 **U.S.** 981 (1984).

To prevent confusion and present consumers with a factual basis for deciding whether to hire the lawyer, the new rules provide that the statement of qualifications that lawyers are now required to have available must be included with direct mail. See Rules 4-7.3(b) and 4-7.4(c)(1)(e). Clearly, states may regulate in areas where, as here, "experience has proved that in fact such advertising is subject to abuse." In re R.M.J., 455 **U.S.** at 203; Fetterman, 439 So.2d at 840.

Since it is not feasible to require that a statement of qualifications be included in public print and electronic broadcast advertisements, those advertisements must disclose that the hiring of a lawyer is an "important decision" which "should not be based solely on advertisements," and that information regarding qualifications and experience is available upon request.[22] See Rules 4-7.2(d) and 4-7.3(e). This disclosure should discourage rash decisions made from insufficient, incomplete, or misleading information, and is clearly permissible under the wide latitude given disclosure requirements by the

[22] An exception is made for public print advertisements which contain only the safe harbor information. See Rule 4-7.2(d).

Supreme Court.[23] It simply requires lawyers "to provide somewhat more information than they might otherwise be inclined to present." Zauderer, 471 **U.S.** at 650.

The other proposed disclosure requirements merely alleviate specific areas of consumer confusion. For example, consumers do not understand that "Juris Doctor" and "Member of The Florida Bar" are not special qualifications for a lawyer practicing in Florida. Similarly, a cost disclosure when fee information is advertised was expressly sanctioned by the Supreme Court in Zauderer because it is "self-evident" that laymen would believe that "no recovery, no legal fees" means no costs either. 471 **U.S.** at 652-53.

All of these disclosure requirements are a "reasonable fit" with the goal of promoting informed and reliable decisionmaking. They will "dissipate the possibility of consumer confusion" and help prevent "false hopes." See In re R.M.J., 455 **U.S.** at 200 n.11. The rules do not stem the flow of useful factual information to the public; they only increase it.

IV. THE NEW RULES REGULATING MISLEADING REPRESENTATIONS AND IRRATIONAL APPEALS PROMOTE INFORMED AND RELIABLE DECISIONMAKING

Several areas of the new rules restrict the scope of advertising where the representations would be misleading or the advertising relies on special effects and other such techniques to create illusions as to quality of services or results. Misleading representations, unverifiable self-promotion, and advertising techniques which elevate

[23] Indeed, Iowa has the same disclosure requirement for all advertisements. See App. K(3)(a) at 522; App. L(6) at 405, 606. South Carolina accomplishes a similar purpose for direct mail through a more demanding disclosure requirement. App. L(6) at **607.**

emotional appeals over useful factual information inhibit rational decisionmaking. The Bar accordingly determined that it was reasonable to restrict the use of those techniques.[24]

A. Trade Names

The existing rule prohibits lawyers from using deceptive trade names; new Rule 4-7.7(b) merely explains that trade names like "Academy" mislead the public into believing that'the firm is something more than a law firm, and that terms like "Legal Clinic" are deceptive unless the firm does in fact provide routine legal services at below-market rates. See Bates, 433 **U.S.** at 381.

This new rule is clearly within the parameters allowed by the case law. In Fetterman, this Court wrote that the trade name "The Law Team" was not inherently misleading but "appears to be the outer limit allowable." 439 So.2d at 838, 840. Moreover, the Supreme Court has approved a total ban on the use of any trade name where there is a history of abuse. See Friedman v. Rogers, 440 **U.S.** 1, 8 (1979) (context of optometrists). In fact, some states prohibit the use of trade names by lawyers entirely, or restrict them to recognized phrases like "Legal Clinic" and geographic designations.

