

**FOOLING OURSELVES? AN ETHICAL AND CONSTITUTIONAL  
ANALYSIS OF LAWYER-TO-LAWYER ADVERTISING**

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**Abstract.** Florida is a trailblazer in advertising regulation. Recently, the Florida Supreme Court considered a proposed amendment to Florida's advertising rules, which would formalize an existing comment excluding lawyer-to-lawyer communications from the rules by moving the exclusion into the rules. Instead of accepting the proposal, the court, *sua sponte*, deleted the comment from the rules, thereby making lawyer-to-lawyer advertising subject to regulation. Advertising is commercial speech entitled to protection under the First Amendment and is subject to an intermediate level of scrutiny. Florida's restrictions on lawyer-to-lawyer advertising are unconstitutional as they exceed the levels of regulation allowed by the United States Constitution. Lawyers are sophisticated professionals who do not need the same level of protection as consumers. The restrictions have ethical and practical implications for the way lawyers advertise and practice law. The restrictions will create a dampening effect on communications between lawyers, including the information sharing and collegial discourse between lawyers that is vital to the legal community. As Florida led the way in advertising regulation in the past, these changes may have national repercussions.

**I. INTRODUCTION**

Many lawyers would agree that one of the most beneficial aspects of any bar meeting or conference is the social hour, and most lawyers would admit that while it is always nice to make new friends, networking is all about creating business contacts. As a result of the Florida Supreme Court's recent decision on lawyer-to-lawyer advertising, however, networking opportunities are now potential

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pitfalls that could subject an attorney to discipline.<sup>1</sup> Recently, the court in essence decided not only does the public need protection from attorney advertising, but lawyers do as well. The court was asked to consider a series of amendments to the Rules Regulating the Florida Bar concerning advertising.<sup>2</sup> Instead of accepting a proposed amendment that would formally exclude lawyer-to-lawyer communications from the advertising rules, the court sua sponte removed an existing comment that excluded such communications from the rules.<sup>3</sup> As a result, lawyer-to-lawyer advertising is now subject to regulation. In August of 2008, the Florida Bar conducted a survey on this topic that revealed the vast majority of lawyers do not want or feel they need protection from other attorneys' advertisements.<sup>4</sup> One has to wonder whether the Florida Supreme Court was just out of touch with attorneys or if it had some other reason to believe attorneys need to be shielded from their peers.

Florida is a trailblazer in the area of attorney advertising regulation.<sup>5</sup> If other states follow Florida's lead as they have in the past, the rule change could have negative ramifications not only in the state, but also across the country.

In a few months, the Florida Bar plans to present another petition to the Florida Supreme Court proposing an amendment excluding lawyer-to-lawyer communications from the advertising rules.<sup>6</sup> Hopefully, given a fresh perspective and additional information,

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<sup>1</sup> See *In re Amendments to the Rules Regulating the Fla. Bar—Adver.*, 971 So. 2d 763, 772 (Fla. 2007) (per curiam) (making lawyer-to-lawyer communication subject to regulation).

<sup>2</sup> *Id.* at 763.

<sup>3</sup> *Id.* at 772.

<sup>4</sup> The Fla. Bar, Results of the 2008 Florida Bar Survey on Attorney Communication 5 (2008) [hereinafter The Fla. Bar] (on file with the Florida Bar).

<sup>5</sup> See Lyrissa Barnett Lidsky & Tera Jckowski Peterson, *Medium-Specific Regulation of Attorney Advertising: A Critique*, 18 U. FLA. J.L. & PUB. POL'Y 259, 264 (2007) (citing William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L.J. 255, 287 & n.164 (2005)).

<sup>6</sup> See E-mail from Elizabeth Clark Tarbert, Ethics Counsel, The Fla. Bar, to Yen Cam, assistant to the author (Oct. 21, 2008, 15:47 EST) (on file with author). For more information on the proposed amendment see *Proposed Lawyer-to-Lawyer Advertising Rule*, FLA. BAR NEWS, Apr. 1, 2009, [http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/cb53c80c8fabd49d85256b5900678f6c/0bb998cc0384b9568525757f006e9398?OpenDocument&Highlight=0,advertising\\*](http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/cb53c80c8fabd49d85256b5900678f6c/0bb998cc0384b9568525757f006e9398?OpenDocument&Highlight=0,advertising*).

the court will reach the correct decision this time around.  
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The restrictions on lawyer-to-lawyer advertising are not only unwanted and unnecessary, but also violate lawyers' First Amendment rights to use commercial speech.<sup>7</sup> This article provides an in-depth analysis of the regulations against the backdrop of existing constitutional case law. It also explains how a restriction on communications between attorneys will not only change the way lawyers advertise, but also how they practice law.

## II. 2007 AMENDMENTS TO THE ADVERTISING RULES

Florida Bar President, Kelly Overstreet Johnson, appointed the Advertising Task Force 2004 (Task Force) to review the advertising rules and recommend changes, if necessary.<sup>8</sup> The Bar asked the Task Force to review the rules, suggest changes to clarify the rules, and provide Bar members with notice of the rules' requirements.<sup>9</sup> Members of the Task Force included lawyers across Florida with varying practice areas and backgrounds.<sup>10</sup> The group consisted of lawyers who advertised as well as those who did not.<sup>11</sup>

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<sup>7</sup> See Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (noting that the First Amendment affords protection to commercial speech even though it is a more limited protection than afforded to "speech at the First Amendment's core").

<sup>8</sup> Petition to Amend the Rules Regulating the Florida Bar—Advertising Rules, *In re* Amendments to the Rules Regulating the Fla. Bar—Adver., 971 So. 2d 763 (Fla. 2007) (No. SC05-2194) [hereinafter Petition], available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/4CB0C4F2A5D7DFC9852570D80073CBF3/\\$FILE/Petition%20to%20Amend%20the%20RRTFB%20Adv%2005.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/4CB0C4F2A5D7DFC9852570D80073CBF3/$FILE/Petition%20to%20Amend%20the%20RRTFB%20Adv%2005.pdf?OpenElement). The task force was given the following mission statement:

The Advertising Task Force 2004 is charged with reviewing the attorney advertising rules and recommending changes to the rules if deemed necessary, including any changes to clarify the meaning of the rules and provide notice to Florida Bar members of the rules' requirements. Included within this charge is an analysis of the advertising filing and review requirement, including consideration of mandatory review prior to dissemination of advertisements. The task force should expect to make a final report to The Florida Bar Board of Governors in year 2004-05.

Petition, *supra* at 2.

<sup>9</sup> *In re* Amendments to the Rules Regulating the Fla. Bar—Adver., 971 So. 2d 763, 763 (Fla. 2007) (per curiam).

<sup>10</sup> See Petition, *supra* note 8, at 2. "The task force [also] included three members of the Standing Committee on Advertising and two members of the [Florida Bar Board of Governors] . . ." *Id.*

<sup>11</sup> *Id.*

388 The Task Force analyzed the rules with three interests in mind: the protection of the public from false and misleading advertising, the protection afforded to commercial speech by the First Amendment, and the protection of the justice system and profession from denigration by improper advertising.”<sup>12</sup> After meeting several times and reviewing comments from Bar members, the Task Force submitted its recommendations to the Board of Governors of the Florida Bar (Board).<sup>13</sup> The Board accepted the recommendations with the exception of two provisions that dealt with exclusion of websites from regulation and review of television and radio advertisements.<sup>14</sup> The Florida Bar presented the proposed changes to the Florida Supreme Court in a petition to amend the Florida rules regulating advertising.<sup>15</sup>

One of the proposed changes to Rule 4-7.1 was the addition of provisions that would clarify what communications the rules cover.<sup>16</sup> Specifically, the petition proposed that attorney advertising rules should “not apply to communications between lawyers, between a lawyer and the lawyer’s own family members, between a lawyer and the lawyer’s current and former clients, and between a lawyer and a prospective client at the prospective client’s request.”<sup>17</sup>

The provision excluding communications between lawyers was actually a formalization of a comment that existed in the rules since 1991.<sup>18</sup> When the rules were amended in 1991, a comment had been added to Rule 4-7.2, which stated that the advertising regulations excluded communications between lawyers.<sup>19</sup> The comment was added

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2-3. The task force met in person and over the telephone. *Id.* at 2. Comments were requested through notices posted in the *Florida Bar News* and its website. *Id.* The chairs of each Bar section, standing committee, and voluntary bar association were also invited to submit comments. *Id.* Comments were solicited again after an interim draft was made. *Id.* at 3. A final draft was then submitted to the board. *Id.*

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 1, 3.

<sup>16</sup> *Id.* at 3-4.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> While the Florida Supreme Court issued its opinion in 1990, the rules did not become effective until January 1, 1991. *See Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Adver. Issues*, 571 So. 2d 451, 460, 464 (Fla. 1991, as corrected Feb. 21, 1991).

