IN THE
SUPREME COURT OF FLORIDA

Case No. SC11-1327

In Re: Amendments to the Rules Regulating
The Florida Bar – vs. Subchapter 4-7,
Lawyer Advertising Rules

Comment of Eight Law Firms Regarding Rules Proposed July 5, 2011

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COMMENT

One year ago, we filed in *In Re: The Florida Bar's Petition to Amend Rules Regulating The Florida Bar – Rule 4-7.6, Computer Accessed Communications*, Case No. 10-1014 comments urging the Court to amend the Rules Regulating the Florida Bar so that websites operated by lawyers would not be governed by advertising rules. (Comment of Eight Law Firms, filed Aug. 14, 2010) (referred to herein as "CELF"). Our comments observed that restrictive lawyer advertising rules had been promulgated when the public had limited access to information about lawyers; that close review of advertising was necessary then because of the limited public access to information about lawyers; that since then, vast amounts of information have become generally available to the public to evaluate lawyers; and that lawyers themselves have created voluminous websites describing their practices and providing extensive information about the law and legal developments that were never designed to comply with the Bar's lawyer advertising rules because the rules treated websites as information requested by existing or prospective clients rather than solicitations or advertisements. (CELF at 1-8, 30-41, & 44-55)

We also expressed concern that the existing rules for the regulation of lawyer advertising were unduly vague and might not survive First Amendment scrutiny today, relying in part on the Eleventh Circuit's recent ruling in *Harrell v.*

The Florida Bar, 608 F.3d 1241 (11th Cir. 2010), and the Second Circuit's recent decision in *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010). (CELF at 42-45, 56-59). We argued that extension of the lawyer advertising rules would violate the First Amendment because lawyer websites are not commercial speech, that regulation of them would be subject to strict scrutiny, and that applications of the advertising rules to all lawyer websites would not serve compelling government interests or be the least restrictive means of achieving the Bar's objectives. (CELF at 45). We further argued that, First Amendment considerations aside, extension of the advertising rules to lawyer websites would impose heavy, unwarranted burdens on law firms that had created hundreds of thousands of pages of website materials without screening them for compliance with advertising rules, because those rules had no application to them when they were created. (CELF at 19-27).

We also noted that extension of the advertising rules to lawyer websites might violate the Dormant Commerce Clause of the United States Constitution, although we did not elaborate at that time on these issues. (CELF at 30 n.8).

Thereafter, the Florida Bar announced that it planned to engage in a wholesale revision of its advertising rules and asked the Court to postpone deciding whether it would implement the rules extending advertising regulation to website regulation. After the Bar's announcement, we submitted a suggestion to the Bar that if its revised advertising rules applied to websites, it should revise Rule

4-7.6 to incorporate the generally accepted First Amendment limits on laws regulating speech. Letter of Richard J. Ovelmen to Elizabeth C. Tarbert (January 25, 2011) (Attachment 2). The letter also pointed out several of the constitutional defects in the proposed rules under consideration and advocated that if the Bar did nothing else, it should amend those rules to conform to general First Amendment principles.[1] After a hearing on the proposed rule and after the Bar asked for more specific comments, we submitted additional comments showing how we suggested amending the rule to comply with the First Amendment. (Letter of Thomas R. Julin to Elizabeth C. Tarbert of February 28, 2011) (Attachment 3).

Our proposal made clear that the rules would apply solely to *advertising* of legal services, rather than to any *information* about legal services. We pointed out that the distinction between these forms of communication is important because the United States Supreme Court has interpreted the First Amendment as providing states with greater discretion to regulate commercial speech than noncommercial speech and that if the rules were interpreted as extending to noncommercial speech, they would be subjected to strict scrutiny and they likely would be invalid. We included in our proposal a definition of "advertising" that is consistent with the

[1] The Ovelmen letter examined the prohibition in Rule 4.7.3(a)(3) against statements that imply the nonexistence of a fact, prohibition of "potentially misleading" advertisements in Rule 4-7.4, and the prohibition of "unduly manipulative advertisement in Rule 4-7.5.

definition of "commercial speech" used by the Supreme Court so that the rules would be treated as only regulating commercial speech.