[24] The Bar also proposes a prohibition against "deceptive" or "unfair" communications. See Rule 4-7.1. Contrary to the suggestion in the Comment filed in this case by the American Association of Advertising Agencies, prohibitions against "unfair" practices are not unconstitutionally vague but instead recognize the need for flexibility in regulation. See Federal Trade Commission v. R.F. Keppel & Brother, 291 **U.S.** 304, 314 (1934); Sears. Roebuck & Co. v. Federal Trade Commission, 258 F. 307 (7th Cir. 1919). Iowa and South Carolina also prohibit "unfair" lawyer advertising. App. K(3)(a) at 522; South Carolina Supreme Court Rules, Rule 32, DR 2-101(A)(1). Indeed, Florida's existing Rule 4-7.3(e)(5) already provides that the factual statement of qualifications a lawyer is required to maintain shall not be "unfair."

App. L(6) at 3003. See also App. L(4). **As** in Friedman, the record in this case shows a history of abuse, which would justify even a total ban on trade names. See Summary of App. G(2) at (ii) and Summary of App. G(3) at (ii). Clearly a limited prohibition against misleading terms is appropriate.

B. Self-Laudatory Representations And Illustrations

Self-laudatory claims like "one of the best" and illustrations calculated to suggest that a lawyer will achieve successful results are misleading and create unrealistic expectations. **As** the Supreme Court wrote in Bates, because the public "lacks sophistication concerning legal services," representations as to the quality of services -- which "are not susceptible of precise measurement or verification" -- "might well be deceptive or misleading to the public" and might "warrant restriction," even though similar statements in other types of commercial advertising could not be regulated. 433 **U.S.** at 366, 383-84. See Shapero, 108 S.Ct. at 1925; The Florida Bar re Amendment to The Florida Bar Code of Professional Responsibility (Advertising), 380 So.2d at 436.

Such claims and other descriptions of the quality of a lawyer's services are accordingly prohibited by new Rule 4-7.2(j). This proposed rule is consistent with the rules of most states prohibiting comparisons with other lawyers' services that cannot be substantiated factually, and some states have even more restrictive provisions. App. L(6) at 301-03. Several courts have read Bates as prohibiting the use of words like "highly qualified and "trustworthy." Id. at 306-07, 309. Delaware prohibits the use of words like "best." Id. at 302. Alabama and Iowa both prohibit representations relating to the quality of legal services. Id. at 105, 306, 309-10. See Mezrano v. Alabama State Bar,

434 So.2d 732, 735 (Ala. 1983). Alabama, Iowa, South Carolina, and Texas prohibit self-laudatory statements. App. K(1)(a) at 18; App. K(3)(a) at 522; South Carolina Supreme Court Rules, Rule 32, DR 2-101(A)(1); Texas Code of Professional Conduct, DR 2-101(A).

Unlike self-laudatory claims as to quality of service or results to be obtained, illustrations which are informational in nature are useful to consumer decisionmaking and therefore cannot be prohibited. In Zauderer, an advertisement featured a line drawing of a contraceptive device, advised that the device was alleged to have caused injuries, and advised that the lawyer was handling such cases. 471 U.S. at 631. The illustration in Zauderer was not self-laudatory; it was simply the most effective and informative means to identify the contraceptive device for consumers. Because the illustration was informative and not deceptive, the Court struck the blanket prohibition on illustrations. ~~See id.~~ at 647.

Consistent with the Court's reasoning in Zauderer, new Rule 4-7.2(f) specifically allows illustrations which present useful information that can be factually substantiated and is not merely self-laudatory. However, the rule would prohibit the type of non-informational, self-promoting illustrations currently appearing in advertisements in Florida, which are not useful to informed decisionmaking by consumers.[25]

A rule short of a complete prohibition against self-laudatory claims and illustrations would be an enforcement nightmare. As the Bates Court recognized, such

[25] Iowa and New Jersey specifically prohibit the use of drawings and visual displays in television advertising. See Humphrey I, 355 N.W. 2d at 566, 568-69; In re Felmeister, 518 A.2d at 189.

claims are not easily susceptible of measurement or verification. **433 U.S.** at **383. As** a result, reviewing such claims on a case-by-case basis would furth r burden an already overburdened disciplinary system.[26]

In short, Rules **4-7.2(f)** and **(j)** are not only reasonable but necessary. Claims and illustrations relating to quality of services mislead consumers, and reviewing them case-by-case is not feasible. While curbing abuses, the rules will encourage the flow of useful information to consumers and thereby facilitate rational decisionmaking.