<sup>19</sup> *Id.* at 464. The comment stated “[t]he rule does not apply to communications between lawyers, including brochures used for recruitment purposes.” *Id.* While the comment was originally attached to Rule 4-7.2, it was later renumbered as 4-7.1 when

with little fanfare.<sup>20</sup> In fact, neither the petition nor the Florida Supreme Court opinion adding the comment contained a discussion regarding the explanation or background for the amendment.<sup>21</sup>

The Task Force likewise spent very little time considering lawyer-to-lawyer advertising.<sup>22</sup> A review of the Task Force's minutes reveals that the members raised the topic only a few times.<sup>23</sup> The minutes state that during initial discussions two Task Force members objected to exemption of communications between lawyers "when lawyers are meant to be prospective clients instead of referral sources."<sup>24</sup> Another member responded in favor of the exemption, reasoning that, "lawyers are sophisticated and the rules were not designed to protect lawyers."<sup>25</sup> There are no more records of substantive discussions regarding the topic. Subsequent entries in the minutes reflect only an implication that the Task Force approved adding the provision and provide no more evidence that the group explored the issue more deeply.<sup>26</sup>

Surprisingly, and despite other more controversial proposals<sup>27</sup> before the Florida Supreme Court, the first topic raised by the justices

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the rules were reorganized in 1999. Amendments to Rules Regulating the Fla. Bar—Adver. Rules, 762 So. 2d 392, 408 (Fla. 1999) (per curiam). Former Rule 4-7.1 was deleted, moving Rule 4-7.2 to its current position. *Id.* at 406-08.

<sup>20</sup> See *Fla. Bar Petition to Amend*, 571 So. 2d at 451-60.

<sup>21</sup> See *id.*

<sup>22</sup> See Final Report of the Advertising Task Force (2004) [hereinafter Final Report], reprinted in Petition, *supra* note 8, app. D at 28, 56-57, 62.

<sup>23</sup> See *id.*

<sup>24</sup> *Id.* at 28.

<sup>25</sup> *Id.*

<sup>26</sup> See *id.* at 56-57, 62. In one entry, the minutes reflect that a question was posed regarding whether communications sent only to other lawyers, family, and prior clients should be exempt from the advertising rules. *Id.* at 56. Only the issues of communications with family and prior clients were discussed in the resulting conversation. *Id.* at 56-57.

<sup>27</sup> One of the topics that had been given great consideration was the issue of whether websites should be subject to the advertising rules. See Petition, *supra* note 8, at 10-12. This issue was in fact so contentious that after receiving the Task Force's recommendation, the Board sent the issue to its Citizen's Forum. *Id.* at 10. The Board finally submitted something in between what the Task Force and the Citizen's Forum each recommended. *Id.* at 11. Another recommendation that would result in a significant change to the Rules was a provision that required lawyers to submit television and radio advertisements for review and approval before airing. *Id.* at 12-17. This was another area where the Board disagreed with the Task Force. *Id.* at 17.

390 during oral argument was lawyer-to-lawyer advertising.<sup>28</sup> Justice Charles Wells mentioned that he received an advertisement from a products liability firm in Florida in the week before the oral argument.<sup>29</sup> He read aloud a list of example monetary recoveries stated in the advertisement and wanted to know if that was the type of advertising that would be allowed if the court accepted the proposed amendment.<sup>30</sup> The Florida Bar representative responded that the current rules already contained a comment providing that communications between lawyers are exempt from the advertising rules, that lawyers are allowed to use such advertising, and that the amendment is only meant to be a clarification.<sup>31</sup> Justice Wells added that he was also concerned that the types of brochures he described were being circulated to lawyers to obtain referrals and that the lawyers would pass on the brochures to clients.<sup>32</sup> The Florida Bar explained its rationale for allowing that type of advertising, stating lawyers are sophisticated and able to determine whether the verdicts or settlements described in the pamphlets are good results.<sup>33</sup>

On November 2, 2006, the Florida Supreme Court deferred adoption of the amendment that would exempt communications between lawyers from the advertising rules.<sup>34</sup> The court also requested further information from the Florida Bar including supporting evidence or research as to why the court should exempt the communications.<sup>35</sup> However, while the court deferred adoption of the amendment, it removed the comment that exempted lawyer-to-lawyer communications

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<sup>28</sup> Transcript of Oral Argument at 2, *In re Amendments to the Rules Regulating the Fla. Bar—Adver.*, 971 So. 2d 763 (Fla. 2007) (No. SC05-2194), available at <http://wfsu.org/gavel2gavel/transcript/05-2194.htm>.

<sup>29</sup> *Id.* Because the proposed exemptions were listed together in the petition, the issues of lawyer-to-lawyer communications were discussed simultaneously with communications with former clients.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 4.

<sup>33</sup> *Id.*

<sup>34</sup> See *In re Amendments to the Rules Regulating the Fla. Bar—Adver.*, 2006 WL 3093126 (Fla. 2006), *withdrawn*, *In re Amendments to the Rules Regulating the Fla. Bar—Adver.*, 971 So. 2d 763, 764 (Fla. 2007). The opinion had been revised to correct scrivener's errors. See *In re Amendments to the Rules Regulating the Fla. Bar—Adver. Rules*, No. SC05-2194, 2007 Fla. LEXIS 2390, at \*1 (Fla. Dec. 20, 2007).

<sup>35</sup> *In re Amendments*, 971 So. 2d at 764.

from the rules.<sup>36</sup> Removal of the comment subjected communications between attorneys to the advertising rules. On August 17, 2007, the Board considered the change regarding lawyer-to-lawyer advertising.<sup>37</sup> At the time, the Board Review Committee on Professional Ethics (BRC)—the body that reviews advertising appeals—had two requests before it from lawyers seeking approval of advertisements to send to other lawyers soliciting client referrals.<sup>38</sup> The BRC discussed whether the advertising rules should apply to lawyer-to-lawyer advertisements in light of the Florida Supreme Court opinion issued on November 2, 2006.<sup>39</sup> The Board first voted that the advertising rules covered lawyer-to-lawyer communications.<sup>40</sup> The Board then voted to have a moratorium on enforcing the rules regarding communications between attorneys, reasoning it would be unfair to Florida Bar members who had little notice of the change.<sup>41</sup> During the meeting, Florida Bar Ethics counsel Elizabeth Tarbert told the board that Bar staff would file more information on lawyer-to-lawyer advertising after the Florida Supreme Court acts on motions pending before it regarding other areas of the advertising rules.<sup>42</sup>

The Florida Bar recently indicated that it intends to file a new petition to the Florida Supreme Court in early 2009, again asking for a provision that excludes communications between attorneys.<sup>43</sup> In support of the new petition, the Bar plans to present a recent survey it conducted concerning attorney communications.<sup>44</sup>

### III. THE FLORIDA BAR STUDY

In July 2008, the Florida Bar sent 2,627 surveys regarding attorney communications “to a random sample of its in-state

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<sup>36</sup> *Id.* at 772.

<sup>37</sup> Gary Blankenship, *Lawyer-to-Lawyer Ads Fall Under Bar Advertising Rules: Enforcement Put on Hold as Bar Seeks Supreme Court Clarification*, FLA. B. NEWS, Sept. 1, 2007, at 26, available at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/FC7332BFBB38954085257344006D8332>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See E-mail from Elizabeth Clark Tarbert, *supra* note 6.

<sup>44</sup> See *id.*

392 membership.”<sup>45</sup> The Bar conducted the survey at the request of the Board of Governors Review Committee on Professional Ethics to obtain the Bar members’ opinions on attorney-to-attorney communications as well as attorney-to-client communications.<sup>46</sup> Along with the survey, the Florida Bar gave each recipient a summary of the current advertising rules and references to where each recipient could find the rules online.<sup>47</sup> By the response cutoff date, the Bar received 504 completed surveys.<sup>48</sup>

The survey delved into what kinds of communications attorneys initiated or received from other attorneys in order to solicit business, the truthfulness of those communications, and whether those communications should be regulated.<sup>49</sup> The survey revealed that over half of the attorneys in private practice initiated some form of communication with another attorney in the past five years for soliciting business.<sup>50</sup> Of the different forms of communications that private practice attorneys reported, they reported using face-to-face and telephone communications most frequently.<sup>51</sup> Seventy-two percent of all attorneys responded that they received a written communication

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<sup>45</sup> The Fla. Bar, *supra* note 4, at 1.

<sup>46</sup> *Id.* A provision excluding communications with current and former clients had also been proposed at the same time the provision concerning lawyer-to-lawyer communications had been proposed. *In re* Amendments to the Rules Regulating the Fla. Bar—Adver., 971 So. 2d 763, 764 (2007).

<sup>47</sup> The Fla. Bar, *supra* note 5, at 1.

<sup>48</sup> *Id.* The Florida Bar reports the study’s error of estimation rate is about “plus or minus four percent at the ninety-five percent level of confidence.” *Id.* That means if all Florida Bar members had been surveyed, it can be ninety-five percent sure that the results would be plus or minus four percent of what this sample found. *Id.*

<sup>49</sup> *See id.* at 2-6.

