In *Harrell v. The Florida Bar*, the United States District Court for the Middle District of Florida examined "as-applied" First Amendment challenges to an attorney's marketing campaign featuring the slogan, "Don't settle for less than you deserve." [94] The Bar initially advised him to change the slogan to, "don't settle for anything less," explaining that his slogan would create unjustified expectations.[95] The Bar, however, later revoked acceptance of any version of the new slogan, finding that it improperly characterized his services in violation Rule 4-7.2(c)(2), which bans all "statements describing or characterizing the quality of the lawyer's services."[96] The attorney then filed suit challenging this rule, as well as other Florida advertising rules that allegedly prohibited various marketing strategies and chilled commercial speech in violation of his First and Fourteenth Amendment rights.[97] Specifically under review, in addition to Rule 4-7.2(c)(2), was Rule 4-7.5(b)(1)(C), which contained the Florida Bar's categorical ban on all background sounds.[98] The prohibition included all background sounds in television and radio advertisements except instrumental music: such as the background noises caused by the attorney-plaintiff's dogs, gym equipment, and other activities in his law firm that were part of his proposed advertisements.[99]

Applying the *Central Hudson* test, the district court concluded that the two advertising rules impermissibly restricted the attorney's First Amendment rights.[100] First, the court found that both the slogan and intended use of background sounds were neither actually nor inherently misleading.[101] Next, the court concluded that the State had two substantial interests: first, an interest in "ensuring that the public has access to information that is not misleading to assist the public in the comparison and selection of attorneys," and second, an interest in "preventing the erosion of the public's confidence and trust in the judicial system and curbing activities that negatively affect the administration of justice."[102]

Finally, upon applying the third prong of *Central Hudson*, the court found that neither rule directly or materially advanced the Bar's asserted interests.[103] In particular, the court found that there was insufficient concrete evidence to justify the Bar's categorical ban on background sounds, stating that "[i]n the absence of any evidence that prohibiting the type of innocuous non-instrumental background sounds as those proposed by Harrell here will protect the public from being misled or prevent the denigration of the legal profession, the Bar has failed to satisfy the third prong of the *Central Hudson* test."[104] Thus, the regulations as applied to Harrell were deemed unconstitutional.

Florida's amended regulations are currently facing another First Amendment challenge under the *Central Hudson* test. In *Searcy et al. v. The Florida Bar*, a personal injury law firm filed a lawsuit against the Florida Bar, attacking regulations that prohibit statements of quality and past results unless such statements are

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[94] Harrell v. Fla. Bar, 915 F. Supp. 2d 1285, 1289 (M.D. Fla. 2011).

[95] Harrell v. Fla. Bar, 608 F.3d 1241, 1249 (11th Cir. 2010)..

[96] *Id.*

[97] *Id.* at 1250.

[98] *Id.*

[99] *Id.* at 1251.

[100] *Harrell*, 915 F. Supp. 2d at 1309-10.

[101] *Id.*

[102] *Id.* at 1302.

[103] *Id.* 1308-10.

[104] *Id.* at 1310.

surrounding the firm's name, and slogans such as "heavy hitters" and "think big," among other gimmicks.[78] After New York's Appellate Division adopted "content-based" lawyer advertising rules to regulate *potentially* misleading advertisements consisting of "irrelevant, unverifiable, and non-informational" statements and portrayals, the attorney filed a complaint, contending that the new rules infringed upon his First Amendment rights because the rules prohibited "truthful, nonmisleading communications that the state ha[d] no legitimate interest in regulating."[79]

The Second Circuit agreed after scrutinizing the regulation's categorical bans on (i) the endorsement of or testimonial about a lawyer or law firm from a client regarding a matter that is still pending, (ii) the portrayal of a judge, (iii) the irrelevant "attention-getting techniques unrelated to attorney competence,"[80] such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and (iv) the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter. The court found that this type of information is not inherently misleading or even likely to be misleading.[81] Therefore, this kind of advertising did not warrant the State's general sweeping prohibition contained in the new rules and so the regulations failed the *Central Hudson* test and were adjudged unconstitutional.[82]

Public Citizen v. Louisiana Attorney Disciplinary Board presented the Fifth Circuit with issues similar to those decided upon in *Alexander v. Cahill*. Here, six subparts of the Louisiana Supreme Court's new attorney advertising Rule 7.2(c) faced constitutional attack: (i) the prohibition of communications that contain references or testimonials to past successes or results obtained; (ii) the prohibition of communications that promise results; (iii) the prohibition of communications that include a portrayal of a client by a non-client, or the depiction of any events or scenes or pictures that are not actual or authentic, without disclaimers; (iv) the prohibition of communications that include the portrayal of a judge or a jury; (v) the prohibition of communications that employ a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter; and (vi) the requirement of disclosures and disclaimers that are clear and conspicuous and of a certain format, size, and visual/auditory display.[83] The Fifth Circuit found that these subparts of the rule, with the exception of

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[78] *Alexander*, 598 F.3d at 84.

[79] *Id.* at 84-86.

[80] *Id.* at 93. This categorical ban was similar in substance to several of the Florida Bar's advertising rules at issue in *Harrell v. The Florida Bar*: Rule 4-7.1, which was a "general prefatory rule, the comment to which limits permissible advertising content to 'only useful, factual information presented in a nonsensational manner,'" Rule 4-7.2(c)(3), which prohibited the use of "'visual and verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events' that are 'manipulative, or likely to confuse the viewer,'" and Rule 4-7.5(b)(1)(A), which similarly prohibited "any television or radio advertisement that was '"deceptive, misleading, manipulative, or that is likely to confuse the viewer."'" *Harrell v. Fla. Bar*, 608 F.3d 1241, 1250 (11th Cir. 2010). There, on remand, the district court struck down these rules on the ground that they were impermissibly vague, indeterminate, and exerted a chilling effect on a lawyer's proposed commercial speech that had a right to constitutional protection. *Harrell*, 915 F. Supp. 2d 1285, 1311 (M.D. Fla. 2011). *See also* Jacobowitz & Hethcoat, *supra*, note 34, at 72-73.

