ORIGINAL

IN THE
SUPREME COURT
OF FLORIDA

Case No. 74,987

IN RE PETITION TO AMEND
THE RULES REGULATING THE
FLORIDA BAR - ADVERTISING ISSUES

FLORIDA ASSOCIATION OF BROADCASTERS,
NATIONAL ASSOCIATION OF BROADCASTERS,
SCRIPPS HOWARD BROADCASTING COMPANY,
FOURTH DISTRICT AMERICAN ADVERTISING FEDERATION,
FLORIDA/CARIBBEAN, INC.,
AMERICAN ADVERTISING FEDERATION,
PHIPPS-POTAMKIN TELEVISION PARTNERS,
JOHN H. PHIPPS, INC.,
SOUTHWEST FLORIDA BROADCASTERS ASSOCIATION,
WABASH VALLEY BROADCASTING CORP.,
FIRST MEDIA CORP.,
GILMORE BROADCASTING CORP.,
SOUTHERN BROADCAST CORPORATION OF SARASOTA,
SOUTH FLORIDA RADIO BROADCASTERS ASSOCIATION, AND
FORT MYERS BROADCASTING COMPANY

BRIEF IN OPPOSITION TO THE FLORIDA BAR'S PETITION TO ADOPT FURTHER RESTRICTIONS ON LAWYER ADVERTISING

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STATEMENT OF THE CASE

On November 7, 1989 the Board of Governors of the Florida Bar ("Bar") filed with this Court a Petition to Amend the Rules Regulating the Florida Bar ("Petition"). The proposed amendments would sharply restrict the methods and content of lawyer advertisements, and if adopted would have the effect of substantially reducing or eliminating lawyer advertisements on radio and television.

Pursuant to Rule 1-12.1 of the Rules regulating the Florida Bar, this Brief is respectfully submitted on behalf of the parties identified above, in opposition to the Bar's proposed rule amendments restricting lawyer advertising via the electronic media.

The proposed amendments include prohibitions on the use of certain formats in all lawyer advertising, and specific additional restrictions on techniques unique to lawyer advertising on the electronic media: television and radio. These include:

(i) a prohibition of the use of endorsements and testimonial advertising;

(ii) a prohibition of the use of dramatizations;

(iii) a requirement that visual displays in electronic media advertising be limited to the same factual information permitted in the print media;

(iv) **a** requirement that electronic media advertisements contain no background sounds, except instrumental music;

(v) a requirement that advertisements be articulated by a single voice or lawyer on screen;

(vi) a prohibition on the use of recognizable celebrities; and

(vii) a requirement that the following disclosure to be included in all lawyer advertisements via the electronic media, but not print advertising:

> 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 free written information about our qualifications and experience.

The Bar, in broad generalities, asserts several alleged interests supporting these proposed restrictions on the dissemination of such valuable consumer information. However, the U.S. Supreme Court has previously rejected all these interests as insufficient to support restrictions on lawyer advertising.

In an unsuccessful attempt to meet its burden of proof, the Bar has inundated the Court and the parties with a record of approximately 3,000 pages. However, a review of the material reveals that most of the documents fail in any way to support the Bar's tenuous conclusions regarding the electronic media. Despite such a voluminous record, the Bar offers nothing to support its allegation that "the unique and powerful characteristics of the electronic media make them especially susceptible to abuse and especially subject to regulation." Petition at **4.**

The only evidence presented by the Bar are three unscientific surveys of attitudes regarding lawyer advertising in general. The author of one of the surveys admits in her conclusion that the survey is not reliable. The methodology and implementation of a second survey is fatally flawed, and therefore completely unreliable. The Bar's final study, a survey of Florida circuit judges, does not distinguish between print media and electronic media advertising of legal services; it simply provides selected comments of Florida jurists regarding lawyer advertising in general. None of these surveys provides evidence to support the Bar's claim that radio and television advertising is subject to abuse and thus ripe for regulation.

The record is also devoid of any evidence that pretends to demonstrate that the proposed restrictions are narrowly drawn to further any substantial state interest. Further, nowhere in the record is there any indication that existing Bar restrictions on lawyer advertising are ineffective, or that there have been any significant number of public complaints regarding

misleading or untruthful lawyer advertising in Florida.

As the following discussion of the case law will demonstrate, without a well documented record demonstrating a compelling state interest for further regulation, the Bar's proposed restrictions on lawyer advertising via the electronic media must be rejected in toto as an unconstitutional restraint upon protected commercial speech.

SUMMARY OF THE ARGUMENT

The U.S. Supreme Court has repeatedly concluded that truthful and non-deceptive lawyer advertising enjoys the protection of the First and Fourteenth Amendment to the **U.S.** Constitution. Similarly, the Florida Supreme Court has concluded that such advertising is protected by Article I, Section **4** of the Florida Constitution. The **U.S.** Supreme Court has universally held that any restrictions on lawyer advertising, in order to survive constitutional muster, must meet the following tests:

(i) support a valid government interest,

(ii) directly advance such government interest, and

(iii) be narrowly tailored to provide a "reasonable fit" between the governments ends and its chosen means of achieving these ends.

Further, the state has the burden of proof to affirmatively meet the above enunciated tests, and the Court must apply a "strict scrutiny" standard to any evidence and arguments advanced by the state.

Rules or regulations which result in blanket suppression of lawyer advertising are impermissible without conclusive evidence that such advertising is inherently misleading. If a message can be presented in a non-deceptive and truthful manner, any prophylactic rule is unconstitutional. Further, any rule which penalizes the mode of communication merely because it is more effective is also unconstitutional.

The U.S. Supreme Court has applied these cardinal principles in several cases, and has thus far concluded that lawyer advertising in newspapers, in direct mail and through the use of illustrations is Constitutionally protected. Only in the case of in-person solicitation was an absolute ban found to be appropriate, due to the pressures and inaccessibility inherent in such

solicitations.

The Florida Bar has proposed rules which would in effect substantially impede or completely eliminate lawyer advertising via the electronic media. However, the Bar has failed to meet its burden of proof in support of such proposed restrictions:

- There is no record to support the Bar's assertion of a substantial government interest to be advanced by these rules.
- There is no record that the proposed rules will directly advance any such interest.
- There is no record the proposed rules are narrowly tailored to provide a reasonable fit to achieve the Bar's alleged interests.
- There is no record to demonstrate that radio and television lawyer advertising require different treatment from other forms of media.
- There is no record to demonstrate that lawyer advertising on radio and television is inherently misleading or untruthful, and further there is no record evidence concerning radio advertising at all.
- There is no record to demonstrate how any of the proposed restrictions, individually or collectively, will advance the Bar's stated interests.
- There is no record that the existing Bar rules are ineffective in policing misleading and untruthful lawyer advertising.
- There is no record evidence of public complaints regarding the alleged misleading nature of lawyer advertising on radio or television.

Thus, this Court must consider under a "strict scrutiny" test the proposed restrictions on a bare record, with only the Bar's preconceived notions, supported by generalities and flawed studies. Applying these constitutionally mandated tests, the Florida Association of Broadcasters, et **al.** conclude that this Court must reject the Bar's proposed restrictions on lawyer advertising via the electronic media.

ARGUMENT

In today's society the services of a skilled attorney are essential to protect the interests of all members of our society. Business leaders seek out legal counsel to further their interests in commerce. The oppressed search for a lawyer to remedy injustice. Victims search for a legal representative to redress their grievances. Accused persons look for a lawyer to defend their liberty. And families seek legal assistance and guidance in planning for the future. Both this Court and the **U.S.** Supreme Court have recognized the public's need for information regarding the availability and cost of legal services. The **U.S.** Supreme Court has repeatedly stated that in order to assist the public in obtaining legal services, lawyers must be allowed to advertise the availability of their services.[1]

The Florida Bar also claims to understand the important function of lawyer advertising in disseminating useful information to the public about the cost and availability of legal services. Further, the Bar admits that the need for such information is "particularly acute in the case of persons of moderate means who have not made extensive use of legal services."[2]

Despite these statements, the Bar has proposed restrictions on lawyer advertisements in general and pernicious limitations on the electronic media, in particular, that would substantially reduce the flow of such information to the public. The de facto elimination of lawyer advertising on the electronic media would prohibit the public's access to its most vital

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[1] See Bates v. State Bar of Arizona, **433 U.S.** 350 (1977); In re R.M.J., 455 **U.S.** 191, (1982); Zauderer v. Office of Disciplinary Counsel, 471 **U.S.** 626 (1985); Shapero v. Kentucky Bar Association, ____ U.S. ____, 108 S.Ct. 1916 (1988).