<sup>50</sup> *See id.* at 2. The survey asked questions of all survey respondents and then asked the same question of attorneys in private practice. *See id.* In response to the question whether an attorney (private practice attorney or otherwise) had initiated contact with another attorney in order to solicit business, forty percent used face-to-face communication, thirty-one percent used telephone communication, twenty-five percent used electronic mail, twenty percent used written communication, eighteen percent used cellular phone communication, two percent used some other form, and fifty-two percent had not used any of the above. *Id.* When the same question was posed again only to private practice lawyers, the results were slightly different. *See id.* Forty-seven percent used face-to-face, thirty-six percent used telephone, twenty-nine percent used electronic mail, twenty-three percent used written communication, twenty percent used cellular phone, two percent used another form, and forty-four percent used none of the above. *Id.*

<sup>51</sup> *Id.* at 2.

from another attorney soliciting business in the past five years.<sup>52</sup> Lawyers used written communication most often, followed by face-to-face, and then electronic mail communication.<sup>53</sup> When asked if the attorney received any kind of communication from another attorney in the past five years that he perceived to contain false or incorrect information, ninety-one percent of lawyers responded that they had not.<sup>54</sup> Sixty-nine percent of all attorneys responded that the Bar should not regulate communications between attorneys.<sup>55</sup> Finally, eighty percent of attorneys replied that the Bar should not review communications between attorneys before dissemination.<sup>56</sup>

Survey respondents were also given the opportunity to provide general comments and suggestions about attorney communications.<sup>57</sup> Many vehemently opposed any restrictions being placed on communications between attorneys.<sup>58</sup> The sentiment that lawyers can handle advertising from other attorneys was repeatedly asserted, as well as the idea that the Bar already placed enough restrictions on lawyers.<sup>59</sup> One participant's comment expressed the resounding theme: "Why overregulate your membership? Attorneys are smart enough to handle these issues by themselves."<sup>60</sup>

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<sup>52</sup> *Id.* at 3. Seventy-two percent had received written communications, fifty percent had received face-to-face, forty-nine percent had received electronic mail, forty-three percent had received telephone, seventeen percent had received cellular phone, four percent had received other communications, and eighteen percent had received none of the above. *Id.* When the same question was posed only to attorneys in private practice, seventy-eight percent had received written communications, fifty-five percent had received face-to-face, fifty-three percent had received electronic mail, forty-seven percent had received telephone, nineteen percent had received cellular phone, four percent had received other communications, and twelve percent had received none of the above. *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* at 4. When the same question was asked of private practice attorneys only, ninety percent responded that they had not received any communication from another attorney in the past five years that they had perceived to contain false or incorrect information. *Id.*

<sup>55</sup> *Id.* at 5. This number was consistent between all survey respondents and attorneys in private practice. *See id.*

<sup>56</sup> *Id.* at 6. This number was also consistent between all survey respondents and attorneys in private practice. *See id.*

<sup>57</sup> *See id.* at 8.

<sup>58</sup> *See id.* at 8, 18-23.

<sup>59</sup> *See id.* at 18-23.

<sup>60</sup> *Id.* at 18.

**A. What and Who are Covered by the Rules?**

Florida's advertising rules have been written in such a way that they regulate virtually every category of marketing available to a lawyer. The rules arrange lawyer marketing into two main categories: advertising communications and written communications.<sup>61</sup> The Task Force discussed defining the word *advertising* but eventually decided against it, reasoning it would be counterproductive because technology changes so much that they feared any term would become underinclusive.<sup>62</sup> While the rules do not clearly define *advertising* or any form of the word, information disseminated through *public media* is included in the term.<sup>63</sup> Varied media, from television commercials to billboards to websites, all fall into this category.<sup>64</sup> The term *public media* is broad, and it is clear that the rules were drafted in a way that any imaginable means of advertisement would be subject to regulation. Rule 4-7.1 describes public media as "including *but not limited to*: print media, such as a telephone directory, legal directory, newspaper or other periodical; outdoor advertising, such as billboards and other signs; radio, television, and computer-accessed communications; recorded messages the public may access by dialing a telephone number; and written communication . . . ."<sup>65</sup> *Written communications* refer to items sent directly to a prospective client, whether they are personalized letters or mass-produced brochures. Rule 4-7.2 further broadens the rules' grasp by detailing regulations that "apply to *any* communication[s]" conveying information about a lawyer's services.<sup>66</sup>

The drafter wrote the rules in such a way that practically any lawyer wishing to do business in Florida or with a Floridian would be subject to them. The rules specify that they apply to Florida lawyers

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<sup>61</sup> See, e.g., *In re* Amendments to the Rules Regulating the Fla. Bar—Adver., 971 So. 2d 763, 772 (2007) (separating advertisements from written communications).

<sup>62</sup> Final Report, *supra* note 22, at 3-4. The task force decided, instead, to come up with a list of communications that are excluded, resulting in the provision at issue in this article. See *id.* at 4.

<sup>63</sup> FLA. RULES OF PROF'L CONDUCT R. 4-7.1(a) (2008) [hereinafter FRPC].

<sup>64</sup> See *id.*

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> FRPC. R. 4-7.2 (2008) ("The following shall apply to *any* communication conveying information about a lawyer's or a law firm's services except as provided in subdivisions (e) and (f) of rule 4-7.1.") (emphasis added).

seeking employment in Florida or targeting Floridians.<sup>67</sup> They also apply to out-of-state lawyers “who have established a regular and/or permanent presence in Florida” and seek employment in Florida or target Florida residents.<sup>68</sup>

Currently, the rules exclude only two categories of communication from regulation: those with a lawyer’s family members and those at the prospective client’s request.<sup>69</sup>

### ***B. What Do the Regulations Require?***

The rules are also extensive in their requirements. With the exception of some written solicitation, the rules forbid a lawyer from soliciting a client when the motive is the lawyer’s pecuniary gain.<sup>70</sup> The rules prohibit in-person, telephone, telegraph, and facsimile contact.<sup>71</sup> The lawyer’s employees and agents are also subject to the ban.<sup>72</sup> Furthermore, in order to make sure the attorney cannot benefit from violating the rules, the rules proscribe a lawyer from entering into an agreement or charging or collecting a fee from a client obtained through solicitation.<sup>73</sup>

While the rules allow some unsolicited written communication; they also contain a comprehensive list of what is required,<sup>74</sup> as well as what is prohibited, in the message.<sup>75</sup> Besides the name of the lawyer and the location of at least one of his offices,<sup>76</sup> the advertisement must contain a description of the lawyer’s background, experience, and

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<sup>67</sup> FRPC R. 4-7.1(b).

<sup>68</sup> *Id.* at R. 4-7.1(c). The Rules do not apply to Florida lawyers advertising outside of Florida as long as the advertisement meets the rules of that jurisdiction, and the advertisement is not intended to be broadcast or disseminated in Florida. *Id.* at R. 4-7.1(d).

<sup>69</sup> *Id.* at R. 4-7.1(e), (f). These were the two exceptions of the four proposed in the petition that were accepted by the Florida Supreme Court. *See In re Amendments to the Rules Regulating the Fla. Bar—Adver.*, 971 So. 2d 763, 764 (2007).

<sup>70</sup> FRPC R. 4-7.4(a) (2008).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See* FRPC. R. 4-7.1(b)(2), 4-7.2(a) (listing information that must be included in lawyer advertising).

<sup>75</sup> *See, e.g.*, FRPC R 4-7.4(b)(1) (listing in several subsections what is prohibited in lawyer advertising).

<sup>76</sup> FRPC R. 4-7.2(a).

training.<sup>77</sup> The rules also require the word *advertisement* to be displayed in red ink on the outside of the mailing.<sup>78</sup> If the solicitation has been prompted by a specific event, there are further requirements.<sup>79</sup> The first sentence of such a communication must be: “If you have already retained a lawyer for this matter, please disregard this letter.”<sup>80</sup> The letter must also explain how the lawyer obtained information regarding the occurrence.<sup>81</sup>

Besides the required information, the sender must also keep in mind the prohibitions. Written communications must not be made to look like “pleadings or other legal documents.”<sup>82</sup> The outside of the envelope also cannot reveal the nature of the legal problem.<sup>83</sup> Furthermore, the rules apply other restrictions to all direct mailings. In addition to the obvious exclusion of false and misleading statements and material misrepresentations, the advertising rules forbid testimonials, references to past successes or results obtained, promises of results, and comparisons to other attorneys unless the comparisons can be factually substantiated.<sup>84</sup> The advertisement must not characterize or describe the quality of the services or seek employment in an area in which the lawyer does not currently practice.<sup>85</sup> Illustrations or visuals cannot be deceptive, misleading, or likely to be confusing.<sup>86</sup> If the lawyer wishes to address the areas of law in which he practices, there are further rules and restrictions he must follow.<sup>87</sup>

The rules do include a safe harbor list of rather bland information that the Florida Bar will tolerate in advertisements.<sup>88</sup> The rules allow items such as the lawyer’s name, the location of his office, his contact information, where to park, and disability accommodation.<sup>89</sup> He may also include information related to his experience including his

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<sup>77</sup> FRPC R. 4-7.4(b)(2)(D).

<sup>78</sup> *Id.* at R. 4-7.4(b)(2)(B).

<sup>79</sup> *Id.* at R. 4-7.4(b)(2)(F).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at R. 4-7.4(b)(2)(I).

<sup>82</sup> *Id.* at R. 4-7.4(b)(2)(G).

<sup>83</sup> *Id.* at R. 4-7.4(b)(2)(J).

<sup>84</sup> FRPC R. 4-7.2(c)(1)(A)-(J).

<sup>85</sup> *Id.* at R. 4-7.2(c)(2), (4).

<sup>86</sup> *Id.* at R. 4-7.2(c)(3).

<sup>87</sup> *Id.* at R. 4-7.2(c)(6).

<sup>88</sup> *See id.* at R. 4-7.2(b) (listing numerous permissible contents).

<sup>89</sup> *Id.* at R. 4-7.2(b)(1)(A).

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date of admission to the Florida Bar, current or former positions in the Florida Bar or its sections or committees, positions of employment, lists of jurisdictions and courts in which he is admitted to practice, military service, and licenses granted by other agencies.<sup>90</sup> The rules also permit the inclusion of salutary terms such as *happy holidays* and *best wishes*.<sup>91</sup> The rules are also very specific for the types of illustrations allowed.<sup>92</sup>

A lawyer may not send unsolicited electronic mail directly or indirectly for obtaining employment, unless the mail follows many of the same rules required of general unsolicited written communications detailed above.<sup>93</sup> Additionally, these communications must contain the words *legal advertisement* in the subject line.<sup>94</sup>

## V. HISTORY OF LAWYER ADVERTISING

Advertising by lawyers is by no means a twenty-first century concept. Even Abraham Lincoln was known to have advertised his law practice.<sup>95</sup> For the most part, however, advertising has historically been frowned upon within the profession.<sup>96</sup> The early practice of law in Great Britain was considered more a form of public service than a means to earn a living, and *trade* was looked down upon in polite society as unseemly.<sup>97</sup> Advertising was seen as no more than a means of self-promotion.<sup>98</sup> That rule of etiquette, however, evolved into a rule

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<sup>90</sup> *Id.* at R. 4-7.2(b)(1)(B)-(D).