[81] *Alexander*, 598 F.3d at 96.

[82] *Id.*

[83] This subpart of the rule provided:

> "Any words or statements required by these Rules to appear in an advertisement or unsolicited written communication must be clearly legible if written or intelligible if spoken aloud. All disclosures and disclaimers required by these Rules shall be clear and conspicuous. Written disclosures and disclaimers shall use a print size at least as large as the largest print size used in the advertisement or unsolicited written communication, and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and read the disclosure or disclaimer. Spoken disclosures and disclaimers shall be plainly audible and spoken at the same or slower rate of speed as the other spoken

(footnote continued)

their dignity in their communications with the public, and behave with decorum in the courtroom—was not convincingly "substantial enough to justify the abridgment of [the attorneys'] First Amendment rights."[60] Moreover, the Court opined that the State's restrictions amounted to an impermissibly broad prophylactic rule in the form of a blanket ban on the use of illustrations, especially given that the State could police the use of illustrations in advertisements on a narrower, more tailored, case-by-case basis.[61]

Nonetheless, the Court did uphold Ohio's disclosure requirements relating to the terms of contingent fees. The Court found that the State's interest in preventing deception of consumers was substantial because the attorney's advertisement, which stated, "[i]f there is no recovery, no legal fees are owed by our clients," would mislead and deceive the public and potential clients who do not necessarily understand the distinction between the technical meanings of "legal fees" and "costs."[62] The Court concluded that the disclosure requirements were not more extensive than necessary to serve the state interest where Ohio has "not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present."[63] Accordingly, the attorney's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal . . . [as] disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech."[64]

c. *Peel v. Attorney Registration & Disciplinary Commission*

Five years later, in *Peel v. Attorney Registration & Disciplinary Commission*, the U.S. Supreme Court considered whether an Illinois attorney's letterhead, stating that he is a National Board of Trial Advocacy ("NBTA") certified civil trial specialist, was First Amendment protected speech.[65] The Illinois regulations stated that "no lawyer may hold himself out as 'certified' or a 'specialist'" and that "communication shall contain information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive."[66] Accordingly, the Attorney Registration and Disciplinary Commission of Illinois ("Commission") and the Illinois Supreme Court deemed the attorney's letterhead— referring to his NBTA certification and his licensure in three jurisdictions— inherently misleading and thus unprotected by the First Amendment.[67]

However, the U.S. Supreme Court held that the contents of the attorney's letterhead were neither misleading nor deceptive because the certification and licensure were both true and verifiable facts.[68] Rejecting the argument that the attorney's listing of certification constituted an implicit assertion as to the quality of his legal services, the Court reasoned that there is no evidence that a claim of NBTA certification suggests any

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[60] *Id.* at 647-48.

[61] *Id.* at 649.

[62] *Id.* at 652.

[63] *Id.* at 650.

[64] *Id.* at 651 (Emphasis Added).

[65] Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 93-94 (1990).

[66] *Id.* at 97.

[67] *Id.* at 98-99.

[68] *Id.* at 101.

listing the areas of his practice in language or in terms other than that provided by the Rule, failing to include a disclaimer, listing the courts and States in which he had been admitted to practice, and mailing announcement cards to persons other than 'lawyers, clients, former clients, personal friends, and relatives.'"[39] Specifically, the lawyer had listed in his advertisements areas of law not explicitly approved by the Missouri Bar's Advisory Committee, including the words "personal injury" and "real estate" instead of the Bar-approved words, "tort law" and "property law," respectively.[40] He also listed in his advertisements other areas of law, such as "contract" and "zoning & land use" that were not found on the Advisory Committee's list at all.[41] His advertisements in local newspapers and the Yellow Pages also stated that he was licensed in Missouri and Illinois, and contained in large capital letters a statement that he was "Admitted to Practice Before THE UNITED STATES SUPREME COURT."[42]

On the issues of listing the areas of law and licensed jurisdictions, the U.S. Supreme Court found that the lawyer's advertisements were not misleading.[43] The Court also found that the answer to the second inquiry of the *Central Hudson* test—whether the asserted governmental interest was substantial in this case—was no.[44]

The Court determined that the state interest was unclear as to enforcing an absolute prohibition.[45] This led the Court to posit that the fourth factor of the *Central Hudson* test could not be met, as there was room for a "less restrictive path" instead of absolute prohibition.[46] Thus, applying *Central Hudson*, the Court found unconstitutional the Missouri rules that provided an absolute prohibition on the advertising of descriptive practice areas, licensed jurisdictions, and the mailing of announcements to persons other than lawyers, clients, former clients, friends, and relatives.

Notably, in his appeal, the lawyer did not challenge the constitutionality of the rule requiring disclaimers.[47] As such, the Court permitted that requirement to stand and explained that "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."[48] The Court would consider the issue of when disclaimers are too burdensome in later cases.

b. *Zauderer v. Office of Disciplinary Council*

Zauderer v. Office of Disciplinary Council involved two different local newspaper advertisements: the first advertisement stated that the attorney would represent defendants in drunk driving cases and that his clients' "full legal fee would be refunded if they were convicted of DRUNK DRIVING"; and the second

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[39] *In re* R.M.J., 455 U.S. at 204.

[40] *Id.* at 197.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 205.

[44] *Id.*

[45] "Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards." *Id.* at 206.