[2] See Petition to Amend the Rules Regulating the Florida Bar, Exhibit A at 9 ("Petition").

and effective source for legal services information. Such a ban violates the public's constitutional right to receive useful commercial information.

I. THE BAR'S PROPOSED DE FACTO BAN ON TRUTHFUL, NON-DECEPTIVE LAWYER ADVERTISING VIA THE ELECTRONIC MEDIA VIOLATES CONSTITUTIONAL PROTECTIONS AFFORDED SUCH COMMERCIAL SPEECH.

A. The First And Fourteenth Amendments To The United States Constitution And Article I, Section 4 Of The Florida Constitution Guarantee The Dissemination Of Truthful, Non-Deceptive Advertising Of Legal Services Via The Electronic Media,

First Amendment protection for commercial speech -- speech which does "no more than propose a commercial transaction"[3] -- has its foundation in the U.S. Supreme Court's decision in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).[4] In invalidating a state ban on advertisements by Virginia pharmacists, the Court stated:

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold?[5]

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[3] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

[4] See also Bigelow v. Virginia, 421 U.S. 809 (1975).

[5] Virginia Pharmacy, 425 U.S. at 770.

The U.S. Supreme Court ruled that the First Amendment also protects lawyer advertising in Bates v. State Bar of Arizona, **433** U.S. 350 (1977). There, the Arizona Bar argued that its complete ban on lawyer advertising was necessary because advertising by attorneys (i) is inherently misleading; (ii) would tarnish the dignified public image of the profession; (iii) would have an adverse effect on the administration of justice; (iv) would have an undesirable economic effect; and (v) would erode a client's trust in his attorney and stir up litigation.

The Bates Court rejected each of these arguments. It held that lawyer advertising was not inherently misleading and enjoyed First Amendment protection against blanket suppression, and it emphasized that suppression of such speech would violate the public's fundamental right to receive useful commercial information:

> **[A]** consideration of competing interests reinforced our view that such speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts. The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making. (citations omitted)[6]

The U.S. Supreme Court has expanded the Bates doctrine to provide similar constitutional protection to truthful and non-deceptive lawyer advertising using illustrations and self-recommending statements in the print media, and by direct mail.

In In re R.M.J., **455 U.S.** 191 (1982), the United States Supreme Court reviewed post-Bates Missouri Bar regulations which sought to strike **a** midpoint between prohibition and

[6] Bates, **433** U.S. at **363-64.**

unlimited advertising. The Missouri Bar permitted advertising, but limited the content to ten categories of information,[7] and limited such advertising to three forms of printed media: newspapers, periodicals and the yellow pages of telephone directories.

The Missouri Supreme Court had reprimanded an attorney for a newspaper advertisement that included information not expressly permitted by the Missouri Bar's rules. In reversing the Missouri Supreme Court, the R.M.J. Court stated:

> We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements.'

Based on the Bates and R.M.J. decisions, the Florida Supreme Court in Florida Bar v. Fetterman, 439 So.2d 835 (Fla. 1983), extended the protections of the First Amendment to the **U.S.** Constitution and Article I, Section **4** of the Florida Constitution to the use of trade names in lawyer advertising. The Fetterman Court recognized the "delicate balance between constitutional freedom of expression and legitimate unrestrained exercise of that privilege," and adopted the commercial speech doctrine of the **U.S.** Supreme Court in connection with lawyer advertising:'

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the

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[7] The Missouri rules allowed the use of an attorney's name, address, telephone number, areas of practice (using certain specified language), date and place of birth, school attended, foreign language ability, office hours, fee for initial consultation, and the availability of a schedule of fixed fees, credit arrangements, and the fixed fee to be charged for certain specified routine legal services.

[8] R.M.J., 455 **U.S.** at 207.

[9] Florida Bar **v.** Fetterman, 439 So.2d 835,840 (Fla. 1983).

> advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information....[10]

The U.S. Supreme Court in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), again affirmed the constitutional principle that the states may not ban or suppress truthful, non-deceptive advertisements regarding legal services. In Zauderer, an Ohio lawyer had published a newspaper advertisement informing the public that he was available *to* represent women injured through use of an intra-uterine contraceptive device called the Dalkon Shield. The advertisement included a drawing of a Dalkon Shield. **As** a result of the advertisement, the Ohio Supreme Court disciplined the attorney for violating rules that prohibited self-recommendations and the use of illustrations in lawyer advertising.

The Zauderer Court found the Ohio Bar's absolute ban on self-recommending statements was unconstitutional:

> Although our decisions have left open the possibility that States may prevent attorneys from making non-verifiable claims regarding the quality of their services, ... they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas. See In re R.M.J., 455 U.S. 191,203-205 (1982). (citation omitted)"

In addition, the Zauderer Court rejected the absolute ban on illustrations in lawyer advertising. It explained that illustrations and pictures attract the attention of an audience to the advertiser's message and provide information directly. The Court concluded that because illustrations serve such an important communicative function in advertising, they are entitled

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[10] Id. at 840, quoting R.M.J., 455 U.S. 191; see also Sakonv. Pepsico, Inc., ____ So. 2d ____, 14 FLW 584 (Fla. 1989).

[11] Zauderer, 471 U.S. at 640 n.9.

to the same First Amendment protections afforded verbal commercial speech.[12] The Zauderer Court rejected the absolute ban on illustrations because the state failed to establish any particular evils associated with the use of illustrations in lawyer advertisements. The Court concluded that:

> [A]cceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force.[13]

During the same term, the **U.S.** Supreme Court considered a case involving restrictions on electronic media advertising of legal services. Humphrey v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association, 472 U.S. 1004 (1985), dealt with an Iowa Bar action enjoining a lawyer from broadcasting television advertisements containing background sounds, visual displays and more than a single, nondramatic voice, techniques which violated the Bar's rules. The U.S. Supreme Court vacated the initial Iowa Supreme Court decision and remanded the case for further consideration in light of the Zauderer decision.[14] On remand, the Iowa Supreme Court affirmed its earlier decision upholding the Iowa restrictions on electronic media advertising." Relying on Bates,[16] the Iowa Supreme

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[12] Id. at 647.

[13] Id. at 649.

[14] Humphrey v. Committee on Professional Conduct of the Iowa State Bar Association, 472 U.S. 1004 (1985).

[15] See Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Humphrey, 377 N.W.2d 643 (Iowa 1985). This case was subsequently appealed to the U.S. Supreme Court, where it was dismissed for want of a substantial federal question. See Humphrey v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association, 475 U.S. 1626 (1986). It is important to note that such dismissal does not have the same authority as decisions that are a product of plenary proceedings, Metromedia. Inc. v. City of San Diego, 454 U.S. 490, 500, (1981); C. Wright, The Law of Federal Courts § 108, at 748

Court opined that the broadcast media have established a uniquely pervasive presence in today's society, and that this pervasiveness justifies stricter regulation of electronic advertising than of print advertising. Therefore, the court found the Iowa Bar rules prohibiting electronic media advertising did not violate Zauderer. The Court also denied that its rule amounted to a blanket ban in the sense proscribed by Zauderer.[17]

Subsequently, the U.S. Supreme Court decided Shapero v. Kentucky Bar Association, _____ U.S. _____, 108 S.Ct. 1916 (1988). Employing the Zauderer analysis, the Shapero Court

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n. 25 (4th ed. 1983), and that commentators have argued that these dismissals should have little weight because they really do not differ greatly from denials of certiorari, see, e.g., Comment, "The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda," 76 Colum. L. Rev. 508, 511, n.19, 518-19 (1976). See In re Petition of Felmeister & Isaacs, 518 A.2d 188, 202 n.16 (1986).