Our proposal also made clear that the rules would apply solely to anyone who communicates that he or she provides legal services *in Florida*, rather than to all persons who advertise legal services in Florida or who target advertisements for legal employment at Florida residents. Without this revision, a lawyer advertising in New York that she is licensed exclusively in New York and will provide legal services exclusively in New York to residents of Florida would be subject to the Florida Bar advertising rule. Dormant Commerce Clause principles preclude this sort of projection of state law outside of the state. A state statute "directly regulat[ing]" commerce occurring beyond the boundaries of that state is "virtually *per se*" invalid and "generally struck down . . . without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

We also noted that the proposed rules prohibited both *inherently* false or misleading advertising and *potentially* false and misleading advertising and that not all forms of potentially misleading advertising can be constitutionally prohibited, *In re R.M.J.*, 455 U.S. 191, 203 (1982) (barring enforcement of rules that allowed only limited topics and wording in attorney advertising). The "absolute prohibitions on [an attorney's] speech, in the absence of finding that his

speech was misleading, does not meet these requirements" for limiting expression. *Id.* at 207; *see also Alexander v. Cahill*, 598 F.3d 79, 91 n.8 (2d Cir. 2010).

To resolve this problem, we proposed modification of the rules to prohibit (1) all false or misleading advertising and (2) any other form of advertising that the Bar could show would cause substantial harm, such as advertising that seeks to exploit vulnerable persons. Because this second category of prohibited advertising has a degree of vagueness that might deter a great deal of advertising that benefits the public without causing significant harm, we also proposed a "take down" rule that would help lawyers to understand what is prohibited before they could be charged with violating it. Our proposal would have provided that a lawyer could not be charged with violating the rules by placing an advertisement on a website until after he or she had been given notice that the advertisement violated the rules and then failed to take down the advertisement.

This "take down" rule borrowed a concept that has been incorporated into the federal Copyright Act by the Digital Millennium Copyright Act ("DCMA"), codified as 17 U.S.C. § 512. The DCMA was adopted in 1998 to balance the rights of authors against the public interest in allowing free flow of information. It provided a limitation of liability for those allowing a copyrighted work to be posted online if they expeditiously removed the work after receiving actual notice of a claim that the work infringed the rights of the copyright holder. The law is

regarded today as "landmark legislation" that is relied upon by "virtually all commercial websites in the U.S." Edward Lee, *Decoding the DMCA Safe Harbors*, 32 Colum. J. L. & the Arts 233, 233 (2009). The "take down" mechanisms of the Act are regarded as having had "tremendous success over the past decade in achieving their central goal" of balancing the public's interest in robust communications and access to information with copyright holders' interest in protecting their rights. *Id.* at 260.

The "take down" rule seemed an attractive mechanism to incorporate into the Bar rules, to the extent they apply to lawyer websites, because providing notice is administratively easy and in many cases would result, as it does under the DMCA, in voluntary removal of material. The rule also would have provided the Bar substantial flexibility in seeking removal of advertisements that could be shown to cause harm but that are not false or misleading. The mechanism also would have ensured that lawyers could continue to develop creative and innovative advertising for legal services without risking being charged with a serious ethical breach. We felt adoption of this proposal would serves the public interest in access to information about legal services.

Although The Bar did not adopt all of our suggestions, it did make significant modifications to the rules to accommodate some of our most serious concerns and the newly-revised Florida Bar Proposed Rules for Attorney

Advertising (the "Proposed Rules") are a substantial improvement over the prior proposal and provide a structure that is less restrictive of speech by and about lawyers, the legal profession and important legal issues. It is our view that the Bar is making progress toward a regulatory framework that comports with the First Amendment and sound ethical practices. However, the Proposed Rules remain flatly unconstitutional and require further revisions if they are to withstand constitutional scrutiny.