C. Dramatizations And Testimonials

Dramatizations and testimonials must be prohibited for two reasons: they are misleading and they promote a lawyer for illusory reasons unrelated to the lawyer's competence. Iowa and New Jersey both recognize this and have rules which preclude dramatizations in the electronic media. See Humphrey I, **355 N.W.2d** at **566, 568-69;** In re Felmeister, **518** A.2d at **189.** See also App. K(3)(a) at **523.** The "vast majority" of states prohibit endorsements and testimonials in lawyer advertising. See App. **L(6)** at **301, 302-04.**

[26] Between **1976-77** and **1988-89,** complaints received against members of The Florida Bar grew from **1,625** to **7,175 (442%)** and lawyer disciplines rose from **73** to **425 (582%).** App. **H(2)** at Aug. **8, 1989;** App. **H(5).** Bar attorneys statewide already have too high a caseload. See App. H(1) at **38** and Section **I.** Significantly more dollars per lawyer are allocated to lawyer discipline in Florida than in comparable states. See App. H(1) at Section E at **7-8** and **n.4.** This Court's case load in lawyer disciplines has shown similar growth. Between **1977** and **1987** the percentage of disciplinary cases to total cases filed in this Court increased from **5%** to **25%.** App H(1) at Section F. In **1987, 39%** of the Court's written opinions were disciplinary cases. App. **H(1)** at **21** and Section **F.**

By their very nature, dramatizations are inherently misleading. For precisely that reason, ABC News does not use dramatic recreations and NBC **News** recently discontinued the technique. Focus group studies conducted by NBC showed that viewers are confused "where reality ends" even when the dramatizations are clearly labeled. App. E(6) at 1. **As** the president of NBC News said: "My whole purpose is to present news as clearly as possible. That can't happen with re-enactments." Id. at 1. The president of ABC News similarly observed that "the very purpose of the recreations is to confuse people," and called them "very dangerous." Id. at 1-2. They are equally deceptive and dangerous in advertisements for legal services.

Likewise, testimonials are inherently deceptive appeals -- their very purpose is to make consumers believe that satisfactory results obtained in the past will likewise be obtained for them. See App. L(6) at **304.** Though the Supreme Court has not considered the issue of testimonials in lawyer advertisements, it has recognized that an advertisement that "offers overblown assurances of client satisfaction" may be misleading. Shagero, 108 S.Ct. at 1925. Testimonials are nothing if not that. Clearly a total prohibition on dramatizations and testimonials is reasonably related to the state's interest in advancing rational consumer decisionmaking.

V. THE RULE REGULATING THE MANNER OF ADVERTISING ON THE ELECTRONIC MEDIA IS REASONABLE TO PREVENT UNDUE INFLUENCE OF CONSUMERS AND TO PROTECT THE LEGAL SYSTEM, AND BECAUSE OF ENFORCEMENT CONSTRAINTS

Lawyer commercials on the electronic media create two types of problems. They rely so heavily on emotional appeals, and are so intrusive and pervasive in the lives of

Americans, that they unduly influence consumers to respond to the commercial without reflection and without regard to the lawyer's competence or qualifications. They also create negative public attitudes which affect the administration of justice through the jury system. Moreover, these commercials typically have little, if any, informational value.

In fact, companies that market consulting services for lawyer advertising make no pretense that lawyer commercials are designed to educate the public. One such company creates television commercials premised on disdain for accident victims, proclaiming that potential clients have "low IQ's" and "don't know a tort from a tortilla"; rather, "[w]hat they really care about is fast money, and that's the lure that a TV lawyer must troll." See App. **D(3)** at **3;** App. **D(4)** at **2.** Certainly, it is not the advertising lawyer's legal competence and experience that draw television viewers to him, or the educational value of his advertisements. Instead, in the words of one legal marketer, it is "a bold, sleek TV image that draws tort victims to you like moths to flame." App. **D(3)** at 2.