[46] *Id.*

[47] *Id.* at 204.

[48] *Id.* at 201.

to consumers in the form of increased fees; (v) advertising will lead to poor quality of service; and (vi) the problems of enforcement justify wholesale restrictions.[24] The Court rejected the "highly paternalistic" approach that the state must protect citizens from advertising because it potentially could manipulate them, and concluded that barring lawyer advertising only "serves to inhibit the free flow of commercial information and to keep the public in ignorance."[25] The Court explained that even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that *some* accurate information is better than *no* information at all.[26] Put differently, the Court stated that "the preferred remedy is more disclosure, rather than less."[27] Thus, out of this decision came the birth of a revolutionary concept that lawyers may have a general constitutional right to advertise.

C. Regulation Since *Bates v. Arizona*

Although the *Bates* court invalidated an absolute prohibition on lawyer advertising, it nonetheless left the door open for states to regulate advertising. For example, states retained the authority to prohibit false, deceptive, or misleading advertising, and to place reasonable restrictions on time, place, and manner of advertising.[28] In declining to consider the full range of potential problems for lawyers when advertising, the Court defaulted to the state bars to apply *Bates* and revise existing regulations accordingly.[29] This undefined scope of regulation bolstered the longstanding reluctance to permit lawyer advertising. Most state bars narrowly construed *Bates* and thereby preserved as much of the traditional view of advertising as unprofessional as could withstand constitutional challenge.[30]

Two years after the decision, the state bars' reaction to *Bates* was "hesitant and inconsistent," as fifteen states had not drafted any new lawyer advertising standards.[31] By 1983, however, the ABA adopted its Model Rules of Professional Conduct ("Model Rules" or "RPCs").[32] In the Model Rules, the ABA expressly permitted advertising, as Rule 7.2(a) stated, "subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication."[33] Many states then followed suit, enacting various advertising regulations and attempting to straddle the fine line between advertising as a constitutionally protected speech and misleading advertising.[34]

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[24] *Id.* at 368-79.

[25] *Id.* at 365.

[26] *Id.* at 374-75.

[27] *Id.* at 375.

[28] *Id.* at 383-84.

[29] "Underlying all of the post-*Bates* amendments is the theory that *Bates* declared a general right to advertise, leaving to the states a regulatory power to prescribe the form, content, and forum of lawyer advertising." Boden, *supra* note 10, at 555.

[30] *Id.*; *see also In re* R.M.J., 455 U.S. 191, 200 (1982) ("the decision in *Bates* nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated.").

[31] Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1086.

[32] *Id.* at 1087.

[33] MODEL RULES OF PROF'L CONDUCT R. 7.2 (AM. BAR ASS'N 1983).

[34] Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising*, 17 J. TECH. L. & POL'Y 63, 64 (2012); R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO J.

(footnote continued)

III. A Brief History of the Regulation of Lawyer Advertising

A. How We Got to Where We Are

Over the years, the regulation of lawyer advertising has swung from one extreme to another and come to a sudden halt at its current position where it ambivalently hovers between the two. At the one extreme, the regulation once consisted of a longstanding blanket prohibition on *all* lawyer advertising. At the other extreme, and with the blink of an eye, the nationwide ban was lifted and the U.S. Supreme Court expressed its decisive recognition of lawyer advertising as commercial free speech protected under the First Amendment. Nevertheless, the Supreme Court left the authority in the states' hands to continue regulating lawyer advertising, and the state regulators have pursued that mandate without much consistency. With ever-changing technologies, which allow for instantaneous and global communication, regulation has become challenging for regulators and practicing attorneys alike who strive to assure that attorney advertising is compliant under both evolving rules and new technology. Lawyers wanting to embrace these new technologies have been reluctant to do so out of concern that they will not comply with lawyer advertising regulation.

B. Regulation Prior to *Bates v. Arizona*

The regulation of lawyer advertising goes as far back as the nineteenth century in Great Britain, where it was a rule of etiquette, not of ethics, based on the view that law was a form of public service and not a means of earning a living.[8] As such, lawyers looked down on advertising as unseemly.[9] This "rule" was neither enforced nor considered "law" in the general sense of the word; instead, it was merely understood.

In 1908, the American Bar Association (the "ABA") adopted the *Canons of Professional Ethics* (the "Canons") and established a general prohibition of all advertising.[10] The logic behind this categorical ban was that advertising was unprofessional; and therefore, lawyer advertising would threaten the requisite of professionalism in lawyering.[11] As Robert Boden, Dean and Professor of Law at Marquette University states, "[h]igh standards and advertising did not mix."[12] Thus began a half-century-long tradition as three generations of lawyers in the United States deemed advertising to be unprofessional and therefore strictly prohibited.

In 1969, the ABA enacted its 1969 *Code of Professional Responsibility* (the "Code"), which maintained the general prohibition of attorney advertising.[13] However, shortly thereafter the adherence to a blanket ban on advertising began to unravel. In 1975, the U.S. Supreme Court decided *Goldfarb v. Virginia State Bar*, and posited that lawyers provide services in exchange for money and thus engage in "commerce."[14] Though this case did not deal directly with the question of lawyer advertising, it nonetheless suggested that the practice of law is not just a profession—it is also a business. As the Court explained, "[i]t is no disparagement of the

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[8] Bates v. State Bar of Ariz., 433 U.S. 350, 371 (1977).

[9] *Id.*

[10] The general prohibition contained a few limited exceptions called a "laundry list" of permitted advertising activity. Robert F. Boden, *Five Years After* Bates*: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 549 (1982).

[11] *Id.* at 554.

[12] *Id.* at 550.