<sup>91</sup> *Id.* at R. 4-7.2(b)(1)(J).

<sup>92</sup> *Id.* at R. 4-7.2(b)(1)(L). An advertisement may depict:

the scales of justice not deceptively similar to official certification logos or The Florida Bar logo, a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), diploma(s), or a photograph of the lawyer or lawyers who are members of or employed by the firm against a plain background consisting of a single solid color or a plain unadorned set of law books.

*Id.* at R. 4-7.2(b)(1)(L).

<sup>93</sup> FRPC R. 4-7.6(c).

<sup>94</sup> *Id.* at R. 4-7.6(c)(3).

<sup>95</sup> Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437, 468 (2006).

<sup>96</sup> See Daniel Callender, *Attorney Advertising and the Use of Dramatization in Television Advertisements*, 9 UCLA ENT. L. REV. 89, 92-93 (2001).

<sup>97</sup> *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371 (1977).

<sup>98</sup> See Callender, *supra* note 96, at 93-94.

of ethics.<sup>99</sup> In 1908, the American Bar Association (ABA) issued its *Canons of Professional Ethics*, banning all advertising except business cards.<sup>100</sup> It was not until 1977 that social views changed enough that the United States Supreme Court was ready to lift the ban with its decision in *Bates v. State Bar of Arizona*.<sup>101</sup> The Court recognized, “[i]n this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow ‘above’ trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.”<sup>102</sup>

The *Bates* decision came just a year after the Court first extended constitutional protection to commercial speech. In the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the parties presented the Court with the question of whether pharmacists should be allowed to advertise the prices of prescription drugs.<sup>103</sup> An individual<sup>104</sup> and two nonprofit groups brought the lawsuit against the state agency that regulated pharmacists in Virginia.<sup>105</sup> The agency’s rules prohibited pharmacists from advertising the price of drugs.<sup>106</sup> The plaintiffs argued they would benefit from such information,<sup>107</sup> and the ban infringed on their First

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<sup>99</sup> *Id.* at 93.

<sup>100</sup> *Id.*

<sup>101</sup> See *Bates*, 433 U.S. at 384 (holding a bar rule banning advertising unconstitutional as applied to newspaper advertisement by attorney).

<sup>102</sup> *Id.* at 371-72.

<sup>103</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749-750 (1976).

<sup>104</sup> The individual was a “Virginia resident who suffer[ed] from diseases that require[d] her to take prescription drugs on a daily basis.” *Id.* at 753.

<sup>105</sup> *Id.* at 753. The Virginia Board of Pharmacy, the agency regulating pharmacists in Virginia, was charged with many duties, including “(m)aintenance of the quality, quantity, integrity, safety and efficacy of drugs or devices distributed, dispensed or administered” [and] “(m)aintaining the integrity of, and public confidence in, the profession and improving the delivery of quality pharmaceutical services to the citizens of Virginia.” *Id.* at 751 (internal quotation marks omitted).

<sup>106</sup> See *id.* at 749-50 (reviewing the constitutionality of a rule challenged by plaintiff-appellees that found a pharmacist to have engaged in unprofessional conduct if he “publishe[d], advertise[d] or promote[d], directly or indirectly, in any manner whatsoever, any amount[,][sic] price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription”).

<sup>107</sup> *Id.* at 754 (recognizing the value of the information and stipulating there was a wide range in price of prescriptions even in the same geographical area).

Amendment right to receive the information.<sup>108</sup> The Court agreed that not only would these particular consumers benefit but also society in general may benefit from a less restricted flow of commercial information.<sup>109</sup> The Court held commercial speech should be afforded some protection, and an absolute ban on advertising violated the First Amendment.<sup>110</sup>

The Court extended First Amendment protection to commercial speech by lawyers in *Bates* the following year, holding an absolute ban on attorney advertising was unconstitutional.<sup>111</sup> The Court rejected a six-prong argument, finding none of the proffered justifications warranted prohibition of all attorney advertising.<sup>112</sup> While providing

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<sup>108</sup> *Id.* at 749-50. The plaintiffs also invoked the Fourteenth Amendment in that the First Amendment is applicable to the states through the Due Process Clause. *Id.* at 750 n.1.

<sup>109</sup> *See id.* at 765 (“So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”).

<sup>110</sup> *Id.* at 771-73.

<sup>111</sup> *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977). The case came about after two Arizona attorneys advertised their law practice in a newspaper of general circulation. *See id.* at 354. The State Bar of Arizona found the lawyers to be in violation of Disciplinary Rule 2-101(B) that provides:

[a] lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio [sic] or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

*Id.* at 355. The Board of Governors of the State Bar of Arizona recommended a one-week suspension for each of the two lawyers, with the weeks to run consecutively. *See id.* at 356. The lawyers appealed the decision. *See id.*

<sup>112</sup> *See id.* at 379. Briefly, the six justifications argued by the regulatory board are as follows: (1) advertising would have an adverse effect on professionalism in that advertising would bring about commercialism which would in turn erode the attorney’s dignity and self-worth. *See id.* at 368. The Court rejected the argument and its presumption that lawyers must hide the fact that they make a living at their business in order to maintain professionalism. *See id.* (2) It was next argued that attorney advertising is inherently misleading because legal services are so individualized that there can be no informed comparison based on an advertisement, because a consumer cannot know in advance just what services he needs, and because advertising will show irrelevant factors and ignore factors of skill. *See id.* at 372. The Court rejected the argument, saying that advertising was not misleading because of some inherent lack in standardization, that consumers do know what services they generally need

little guidance as to how state bars are to regulate advertising, the Court clarified that attorneys are not protected from all regulation.<sup>113</sup>

Restrictions on false, deceptive, or misleading advertising, as well as limits on time, place, and manner were listed as examples of acceptable regulation.<sup>114</sup> The Court also noted that because of the nature of legal advertising and the lack of legal sophistication amongst the public, the public might view legal advertising differently from advertising in other areas.<sup>115</sup>

A year later, the Court further clarified what forms of attorney marketing are constitutionally protected in *Ohralik v. Ohio State Bar Ass'n*.<sup>116</sup> In *Ohralik*, the Court upheld the discipline of a lawyer who solicited an accident victim in-person.<sup>117</sup> The lawyer argued that in-

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even if they do not know the details, and the public is sophisticated enough to know that advertising is limited in its ability to provide information. *See id.* at 372-75. (3) The next argument proffered was that advertising would have adverse effects on the administration of justice in that it would stir up litigation. *See id.* at 375. The Court countered, stating advertising might actually offer benefits in that it would inform the unknowledgeable of their access to legal services. *See id.* at 376. (4) It was also argued that advertising could have undesired economic effects in the form of increased overhead costs being passed on to consumers and that advertising would make it more difficult for young lawyers to enter the market. *See id.* at 377. The Court responded that the opposite might be true as evidence showed prices were often reduced with advertising, and advertising might make it easier for young attorneys to break into the market as they would not have to rely solely on business generated from contacts with the community. *See id.* at 377-378. (5) The regulatory body was also concerned that advertising would create an adverse effect on the quality of service in that attorneys might be tempted to advertise a package of services regardless of the client's needs. *See id.* at 378. The Court replied that an attorney determined to produce shoddy work would do so regardless of the rules. *See id.* (6) Finally, it was argued that enforcement of anything but complete restriction would be too difficult. *See id.* at 379. The Court responded that the state's fears were unfounded, as most lawyers would abide by the rules, and it was in the state's interests to pursue the rest. *See id.*

<sup>113</sup> *See id.* at 383.

<sup>114</sup> *See id.* at 383-84.

<sup>115</sup> *See id.* at 383.