Of course, that "bold, sleek TV image" is created not by conveying useful information to consumers but rather through pervasive reliance on illusory appeals. See App. E(1) at 105, 109, 112, **114;** App. **E(2)** at **433, 455.** The media techniques are so powerful and the nature of the medium itself is so elusive that considered reflection by the viewer is all but impossible. Indeed, the subliminal message disappears into air once it is given, and the listener cannot review it as one can a print advertisement.

Moreover, the message of television commercials running in Florida is clear -- call us right now! See generally App. **E(3).** The Supreme Court has previously held that in-person solicitation can be restricted precisely because it encourages "an immediate

response, without providing an opportunity for comparison or reflection." Ohralik, 436 U.S. at 457. As the record before this Court shows, the abusive use of electronic media techniques create those same dangers.

Indeed, it was for these very reasons that the Iowa Supreme Court in Humphrey approved a television advertising rule prohibiting the use of background sound, visual displays, more than a single nondramatic voice, and self-laudatory statements -- restrictions very similar to new Rule 4-7.2(b).[27] See 355 N.W.2d at 566, 568-69. The Court recognized the "special problems" inherent in electronic media and the "very real potential for abuse" there. 377 N.W.2d at 645-46. Unlike print advertising, the electronic media is "immediate" and "elusive" and provides the viewer with no opportunity to pause and restudy and thoughtfully consider options. Id. at 646. Moreover, the Court emphasized that the rules did not restrict the flow of useful information: "All that is prohibited are the tools which would manipulate the viewer's mind and will." 355 N.W.2d at 571. See 377 N.W.2d at 647.

Subsequent to Humphrey, the New Jersey Supreme Court approved rules prohibiting the use of drawings, animations, dramatizations, music, or lyrics in television advertising, and the use of shock or amusement appeals in any advertisement.[28] See In

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[27] New Rule 4-7.2(b) provides that commercials on the electronic media shall be articulated by a single voice, with no background sound other than instrumental music. Dramatizations and testimonials are prohibited by Rules 4-7.1(d) and 4-7.2(e).

[28] The court wrote that, under Hicks, the dismissal of the Humphrey II appeal was in effect a holding by the Supreme Court "that a state may bar use of these various techniques in conjunction with lawyer television advertising without offense to the United States Constitution." 518 A.2d at 202. Nevertheless, the New Jersey court did
(continued...)

re Felmeister, 518 A.2d at 189. The Court noted that "the potential impact of irrational factors is greatest" in television advertising, and that the most vulnerable segment of the public rely on television for information. Id. at 195. The Court concluded that the television restrictions advanced the state's interest in the "prevention of undue irrational influence on consumers in the selection of counsel." Id. at 201. The Court further reasoned that the prohibition against portrayals with shock value was justified by the state interest in preserving the public's confidence in the legal system. Id. at **203.** Such portrayals may alienate consumers not only from the advertising lawyer and the bar but also from the court which permits the ad. Id.

Chief Justice Reynoldson stressed similar concerns in his special concurrence in Humphrey II. He wrote to "express my deep philosophical concern for the future of state courts" if states cannot restrict "the uncontrollable and inevitable machinations of television advertising." 377 N.W.2d at 647-48. He recognized that state courts must "be perceived to be" dispassionate forums: "It is more than an axiom that '[j]ustice must satisfy the appearance of justice."' Id. at 648 (emphasis in original). "The state courts cannot be disassociated, in the minds of lay persons, from the conduct of their officers, either in or out of court." Id. at 649. Thus, "those officers who utilize the manipulative television techniques of the marketplace" have "diminish[ed] state courts in the eyes of the public." Id. at 649-50.

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[28](...continued)
not base its decision on that and instead made an independent consideration of the appropriateness of the rules. Id. Significantly, the court approved the rules even though it believed it had to apply a least restrictive means test. See id. at 203.