[13] *Id.*

[14] Goldfarb v. Va. State Bar, 421 U.S. 773, 787-88 (1975).

believes that state regulators should establish procedures for responding to complaints regarding lawyer advertising through non-disciplinary means. Professional discipline should be reserved for violations that constitute misconduct under ABA Model Rule 8.4(c).[3] The Committee recommends that violations of an advertising rule that do not involve dishonesty, fraud, deceit, or misrepresentation under Rule 8.4(c) should be handled in the first instance through non-disciplinary means, including the use of advisories or warnings and the use of civil remedies where there is demonstrable and present harm to consumers.

The Committee decided to focus initially on advertising activities regulated under ABA Model Rules 7.1 ("Communications Concerning a Lawyer's Services"), 7.2 ("Advertising"), 7.4 ("Communications of Fields of Practice and Specialization") and 7.5 ("Firm Names and Letterheads"). The proposed revisions to these rules are set forth in Attachment 2. The proposed revisions to ABA Model Rules 7.1., 7.2, 7.4, and 7.5 retain the standard of prohibiting "false and misleading" communications in Rule 7.1 as the all-encompassing criterion for the regulation of lawyer advertising. Commentary from Rules 7.2, 7.4, and 7.5 has been merged into the Comments in Rule 7.1 to provide additional guidance to practitioners about what types of communications involving advertising, marketing, use of the terms "certified specialist," and firm names do and do not comport with the Rule 7.1 standard. The remainder of Rules 7.2, 7.4, and 7.5 were deleted, given the consensus that Rule 7.1 establishes a sufficient basis for the regulation of legal services advertising. The Committee reserved consideration, for a later time, of issues related to the regulation of direct solicitation of clients (Model Rule 7.3) and communications transmitted in a manner that involves intrusion, coercion, duress, or harassment.[4] The Committee also deferred consideration regarding the effect of certain forms of lawyer advertising and marketing on the regulation of lawyer referral services.[5]

In submitting these recommendations, the Committee is not advocating that states abdicate their regulators' authority over lawyer advertising. Instead, the proposed amendments to the ABA Model Rules on advertising and the proposed enforcement procedures are a common sense response to the major practical and constitutional problems that the Committee has identified with the current approach to regulating lawyer advertising.

II. Identifying the Problem and the Need for Change

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[3] ABA Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

[4] The U.S. Supreme Court has identified other considerations related to direct solicitation that are outside the scope of this report. *E.g.* The Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (holding that Florida's 30-day ban on direct mail solicitation in accident or disaster cases materially advances, in a manner narrowly tailored to achieve the objectives, the state's substantial interest in protecting the privacy of potential recipients and in preventing the erosion of public confidence in the legal system); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (holding that a state may not totally prohibit targeted direct mail to prospective clients known to face specific legal problems where the state's interest in preventing overreaching or coercion by an attorney using direct mail can be served by restrictions short of a total ban); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding a total ban of in-person solicitation when the primary motivation behind the contact is the attorney's pecuniary gain); *In re* Primus, 436 U.S. 412 (1978) (holding that direct in-person solicitation is entitled to greater constitutional protection against state regulation when the attorney is motivated by the desire to promote political goals rather than pecuniary gain). *See also* The Fla. Bar v. Herrick, 571 So.2d 1303 (1990) (holding that a state can constitutionally regulate and restrict direct-mail solicitations by requiring personalized mail solicitation to be plainly marked as an "Advertisement."); *"Commercial Speech Doctrine,"* THE FLORIDA BAR, https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3BC6699A524B477B85257283005D415D/$FILE/Information%20on%20the%20Commercial%20Speech%20Doctrine.pdf?OpenElement.

[5] See, e.g., Geeta Kharkar, *Googling for Help: Lawyer Referral Services and the Internet,* 20 GEO. J. LEGAL ETHICS 769 (2007).

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~~Comment~~

~~[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.~~

~~[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.~~

~~[3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person's judgment.~~

~~[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

~~[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from~~

endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (~~b~~f)(1), however, allows a lawyer to pay for advertising and ~~communications~~solicitations permitted by Rule 7.1 and this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers, as long as the employees, agents and vendors do not direct or regulate the lawyer's professional judgment (See Rule 5.4(c)). Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[10~~6~~] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

~~[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would~~

~~regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.~~

~~[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~*[portions of these Comments were moved to the Comments to 7.1]*

Solicitation

[1] A lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves in-person, face-to-face or live telephone contact by a lawyer with someone known to need legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyers to the public, rather than direct in-person, face-to-face or live telephone communication, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.1 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of in-person, face-to-face or live telephone communication can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading. All solicitations permitted under this Rule must comply with the prohibition in Rule 7.1 against false and misleading communications

[4] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or a sophisticated user of legal services. A sophisticated user of legal services is an individual who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. Consequently, the general prohibition in paragraph (b) and the requirements in paragraph (c) are not applicable in those situations. Also, paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade

APRL Proposed Amendments to
ABA Model Rules of Professional Conduct 7.2 and 7.3
[REDLINE VERSION]

Rule 7.2 ~~Advertising~~Solicitation of Clients

Solicitation

(a) ~~Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.~~A solicitation is a targeted communication initiated by or on behalf of a lawyer, that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services for a particular matter.

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(b) Except as provided in paragraphs (c) and (e), a lawyer shall not solicit in person by face-to-face contact or live telephone, or permit employees or agents of the lawyer to solicit in person or by live telephone on the lawyer's behalf, professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

(4) is a lawyer;
(5) is a sophisticated user of legal services;
(6) is pursuant to a court-ordered class action notification; or
(4) has a family, close personal, or prior professional relationship with the lawyer.

Written Solicitation

(c) Every written, recorded or electronic solicitation by or on behalf of a lawyer seeking professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (b)(1)-(4).