[16] The Bates dicta included a statement that "the special problems of advertising on the electronic media will warrant special consideration." Bates, 433 U.S. at 384. However, the Bates Court did not state that electronic media advertising could be or is in fact misleading. The very notion that the electronic media should be penalized because of its effectiveness is an antiquated theory rejected by the Shapero Court. The Bates dicta relies on Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.C. 1971), aff'd. sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 **U.S.** 1000 (1972). Capital discusses the type of "special problems" to be considered by the Court in connection with television advertising, namely children's exposure to cigarette advertising and the unique ability of the broadcast media to attract and persuade young children.

Clearly, the Capital decision established a very narrow exception to the general First Amendment protections afforded the content of electronic media commercials and entertainment programs. The legitimate governmental interest in protecting children from the adverse effects of the broadcast of cigarette advertisements has no relevance to the Bar's proposed restrictions on electronic media advertising of legal services. Therefore, the dicta in Bates regarding the special problems of advertising via the electronic media provides no authority for the Bar's proposed restrictions.

[17] Subsequent to Humphrey, the New Jersey Supreme Court also upheld a similar bar restriction on television advertising. In re Petition of Felmeister & Isaacs, 518 A.2d 188, 201 (N.J. 1986). While the court rejected a total ban on lawyer advertising in radio and television, it allowed substantial restrictions on television advertising. However, the court specifically held that its conclusion was tentative and subject to change, and in fact the restrictions will be reconsidered when the court receives a report from a court-appointed agency concerning implementation of its regulations.

struck down a Kentucky Bar rule prohibiting direct mail solicitation of prospective clients. The Shapero Court noted that its lawyer advertising cases have never distinguished between different modes of written advertising to the general public.[18] Thus, targeted direct mail could not be prohibited since it possessed the same inherent qualities as any other written advertisements. First, it was unlike in-person solicitation, "a practice rife with possibilities for overreaching, invasion of privacy and the exercise of undue influence and outright fraud'; and second, again unlike in-person solicitation, targeted direct mail was visible and open to state regulation. The Shapero Court further stated that the First Amendment does not allow a complete prohibition of certain speech merely because it is more efficient.[19]

Thus, Iowa's Humphrey decision conflicts with the principles the U.S. Supreme Court later enunciated in Shapero. The pervasiveness or effectiveness of an advertising medium is not the issue to determine whether regulation is warranted to prevent abuse.[20] Rather, the appropriate question is whether there is conclusive evidence of the alleged misleading nature of electronic media advertising of legal services, or whether such advertising is inherently misleading. The Iowa decision was not supported by evidence of untruthful or misleading lawyer advertising on radio or television. Given the absence of evidence of abuse of lawyer advertising via the electronic media and the fact that electronic media advertising of legal services is on the public airwaves, open to oversight and case-by-case adjudication if necessary,

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[18] Shapero, 108 S.Ct. at 1922. Bates equated advertising in telephone directories with newspaper advertising. In R.M.J. the Court treated mailed announcement cards the same as newspaper advertising and telephone directory announcements. Id.

[19] Id.

[20] In fact, the relative effectiveness and reach of the electronic media is why unfettered speech via these media is so crucial, i.e., the ability to educate the population about the legal system and thereby provide access to it. See Shapero, 108 S.Ct. 1916.

a different result is compelled.*' The short shrift treatment of the electronic media by the Iowa Supreme Court fails to pass Constitutional muster.

In the same context, the Florida Bar's proposed differential treatment of print and electronic media advertising also violates the U.S. Supreme Court's First Amendment-Equal Protection Doctrine. In Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 577 (1983), the U.S. Supreme Court declared that differential treatment of media suggests that the goal of the regulation is suppression of speech, and that such a goal is presumptively unconstitutional.'' To justify disparate treatment of the media, the state must meet a "strict scrutiny" standard by showing that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'' The Florida Bar has failed to advance any compelling state interest that dictates different treatment of radio and television from the print media, and as demonstrated infra, the Bar's proposed restrictions on radio and television are not narrowly tailored regulations, but are broad prophylactic schemes designed to suppress commercial speech. **As** such, the Bar's proposed rules are presumptively unconstitutional.[24]

Based on the foregoing, it is abundantly clear that the First and Fourteenth Amendments to the United States Constitution and Article I, Section 4 of the Florida Constitution afford constitutional protection to lawyer advertising via the electronic media, and thus require rejection of the Bar's proposed restrictions.

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[21] See Zauderer, 471 U.S. 626.

[22] Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 577, 585 (1983). See also Arkansas Writers Project, Inc. v. Ragland, 481 **U.S.** 221 (1987).

[23] See Minneapolis Star, 460 U.S. at 591-92; Arkansas Writers, 481 U.S. at 236.

[24] See id.

B. Lawyer Advertising Via The Electronic Media Is Not Inherently Misleading And Therefore Is Protected Commercial Speech.

In the cases discussed supra, the U.S. Supreme Court has reviewed several different modes of advertising: newspaper advertisements, direct mail solicitation, and the use of illustrations. In doing so, the Court has stated that when considering restrictions on lawyer advertising, the "relevant inquiry is ... whether the mode of communications poses a serious danger," and that "the States may not place an absolute prohibition on certain types of potentially misleading information ... if the information may be presented in a way that is not deceptive."[25] Moreover, the Court stated in Shapero that "... the First Amendment does not permit a ban on certain speech merely because it is more efficient ..."[26]

In only one context -- in-person solicitation -- did the U.S. Supreme Court find that the mode or medium of communications was so inherently fraught with danger that an absolute prohibition of its use would pass Constitutional muster.

The U.S. Supreme Court in Ohralik v. Ohio State Bar Association, 436 U.S. 477 (1978), reviewed a case concerning an Ohio lawyer who had personally solicited two accident victims regarding possible tort claims that could be filed on their behalf. The Ohio Bar disciplined the attorney for violating Bar rules prohibiting a lawyer from recommending himself to a non-lawyer who had not sought his advice and from providing a non-lawyer unsolicited advice regarding a legal matter. The Ohralik Court held that in-person solicitation may involve undue influence, intimidation, overreaching, and other forms of misconduct, and is therefore beyond

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[25] R.M.J., 455 U.S. at 203.

[26] Shapero, 108 S.Ct. at 1922.

the ambit of protection afforded commercial speech under the First Amendment.[27] The Ohralik Court's approval of the ban on in-person solicitation turned on two factors:

> First ... our characterization of face-to-face solicitation as "a practice rife with possibilities for overreaching, invasion of privacy, and the exercise of undue influence, and outright fraud." ... Second, "unique ... difficulties" would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is "not visible or otherwise open to public scrutiny." (citations omitted)[28]

Unfortunately, the Florida Bar disregards the U.S. Supreme Court's broad acceptance of multiple forms of media and disregards the critical analysis used in Ohralik. Instead, the Bar strikes at the mode of communications, the electronic media, simply because of their wide use and effectiveness.

The Bar's rationale for its proposed restrictions on lawyer advertising via the electronic media is enunciated in the Comments following proposed Rule 4-7.2:

> Television is now one of the most powerful media for conveying information to the public .... However, the unique characteristics of electronic media, including the pervasiveness of television and radio, the ease with which these media are abused, and the passiveness of the viewer or listener, make the electronic media especially subject to regulation in the public interest. Therefore, greater restrictions on the manner of television and radio advertising are justified than might be appropriate for advertisements in the other media.

It is undisputed that the electronic media -- radio and television -- play a dominant role in the dissemination of valuable commercial information to every man, woman and child in our society. This is the very reason that free and uninhibited dissemination of lawyer advertising via the electronic media is so critical.