The Bar's continuing difficulties with accommodating the serious constitutional issues caution against Florida rushing forward with website restrictions. The American Bar Association is even now conducting its own major study of attorney website regulations. On June 29, 2011, the ABA's Commission on Ethics 20/20, released its initial proposals relating to lawyers' use of technology-based client development tools. The Commission concluded that "no new restrictions are necessary in this area, but that lawyers would benefit from more guidance on how to use new client development tools in a manner that is consistent with the profession's core values." *See* Memo from Jamie S. Gorelick & Michael Trainer to ANA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals (June 29, 2011) (with attached proposed rules and report) (referred to as the "ABA Commission Report") (Attachment 1). The ABA Commission notes that that websites are "less targeted

forms" of communication that are not governed by the ABA solicitation rule.[2] ABA Commission Report at 7. The ABA Commission recommends adoption of comments to the model rules that make clear that lawyer communications "generated in response to an Internet search are not solicitations" and "are more analogous to a lawyer's response to a request for information (which is not a solicitation)." *Id.* The ABA Commission has asked for comments by August 31, 2011. The prudent course would be to continue the stay on extending the Florida Bar advertising rules to websites until the ABA acts on its Commission's recommendations. The Commission will submit to the ABA House of Delegates a final version of its proposals in May 2012, for the House of Delegates' deliberation at the August 2012 ABA Annual Meeting.

If the Court instead decides to proceed with revision of the advertising rules

[2] The ABA Model Rules are available here: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. They take a less restrictive and far simpler approach to lawyer advertising than do the Florida rules and they do not treat all information on lawyer websites as categorically subject to advertising or solicitation rules. Instead, website content sensibly is regulated only if falls within a category regulated by the rules. Rule 7.1 prohibits a lawyer from making false or misleading communications about the lawyer's services. Rule 7.2 prohibits payment for recommendations, and requires an advertisement to include the name and office address of at least one lawyer or law firm responsible for its content. Rule 7.3 prohibits "solicitation" for pecuniary gain other than to lawyers or others with whom the lawyer has a relationship. It also prohibits unwanted, coercive or harassing solicitations. Rule 7.4 regulates communications regarding certification or specialization. Rule 7.5 regulates firm names and letterheads.

and simultaneous extension of the advertising rules to lawyer websites, we respectfully request consideration of the following points:

1. The Proposed Rules Fail to Distinguish Commercial and Noncommercial Expression

Lawyer websites typically contain substantial amounts of noncommercial expression that must be afforded the highest protection under the First Amendment. Under the "strict scrutiny" standard, such speech may be restricted only to serve a compelling governmental interest, and the regulation must be the least restrictive means of serving that interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 804 (2000); *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

Many of our firms' websites contain scholarship: white papers on important legal issues; texts and analysis of leading judicial decisions; explanations of complex legal rules, regulations or transaction requirements; law firm histories; and blogs that offer contemporary discussion of legal issues of public concern. (CELF at 9-19) (providing much greater detail regarding our website content).

These types of non-commercial expression, the most heavily protected under the Constitutions of the United States and Florida, reside on our websites, along side information and data that might be regarded as commercial speech, such as advertising and marketing. The Bar's failure to distinguish between the types of

content we publish renders the proposed regulation structure constitutionally infirm.

2. The Proposed Rules are Overly Restrictive of Commercial Speech

In our comment of a year ago, we recited the First Amendment standards that the Supreme Court applies for scrutinizing restrictions on commercial speech. (CELF at 35-40). Since that filing, the Supreme Court has rendered a further decision, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), showing how difficult those standards are to meet. The Court, invalidating a law under the standards governing commercial speech, re-emphasized that "A 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.'" *Id.* at 2664 (citation omitted). Rejecting an argument that heightened scrutiny should not apply to communications consisting of nothing more than facts, the Court held: "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Id.* at 2667. "Rules that burden protected expression," the Court held, "may not be sustained when the options provided by the State are too narrow to advance legitimate interests or too broad to protect speech." *Id.* at 2669.