Limitation on Solicitation

(d) A lawyer shall not solicit professional employment from any person if:
(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.

Prepaid and Group Legal Services Plans

(e) Notwithstanding the prohibitions in paragraph (b), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Paying Others to Recommend a Lawyer

designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 7.1 and this Rule. See Rule 8.4(a).

Paying Others to Recommend a Lawyer

[9] Except as permitted under paragraphs (f)(1)-(f)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rules 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (f)(1), however, allows a lawyer to pay for advertising and solicitations permitted by Rule 7.1 and this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers, as long as the employees, agents and vendors do not direct or regulate the lawyer's professional judgment (see Rule 5.4(c)). Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[10] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

(f) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:

(1) pay the reasonable costs of advertisements and other communications permitted by Rule 7.1, including online group advertising;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
(i) the reciprocal referral agreement is not exclusive; and
(ii) the client is informed of the existence and nature of the agreement.

Comment

Solicitation

[1] A lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves in-person, face-to-face or live telephone contact by a lawyer with someone known to need legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyers to the public, rather than direct in-person, face-to-face or live telephone communication, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.1 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of in-person, face-to-face or live telephone communication can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading. All solicitations permitted under this Rule must comply with the prohibition in Rule 7.1 against false and misleading communications

ATTACHMENT A

who work in the same firm as the lawyer receiving the referral. Rule 7.2(f)(1) is changed to clarify that payments for online group directories/advertising platforms are just payments for advertising. Paying for referrals historically was a prohibited form of solicitation, allegedly because of the risk that a lawyer who pays someone for referrals would engage in unseemly "ambulance chasing" by engaging runners to lure potential clients. Thus, as Hazard, Hodes, & Jarvis, *Law of Lawyering* §60.05 (4th ed. 2015) notes: "Ordinarily, paying for a recommendation of a lawyer's services is a form of solicitation, and thus prohibited by Model Rule 7.3. Rule 7.2(b), however, provides several commonsense exceptions for a recommendation of services, but where the evils of direct contact solicitation are not present." The Committee has added the language about employees and lawyers in the same firm to address the reality that lawyers in the same firm routinely pay a portion of earned fees on a matter to the "originating" lawyer in the firm. The policy prohibiting giving anything of value for client referrals reflects the same public policy concerns as the Federal Trade Commission's restrictions on the use of endorsements and testimonials in advertising, which are premised on the recognition that marketing products and services based on compensated endorsers, without conspicuous disclosure of the details of their connections, is unfair and deceptive to consumers. *See* 16 C.F.R. Part 255.

The provision in Model Rule 7.2(b) pertaining to lawyer referral services has been carried forward without change to paragraph (f)(2) to permit, among other things, lawyers to pay charges for prepaid plans and not-for-profit or "qualified lawyer referral service." The language was modified in 2000 because, as the Reporter's Notes to the *ABA Ethics 2000 Commission Proposed Amendments to the Model Rules of Professional Conduct* explain:

> This change is intended to more closely conform the Model Rules to ABA policy with respect to lawyer referral services. It recognizes the need to protect prospective clients who have come to think of lawyer referral services as consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.

Comments to Proposed Rule 7.2

Comment [1] to proposed Rule 7.2 is derived from the second sentence in Comment [1] to Model Rule 7.3.

Comments [2] and [3] are Comments [2] and [4] of Model Rule 7.3. No substantive change is intended.

Comment [4] derives from Comment [5] to Model Rule 7.3 and adds a sentence describing who is a sophisticated user of legal services. Comment [5] carries over Comment [8] to Model Rule 7.3. Comments [6] and [7] are based on Comments [6] and [7] of Model Rule 7.3. Comment [8] derives from Comment [9] of Model Rule 7.3

Comments [9] – [11] are Comments [5], [6] and [8] from Model Rule 7.2.

"Skype" because the communication is just a live telephone call with the ability to show yourself to the other person (if he consents).

Though described by the ABA rules as "real-time electronic contacts," if the means of solicitation is more akin to targeted letters or written communications, state regulators cannot impose a prophylactic ban. *Shapero v. Kentucky Bar Ass'n*[8], held that the state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. In *Shapero*, the Court focused on the method of communication and found targeted letters to be comparable to the print advertising used in *Zauderer,*[9] which can easily be ignored or discarded. The same reasoning applies to social media, texting and other forms of electronic solicitation.

The Supreme Court upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days after an accident or disaster. *Florida Bar v. Went For It, Inc.*[10] However, in reaching its holding the Court focused on the timing of the letters. The Court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day "cooling off" period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing. Moreover, other states have not followed Florida's rule.

Thus, having considered the indirect nature of electronic communication, the Committee recommends a rule that imposes a ban only on face-to-face and live telephone solicitations, but not "real time" electronic or video contacts with a potential client. Several state bar opinions have reached similar conclusions.[11]

In addition to limiting prohibited solicitation to face-to-face and live telephone, the Committee proposes an expansion of the exceptions to the ban on direct in-person solicitation to include persons who are sophisticated users of legal services and persons who are contacted pursuant to a court-ordered class action notification. As in the case of persons who are lawyers or with whom the lawyer has a close personal or family relationship, there is far less likelihood of undue influence, intimidation and overreaching when the person contacted is a sophisticated user of legal services.[12] Proposed Comment [4] describes a sophisticated user of legal services as a person who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. The exception under paragraph (b)(3) reflects existing case law. In each instance, the safeguards under paragraphs (c) and (d) as well as the requirements of Rule 7.1 serve as adequate protection and an absolute ban is no longer warranted in these situations.

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[8] 486 U.S. 466 (1988).

[9] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

[10] 515 U.S. 618 (1995).