A mere claim that the possibility exists that a particular message, disseminated by the electronic media, may be misleading is not sufficient justification for the absolute prohibition

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[27] Ohralik v. Ohio State Bar Association, 436 U.S. 477 (1978).

[28] Shapero, 108 S.Ct. at 1922.

of such medium. In R.M.J. the U.S. Supreme Court stated:

> "[T]he States may not place an absolute prohibition on certain types of potentially misleading information, ... if the information also may be presented in a way that is not deceptive."[29]

Therefore, lawyers' use of radio and television can not be found to be inherently misleading, since lawyer advertising via the electronic media can be presented in a truthful and non-deceptive way.

For any prohibition of electronic media advertising to survive the Constitutional scrutiny demanded by Bates. R.M.J., Zauderer, Shapero and Ohralik, the regulator must provide factual evidence that electronic media advertising is akin to in-person solicitation. The Bar has failed to do so. Nowhere in the record is there any evidence demonstrating inherent abuses of the electronic media. We submit that such a showing is simply impossible.

The electronic media, just as newspaper advertisements, illustrations and the use of direct mail, merely provide a vehicle, a blank canvas or platform upon which the speaker communicates his message to the public. Unlike personal solicitation, the vehicle does not possess inherent dangers of abuse:

- There is not present the personal coercive force of a trained advocate.
- The listener or viewer can "put" the advertisement aside by turning off the radio or television or by changing the channel.[30]
- The advertising is public and thus easily available to the Bar for scrutiny and disciplinary action, if warranted.

Accordingly, the electronic media must be afforded full First Amendment protection in keeping with the U.S. Supreme Court's analysis in Bates, R.M.J., Zauderer, Shapero and

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[29] R.M.J., 455 U.S. at 203.

[30] See Affidavit of Dean Goodman, Affidavit of Michael Schweitzer (Appendix at 2-5).

Ohralik.

It is interesting to note that this Court has previously considered the issue of the effect of the electronic media as compared with other media. In deciding to allow the electronic media access to the courtrooms of the State of Florida, this Court in In Re Petition of Post-Newsweek Stations. Florida, Inc., 370 So.2d 764 (1979), eloquently touted the societal benefits to be derived from electronic media coverage of the judicial process:

> Electronic media coverage of all other branches and subdivision of Florida government exists and apparently has served not only to inform the public about the operation of their government but has made the representatives of government act more responsibly. At the advent of gavel-to-gavel television coverage of the Florida Legislature, members of that body expressed many of the same fears held by the respondents before us today. That experience, however, has demonstrated that the legislative process has been enhanced rather than degraded."

Further, in allowing television cameras into the courtroom, this Court rejected the very argument that the medium of electronic communications is inherently misleading. In addition, the Court found that the electronic media would most likely enhance rather than reduce the public's confidence in the judicial system.

Lawyer advertising, contrary to the Florida Bar's unsupported assertions, has the same salutary effects of educating the public about the legal system and informing the public about the availability of legal services, thus enhancing the overall legal process.

Accordingly, the Florida Supreme Court must reject the Bar's attempt to single out radio and television as media of communication for lawyer advertising especially subject to regulation more stringent than can be justified for other media.

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[31] In re Petition of Post-Newsweek Stations, Florida. Inc., 370 So.2d 764,780 (1979).

C. The Bar's Proposed Restrictions On Lawyer Advertising Via The Electronic Media Are Discriminatory And Constitute A De Facto Ban On All Electronic Media Advertising Of Legal Services In Violation Of The First And Fourteenth Amendments To The U.S. Constitution And Article I, Section 4 of the Florida Constitution.

Despite acknowledging the electronic media as a vital source of commercial information, the Bar has devised **a** regulatory scheme which discriminates against the electronic media by restricting the techniques used in television and radio advertising. Such restrictions will substantially impede, if not totally obstruct, the flow of legal services information to the general public.

The most insidious and ill-conceived of its proposed rules is a disclaimer to be broadcast with all lawyer advertisements via the electronic media. Proposed Rule 4-7.2(d) would require the following disclaimer be announced or displayed in all lawyer advertisements via the electronic media:

> 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 free written information about our qualifications and experience?'

Such disclaimer is not required for lawyer advertisements in the print media if they do not contain illustrations and are limited to the information sanctioned by the rules." This proposed rule represents blatant discrimination against electronic media advertising. To justify such disparate treatment, the First Amendment-Equal Protection Doctrine requires the state to show that its regulation is necessary to serve a compelling state interest and is narrowly

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[32] Petition at 5.

[33] Id.

drawn to achieve that end."

The Bar has utterly failed to make such a showing. It has provided no conclusive evidence to support its claim that "the unique and powerful characteristics of the electronic media make them especially susceptible to abuse and especially subject to regulation in the public interest."[35] The Bar's unfounded allegation of "potential abuse" of electronic media advertising is not a sufficiently compelling state interest to justify the Bar's discriminatory disclaimer rule. It must therefore be inferred that the goal of such a discriminatory regulation is the suppression of speech, and that the regulation is therefore presumptively unconstitutional.

The Bar's proposed disclaimer rule would also have a chilling effect on lawyer advertising. In reviewing the constitutionality of a required disclaimer regarding legal fees, the Zauderer Court stated that:

> [U]njustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.[36]

The Bar's proposed disclaimer, if adopted, would discourage lawyers from airing electronic media advertisements because of the negative image such a disclaimer would attach to the message.[37] Such a disclaimer would communicate to the viewer or listener that electronic media advertising of legal services is at best improper, and at worst misleading. The public image created by such a disclaimer is one of distrust or suspicion of the advertising lawyer. With such potential fallout from such a disclaimer, it is difficult, if not impossible, to

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[34] See Minneapolis Star, **460 U.S. 577;** see also Arkansas Writers, **481** U.S. 221.

[35] Petition at **4.**

[36] Zauderer, **471 U.S.** at 651.

[37] See Affidavit of Dean Goodman, Affidavit of Michael Schweitzer (Appendix at 2-5).

understand how any lawyer would continue to use electronic media advertising. The proposed disclaimer would have a very real and immediate "chilling effect" upon electronic media advertising of legal services.[38]

With regard to the format of lawyer advertisements on the electronic media, the proposed rules would prohibit testimonial advertisements,[39] celebrity endorsements,[40] and dramatizations?[41] In addition, the proposed rules would prohibit the use of any background sound other than instrumental music,[42] and would virtually eliminate the use of illustrations in television advertising.[43]

The electronic media employ auditory and visual techniques to enhance messages and capture the attention of the listener or viewer. **A** major objective in producing an advertisement is to devise a format or technique to attract and hold the attention of the viewers or listeners. Effective methods of attracting and maintaining audience attention include the use of background sound or music, illustrations or graphics, celebrity endorsements, testimonials and dramatizations.[44] Such techniques are core elements which distinguish radio and television from other media, and make the electronic media effective. The use of such techniques and formats ensures the flow of valuable commercial information to the public.

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[38] Id.

[39] See Petition at 2.

[40] Id. at 4.

[41] Id. at 5.

[42] Id. at **4.**

[43] Id.

[44] See Affidavit of Dean Goodman, Affidavit of Michael Schweitzer, Affidavit of John Drury (Appendix at 2-7).

The prohibition of such techniques and formats would render the electronic media impotent and would discourage, if not eliminate, lawyers' use of the electronic media for dissemination of information regarding the availability and cost of legal services.[45]

To fully understand the potentially devastating effect of the Bar's proposed advertising restrictions, it is necessary to review the past and present experience of lawyers in the State of Iowa. Following the Bates decision, the Iowa Bar authorized limited advertising by lawyers but instituted restrictions on the use of electronic media advertising. The Iowa restrictions on lawyer advertising via the electronic media are almost identical to the Bar's proposed restrictions in the instant case, except they do not include the disclaimer requirement for electronic media advertisements required by the proposed Florida rules. As a direct result of the adoption of such "chilling" restrictions, advertising by Iowa lawyers via the electronic media is non-existent.[46] A similar scenario will be played out in Florida if the Bar's proposed restrictions on electronic media advertising are adopted.