<sup>116</sup> *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

<sup>117</sup> *See id.* at 467-68. The facts of the case are particularly sordid. On a trip to the post office, the appellant, a lawyer, learned that a casual acquaintance, Carol McClintock, had been involved in an automobile accident. *See id.* at 449. He contacted the 18-year-old's mother and asked if he could visit Carol at the hospital. *See id.* Mrs. McClintock agreed, and he visited Carol who was lying in traction at the hospital. *See id.* at 449-50. He "told [her] he would represent her and asked her to sign an agreement" to which she responded that she would have to speak to her parents first. *See id.* at 450. He then attempted to visit Carol's 18-year-old friend, Wanda Lou

person solicitation provides the same information that was found to be protected in *Bates*.<sup>118</sup> The Court distinguished the two methods, however, finding that with a public advertisement, the lawyer gives the information and the recipient is free to respond or not.<sup>119</sup> With in-person solicitation, the solicitor “may exert pressure and often demands an immediate response, without providing time for comparison and reflection.”<sup>120</sup> The Court found that protecting the public from such dangers as fraud, duress, undue influence, and intimidation are an important government interest and the State maintains a responsibility to regulate against those dangers.<sup>121</sup> The Court recognized that allowing an unsophisticated lay person to be confronted directly by a lawyer who has been trained to persuade could prove especially hazardous.<sup>122</sup> The Court concluded the First Amendment did not protect in-person direct solicitation by the First Amendment.<sup>123</sup>

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Holbert, who was the passenger and also injured but learned she had been released from the hospital. *See id.* After next taking pictures at the scene of the accident, he “picked up a tape recorder, which he concealed under his raincoat . . . .” *See id.* He then visited the McClintocks at their residence. *See id.* He discussed the insurance policy with Mr. and Mrs. McClintock, and they told him Carol had called to say he “could ‘go ahead’ with her representation.” *See id.* Carol signed a contract two days later, stating that the attorney would receive one third of her recovery. *See id.* In the meantime, the attorney obtained Wanda Lou’s contact information from the McClintocks, claiming he needed to ask her questions about the case. *See id.* at 451. He then visited Wanda Lou without an invitation, again concealed the tape recorder, and told her he was representing Carol. *See id.* He explained to her that under Carol’s insurance policy she might be entitled to a recovery. *See id.* Even though she was not a high school graduate and stated she did not understand what was going on, the attorney offered to represent her for one third of the recovery. *See id.* The next day, Wanda Lou’s mother attempted to repudiate the agreement, claiming that they did not want to sue anyone. *See id.* at 451-52. The appellant replied that Wanda had entered into a binding contract. *See id.* at 452. Wanda again confirmed in writing that she did not want to be represented by him and asked that he notify the insurance company that he was not her lawyer. *See id.* Carol also later discharged the appellant, and another lawyer assisted her in obtaining a recovery. *See id.* She gave the appellant one third of her recovery when he sued her for breach of contract. *See id.* Both Carol McClintock and Wanda Lou Holbert filed grievance complaints against the appellant. *See id.*

<sup>118</sup> *See id.* at 455.

<sup>119</sup> *See id.* at 457.

<sup>120</sup> *See id.*

<sup>121</sup> *See id.* at 460, 462.

<sup>122</sup> *See id.* at 465.

<sup>123</sup> *See id.* at 468.

402 The Court later articulated the standard for regulating commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>124</sup> The Court, recognizing a distinction between different forms of speech and maintaining that commercial speech does not warrant as much protection as other “constitutionally guaranteed expression” such as political speech, developed a four-part intermediate scrutiny test.<sup>125</sup> First, the speech must concern lawful activity and not be misleading.<sup>126</sup> Second, the interest asserted by the government necessitating the need must be substantial.<sup>127</sup> Third, the regulation must directly advance the interest asserted.<sup>128</sup> Fourth, the limitation must not be more restrictive than necessary to serve the asserted interest.<sup>129</sup>

A couple of years later, in *In re R.M.J.*, the Court applied the test and struck down a regulation that failed to meet the fourth prong.<sup>130</sup> In the case, the state regulatory agency, instead of prohibiting advertising

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<sup>124</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980). This case involved advertising electrical utilities. *See id.* at 558. In 1973, there was a fuel shortage in New York, and the Public Service Commission (the “Commission”) of the State of New York ordered electric utilities to stop all advertising that would promote the use of electricity. *See id.* at 558-59. Three years later, even after the fuel shortage ended, the Commission extended the ban of promotional advertising, or advertising intended to stimulate the use of electricity. *See id.* at 559. *Central Hudson Gas & Electric Corp.* (“Central Hudson”), challenged the ban on the basis that it violated the First and Fourteenth Amendments. *See id.* at 560. The lower court questioned whether Central Hudson’s advertising would be protected because Central Hudson held a monopoly on the supply of electrical power and therefore, the court reasoned, the speech conveyed little useful information. *See id.* at 566. The Supreme Court disagreed, saying that even in monopoly markets, advertising restrictions reduce the flow of useful information. *See id.* at 567. The Commission argued that energy conservation is a substantial interest, and the Court agreed. *See id.* at 568. The Court found, however, that the restriction was more extensive than necessary to further the state’s interest in energy conservation. *See id.* at 570. The Court pointed out that the ban also prevented Central Hudson from advertising energy efficient devices that would reduce energy use. *See id.* It stated that the Commission had not shown its interests could not be met with less restrictive alternatives. *See id.* The Court reversed a decision that found the ban to not be in violation of the First and Fourteenth Amendments. *See id.* at 572.

<sup>125</sup> *See id.* at 562-63.

<sup>126</sup> *See id.* at 563-64.

<sup>127</sup> *See id.* at 564.

<sup>128</sup> *See id.*

<sup>129</sup> *See id.*

<sup>130</sup> *In re R.M.J.*, 455 U.S. 191, 207 (1982).

altogether, decided to limit advertisers to listing certain categories of information.<sup>131</sup> The Court acknowledged that lawyer advertising had the potential to mislead or deceive the public, and the Court agreed that the State has an interest in preventing public deception.<sup>132</sup> However, the Court recognized that limiting advertisements to certain categories meant barring attorneys from providing other information.<sup>133</sup> The State argued that such information had the potential to be misleading.<sup>134</sup> The Court found mere potential was not enough to ban attorney advertising, and the State must at least attempt to implement a less restrictive method to reach its goal.<sup>135</sup>

The Court later tweaked the last prong of the *Central Hudson Gas & Electric Corp.* test with its decision in *Board of Trustees of the State University of New York v. Fox*.<sup>136</sup> The Court clarified that the

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<sup>131</sup> See *id.* at 193 (explaining that before the *Bates* decision, Missouri had an absolute ban on lawyer advertising). Afterwards, the Court decided on what it intended to be a compromise by limiting lawyer advertisements to listing certain categories of information in newspapers, the yellow pages of telephone directories, and periodicals. *Id.* at 193-94. The categories were “name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified ‘routine’ legal services.” *Id.* at 194. Although the regulatory provision did not explicitly state that advertising was limited to those categories, this was the way it was interpreted by the regulatory agency. *Id.* The rule also listed specific wording to be used to describe the attorney’s area of practice if he chose to include that information. *Id.* at 194-95. Missouri’s regulations also allowed the mailing of dignified announcement cards to inform of changes of address, firm names, associates, or similar matters but restricted the mailing only to “lawyers, clients, former clients, personal friends, and relatives.” *Id.* at 196.

<sup>132</sup> *Id.* at 202.

<sup>133</sup> See *id.* at 205 (“Appellant was reprimanded for deviating from the precise listing of practice areas included in the Advisory Committee addendum to Rule 4.”).

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* at 203 (“Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.”).

<sup>136</sup> *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 471-77 (1989). The case involved a rule of the State University of New York (hereinafter “SUNY”) that prohibited private businesses from operating at its facilities. *Id.* at 471. In October of 1982, a representative of American Future Systems, Inc. (hereinafter “AFS”) demonstrated the company’s products at a “Tupperware party” held at a student dormitory. *Id.* SUNY’s campus police asked her to leave, stating that she was violating the rule. *Id.* When she refused, they arrested her and charged her with trespassing, loitering, and soliciting without a permit. *Id.* SUNY students along with

404 challenged regulation does not need to meet a least restrictive means test.<sup>137</sup> Rather, there must be “a fit that is not necessarily perfect, but reasonable” between the asserted government interest and the regulation.<sup>138</sup> The Court emphasized lawmakers can choose the manner in which to meet their objective, but cautioned that the method must still be narrowly tailored.<sup>139</sup>

The Supreme Court further clarified what government interests are substantial enough to meet the *Central Hudson Gas & Electric Corp.* test in *Zauderer v. Office of Disciplinary Counsel of the Superior Court of Ohio*.<sup>140</sup> In the opinion, the Court considered the question of whether the State violated the First Amendment in reprimanding an attorney for placing an advertisement, which contained a nondeceptive illustration and legal advice.<sup>141</sup> The Court commented that the fear that

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AFS sued for a declaratory judgment that enforcement of the rule violated the First Amendment. *Id.* The students and AFS attempted to argue that the parties constituted noncommercial speech because even though there were commercial aspects to the parties, they also attempted to teach financial responsibility and how to run an efficient home, so the commercial and noncommercial speech were “inextricably intertwined.” *Id.* at 474. The Court rejected that argument, stating there was nothing in the nature of selling housewares that forced the commercial messages to be mixed with the noncommercial. *Id.* The Court therefore analyzed the case as if commercial speech was at issue and applied the *Central Hudson* test. *Id.* at 476-78.

<sup>137</sup> *Id.* at 479.

<sup>138</sup> *See id.* at 476-80. The Court went through a substantial analysis on the issue. The Court first considered the concept that the restriction be no more restrictive than necessary to achieve the state’s interests. *Id.* at 480. The Court conceded that if interpreted strictly, the word necessary would require a “least restrictive means” test, however, the Court noted that the word necessary was sometimes interpreted more loosely, such as with the Necessary and Proper Clause of the Constitution. *Id.* Moreover, the Court indicated that other commercial speech cases favored a more loose interpretation of the *Central Hudson* test. *Id.* Because the Court felt the First Amendment does not require as much protection of commercial speech as other forms of protected speech, the Court settled on the less rigid interpretation. *Id.*

<sup>139</sup> *Id.* at 480.

<sup>140</sup> *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (“But we hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”).