[11] Philadelphia Bar Ass'n Ethics Op. 2010-6 concludes that Rule 7.3 does not apply to solicitation by e-mail, social media, chat room or other electronic means where it would not be socially awkward for potential client to ignore a lawyer's overture as they can with targeted mailing; such contacts are not "real time" communications for purposes of the rule. North Carolina State Bar Op. 2011-08 advises that a lawyer's use of chat room support service does not violate Rule 7.3 as it does not subject the website visitor to undue influence or intimidation; the visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session. Florida also concurs as evidenced by its complete reversal of its original opinion that banned chat room solicitation and its acknowledgement of the evolution of digital communications. Florida Advisory Opinion A-00-1 (Revised) (Approved by the Board Review Committee on Professional Ethics on October 15, 2015) notes,"... written communications via a chat room, albeit in real time, does not involve the same pressure or opportunity for overreaching" as face to face solicitation).

[12] Other state bar rules have recognized this long-established exception. See Va. Rule 7.3, cmt.[2] at http://www.vsb.org/pro-guidelines/index.php/rules/information-about-legal-services/rule7-3/

that most of the current restrictions on solicitation in the attorney advertising rules as well as the underlying public policy at play are based primarily upon lawyers approaching prospective clients in a face-to-face encounter without regard to today's digital world of electronic communications.

In fact, the ABA historically expressed concern about in-person solicitation assuming a lawyer may overwhelm a potential client and that, given the verbal nature of the exchange, it may be unclear what the lawyer said or what the prospective client reasonably inferred. However, that rationale does not apply to electronic communications, such as text messaging and posting on social media and in chat rooms, where there are verbatim logs or records of the communications that preserve the lawyer-prospective client exchange, and where the consumer can simply delete/ignore the exchange.

The Supreme Court has upheld restrictions on lawyer solicitation based upon the rationale that lawyers are better trained and skilled than other professionals in persuasion and oral advocacy.[2] For example, in *Ohralik v. Ohio State Bar Ass'n*,[3] the Court upheld a blanket prohibition against in-person solicitation of legal business for pecuniary gain. The state's interest in preventing "those aspects of solicitation that induce fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct" overrides the lawyer's interest in communication. Moreover, the Supreme Court noted that since in-person solicitation for pecuniary gain is basically impossible to regulate, a prophylactic ban is constitutional.

Once again, that rationale may be justified when applied to traditional face-to-face solicitation and live telephone conversations, but loses ground when applied to today's prerecorded telephonic messages and other electronic communications. Individuals may easily ignore a message that a lawyer sends via a chat room, text message or instant message without feeling awkward or impolite in doing so, as they might in a face-to-face encounter or a live telephone conversation. Modern telephone communication also allows a person who sees an unfamiliar number on his caller ID to easily ignore, block or not answer the incoming call. In fact, the tremendous growth of unsolicited business calls have created an environment in which people routinely ignore unfamiliar numbers and, at their convenience, screen their voicemail messages deciding whether to respond to the caller or delete the message. As a result, the risk of duress, coercion, over-persuasion or undue influence is far less with many forms of electronic communications than with live (face-to-face) communications and therefore the case for restricting solicitation by electronic communication is much weaker. Recall that the facts in *Ohralik* involved face-to-face contact between the lawyer and the prospective client.

As the Supreme Court noted in *Edenfield v. Fane*,[4] striking down a ban on in-person solicitation by CPAs:

> "[T]he constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation. Later cases

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https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3BC6699A524B477B85257283005D415D/$FILE/Information%20on%20the%20Commercial%20Speech%20Doctrine.pdf?OpenElement.

[2] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-465 (1978)(finding a greater potential for overreaching when a lawyer, professionally trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed person).

[3] 436 U.S. 447, 454 (1978).

[4] 507 U.S. 761 (1993).

law. However, we hope that Ms. Klein and the ABA also share our interest in ensuring that individuals are not injured by misleading advertising that leaves them under the impression that their life-saving, FDA approved drugs, are instead dangerous drugs that they should stop taking immediately.

Our interest in protecting consumers from these advertisements is supported by ABA Model Rule 7.1 *Communication Concerning a Lawyer's Services,* which states that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."[xv] Lawyers in violation of this Model Rule are subject to discipline.

A misleading communication conveys a factually incorrect idea or impression, and, as a result, leads the person receiving that communication in the wrong direction. The adverse event data reported in the May 2016 Heart Rhythm Case Reports journal prove that viewers are getting the wrong impression and going off their medications—suffering actual harm. While the language of the ABA Model Rule is not clear on whether the communication must be *deliberately* misleading, this is clearly deliberate. The advertisements are created with the express purpose of leading viewers to believe that these are dangerous drugs that people shouldn't take. It doesn't take much imagination to see that if the ads work, patients on the drugs will want to get off them quickly. Ironically, the patient victims who go off their medication as a result of these advertisements do not suffer bleeding events but strokes and deaths, which are arguably worse. I would imagine that Ms. Klein would want to do everything in her association's power to ensure that ABA member marketing practices are not causing personal injuries to occur.

While we believe the BAD-DRUG ads are misleading, the *Central Hudson Standard* that is currently used to determine if a lawyer advertisement can be regulated does not require the ad to be misleading. In fact, according to the Association of Professional Responsibility Lawyers' (APRL) June 2015 report cited by Ms. Klein, it must first be shown to be expressly protected by the First Amendment and *not be* misleading. It must then be shown that the government interest is substantial, that the regulation directly advances the governmental interests, and that the regulation is not more extensive than is necessary to serve that interest. We believe that the interest of preventing serious medical harm and death is substantial, that the disclaimers outlined above would help prevent this harm, and that the regulation would not be more extensive than necessary since advertisements would still be able to recruit patients harmed by the drugs.