In conclusion, the Bar's proposed discriminatory regulation of electronic media advertising -- requiring the broadcast of a disclaimer, prohibiting dramatic and testimonial advertising formats, virtually eliminating the use of background sounds and illustrations, and tightly regulating content -- would violate the First Amendment-Equal Protection Doctrine and would have a chilling effect on lawyers' use of electronic media advertising, effectively banning a vital means of communication of valuable commercial information to the public. The Bates, Ohralik, R.M.J., Zauderer, Fetterman and Shapero decisions provide that a state may not institute a blanket suppression of any medium of communication of information regarding legal

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[45] Id.

[46] See Affidavit of Larry Edwards, Executive Director of the Iowa Broadcasters Association (Appendix at 1).

services, unless the state demonstrates that such medium is akin to in-person solicitations, in that it is inherently misleading. The Bar has utterly failed to demonstrate that the electronic media are inherently misleading or susceptible to the abuses prevalent with in-person solicitation. Thus, the Bar's proposed blanket suppression of electronic media advertising of legal services is contrary to the First and Fourteenth Amendments to the **U.S.** Constitution and Article **I,** Section **4** of the Florida Constitution, and therefore must be rejected.

II. ASSUMING ARGUENDO THAT THE BAR'S PROPOSED RESTRICTIONS *ARE* NOT A DE FACTO BAN ON LAWYER ADVERTISING VIA THE ELECTRONIC MEDIA, THE BAR HAS FAILED TO DEMONSTRATE THAT SUCH PROPOSED RESTRICTIONS ARE NARROWLY TAILORED TO FURTHER A SUBSTANTIAL GOVERNMENTAL INTEREST.

A. The First Amendment Requires That Any Regulation Of Truthful, Non-Deceptive Advertising Of Legal Services Be Narrowly Tailored To Further A Substantial Governmental Interest.

The **U.S.** Supreme Court established a standard of review for commercial speech cases in Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, **447 U.S. 557 (1980).** The Central Hudson Court framed the following four-part analysis:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[47]

[47] Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, **447 U.S. 557,566 (1980).**

Lawyer advertising satisfies the first component of the Central Hudson analysis by qualifying as non-deceptive commercial speech regarding a legal activity, thereby entitled to First Amendment protection.[48] Therefore, in applying the Central Hudson test, the Zauderer Court concluded that for a state to regulate such lawyer advertising, it must assert a substantial governmental interest and demonstrate that such restrictions are necessary to directly advance its stated interest and are not broader in scope than necessary to serve such interest."

Subsequent to the Zauderer decision, the **U.S.** Supreme Court modified the fourth element of the Central Hudson test (i.e., the "not more extensive than necessary" test) in Board of Trustees of State of New York v. Fox ("SUNY") ___ **U.S.** ___, 109 S.Ct. 3028 (1989). This element had been interpreted in the past to require the "least restrictive" means for any regulation of commercial speech. The SUNY Court found that this fourth element requires instead that there be a "reasonable fit" between the government's ends and its chosen means, and that the regulations be narrowly tailored to achieve the governmental objective." The SUNY Court concluded that since Zauderer requires the government to bear the burden of justifying its restrictions on commercial speech, it is the government that must affirmatively establish a "fit" between the government's goal and the means chosen to accomplish the goal.[51]

Therefore, for the Bar's proposed restrictions upon lawyer advertising to survive the required Constitutional scrutiny, the Bar must assert a substantial governmental interest to justify its restrictions and must demonstrate that its proposed restrictions are narrowly tailored

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[48] See Bates, 433 U.S. 350; R.M.J., 455 **U.S.** 191; Zauderer 471 U.S. 626; Shapero, 486 U.S. 466.

[49] Zauderer, 471 U.S. at 647.

[50] Board of Trustees of State of New York v. Fox, ___ U.S. ___, 109 S.Ct. 3028 (1989).

[51] Id. at 3035.

to advance a substantial governmental interest. As the following will illustrate, the Bar has failed to meet its burden of proof.

B. The Bar Has Failed To Assert A Substantial Governmental Interest To Justify Its Proposed Restrictions On Lawyer Advertising Via The Electronic Media.

In petitioning for its proposed advertising restrictions, the Bar stated that such restrictions are an attempt "to prevent abuses, identified by the Bar's Advertising Commission, which result in misinformation and unjustified expectations of law clients and that diminish the effectiveness and dignity of our system of the administration of justice."[52] In addition, the Bar found it necessary to substantially restrict the content and format of television and radio advertising to (i) eliminate potential interference with the administration of justice; (ii) dispel incorrect public assumptions regarding our legal system; and (iii) promote public confidence in the legal profession and our system of justice."[53]

The U.S. Supreme Court has previously rejected assertions of such interests as a rationale for suppressing lawyer advertising. In Bates the Court concluded:

> Moreover, the assertion that advertising will diminish the attorney's reputation in the community is open to question. Bankers and engineers advertise, and yet these professions are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney.[54]
>
> But advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion

[52] Petition at 17.

[53] Id. at 3.

Bates, 433 U.S. at 369-70.

> that it is always better for a person to suffer a wrong silently than to redress it by legal action. **As** the bar acknowledges, "the middle 70% of our population is not being reached or served adequately by the legal profession." Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. (citations omitted)''

The Zauderer Court did not accept the state interest of ensuring that attorneys advertise "in a dignified manner."[56] In rejecting such reasoning as justification for prohibiting the use of illustrations, the Zauderer Court stated:

> [A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights.... [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.''

Clearly, the Bar may not restrict advertisements simply because it deems them offensive. Moreover, the Bar can not support its proposed restrictions based on an assertion that certain lawyer advertisements may be offensive to the public and thereby tarnish the public image of lawyers and weaken public confidence in the judicial system?' Therefore, based on the decisions in Bates and Zauderer, the interests asserted by the Bar in the instant case are not sufficient to justify the abridgement of First Amendment rights that would result if the Bar's proposed restrictions on lawyer advertising via the electronic media were adopted.

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[55] Id. at 376.

[56] Zauderer, 471 **U.S.** at 647-48.

[57] Id. at 648.

[58] Petition at 12.

C. The Bar's Proposed Restrictions On Lawyer Advertising Via The Electronic Media Fail To Advance Any Substantial Governmental Interest.

Even assuming the governmental interests asserted by the Bar were legitimate, Zauderer requires the Bar to demonstrate that its proposed restrictions on lawyer advertising will directly advance such interests. The Bar has failed to meet its burden of proving that its proposed restrictions on electronic media advertising will further, in any way, its stated interests of eliminating interference with the administration of justice, dispelling incorrect public assumptions, and promoting confidence in the legal profession and judicial system.

The record evidence the Bar has offered in support of its proposed restrictions consists primarily of several surveys measuring attitudes toward lawyer advertisements. (However, none of the Bar's studies relates to lawyer advertising on radio.) The Bar touts the results of these surveys as conclusive evidence that its proposed restrictions on electronic media advertising are necessary to further its stated goals.[59]

One study the Bar cites was conducted by a communications student at the University of Nevada regarding the effects of lawyer television advertising on former jurors. Attorney Advertising: The Effect On Juror Perceptions and Verdicts, by Stephanie Moore Myers, was published in May 1988 ("Nevada Study"). The Bar's reliance on the Nevada study is misguided and irrelevant. By the author's own admission, the Nevada study is not a reliable scientific study:

> Because the main conclusion of the research involved jury verdicts when the plaintiffs lawyer was a television advertiser, results would have had more validity with a larger number of advertising attorneys included in the survey. There were only a total of thirty respondent jurors in six trials with a plaintiffs lawyer who was also a television advertiser. It could be that these six trials were not

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[59] Petition at 17.