Justice Reynoldson also cited the "massive task" faced by the states in regulating the sights, color, sounds, and subliminal messages of commercial television advertising. Id. at **649.** Commercials are deceptive in subtle ways. Justice Reynoldson cites an award-winning commercial with a judge listening intently to a lawyer who rests casually with his elbow on the bench. The underlying message is obvious, and deceptive: "Here is a lawyer who has the private ear of the judge in the courtroom. The message about the court is equally, and unfortunately, very clear." **377** N.W.2d at **650, 653.**

In Bates, the Court foresaw that techniques used in other forms of advertising might be abused in lawyer advertising. See **433 U.S.** at **383.** The use of subliminal messages like a judge listening intently to a lawyer in an inappropriate setting is one of those techniques. **As** Justice Reynoldson recognized, such messages cannot be tolerated in a profession so inextricably involved in our very system of justice. Rather, the unique power and pervasiveness of the electronic media unduly influence consumers and distort their perception of the justice system.

The record in this case shows that the conclusions in Humphrey and In re Felmeister are not idle speculation. Much of the current television advertising by lawyers discourages rational decisionmaking and instead relies on emotional techniques in a medium that itself encourages emotional response. See App. **E(2)** at **433.** Lawyer commercials often seek to have the public "manifest blind faith" in the lawyer and telephone the lawyer immediately without reflection. See App. **C(5)** at 5, **117,** 181. See generally App. **E(3).** In short, viewers are not asked to consider a lawyer because of his abilities but subliminally urged to hire him because of his "bold, sleek image." The

record also shows that those tactics have created a public perception that television advertising promotes unwarranted and frivolous litigation in pursuit of the almighty dollar. Unfortunately but predictably, there is evidence that the public responds in reprisal through its jury verdicts. See App. **C(6)** at 1, **11-16;** App. **C(8)** at **17;** App. **C(9)** at **43-46;** App. **E(4);** App. **J**(2) at 10.

No enforcement method other than a total ban can effectively police those advertising abuses. That conclusion is especially true where, as in Florida, lawyer disciplinary procedures already overburden the Bar and this Court. The new rule is a "reasonable fit" designed to minimize the harms caused by such television advertising. **As** Humphrey recognizes, the new rule regulates only the manner of advertising and does not restrict the flow of information useful to informed decisionmaking.

VI. THE RULE REGULATING DIRECT MAIL SOLICITATION IS REASONABLE TO PROTECT THE LEGAL SYSTEM AND BECAUSE OF ENFORCEMENT CONSTRAINTS

Given the capabilities of modern word processing systems, direct mail today little resembles the advertisements of yesterday. The letters begin arriving soon after various occurrences -- automobile accidents, creditor problems, etc. -- and are personalized to refer to the recipient's particular circumstances. Hundreds of thousands of those solicitations are now being mailed to the citizens of Florida each year. See App. **H(4).**

Direct mail solicitation by lawyers -- and in particular the solicitation of accident victims -- is viewed by the public as being motivated purely by greed and as encouraging the public to bring claims without regard to the merits of the individual circumstances.

See, e.g., App. C(4) at 4, 5, 9, 11. In the end, this practice, like television advertising, is reflected in their jury verdicts. See App. C(4) at 6, 11. See also App. C(6).

For those reasons, the Bar determined that regulation of direct mail solicitation was reasonable and appropriate. The new rules take two forms to limit these practices. A series of disclosure requirements regulate the manner in which lawyers may solicit clients by direct mail, to make it clear that direct mail is only an advertisement. See Rule 4-7.4(c)(1). Another rule proposes a total prohibition of direct mail in the area of greatest concern -- solicitation of personal injury and wrongful death cases. See Rule 4-7.4(b)(1). Both rules are appropriate in view of the record before the Court.