Conclusion: Next Steps in Protecting Patient Lives

The Alliance for Aging Research agrees with Chairman Goodlatte that the ABA should, ideally, amend its own Model Rules of Professional Conduct to effectively self-regulate these advertisements. However, it is also clear that government regulation is clearly supported by the standard embraced by APRL and the ABA, should the ABA fail to take the necessary steps to protect patient lives.

We call on the ABA and this subcommittee to ensure that all future television advertisements on BAD-DRUGs include the outlined disclaimers—in legible print and verbally communicated.

diagnosed AFib patients.[vii] As our nation ages, those costs are going to skyrocket and the American Heart Association estimates the annual healthcare expenditures related to all types of stroke can be expected to increase to $140 billion by 2030.[viii]

To reduce stroke risk, patients with AFib are often treated with an anticoagulant, which are highly effective at reducing stroke risk by as much as 80% in AFib patients.[ix] Anticoagulants do increase the risk of bleeding— from minor bleeding to fatal hemorrhage—but experts are generally united in the opinion that the net benefit of ischemic stroke prevention through anticoagulation supersedes bleeding risk concerns for most AFib patients.[x]

Despite the fact that oral anticoagulation is highly effective at reducing stroke risk, elderly patients are often not anticoagulated, owing in part to under-appreciation of the stroke risk associated with AFib, the tendency of some health care professionals to prioritize bleeding risk over stroke prophylaxis, and concern over falls and bleeding risk.[xi]

In October 2014, the Alliance convened a symposium with representatives from federal agencies including the Food and Drug Administration (FDA), Veteran's Administration, National Heart, Lung, and Blood Institute, National Institute of Neurological Disorders and Stroke, and the National Institute on Aging; patient advocacy groups; and medical professional societies to discuss those factors leading to undertreatment of older AFib patients, and to identify gaps in current clinical practice, education, research, and policy. Symposium participants concluded that an integrated, national effort is needed to promote adoption of best practices, develop alternate reimbursement models, expand patient and caregiver education on stroke risk and treatment, leverage existing initiatives, and address gaps in research on stroke and bleeding in AFib.[xii]

Such an integrated effort is necessary because the public health impact of under-anticoagulation is severe. AFib patients who discontinue the use of their anticoagulation revert to their original stroke risk.[xiii] We are concerned about the 1-800-BAD-DRUG advertising because it has caused patients to discontinue their potentially life-saving oral anticoagulant without consulting with a healthcare professional. **Adverse event data show that this discontinuation has directly led to serious medical events, including stroke and death[xiv]; and future advertising of this nature will undoubtedly lead to more.**

Deceptive Advertising

We believe that one problem with the 1-800-BAD-DRUG ads is that they are deceptive under the FTCs' truth-in-advertising rules. First, calling the hotline "bad drug" and referring to a "dangerous blood thinner drug," or "blood thinner warning" gives the impression that the drug being featured is dangerous for the consumer. This is deceptive on its face.

Second, the statement in the ads about the drugs being linked to dangerous bleeding while true, are deceptive because they omit "material" information. That omitted information is the number of people on anticoagulants that have a serious bleed—which is very low—and the benefits of anticoagulation—which is high. An October 2015 piece from Dr. Ellis Unger, Director of the Office of Drug Evaluation in the Office of New Drugs at the FDA, emphasized the fact that

intentionally shocking images (for example, urging patients to call "1-800-BAD-DRUG," referring to the ad itself as a "medical alert," or including unsupportable conclusory statements about the dangerous nature of an FDA-approved product), policymakers must intervene. AdvaMed encourages the adoption of clear disclosures to protect patient safety and care.

This includes – as the AMA recommends – requiring attorney advertisements to display a prominent warning (not buried in the fine print) to consult with the viewer's own physician before ceasing medical treatment. Requiring a simple disclosure to consult with a patient's physician regarding medical or surgical treatment is a reasonable and nonintrusive approach to rebalancing the impact of these advertisements. It could also include prohibiting practices considered deceptive in other advertising contexts (*e.g.*, presenting advertisements as health or medical alerts or suggesting an affiliation with FDA or another government agency) or requiring ads to disclose that a product remains FDA-approved. These common sense approaches:

- Preserve the sanctity of the physician-patient relationship by acknowledging the importance of soliciting and understanding a knowledgeable physician's opinion and aligning with appropriate advertising practices in other commercial contexts;
- Strive for transparency by reminding patients about the physician relationship, the importance of a physician's opinion, and the fact that the product has been approved by FDA; and
- Avoid impinging upon any party's First Amendment right to commercial free speech.

to the information that must be included in advertisements in order not to be considered false or misleading.[11]

While the language and fear-baiting of attorney advertisements has the potential impact of deterring patients from complying with their drug prescriptions, we also believe that the result could be patients requesting physicians to conduct unnecessary medical procedures to revise or remove an implanted medical product based on perceived – but not real – safety concerns. Imagine, for example, if a patient – inspired by attorney advertising-induced fear – requests that a physician remove or replace an implanted medical device, such as an orthopedic hip implant, pelvic mesh, or an IVC filter. In addition to driving a dynamic of fear, doubt, and worry into the physician-patient relationship, additional patient safety concerns will emerge, including patient safety in undergoing a revision surgery, a likely unnecessary procedure. The patient's personal safety will be at issue along with lost time and wages, and costs to the health care system will increase, all because of an attorney advertisement.

III. SUPREMACY OF FDA DECISION-MAKING ON SAFETY & EFFECTIVENESS

In addition to directly threatening patient safety, misleading attorney ads can also call into question the FDA's singular voice on medical product safety and effectiveness. By deeming products to be unsafe, dangerous, or somehow contributors to other terrible ailments, attorney advertisements ignore or dismiss the robust FDA review process that the medical device industry has worked so hard to strengthen and support. In essence, attorney advertisements flagrantly disregard the process that is already in place for determining whether a medical product is safe and effective for the marketplace.