> representative of personal injury trials; perhaps these particular six cases did not have the most convincing evidence and would have ended in defense verdicts whether the plaintiffs lawyer was a television advertiser or not...no determination could be made from the data whether jurors voted against the plaintiffs attorney because he/she was a television advertiser or whether those jurors were even aware that he/she advertised at all.[60]

Due to these inherent flaws, recognized by its author, any conclusions drawn from the Nevada Study must be rejected as lacking basis in fact. This study provides no objective evidence to support the Bar's assertion that electronic media advertising of legal services undermines the judicial system and degrades the public image of the legal profession.

The second study the Bar cites is Television Advertising By Attorneys: An Evaluation of its Impact on the Public, by Harvey A. Moore, published September 12, 1989 ("Moore Study"). This study was allegedly designed to identify and describe the impact on members of the general public of television advertising by attorneys. The study involved two groups of 11 persons each, who viewed several videotapes of actual lawyer advertisements and then discussed their feelings about each advertisement. The study concluded that the "general consensus was that such commercials have broadly negative consequences for the courts and the overall judicial system of our society."[61]

The Bar's reliance on the Moore Study as evidence of the evils of unrestricted lawyer advertising on television is unpersuasive. First, it was severely biased. For example, prior to viewing the selected advertisements, both study groups were told that there are inherent differences between print advertising, television advertising and personal solicitations. The groups were also told that television advertising generally does not allow the same opportunity

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[60] S. Myers, Attorney Advertising: The Effect on Juror Perceptions and Verdicts, at 62. (See Bar Appendix C[9]).

[61] H. Moore, Television Advertising by Attorneys: An Evaluation of Its Impact on the Public, at 11 (1989). (See Bar Appendix C[14]).

for rational deliberation and comparison that print advertisements permit.[62] Such unsupported conclusions undoubtedly created a negative image of television advertising before the study participants had an opportunity to view the selected commercials and form their own opinions.

Further, this study was not designed or executed in accordance with generally accepted standards for such research. The sampling procedure utilized in the Moore study was statistically invalid.[63] The Moore study is therefore fatally flawed, and its results cannot be considered representative of public attitudes regarding television advertising of legal services.

The Bar's final study is a survey of Florida circuit judges conducted by the Bar in 1988.[64] The Bar relies on this survey to substantiate its claim that current lawyer advertising trends adversely affect the administration of justice. The Bar will cite the survey's finding that a majority of Florida judges think lawyer advertising has adversely impacted their courtrooms.

However, the questions asked of Florida jurists in this informal survey" did not distinguish between print and electronic media advertising of legal services. The survey simply asked whether, in the opinion of each judge, lawyer advertising in general has any adverse effect on the administration of justice. The survey fails to present any empirical evidence that lawyer advertising is misleading or false. In fact, the survey provides no evidence that lawyer advertising has created bias or prejudice against any person seeking relief in our court system. This survey provides no evidence to support the Bar's claim that its proposed restrictions on electronic media advertising are necessary to protect the orderly administration of justice. Rather, the survey simply mirrors the preconceived bias against lawyer advertising held by

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[62] Moore, supra, at 4 n.50.

[63] See Affidavit of Dr. Marvin Dawkins, Affidavit of Dr. Hollis Price (Appendix at 8-15).

[64] Florida Circuit Judges Questionnaire, 1988. (See Bar Appendix C[6]).

[65] See Affidavit of Dr. Marvin Dawkins (Appendix at 8-10).

some Florida judges. The Bar's proposed restrictions on lawyer advertisements cannot be justified merely because some members of the Bar find them to be embarrassing or offensive.[66]

Overall, the Bar has failed to meet the burden of proof, required by Zauderer, to demonstrate that its proposed prophylactic regulation of the dissemination of the commercial speech of its members over the electronic media is necessary to advance some important state interest. Therefore, this Court must reject the Bar's proposed restrictions on electronic media advertising of legal services as an unconstitutional restraint upon protected commercial speech.

D. The Bar's Proposed Rules Eliminating The Basic Elements Of Electronic Media Advertising Are Not Narrowly Drawn.

Finally, the Bar has failed to meet the SUNY requirement of record evidence demonstrating a "reasonable fit" between its stated goals and the means proposed to achieve those goals. The Bar's proposed rules prohibiting production techniques and format ideas in electronic media advertising are far more extensive than necessary to protect the public from fraudulent use of the broadcast medium. In fact, such proposed restrictions threaten the very existence of lawyer advertising via the electronic media.[67]

The use in electronic media advertisements of background sounds and lyrical music, illustrations and graphics, celebrity endorsements, testimonials and dramatizations, are effective methods of attracting the attention of viewers and listeners.[68] The use of such techniques and formats furthers the interests stated in Bates, R.M.J., Zauderer, Fetterman, and Shapero by ensuring the flow of valuable commercial information to the public. The

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[66] See Zauderer, 471 U.S. at 648.

[67] See Affidavit of Dean Goodman, Affidavit of Michael Schweitzer, Affidavit of John Drury (Appendix at 2-7).

[68] Id.

prohibition of such techniques and formats, together with the proposed 33-word disclaimer, would drastically reduce the effectiveness of electronic media advertisements and substantially reduce, if not eliminate, the flow of valuable commercial information to the public via radio and television.

1. Proposed Disclaimer Would Discourage Lawyers' Use Of The Electronic Media.

Proposed Rule 4-7.2(d) would require a 33-word disclaimer be broadcast during all electronic media advertisements of legal services. This rule would not apply to print media advertising containing information sanctioned by the rules.@The Bar has provided no record evidence to support such disparate regulation of the print and electronic media.

This proposed rule is unduly burdensome and would have a chilling effect upon lawyers' use of the electronic media. Such a regulation would substantially impede, if not totally obstruct, the flow of legal services information to the public.

The proposed disclaimer is particularly detrimental to advertising via the electronic media because such advertising, by nature, involves substantial time constraints. The standard radio or television spot lasts one minute or less. Electronic media advertising allows no extra time for extraneous information. The required broadcast of a 33-word disclaimer would substantially reduce the amount of time remaining for the advertising attorney to deliver his or her message, and thereby reduce the effectiveness of radio and television advertising of legal services.[70] In fact, in radio advertisements the 33-word disclaimer would require 50% of the total broadcast time in a 30-second advertisement and 25% of the total broadcast time in

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[69] Petition at 5.

[70] See Affidavit of Dean Goodman, Affidavit of Mike Schweitzer, Affidavit of John Drury (Appendix at 2-7).

a 60-second advertisement.[71] Such a disclosure requirement in the end would have the effect of decreasing useful information available to consumers.

In addition, the required disclaimer would discourage electronic media advertising by lawyers due to the negative image associated with advertisements that include disclaimer tags.[72] Attorneys will not want their names or faces associated with an advertisement that is suspect in the eyes of the public.

Based on the foregoing, it is evident that the proposed disclaimer requirement is not narrowly drawn,[73] and that such a requirement would "offend the First Amendment by chilling protected commercial speech."[74] Therefore, this Court must reject the disclaimer requirement as a violation of the First and Fourteenth Amendments to the **U.S.** Constitution and Article I, Section **4** of the Florida Construction.

2. **Prohibition Of Visual Displays Is Overbroad And Violates The Zauderer Precedent.**

Rule 4-7.2(b) of the Bar's proposed rules would limit the use of visual displays in electronic media advertisements to factual information permitted in print media advertisements.[75] The Bar based the need for such limitations on the alleged misleading

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[71] See Affidavit of Dean Goodman (Appendix at 2-3).

[72] Id.

[73] See Letter from Jeffrey I. Zuckerman, Director, Bureau of Competition, Federal Trade Commission to William F. Blews, Esquire, member of Florida Bar Board of Governors (July 17, 1989)(discussing the anti-competitive nature of Bar's proposed restrictions on lawyer advertising) (Appendix at 16-23).

[74] See Zauderer, 471 **U.S.** at 651.

[75] Petition at 4.

nature of self-laudatory illustrations."