The Proposed Rules did take into account some of the arguments we advanced in our original comment regarding the treatment of references to past

successes or results obtained, comparisons, and testimonials as inherently misleading. (*Compare* CELF 46-50 *with* Proposed Rule 4-7.3(b)(2), (3), & (8) and Comments). But the Proposed Rules still do not cure the constitutional infirmities. Instead, the Proposed Rules create exemptions where the advertising lawyer can demonstrate claims are "objectively verifiable," "truthful," and "beneficial to prospective clients." This improperly places a burden on the speaker and allows the punishment of speech that the Bar itself does not show to be misleading in fact.

3. The Proposed Rules Abrogate the Commerce Clause

The Proposed Rules fail with regard to websites for an additional reason – namely, websites operate in interstate commerce because the law firms and lawyers have multistate practices. National firms have significant numbers of lawyers who, under the Dormant Commerce Clause, may not be regulated by The Florida Bar, and the inter-jurisdictional nature of websites and contemporary legal practice create unique difficulties for Bar regulation. Websites are fundamentally different from email and Internet advertising in that websites are passive repositories of vast stores of information that must be affirmatively sought out by individuals using sophisticated computer search engines. They constitute information that must be requested and sought by potential clients and other third parties. They are not intrusive or otherwise thrust upon consumers or the general public. In a real sense, such websites constitute a law firm's "virtual home" that

others must seek out and enter on their own.

Yet, the Comment following Proposed Rule 4-7.1 provides:

> Subchapter 4-7 applies to portions of a multistate firm that directly relate to the provision of legal services by a member of the firm who is a member of The Florida Bar. Additionally, subchapter 4-7 applies to portions of a multistate firm's website that relate to the provision of legal services in Florida, e.g., where a multistate firm has offices in Florida and discusses the provision of legal services in those Florida offices. Subchapter 4-7 does not apply to portions of a multistate firm's website that relate the provision of legal services by lawyers who are not admitted to the Florida Bar and who do not provide legal services in Florida. Subchapter 4-7 does not apply to portions of a multistate firm's website that relate to the provision of legal services in jurisdictions other than Florida.

This Comment and the accompany Rule 4-7.1 simply do not consider the realities of multi-state legal practices today. They are constantly changing and dynamic. Lawyers admitted in one state and not in any other state often will be called upon at a moment's notice to provide legal services to a client in another state through *pro hac vice* admission, in the case of litigation, or affiliation with local counsel, in connection with corporate matters. Websites, which typically consist of millions of lines of code, cannot, as a practical matter, be changed to conform to the hour-by-hour engagements of the hundreds of lawyers who practice within a single firm. The Proposed Rules, however, purport to require such compliance. Effectively, this rule may be construed to require all websites of multistate law firms to comply with the Rules Regulating the Florida Bar and, if so, this would be an unjustifiable burden in interstate commerce.

In our February 28, 2011, proposal to the Florida Bar, we proposed modification of Rule 4-7.1(b) to provide:

> (b) Lawyers. This subchapter shall apply to anyone who advertises that he or she provides legal services in Florida. The term "lawyer" as used in chapter 4-7 includes one or more lawyers or a law firm. This rule shall not be interpreted to permit the unlicensed practice of law or advertising that a lawyer provides legal services that are not authorized to be provided in Florida.

We also suggested that a Comment should be added to state: "Subchapter 4-7 . . . does not apply to a website advertisement not accessed in Florida or that does not offer the services of a lawyer shown to be admitted in Florida or located in Florida." These suggestions, we felt, would dampen, if not solve, the Commerce Clause problem that extension of the Bar's advertising rules to websites creates.