<sup>141</sup> *See id.* at 629-52. The attorney in the case was actually charged with several violations. *Id.* at 631-34. The lawyer was reprimanded for placing an ad that stated the client’s legal fee would be refunded if the client was convicted of drunk driving. *See id.* at 652-53. The Court found that reprimand to be sustainable because the advertisement was misleading in that it did not warn of the practice of plea bargaining and that clients could find themselves owing a legal fee if they were found guilty of a

the advertising would “stir up litigation” was not an adequate justification for the restriction.<sup>142</sup> Furthermore, the Court also rejected the argument that it is difficult to distinguish advertisements that are deceptive and misleading from those that are not when they contain legal advice.<sup>143</sup> The Court pointed out the accuracy of the illustrations in the case were easily verifiable.<sup>144</sup> Moreover, the regulatory board asserted that the reason for the restriction was to assure attorneys advertised in a *dignified manner*.<sup>145</sup> The Court found the asserted interest to be insufficient, remarking, “the 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.”<sup>146</sup>

The Court again upheld the right to advertising when it considered direct-mail solicitation issues in *Shapero v. Kentucky Bar Ass’n*.<sup>147</sup> In *Shapero*, the regulation at issue prohibited mailings that lawyers targeted at persons who the lawyers knew to be in need of legal services.<sup>148</sup> The Court recognized that direct-mail solicitations differed

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lesser defense. *Id.* The same lawyer also published an advertisement stating that he would represent women who had been injured from the use of a Dalkon Shield Intrauterine Device. *Id.* at 630. The advertisement contained a line drawing of the device as well as a statement that the device had generated a large amount of lawsuits, that women should not assume their cases were time-barred, and the case would be handled by him on a contingent-fee basis and no legal fees would be owed if there was no recovery. *Id.* at 630-31. The Court found that the contingent-fee statement was misleading because while it declared that no legal fees would be due, it did not mention that there might be costs owed. *Id.* at 652. The rest of the opinion dealt with the illustration and legal advice in the Dalkon Shield advertisement. *See id.* at 652-73.

<sup>142</sup> *Id.* at 642.

<sup>143</sup> *Id.* at 644.

<sup>144</sup> *See id.* at 645 (“This notion is belied by the facts before us: appellant’s statements regarding Dalkon Shield litigation were in fact easily verifiable and complete accurate.”).

<sup>145</sup> *Id.* at 647.

<sup>146</sup> *Id.* at 648.

<sup>147</sup> *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 479 (1988) (“The letter simply presents no comparable risk of overreaching. And so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and non-deceptive lawyer solicitations . . .”).

<sup>148</sup> *See id.* at 469-70. The case was commenced when the Kentucky Bar Association declined approval of the following letter:

It has come to my attention that your home is being foreclosed on.  
If this is true, you may be about to lose your home. Federal law may

406 from general mailings because direct-mail solicitations were more likely to reach individuals in need of legal services; however, the Court pointed out that it cannot ban certain forms of speech solely because they are more efficient.<sup>149</sup> In addition, the Court rejected the argument that, like in-person solicitation, targeted, direct-mail solicitation “subjects the prospective client to pressure from a trained lawyer in a direct personal way.”<sup>150</sup> The Court recognized that unlike someone faced with in-person solicitation, the recipient of a letter can merely choose not to look at it in order to avoid the nuisance.<sup>151</sup> Likewise, a targeted letter does not invade a person’s privacy any more than a letter that a lawyer mails at large.<sup>152</sup> While the Court admitted that targeted solicitation provided more opportunities for abuse than general mailings, it found that such opportunities for abuse did not justify an absolute ban.<sup>153</sup> Instead, the Court recommended less restrictive alternatives, such as the filing of proposed letters to the agency for review.<sup>154</sup>

The Supreme Court further clarified what governmental interests are substantial enough to justify infringement of First Amendment commercial speech rights in *Florida Bar v. Went for It, Inc.*, one of the Court’s few decisions in which it upheld a State’s regulation on attorney advertising.<sup>155</sup> In *Went for It, Inc.*, the Court examined a Florida rule that prohibited “lawyers from sending targeted direct-mail solicitations to victims and their relatives for [thirty] days following an accident or

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allow you to keep your home by *ORDERING* your creditor [sic] to *STOP* and give you more time to pay them. You may call my office anytime from 8:30 a.m. to 5:00 p.m. for *FREE* information on how you can keep your home. Call *NOW*, [sic] don’t wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is *FREE*, there is *NO* charge for calling.” *Id.* at 469. Although the state did not find the letter to be false or misleading, the letter was found to be in violation of a rule that banned the mailing of written advertisements “precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

*Id.* at 469-70.

<sup>149</sup> *Id.* at 473.

<sup>150</sup> *Id.* at 474.

<sup>151</sup> *Id.* at 475.

<sup>152</sup> *Id.* at 476.

<sup>153</sup> *Id.* (explaining that a personalized letter invites a greater risk of intentional or inadvertent deception).

<sup>154</sup> *Id.*

<sup>155</sup> Fla. Bar v. Went for It, Inc., 515 U.S. 618, 635 (1995).

disaster.”<sup>156</sup> The Florida Bar argued the rule was necessary for two reasons.<sup>157</sup> First, the rule was meant to protect the public’s tranquility and privacy.<sup>158</sup> Second, the rule was intended to protect the reputation of the legal profession, as the Bar’s research revealed the conduct to be “universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.”<sup>159</sup> The Court agreed that the interests were substantial enough to meet the second prong of the *Central Hudson Gas & Electric Corp.* test.<sup>160</sup>

In order to prove the third prong of the test, that the interest asserted was directly advanced by the regulation, the Bar presented a study of lawyer advertising that the Bar conducted over two years.<sup>161</sup> In prior cases, the Court stated the regulating agency must prove the harms are real and the restriction will alleviate them.<sup>162</sup> The Court reflected that, in other cases where it invalidated restrictions of commercial speech, the regulating agency presented no supporting documentation to substantiate the allegations of harm.<sup>163</sup> The Florida Bar, however, came prepared. Its study included both statistical and anecdotal evidence to support the Bar’s assertion that targeted “direct-mail solicitations in the immediate wake of accidents” reflected poorly on the public’s perception of lawyers.<sup>164</sup> The study persuaded the Court that the rule advanced the State’s interests in a direct and material way, thus meeting

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<sup>156</sup> *Id.* at 620. The case involved Rule 4-7.4 (b)(1) of the Florida Rules of Professional Conduct. *Id.*

<sup>157</sup> *See id.* at 624-25.

<sup>158</sup> *Id.* at 624.

<sup>159</sup> *Id.* at 625 (internal quotation marks omitted).

<sup>160</sup> *Id.* The Court described the *Central Hudson* test as a three-prong test, as it first assumes that the speech at issue is not unlawful or misleading. *Id.* at 624. Accordingly, in this opinion, the Court stated that the Bar’s two asserted interests satisfy the *first* prong of the test instead of the second as this article does. *Id.* As the *Central Hudson* test is most often referred to elsewhere as a four-prong test, this article has done so to maintain consistency.

<sup>161</sup> *Id.* at 626.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* The opinion stated that the record included ample anecdotal evidence. *Id.* at 627. The Court referred to numerous newspaper articles about the public’s opinion of the legal profession as well as letters from recipients of direct mail. *Id.* The Court quoted complaints from people who had received letters from lawyers days after a loved one’s funeral. *Id.*

Finally, in its analysis of the fourth prong, the Court reemphasized that in examining the relationship between the governmental interest and the means to achieve it, while the test does not require least restrictive means, the test is still more rigorous than rational basis review.<sup>166</sup> It noted, for example, that the existence of numerous less restrictive alternatives would be relevant.<sup>167</sup> The Court did not agree that there were many less restrictive alternatives to the rule and found that a thirty-day waiting period was reasonable.<sup>168</sup> Furthermore, the Court was satisfied that there were many other methods that the injured could use to locate counsel during the waiting period.<sup>169</sup> The Court concluded that Florida's rule requiring the thirty-day moratorium was constitutional.<sup>170</sup>

## VI. LAWYER-TO-LAWYER ADVERTISING IN OTHER JURISDICTIONS

Florida is not the only jurisdiction that considered the question of lawyer-to-lawyer advertising.<sup>171</sup> The only federal court that examined the issue was unable to find a state interest that would necessitate restrictions on lawyer-to-lawyer advertising.<sup>172</sup> In *Spencer v. The Honorable Justices of the Supreme Court of Pennsylvania*, the United States District Court for the Eastern District of Pennsylvania considered a provision that limited lawyers to publishing in a legal journal or distributing to other lawyers a dignified announcement of his availability to other lawyers in a particular branch of law.<sup>173</sup> A lawyer

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<sup>165</sup> *Id.* at 628.

<sup>166</sup> *Id.* at 632.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 633.

<sup>169</sup> *Id.* at 634.

<sup>170</sup> *Id.*

<sup>171</sup> *See, e.g., Spencer v. Honorable Justices of the Supreme Court of Pa.*, 579 F. Supp. 880, 892-93 (E.D. Pa. 1984) (considering a provision that limited lawyers to publishing in a legal journal).

<sup>172</sup> *Id.* at 892.

<sup>173</sup> *Id.* The case involved a lawyer who was a pilot with a master's degree in computer science. *Id.* at 882. He intended to focus his legal career on the areas of aviation and computer law, so he wished to publish general advertisements as well as send direct mail targeted at individuals with needs in those areas. *Id.* He first had to overcome a standing issue in the case because he had not actually advertised yet and had not been disciplined but was seeking a declaration. *Id.* at 882-84. The court ruled that he did have a justiciable issue, as he was not required to first violate any rules. *Id.* at 884.