The disclosure requirements merely require direct mail to convey more information rather than less, and are designed "to dissipate the possibility of consumer confusion." See In re R.M.J., 455 U.S. at 201. Such disclosures are not only allowed but have been encouraged in the context of direct mail. In applying the "least restrictive means" test in Shapero, the Court wrote that a state has "innumerable options" to regulate direct mail:

> It might, for example, require the lawyer to prove the truth of the fact stated . . . ; it could require the lawyer to explain briefly how she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, or directing the recipient how to report inaccurate or misleading letters.

108 S.Ct. at 1924. Rule 4-7.4(c)(1) implements some of those suggestions, though it stops short of requiring that letters notify recipients how to report lawyers.

Some of the Bar's proposed disclosure requirements have been specifically adopted by other states. For example, identifying the letter as an advertisement in red

ink is required in at least two other states, and many other states require that similar labeling be conspicuous. See App. L(6) at 403, 606-08. South Carolina has a rule requiring direct mail to state that it should be disregarded if the recipient already has a lawyer. App. L(6) at 405, 607. And the rule requiring a lawyer to explain in the letter how he learned of any occurrence referenced in the letter appears to be expressly authorized by Shapero. See 108 S.Ct. at 1924. Those requirements and others (such as no direct mail by specialized forms of delivery) are reasonably designed to prevent confusion and lessen the emotional impact of the communication on the recipient by making him aware that it is only an advertisement.

The prohibition of direct mail solicitation of personal injury suits is justified by a particularly serious concern -- the need to protect the integrity of the judicial system. Unless that practice is stopped, the damage to the administration of justice in this state will be immense. To automobile accident victims alone, direct mail letters are being sent in Florida at the rate of nearly 300,000 annually. App. H(4). A survey showed that 11% of all direct mail recipients say that receiving those letters will prejudice them if they are called as jurors. See App. C(4) at 6. Given that the public perceptions of abuse are strongest with respect to solicitation of personal injury and wrongful death suits, the impact upon the legal system for compensating tort victims is enormous.

In Justice O'Connor's dissent in Shapero, she saw that, without restrictions, lawyers are tempted to manipulate the prospective client for the lawyer's own pecuniary gain, and that a consumer cannot easily dismiss a solicitation letter directed to his own specific circumstances. See 108 S.Ct. at 1926, 1930. See also Zauderer, **471** U.S. at 678

(O'Connor, **J.**, dissenting). Though the majority disagreed with Justice O'Connor and held, under a "least restrictive means" analysis, that the state could not ban all forms of direct mail solicitation, that holding does not preclude the limited ban in Rule 4-7.4(b)(1) on written solicitations of personal injury and wrongful death cases.

First, unlike this case, there was no record in Shapero that direct mail solicitation harms the legal profession or the administration of justice. The disagreement between Justice O'Connor and the majority was not whether the state can regulate direct mail to protect the legal system -- clearly lawyer advertising and solicitation which adversely affects the judicial system can be restricted. See Ohralik, 436 **U.S.** at 460-61. The disagreement was whether that harm can be presumed. Because the record was silent as to any harm which had led to the Kentucky rule, the majority struck the blanket prohibition.

Second, the majority applied a "least restrictive means" test, a test which the majority of the Court, with the dissenters in Shapero at its core, subsequently rejected in **SUNY**. Applying Central Hudson, the majority in Shapero concluded that the state could regulate direct mail "through far less restrictive and more precise means" than a total ban, such as requiring filings with a state agency and penalizing abuses, or by requiring disclosures and disclaimers. See 108 S.Ct. at 1920, 1923-24. However, **SUNY** has now made it clear that states only need a regulation reasonably designed to achieve a substantial governmental goal, not the least restrictive means of doing so. The Supreme Court specifically noted there that "declining to impose . . . a

least-restrictive-means requirement" provided the "needed leeway" to regulate speech which enjoys only limited Constitutional protection. **SUNY,** 109 S.Ct. at 3035.