The effect of this rule would be to eliminate the very essence of the visual media: the picture. Without the right to employ the visual techniques offered by television, the speaker loses the ability to attract and maintain the attention of his or her audience. Such restrictions on visual displays, such as graphics, illustrations and backgrounds, would render the television medium useless.[77]

The U.S. Supreme Court struck down a similar prohibition upon the use of illustrations in Zauderer. The Zauderer Court found that the use of illustrations or pictures in advertisements is not inherently misleading, and indeed is essential to commercial speech because such techniques attract the attention of the audience to the commercial message and may communicate information directly to the audience." Based on the communicative nature of such visual media of expression, the Zauderer Court decided such items are entitled to the same First Amendment protection afforded verbal commercial speech, and that an absolute ban of the use of illustrations was more extensive than necessary to serve the state's asserted interest.[79] The Court reasoned that lawyers' use of illustrations may be policed on a case-by-case basis; therefore, the absolute ban on such a practice is overly restrictive of protected commercial speech.[80]

The Florida Bar's proposed prohibition of visual displays is clearly inconsistent with the Zauderer precedent. Electronic media advertising without the use of illustrations,

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[76] See Petition, Exhibit A at 12.

[77] See Affidavit of Michael Schweitzer, Affidavit of John Drury (Appendix at 4-7).

[78] Zauderer, 471 **U.S.** at 647.

[79] Id.

[80] Id. at 649.

graphics or other visual displays would be ineffective.[81] There is no doubt that such prohibition would adversely affect the flow of information regarding the availability and cost of legal services.

Moreover, the Bar can readily monitor the use of visual displays in electronic media advertising of legal services, and handle instances of fraudulent or misleading uses of such techniques on a case-by-case basis, as the **U.S.** Supreme Court advocated in Zauderer. Thus, the proposed prohibition of visual displays is not "narrowly tailored as required by SUNY, and must therefore be rejected as violative of the protections afforded such information under the First and Fourteenth Amendments to the **U.S.** Constitution and Article I, Section **4** of the Florida Constitution.

3. Prohibition On Self-Laudatory Statements Constitutes A Blanket Suppression Of All Lawyer Advertising.

Proposed rule 4-7.2(j) would prohibit lawyers from making self-laudatory statements in advertising or any statements in advertising as to the quality of the particular lawyer's services. The Bar concluded that self-laudatory and quality statements are inherently misleading and therefore should be prohibited.[82]

In the matter of self-laudatory statements and references to the quality of a lawyer's skills, the Bar has presented no record evidence that conclusively demonstrates that such statements are more likely to deceive the public than inform it.

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[81] See Affidavit of Michael Schweitzer, Affidavit of John Drury (Appendix at 4-7).

[82] Petition at 7.

In contrast, the Zauderer Court made a determination that self-recommending statements are not inherently misleading, and therefore can not be prohibited.[83] The Court found that since factual information could be considered self-laudatory, there was a danger that a broad reading of the restrictions might forbid all lawyer advertising.[84]

The Bar's proposed ban on self-laudatory statements and references to the quality of legal services is simply inconsistent with the Zauderer decision, which called for a case-by-case analysis of the truthful or deceptive nature of each particular advertisement.[85] The Zauderer decision clearly indicates that the Bar may not impose its proposed broad prophylactic rule prohibiting self-laudatory statements because such a ban could be used to prohibit all lawyer advertising, effectively eliminating the flow of valuable commercial information to the public. Based on the foregoing, the Bar's proposed ban on self-laudatory statements is not narrowly tailored, and must be rejected by this Court as an unconstitutional restraint on protected commercial speech. **As** such, it violates the First and Fourteenth Amendments to the U.S. Constitution and Article **I,** Section 4 of the Florida Constitution.

4. Prohibition Of Lyrical Music And Background Sound Adversely Affects The Dissemination Of Useful Commercial Information Via The Electronic Media.

Rule 4-7.2(b) of the Bar's proposed restrictions would prohibit the use of all background sounds and lyrical music in lawyer's advertisements. The Bar deemed such a

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[83] Zauderer, 471 U.S. at 639.

[84] Id.

[85] Id. at 646.

restriction necessary to insure continued public confidence in the legal system.[86]

The Zauderer Court struck down a ban on the use of illustrations because it found that such techniques are essential to commercial speech in attracting the attention of the audience to the commercial message.[87] In all respects background music and sound are akin to illustrations. The use of background sounds and lyrical music serves to enhance a commercial message and attract the attention of the listener or viewer, thereby ensuring the communication of valuable commercial information to the public.[88] Due to the fundamental communicativenature of background music and sound, the Zauderer precedent requires that such items are entitled to the same First Amendment protection afforded verbal commercial speech.

In applying the Central Hudson, Zauderer and **SUNY** standards of review, this Court must recognize that the Bar has failed to present any record evidence that the use of music or background sounds in lawyer advertisements is in fact misleading and subject to blanket suppression. Further, the Bar cannot support the total prohibition on the use of audio techniques in electronic media advertising on the mere assertion that such technique may be potentially misleading.@

The Bar's proposed prohibition of the use of lyrical music and background sound would greatly limit the public's receipt of valuable information regarding the availability and cost of

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[86] Petition at 2.

[87] Zauderer, 471 **U.S.** at 647.

[88] See Affidavit of Dean Goodman, Affidavit of Michael Schweitzer, Affidavit of John Drury (Appendix at 2-7).

[89] See R.M.J., 455 **U.S.** at 203. The R.M.J. Court found that the regulator may not institute an absolute restriction upon any type of "potentially misleading" information if such information may also be presented in a way that is not deceptive. Id.

legal services. This proposed regulation is unsupported and is not narrowly tailored to achieve the Bar's asserted goals. It would therefore violate the protections afforded such commercial speech by the First and Fourteenth Amendments to the **U.S.** Constitution and Article I, Section 4 of the Florida Constitution.

5. Prohibition On Client Testimonials Eliminates Public Access To A Valuable Means Of Selecting An Attorney.

Rule 4-7.2 of the proposed rules absolutely bans any testimonial advertising of legal services. The Bar has concluded that client endorsements and testimonials are inherently misleading because they may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.[90] This proposed ban on all testimonials is more stringent than the current Bar Rules, which ban only those testimonials that contribute to "unjustified expectations" as to the results that may be expected from a lawyer?'

Again, the Bar has failed to provide record evidence that testimonial advertising is in fact misleading, or that this regulation is narrowly tailored to achieve the Bar's asserted goals.

Advertising in which clients discuss their reasons for satisfaction with a particular lawyer or law firm provides the consumer with more information than would otherwise be available. What better source of information could there be for a consumer in search of a lawyer than another consumer who is satisfied with the quality of the legal representation

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[90] Petition at 2.

[91] See Rules Regulating The Florida Bar, Rule **4-7.1** Communications Concerning; A Lawyer's Services.

provided him or her?[92]

The California Bar Association recently recognized testimonial advertising of legal services as a protected form of commercial speech. In ~~Oring v. State Bar of California~~, ___ **U.S.** ___, 109 S.Ct. 1562 (1989), a California lawyer challenged a California State Bar rule establishing a presumption that testimonial advertising was false, misleading and deceptive. The attorney argued that testimonial advertising is not inherently misleading, and is thus protected commercial speech, and that the California Bar rule regarding testimonials was therefore unconstitutional.

Following the filing of briefs and completion of oral arguments in the case, the California Bar amended its rules to eliminate the challenged rule regarding testimonial advertising."[93] The California Bar's actions illustrate that testimonial advertising is an effective means of communicating valuable information to consumers in search of a lawyer.

The Florida Bar's proposed absolute prohibition on testimonial advertisements is clearly not narrowly tailored, and would foreclose a vital mode of communication of legal services information to the public. Therefore, such regulation must be rejected as violative of the protections afforded such commercial speech by the First and Fourteenth Amendments to the **U.S.** Constitution and Article **I,** Section **4** of the Florida Constitution.