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challenged the provision because it prohibited him from advising lawyers of other information, such as the fact that he was also certified as a pilot.<sup>174</sup> The Eastern District cited a comment from the *Bates* decision that a “determination [of] whether an advertisement is misleading requires consideration of the [audience’s] legal sophistication . . . .”<sup>175</sup> The court concluded that “[l]awyers are capable of understanding, evaluating, and distilling legal advertisements and thus prohibiting plaintiff from making representations as to his background, education, and experience to other lawyers is unnecessary to advance *any* state interest and therefore unconstitutional.”<sup>176</sup>

The ABA also offered guidance on the issue with its *Model Rules of Professional Conduct (Model Rules)*.<sup>177</sup> The ABA adopted the *Model Rules* in 1983 as a model for the ethics rules of most states.<sup>178</sup> Model Rule 7.3 deals with direct contact with prospective clients.<sup>179</sup> While the rule prohibits lawyers from using in-person, live telephone, or real-time electronic contact with prospective clients for pecuniary gain, it contains an exception when the person contacted is a lawyer.<sup>180</sup> Also, the comment to Model Rule 7.3 states that the rules for written, recorded, and electronic communications do not apply when the recipient is an attorney.<sup>181</sup>

The fact that the *Model Rules* allow lawyers free reign on direct contact with other lawyers is significant as the Supreme Court made it clear that the First Amendment does not protect direct solicitation.<sup>182</sup> Direct solicitation is seen as fraught with danger. As the Court stated in

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<sup>174</sup> *Id.* at 892. The provision was also challenged on the ground that the word “dignified” is constitutionally vague. *Id.* The District Court found the state had a substantial interest in maintaining the image of its lawyers and that requiring advertisements to be “dignified” furthered that interest. *Id.* However, the Supreme Court issued the *Zauderer* opinion the following year, which stated that assuring that attorneys maintain themselves in a “dignified manner” was not a sufficient state interest to restrict commercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 676 (1985).

<sup>175</sup> *Spencer*, 579 F. Supp. at 892.

<sup>176</sup> *Id.* (emphasis added).

<sup>177</sup> See generally MODEL RULES OF PROF’L CONDUCT (2008) [hereinafter MRPC].

<sup>178</sup> *Id.* at viii.

<sup>179</sup> MRPC R 7.3 (2008).

<sup>180</sup> See *id.* at R. 7.3(a)(1)(2008).

<sup>181</sup> See *id.* at R. 7.3 cmt. (2008).

<sup>182</sup> See generally *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (rejecting absolute First Amendment protection for lawyer advertising).

410 *Ohralik*, “the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.”<sup>183</sup> The key distinction between what the Court described and lawyer-to-lawyer advertising, of course, is that with communications between lawyers, there is no unsophisticated lay person to protect. The fact that the ABA sees no need for any regulation when a lawyer directly solicits another lawyer shows that the ABA recognizes lawyers need no protection from their colleagues. As stated in the Model Rule’s comment, there is no “serious potential for abuse when the person contacted is a lawyer.”<sup>184</sup>

A few states also issued advisory opinions regarding communications between lawyers.<sup>185</sup> Ohio’s Supreme Court, for example, was asked to consider whether one attorney could contact another to convey his interest in serving as appellate or local counsel.<sup>186</sup> The Ohio court advised that its state rules were meant to protect laypersons, not lawyers.<sup>187</sup> Therefore, lawyer-to-lawyer communications are not subject to regulation.<sup>188</sup> The court also stated telephonic and in-person communications are proper as the State’s rule prohibiting such contact does not apply to communications with lawyers.<sup>189</sup> The State Bar of California’s Standing Committee on

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<sup>183</sup> See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 465 (1978).

<sup>184</sup> See MRPC R. 7.3 cmt. (2002).

<sup>185</sup> See, e.g., Ohio Bd. of Comm’rs on Grievances & Discipline, Informal Advisory Opinion 2002-6 (2002).

<sup>186</sup> *Id.* at 1-2. The Supreme Court of Ohio actually considered three questions: (1) Whether it is proper for an Ohio attorney to contact another attorney to convey his interest in acting as appellate counsel when he learns that an appeal has been filed in an Ohio court; (2) whether it is proper for an Ohio attorney to contact out-of-state counsel to convey his interest in acting as local counsel when he learns that an out-of-state corporation has been named as a defendant in an Ohio court; and (3) whether it is proper for an Ohio attorney to contact an out-of-state corporation to ask for information as to the identity of the corporation’s counsel when he learns that an out-of-state corporation has been named as defendant in an Ohio court. *Id.*

<sup>187</sup> *Id.* at 3.

<sup>188</sup> See *id.*

<sup>189</sup> *Id.* at 3-4. The court saw no reason to bar lawyer-to-lawyer communications by telephone, mail, email, or in-person. *Id.* However, the court warned against contact through facsimile as there are federal and state laws against sending unsolicited advertisements by facsimile transmission. *Id.* at 4. Also, in answering the question regarding communications with out-of-state counsel, the court cautioned that the communication must not violate the laws of the other state. *Id.* It also advised that while communications with other counsel were not forbidden, a lawyer should not contact the corporate party in-person or by telephone to ask whether the corporation

Professional Responsibility and Conduct (Committee) likewise issued an opinion that lawyer-to-lawyer advertising does not fall within its rules because the rules were “intended to prevent fraud, undue influence, and other abuses” to laypersons and that lawyers are not likely to be subject to such conduct.<sup>190</sup> As the Committee stated in its opinion, the rules were meant to protect the public, not other lawyers “who can be presumed able to protect themselves.”<sup>191</sup>

## VII. RESTRICTIONS ON LAWYER-TO-LAWYER ADVERTISING VIOLATE THE FIRST AMENDMENT

The United States Supreme Court has been reluctant to place too many restrictions on commercial speech.<sup>192</sup> Since it first announced that the First Amendment entitles commercial speech to constitutional protection in 1976,<sup>193</sup> the Court has only upheld provisions restricting commercial speech related to lawyers in a handful of cases.<sup>194</sup> Florida, however, seems intent on moving in the opposite direction. Its new restriction on communications between attorneys is especially severe and violates the First Amendment. Applying the *Central Hudson Gas & Electric Corp.* test, restrictions on lawyer-to-lawyer advertising fall short of constitutional sufficiency.<sup>195</sup> Assuming that an advertisement is lawful and not misleading, the second prong of the test dictates that the Court must then determine whether the State has a substantial interest in regulating the advertisement.<sup>196</sup> In the case of communications between

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has counsel. *Id.* at 5. Contact with the corporate party itself must follow the direct mail rules. *Id.*

<sup>190</sup> See Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Opinion 2004-165 (2004), reprinted in STATE BAR OF CAL., RECENT DEVS. IN THE LAW OF LAWYERING 2003-2004 50 (2004). The opinion mainly dealt with ethical issues surrounding a business run by lawyers that provides independent lawyers to firms on a contract basis. *Id.* The lawyer-to-lawyer advertising issue arose because the business advertises only to other lawyers. *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (proposing the proper steps to take in analyzing a restriction on commercial speech).

<sup>193</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976).

<sup>194</sup> See, e.g., *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 620 (1995) (upholding restrictions on personal injury lawyers from sending mail to victims and their families).

<sup>195</sup> See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564, 566.

<sup>196</sup> See *id.*

One interest that parties asserted in the past is the protection of the public.<sup>197</sup> A comment to Florida’s advertising rules states that while the *public* needs information regarding legal services, certain types of advertising pose the risk of “misleading or overreaching and can create unwarranted expectations . . . .”<sup>198</sup> One cannot emphasize enough that the focus has always been on the protection of the public, not lawyers.<sup>199</sup> The thought process is that the public is not knowledgeable and has not had the training to understand legal nuances.<sup>200</sup> They also do not generally understand the practicalities of the legal world such as how a law practice functions and how a lawyer gets paid.<sup>201</sup> For instance, the average consumer might not know the difference between fees and costs. Lawyers, however, need no protection because they are knowledgeable of the law. They understand legal jargon and the limitations of the justice system. Although an individual lawyer may not be competent in all practice areas, he should at least know how to access the information to answer any questions he might have.

A comment to the rules also expresses the concern that advertising might reflect poorly on the *public’s* perception of the judicial system.<sup>202</sup> In considering a communication that one lawyer sends to another lawyer, it is difficult to conceive how such a communication can affect the public because a member of the public would never see the advertisement unless it was given to him by the recipient attorney. During oral arguments concerning the proposed amendments regarding communications between lawyers, Justice Wells expressed his concern that lawyers would pass on these advertisements to members of the public because the lawyers sought to refer clients to other lawyers.<sup>203</sup> Even if lawyers pass on those advertisements, the public will not be receiving them directly. There is a layer of protection from the attorney who received the ad and has had a chance to screen it before passing it on. The attorney is available to clarify any confusing

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<sup>197</sup> See *In re R.M.J.*, 455 U.S. 191, 200 (1981) (citing lack of public sophistication as a reason for protection).

<sup>198</sup> See FRPC R. 4-7.1 cmt. (2008).

<sup>199</sup> See, e.g., *In re R.M.J.*, 455 U.S. at 200.

<sup>200</sup> See FRPC R. 4-7.1 cmt. (2008).

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> Transcript of Oral Argument, *supra* note 28, at 4.

A couple of members of the Task Force raised concerns early on in their discussions that communications between lawyers might need regulation when a lawyer is the potential client.<sup>204</sup> However, the fact that a lawyer might be in need of legal representation does not change the fact that he or she still has a certain level of knowledge that the average layperson does not.<sup>205</sup> The recipient's comprehension should measure the need for protection and subsequent regulation, not the sender's intent.