Adoption of uniform rules, such as the ABA model rules, also would alleviate the Commerce Clause problem by decreasing the likelihood that lawyers practicing in multistate law firms would be faced with conflicting regulations or forced to conform their websites to the most restrictive state rules. In other areas of regulation, the federal courts have cautioned against state regulation of the Internet. For example, in *American Booksellers Foundation for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd in part*, 342 F.3d 96 (2d Cir. 2003), the operators of websites challenged a Vermont law prohibiting transfer to minors of sexually explicit material. *Id.* at 302. The court found the law to be "a *per se* violation of the Commerce Clause because it regulates commerce occurring wholly

outside Vermont's borders." *Id.* at 320. The law, by its own terms, applied to "any electronic communication, intrastate or interstate, that fits within the prohibition and over which Vermont has the capacity to exercise criminal jurisdiction." *Id*. On appeal, the Second Circuit affirmed, acknowledging the state had a substantial interest in regulating out-of-state commerce because it could have a harmful impact within Vermont, but also holding the law "still runs afoul of the dormant Commerce Clause because the Clause 'protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state.'" *Dean*, 342 F.3d at 104. "[W]e agree with the district court that it presents a *per se* violation of the dormant Commerce Clause." *Id.* The Second Circuit cautioned: "We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand[] a single uniform rule.'" *Id.* at 104 (citation omitted).

Before the Court projects Florida's restrictive advertising regime to websites and invites Commerce Clause challenges, it would be prudent to await the ABA's conclusion of its work. The ABA ultimately may adopt rules and guidelines that would provide effective consumer protection and that would be so widely adopted that interstate conflict would be avoided.

4. <u>The Proposed Rules Are Vague and Overbroad</u>

The Proposed Rules continue to use impermissibly vague and overbroad

standards in Proposed Rule 4-7.4 ("Potentially Misleading Advertisements") and Rule 4-7.5 ("Unduly Manipulative or Intrusive Advertisements"). We have been unable to find even one other jurisdiction employing these standards in its Bar advertising rules. That is scarcely surprising since all advertisements are in a sense "manipulative," and the term "unduly" provides no criteria whatsoever for drawing a line between potential and unprotected "manipulation." No one can know in advance what ads the Bar would consider "unduly manipulative." Similarly the phrase, "potentially misleading" provides no specific criteria for understanding what is being prohibited and what is not, and clearly would apply to expression that is not actually misleading.

Indeed, it is surprising that the Bar would even contemplate using such language after the decisions in *Harrell v. The Florida Bar*, 608 F.3d 1241 (11th Cir. 2010) and *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010). In *Harrell*, Circuit Judge Stanley Marcus concluded that a Florida lawyer had established a prima facie case that "manipulative" was unconstitutionally vague:

> Harrell has made an adequate threshold showing that five of the rules – those prohibiting advertisements that are "manipulative," Rules 4-7.2(c)(3) & 4-7.5(b)(1)(A), "promise[ ] results," Rule 4-7.2(c)(1)(G), "characteriz[e] the quality of the lawyer's services," Rule 4-7.2(c)(2), or provide anything other than "useful, factual information," Rule 4-7.1, cmt. – seem to apply to his proposed advertisements, but fail to provide meaningful standards and thus chill his speech. Harrell makes this threshold showing of vagueness in two ways. With respect to three of the rules – the rule prohibiting ads that provide anything other than "useful, factual information," Rule 4-7.1, cmt., and the two rules