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[92] See Zuckerman Letter (Appendix at 16-23). The Federal Trade Commission ("FTC") stated that truthful testimonials from actual clients may be valuable to consumers of legal services. Such testimonials, the FTC concluded, are not necessarily misleading, and to prohibit them may impede the flow of useful information to consumers. Id.

[93] As a result of the California Bar's amendment of its rules, Oring v. State Bar of California, ___ **U.S.** ___, 109 S.Ct. 1562 (1989), was dismissed by the **U.S.** Supreme Court.

6. Prohibition On The Use Of Dramatizations Is Inconsistent With Constitutional Mandate To Provide The Public Useful Commercial Information.

Proposed Rule 4-7.2(e) would specificallyprohibit the use of dramatizations in lawyer advertising." The Bar's Comments to the proposed rule indicate that the rule is meant to preclude use of scenes creating suspense, scenes containing exaggerations of situations calling for legal services, scenes creating consumer problems through characterization and dialogue, and the portrayal of an event or situation. The Bar concluded that such self-laudatory illustrations are inherently misleading and should be prohibited."

The use of dramatizations can help consumers understand their legal rights and obligations, and can help consumers locate the attorneys qualified to represent their interests. The use of actors, scenes and props allows the advertiser to deliver his or her message most effectively. Such an advertisement, if skillfully produced, will enhance the quality of the message and increase the level of concentration of the viewers or listeners.[96] Enhanced messages are more likely to be received by the viewers or listeners, and therefore further the Bates goal of ensuring that consumers receive useful commercial information. The communicative nature of dramatizations is akin to illustrations, which the Zauderer Court found to be entitled to the same First Amendment protections afforded verbal commercial speech.[97]

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[94] Petition at 5.

[95] Id.

[96] See Affidavit of Dean Goodman, Affidavit of Michael Schweitzer, Affidavit of John Drury (Appendix at 2-7).

[97] Zauderer, 471 **U.S.** at 647.

It is interesting to note that not only did the Bar fail to support its proposed dramatization ban with any record evidence, but the Bar apparently also agrees that the use of dramatizations is essential to informing the public regarding their legal rights. The Bar's new cable television series, "People's Law," which is scheduled to premiere in late January 1990, will include the use of dramatizations in each of the twelve programs scheduled." It is ironic that the Bar's use of dramatizations is beneficial to the public, while the use of dramatizations by members of the Bar would be misleading and should therefore be restricted. The Bar has failed to explain its inconsistency.

The Bar has failed to demonstrate that dramatizations are in fact misleading, and that its regulation is narrowly tailored to further the Bar's asserted substantial interests. Thus, the Bar's proposed absolute prohibition of dramatizations would clearly be in violation of the protections afforded such commercial speech pursuant to the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 4 of the Florida Constitution.

III. THE PRESENT BAR RULES REGULATING LAWYER ADVERTISING *ARE* SUFFICIENT TO PROTECT THE PUBLIC FROM ANY FRAUDULENT OR MISLEADING LAWYER ADVERTISEMENTS.

The Bates Court acknowledged the benefits of lawyer advertising and rejected attempts to ban it. The Bates Court found that:

> Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative -- the prohibition of advertising -- serves only to restrict the information that flows to consumers.... If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to

[98] See Florida Bar News, Dec. 1, 1989, at 6.

place advertising in its proper perspective."

The Zauderer Court reaffirmed the benefits of lawyer advertising and placed the burden on the state to regulate such advertising in a manner that does not unduly inhibit the public's access to legal services information. The Zauderer Court stated:

> Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'"

The Florida Bar's proposal to restrict electronic media advertising of legal services is not a studied attempt to distinguish between truthful and deceptive legal advertisements, but is simply a broad prophylactic scheme of regulation which, if adopted, would severely limit the flow of valuable information regarding the availability and cost of legal services. Moreover, the Bar has failed to demonstrate that its proposed restrictions would further its asserted interest in protecting and defending the integrity of the judicial system and the image of the legal profession.

Not only does the Bar's primary evidence -- several unrelated, poorly designed studies regarding personal attitudes about lawyer advertising -- present no foundation for the radical changes being proposed by the Bar, but the Bar has omitted certain evidence that would be essential to support a conclusion that more regulation of lawyer advertising is required.

If the Bar's claims of abuse of electronic media advertising of legal services are valid, would there not be an indisputable record of citizen complaints or even independent Bar actions against attorney advertising via the electronic media? The truth is that there has been no public outcry against alleged fraudulent or misleading lawyer advertising on the electronic

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[99] Bates, 433 U.S. at 374-75.

[100] Zauderer, 471 U.S. at 646.

media, and the Bar has not been inclined to institute disciplinary actions against attorneys' alleged fraudulent advertisements.

The latest statistics from the American Bar Association Center for Professional Discipline, which maintains records of lawyers disciplined throughout the United States, indicate that from 1977 through 1988 only 50 lawyers were disciplined for advertising violations in all 50 states.'" The advertising lawyers disciplined represent only 0.16% of the total of 31,553 lawyers disciplined for a variety of violations during this time period. Clearly, these numbers are undisputed evidence that there has been no public outcry against lawyer advertising, and that the Bar has little or no evidence of the evils it claims are associated with electronic media advertising of legal services.

The absence of any significant number of disciplinary cases regarding lawyer advertising suggests two possible conclusions. First, lawyers advertising on the electronic media in the State of Florida have rarely delivered misleading or fraudulent messages to the public. Second, if there have been some misleading or fraudulent electronic media advertisements regarding legal services, the Bar has failed to discipline the guilty lawyers under the present rules regulating such behavior.[102] Either conclusion refutes the Bar's proposal for more restrictive regulation of lawyer advertising in Florida.

Even without the adoption of its proposed restrictions, the Bar has the ability under its current rules to effectively monitor and regulate electronic media advertising of legal

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[101] See Analysis of National Discipline Data Bank from the Center for Professional Discipline, American Bar Association (Appendix at 24).

[102] In fact, an employee of the Florida Bar has stated that the Bar has not devoted its resources to the vigorous prosecution of lawyer advertising violations under its existing rules. See Affidavit of John T. Berry, Staff Counsel to the Florida Bar, dated December 13, 1989. (See Bar Appendix (H)5).

services.[103] Any alleged misleading or fraudulent messages by attorneys can be reviewed, and if necessary the offending attorney can be disciplined. Accordingly, it is difficult to understand why the Bar wishes to forgo such a case-by-case analysis of lawyers' alleged deceptive or manipulative uses of the electronic media in favor of the far more restrictive alternative of a blanket ban on the essential elements of electronic media advertising. Such a prophylactic scheme of regulation is not narrowly tailored to further a substantial government interest, and therefore must be rejected as an unconstitutional infringement on protected commercial speech.

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[103] The Bar's present Rules of Professional Conduct provide the Bar ample authority to protect the public from deceptive and manipulative uses of any type of lawyer advertising. Rule 4-7.3(e) provides that:

> Any factual statement contained in any advertisement or any information furnished to a prospective client under this rule shall not be:
> (1) Directly false or misleading;
> (2) Impliedly false or misleading;
> (3) Fail to disclose material information;
> (4) Unsubstantiated in fact; or
> (5) Unfair.

In addition, Rule 4-7.1(a) provides:

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

These current disciplinary rules allow the Bar to review each lawyer advertisement on a case-by-case basis as the U. S. Supreme Court advocated in Zauderer. At this moment, even without its proposed restrictions, the Bar is fully able to effectively monitor and regulate electronic media advertising of legal services.

CONCLUSION

Based upon the foregoing, it is evident that the Bar's proposed plethora of restrictions on electronic media advertising of legal services, if adopted, would severely restrict the dissemination to the public of reliable commercial information regarding the availability and cost of legal services, in violation of the First and Fourteenth Amendments to the **U.S.** Constitution and Article I, Section 4 of the Florida Constitution. Therefore, the Bar's proposed restrictions on lawyer advertising discussed herein should be rejected, and the Bar's Petition denied as to those particular amendments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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