Even if the Court found an interest to be sufficient, the State would still have to show that the regulation advanced the interest asserted to satisfy the third prong of the *Central Hudson Gas & Electric Corp.* test.<sup>206</sup> As the Supreme Court reiterated in *Went for It, Inc.*, the State must show the harms are real and that the restrictions will alleviate them.<sup>207</sup> The Court was satisfied with studies and anecdotal evidence to prove the harms.<sup>208</sup> According to the Florida Bar's recent study, there is no harm derived from communication between attorneys.<sup>209</sup> Ninety-one percent of the attorneys surveyed had not received a communication from another lawyer that they perceived to be false in the last five years.<sup>210</sup> In light of that, it is not surprising that over two-thirds of the attorneys felt that the Bar should not regulate attorney-to-attorney communication, and eighty percent felt that the Bar did not need to review those communications before dissemination.<sup>211</sup> The statistical evidence does not show any harm from lawyer-to-lawyer advertising.<sup>212</sup>

The anecdotal evidence detailing any harm from communication between attorneys is also sparse. While some survey respondents

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<sup>204</sup> Final Report, *supra* note 22, at 28.

<sup>205</sup> *See id.* at 44. It has also been argued by some that the advertising restrictions should not apply when the targeted potential clients are savvy businesspeople, as they often have a level of legal sophistication not possessed by the average layperson. That, of course, is a topic for another discussion.

<sup>206</sup> *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>207</sup> *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995).

<sup>208</sup> *Id.* at 627.

<sup>209</sup> *See* The Fla. Bar, *supra* note 4, at 5, 6 (reporting that attorneys did not feel the Florida Bar should regulate attorney-to-attorney communication).

<sup>210</sup> *Id.* at 4.

<sup>211</sup> *See id.* at 5, 6.

<sup>212</sup> *See id.*

414 reported communications they received from other attorneys that contained false statements, many of the complaints concerned interactions during the course of litigation, not solicitations.<sup>213</sup> Some attorneys reported seeing marketing materials from attorneys such as spam e-mails or facsimiles offering “materials or services that appear to be too good to be true.”<sup>214</sup> However, they did not explain if or how the advertisements caused them harm.<sup>215</sup> Furthermore, most of the attorneys recounting false communications also described ways that they handled the situations,<sup>216</sup> again showing that the majority of attorneys are skilled enough to deal with communications from their peers, whether false or not. Justice Wells’ anecdote during oral argument, about receiving an irritating brochure in the mail from a law firm, also fails to demonstrate a real harm.<sup>217</sup> Justice Wells was clearly disturbed that the advertisement boasted of the firm’s recent monetary recoveries, statements that would have violated the rules’ prohibition against references to past successes or results obtained had the brochure not been a lawyer-to-lawyer communication that the rules exempted at the time.<sup>218</sup> As it was pointed out during oral argument, however, a lawyer should be able to tell whether a certain recovery is a good result where a layperson could not.<sup>219</sup>

Finally, the restriction must be narrowly tailored to serve the asserted interest.<sup>220</sup> If the interest is in protecting the public and keeping the public’s perceptions from a negative view of lawyers, the restrictions should be focused on advertisements that lawyers disseminate to the public, not those intended for other lawyers. Prior to the recent change, the rules were less restrictive and were still accomplishing that interest.<sup>221</sup> If the concern is that a lawyer might pass the advertisement on to the member of the public, the rules could use other less restrictive methods. For instance, the rules could require lawyers to screen all materials passed on to nonlawyers to make sure

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<sup>213</sup> *Id.* at 21.

<sup>214</sup> *Id.* at 12, 13.

<sup>215</sup> *See id.*

<sup>216</sup> *See, e.g., id.* at 13.

<sup>217</sup> Transcript of Oral Argument, *supra* note 28, at 2.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 4.

<sup>220</sup> *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002) (supporting the application of the *Central Hudson* test).

<sup>221</sup> *See* FRPC R. 4-7.1 cmt. 5 (2002), available at [http://www.law.cornell.edu/ethics/fl/code/CRule\\_4-7.1.htm](http://www.law.cornell.edu/ethics/fl/code/CRule_4-7.1.htm).

### VIII. IMPLICATIONS OF RESTRICTIONS ON LAWYER-TO-LAWYER ADVERTISING

With the removal of the comment excluding communications between lawyers, there seems to be little room to interpret Florida's advertising rules except to conclude that lawyer-to-lawyer communications are subject to the same regulations as all other lawyer marketing.<sup>222</sup> As the Florida Bar's recent study shows, most attorneys in private practice utilize communications with other attorneys, including the giving and receiving of referrals, as a way to generate business.<sup>223</sup> The study also reflects that face-to-face and telephone contact are the most frequently used methods.<sup>224</sup> Now that lawyer-to-lawyer advertising is subject to regulation, the regulations prohibit face-to-face and telephone contact, and the regulations also restrict written communications.<sup>225</sup> The change will undoubtedly affect the ability of many lawyers to obtain clients.

Moreover, attorneys may have to reconsider not only how they advertise, but also how they communicate with other lawyers altogether. The rules prohibit in-person and telephone contact *when the motive is the lawyer's pecuniary gain*.<sup>226</sup> Interpreting the rules strictly, networking opportunities such as bar meetings and socials are now potential mine fields as the point of networking, of course, is to develop business relationships.<sup>227</sup> Every time an attorney introduces himself to a lawyer and hands him a business card or talks about his practice, he is marketing himself and could be subject to reprimand. Likewise, the telephone calls, e-mails, and meetings he sets up to maintain those contacts could put him in danger of violating an advertising rule.<sup>228</sup>

So many activities lawyers partake in on a daily basis can now put them in danger of punishment by the Bar. For instance, if an attorney wins a big case and wants to let his friends, who also happen to

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<sup>222</sup> *See id.*

<sup>223</sup> *See* The Fla. Bar, *supra* note 4, at 2.

<sup>224</sup> *Id.*

<sup>225</sup> *See* FRPC R. 4-7.2 cmt. (2008).

<sup>226</sup> FRPC R. 4-7.4(a).

<sup>227</sup> *See id.* (prohibiting solicitation of professional employment by a lawyer when "a significant motive for the lawyer's doing so is the lawyer's pecuniary gain").

<sup>228</sup> *See* FRPC R. 4-7.2 cmt.

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be fellow attorneys, know. If he calls his friends or sends out an e-mail boasting about what a great job he did, the Bar could potentially discipline him because he referred to “past successes or results obtained.”<sup>229</sup> Many firms send out announcements to other lawyers when they hire a new associate, when a member becomes a partner, or when they open a new office. These announcements would now come under scrutiny.<sup>230</sup> Something as simple as a firm logo might make the announcement noncompliant.<sup>231</sup> If a lawyer mentions to his attorney acquaintances in conversation that he is now certified as a mediator or arbitrator, he may run afoul of the rules, as the Bar could view his comment as an in-person solicitation.<sup>232</sup> A new lawyer fresh out of law school could run into trouble by sending out a mass mailing of resumes to law firms if he does not follow the extensive requirements of the rules.

Lawyers should be able to have free discourse with their colleagues. Restrictions on communications between lawyers could result in a chilling effect. If an attorney had to stop and think about whether any simple phone call or e-mail to another lawyer could be construed to be a solicitation or advertising, he or she would of course be more reluctant to participate in that behavior. The rules are broad and offer no clear definitions to guide a lawyer in avoiding any trouble from the Florida Bar by choosing to err on the safe side. Attorneys communicate with their counterparts not just to generate business but for a multitude of other reasons. Lawyers often meet with or call other attorneys to get input on their cases or strategize or brainstorm new interpretations of the law. The attorney who has just won a precedent-setting case, for example, might want to inform other lawyers, not only because it would be good for business, but because his case is one that others might want to cite to. This is just the kind of collegial discourse that will be dampened if a lawyer is in constant fear that something he might say or do could be misinterpreted as solicitation.

## IX. CONCLUSION

Not much has been written for or against restrictions on communications between lawyers. The Florida Bar likewise spent very

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<sup>229</sup> *See id.* at R. 4-7.2(c)(1)(F).

<sup>230</sup> *See id.* at R. 4-7.2 cmt.

<sup>231</sup> *See id.* at R. 4-7.2 (b)(1)(L), (c)(3).

<sup>232</sup> *See* FRPC R. 4-7.4 (a).

little time discussing the topic prior to the Supreme Court's decision in 2006.<sup>233</sup> The idea that lawyers do not need protection from other lawyers is so obvious that it has not merited much discussion. The courts said repeatedly that there is a constitutional right to commercial speech, and that right may only be infringed if certain specific requirements are met.<sup>233</sup> The State must show that it has a substantial interest that can be served through the regulation.<sup>234</sup> The courts allowed some regulation of attorney advertising because the *public* is not sophisticated.<sup>235</sup> Lawyers, however, are erudite and trained to decipher the writing of other lawyers. The Florida Bar's study found that ninety-one percent of lawyers had not received false or incorrect communications from other lawyers in the past five years, further strengthening the argument that attorneys have no need for protection from their peers.<sup>236</sup>

Most lawyers will admit that one of the greatest tools in the practice of law is the relationships built with other lawyers. Attorneys rely on peers and colleagues in all aspects of their practice. The ability to communicate with other attorneys is vital not only to the individual lawyer, but also to legal society as a whole. It is information sharing that allows the population of attorneys to collectively grow in knowledge, and the collegial discourse that keeps the practice of law civil. Restrictions on communications between lawyers are not only unconstitutional but also unnecessary, wearing down the very foundations of the legal community.

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<sup>233</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>234</sup> See *id.*

<sup>235</sup> See *In re R.M.J.*, 455 U.S. 191, 200 (1982).

<sup>236</sup> See *The Fla. Bar*, *supra* note 4, at 4.