> banning advertisements that are "manipulative," Rules 4-7.2(c)(3) & 4-7.5(b)(1)(A) – Harrell points to ambiguity in the language of the rules itself.
>
> Similarly, Harrell has convincingly explained why the prohibition against "manipulative" radio or television advertisements, *see* Rule 4-7.5(b)(1)(A); *see also* Rule 4-7.2(c)(3), reasonably might cause him to "steer wide of any possible violation lest [he] be unwittingly ensnared," *Eaves*, 601 F.2d at 820: almost every television advertisement employs visual images or depictions that are designed to influence, and thereby "manipulate," the viewer into following a particular course of action, in the most unexceptional sense.
>
> The rule against "manipulative" advertisements leads us to Harrell's second category of evidence, because that rule is also one of several for which Harrell has shown evidence of substantially inconsistent applications by the Bar, in ways potentially suggesting that the rules themselves may be indeterminate and run afoul of the proscription against vagueness. On the subject of manipulation, for example, the Standing Committee held that a close-up image of a tiger's eyes, Harrell Aff., Ex. 12, at 79, and a claim to have the "strength of a lion in court," *id*., Ex. 12, at 53, were manipulative, whereas the Board held that an image of two panthers was not manipulative. Conversely, the Standing Committee noted that a photograph of a man looking out of a window, representing victims of drunken driving collisions, was not manipulative, *id*., Ex. 12, at 79, while the Board held that an image of an elderly person looking out of a nursing home window, suggesting nursing home neglect, was manipulative, *id*., ex. 16, at 5-6. The Ethics and Advertising Department, for its part, said that an image of a fortune teller was "deceptive, misleading, or manipulative,", ex. 11, at 9-10, and the Standing Committee similarly held that an image of a wizard violated the applicable rule, *id*., ex. 12, at 17, but the Board ultimately concluded that the image of the wizard was not "deceptive, misleading, or manipulative," *id*., ex. 12, at 17.

608 F.3d at 1255-56. Adding another vague term like "unduly" to "manipulative" multiplies the vagueness rather than lessening it.

Similarly in *Alexander*, Circuit Judge Calabresi, also writing for an

unanimous panel, explained why "potentially misleading" is likely unconstitutional as a state interest supporting an attorney advertising regulation, let alone as the language for the rule itself:

> Defendants at times assert an interest in "ending attorney advertising that is potentially deceptive or misleading." (Appellants' Br. 36) It is not clear, however, that a state has a substantial interest in prohibiting *potentially* misleading advertising, as opposed to inherently or actually misleading advertising. "If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant" the State's burden. *Ibanez*, 512 U.S. at 146, 114 S.Ct. 2084 (internal quotation marks and citation omitted). Moreover, it is unclear what harm *potentially* misleading advertising creates, and the state bears the burden of proving "that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Florida Bar*, 515 U.S. at 626, 115 S.Ct. 2371 (quotation marks omitted). We need not resolve this issue in order to decide this case, and so we leave it for a future case.

598 F.3d at 91 n. 8.

The Proposed Rule 4-7.4 is unconstitutional on its face, as it specifically requires lawyers to hew to the vague and overly broad standards of "potentially misleading" and "unduly vague." But to do so fails to provide any guidance as to the Proposed Rule's ambit. It is one question whether the examples given in this Proposed Rule can satisfy "heightened scrutiny" or the commercial speech test because the specified speech they restrict is potentially misleading. It is quite another to simply prohibit "potentially misleading" or "manipulative" speech, whatever that may mean.

Conclusion

The Court should not extend rules that govern lawyer advertising to lawyer websites or treat lawyer websites generally as advertising. Instead, it should adopt a rule specifying that websites are communication upon the request of a client or prospective client and not subject to Rule 4-7. Alternatively, the Court should adopt a modification of Rule 4-7.6, as suggested in our January 25, 2011, submission to the Bar (Attachment 2), that would apply generally accepted First Amendment standards for regulation of speech or the specific modifications of the rules that we suggested in our February 28, 2011, submission to the Bar (Attachment 3). Before taking any steps, however, the Court should await the conclusion of the ABA's study of lawyers' use of technology-based client development tools. The ABA's rules are simple, easily understood, and avoid most of the First Amendment and Commerce Clause problems found in both the rules that are now in place and the Proposed Rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed August 4, 2011, to:

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