Given the record here of the harm caused by direct mail solicitation of personal injury and wrongful death cases, it cannot be said that a ban on that particular practice is unreasonable. In fact, means less restrictive than a total prohibition would simply not be effective. No reasonable disclosure requirement and no amount of review in Tallahassee can undo the alienation from the legal system caused when a person arrives home from burying a loved one to find a letter from a lawyer trying to make a profit on the tragedy. See App. I(1) at Sept. 28, 1987; App. J(2) at 9-10; App. J(3) at 31, 35-36; App. J(4) at 10-13, 19. Nor can it reverse the cynicism toward the legal system caused when a person involved in a minor fender bender receives a personalized letter suggesting he should file a lawsuit seeking damages for his "injuries." See App. B at St. Petersbure Times, Oct. 26, 1987 and Sun-Sentinel, June 23, 1987; App. I(1) at Dec. 4, 1987; App. J(5) at 65-66.

The fact of the matter is, the public views those tactics as an invasion of privacy,[29] see App. I(1) at Nov. 10, 1988; J(4) at 13-14, and retaliates through their jury verdicts. Clearly a ban on mail solicitation of these types of cases reasonably advances the state

[29] Although targeted direct mail does not violate any federal privacy right, Shapero, 108 S.Ct. at 1923, it is settled that "the states, not the federal government, are the final guarantors of personal privacy." In re T.W., 14 FLW, 531, 532 (Fla. Oct. 5, 1989). The Florida Constitution provides an express right to privacy which is "'much broader in scope than that of the Federal Constitution.'" Id. Thus, direct mail solicitation of persons might well violate the explicit and broad privacy right guaranteed by the Florida Constitution. Regardless, it is the recipient's perception that his privacy has been invaded that is important here, for it is that perception which eventually surfaces when the recipient serves as a juror.

interest in protecting the integrity of the legal system. The rule has been carefully crafted. Unlike the ban in Shapero, Rule 4-7.4(b)(1) bans direct mail **only** in the limited area that the Bar determined to be the most immediate and substantial concern.[30] The fact that hypothetical "better" regulatory methods might exist cannot foreclose Rule 4-7.4(b)(1). SUNY leaves it to the state to determine "what manner of regulation may best be employed." SUNY, 109 S.Ct. at 3035.

CONCLUSION

A leading opponent of the Bar's proposed rules recently stated: "There's no reason to treat our ads differently than those of the lottery or race tracks or banks." App. B at **ABA** Journal, September 1, 1989. But the legal profession is not simply a business indistinguishable from all others. The Supreme Court repeatedly has recognized that lawyer advertising has the potential to negatively impact the administration of justice. The Supreme Court, however, has never been presented with a record which -- like the record in this case -- shows that lawyer advertising is not doing what the Supreme Court hoped it would (educating the public), and is doing what the Supreme Court feared it might (damaging the legal system).

Given the record of actual harm caused by lawyer advertising developed by The Florida Bar, the restrictions on advertising proposed by the Bar are plainly justified. Based upon the record before this Court, the Bar has fashioned rules which will allow the proper function of lawyer advertising to be carried out but will eliminate the harm

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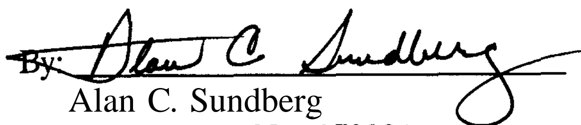
[30] The Supreme Court recognizes that states may regulate one area of abuse more tightly than another. Thus, a state "may take one step at a time, addressing itself to the phase of the problem which seems most acute." Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955). See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342 (1986).

that certain types and techniques of advertising create. Thus, the Bar has gone back to the twin goals of lawyer advertising and developed rules with a two-fold thrust: encouraging advertising to include useful factual information, and restricting advertising where the potential for deception and overreaching is greatest and the record shows the harm to the justice system is most severe.

The Bar feels strongly that these rules will not only curb abuses and promote the flow of information to consumers, but also help restore the public's faith in the judicial system. The Bar accordingly urges the Court to approve these rules.

January 22, 1990

Respectfully submitted,



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