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11. *See, e.g.*, 21 U.S.C. § 352; *see also* 21 C.F.R. § 202.1.

vena cava ("IVC") filters.[5] These advertisements use scare-tactics, leaving viewers – especially those who have been prescribed or implanted with a product – with misimpressions about a product's safety. These Americans may question whether they should continue taking their physician-prescribed medical treatment or whether the medical device they have implanted (for example, their artificial hip, vaginal mesh, or IVC filter) will harm them. They may also be scared away from using a beneficial pharmaceutical or medical device that could have life-saving or life-changing benefits. Despite well-educated and highly-trained physicians prescribing drugs and performing surgeries or interventions using high-quality medical devices in the care of their patients, the language used in these advertisements is designed to terrify patients. While their primary goal is to scare patients into filing a lawsuit, they also scare patients into actions that could harm themselves.

As House Judiciary Committee Chairman Goodlatte references in his March 7, 2017 letter to Linda Klein, President of the American Bar Association, the Heart Rhythm Society published a limited study of the negative consequences and impact of attorney advertising on patient compliance with prescriptions.[6] The article indicates that "[l]egal advertising concerning [anticoagulant Xarelto] has resulted in some patients stopping XARELTO therapy and

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5. A simple Internet search of medical device-related attorney advertisements reveals a plethora of images and screenshots. Attorney advertisements about orthopedic hip replacements remind "metal-on-metal hip implant victims" that "settlements are being paid right now, but there are strict deadlines." Lawyers have even created the "Hip Replacement Helpline," and other ads warn of "Dangerous Hip Implants!" Similarly, a search for attorney advertisements in connection with pelvic mesh reveals a similarly broad scope of ads referring to "Pelvic Mesh Warning," "Defective Medical Device," "Thousands of serious complications," and the opportunity for "Substantial Compensation."

6. Paul Burton MD & Frank Peacock MD, *A Medwatch review of reported events in patients who discontinued rivaroxaban (XARELTO) therapy in response to legal advertising*, Heart Rhythm Case Reports, May 2016, at 248-49.

medical devices.[1] While a patient cannot simply cease a medical device treatment (for example, an artificial hip or pacemaker that has been implanted) in the same way they can stop taking a medication, a patient can request a physician to perform a revision surgery or to remove a device in the absence of a medical need to do so, a risky and costly proposition. Alternatively, patients may avoid using a medical device that can provide life-saving or life-changing benefits. They may also overly weigh potential side effects or complications in contradiction to the FDA-approved warnings that put those side effects or complications in proper context.

- ***Third***, misleading attorney advertisements call into question the supremacy of the Food and Drug Administration's (FDA's) singular voice on the safety and effectiveness of medical products. The American people – through Congress – have authorized the FDA to serve as the sole arbiter as to whether pharmaceutical and medical device products are safe and effective for the marketplace. Despite clinical evidence and rigorous FDA review, attorney advertisements assert that certain medical products are not safe and effective and even go so far as to decry an immediate public safety risk. Undermining the FDA's singular voice on safety and effectiveness destabilizes the process by which the government approves products to be introduced and sold, which in turn could jeopardize patient safety.

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1. *See also* Letter from Alliance of Specialty Medicine to Chairman Goodlatte, House Judiciary Committee (April 5, 2017) (on file with author) (stating, "Unfortunately, this advertising is not limited to pharmaceuticals but also exists for other medical treatments, including devices. While patients cannot as easily decide to simply stop using a device as they can a drug, these frightening advertisements have the same effect: they 'place fear between [patients] and their doctor.' We urge you to expand your inquiry into device advertising as well.").

I. INTRODUCTION

The Advanced Medical Technology Association (AdvaMed) appreciates the opportunity to provide a written statement for the record in connection with the House Judiciary Committee's June 23, 2017 hearing on examining ethical responsibilities regarding attorney advertising. In brief, AdvaMed strongly supports the Committee's efforts to examine the impact of such advertisements on patient safety and urges policymakers to address this matter, which affects the health and well-being of the American public.

AdvaMed is the world's largest trade association of medical device manufacturers. AdvaMed represents nearly 300 members, consisting of the world's leading innovators and manufacturers of medical devices, diagnostics products, and health information systems. Our members manufacture much of the life-enhancing health care technology purchased annually in the United States and globally. Our members are committed to the development of new technologies that allow patients to lead longer, healthier, and more productive lives. The devices AdvaMed members make help patients stay healthier longer and recover more quickly after treatment, thus allowing patients to participate more fully at work and in the community. Our continual innovation leads to the introduction of new technologies that prevent illness, allow earlier detection of diseases, and treat patients as effectively and efficiently as possible.

In addition to advancing patient care and creating innovative technology, AdvaMed is committed to serving as a voice for ethics and integrity in the delivery of health care. AdvaMed and its member companies recognize that strong ethical standards are critical to ensuring appropriate collaboration between the medical device industry and health care professionals to produce the world's most advanced medical technologies, to fostering a healthy innovation

patients who stop taking their prescribed medicines prematurely and potentially at significant health risk without consulting their supervising clinician. PhRMA stands ready to engage in the dialogue around this public health issue and work with the Subcommittee, members of Congress and relevant stakeholders on these important issues.

threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment."); *accord Cent. Hudson*, 447 U.S. at 565-67. And states' rules of professional responsibility typically only prohibit false or misleading statements by an attorney.

PhRMA shares Chairman Goodlatte's concerns regarding the ethical considerations and public health consequences of attorney advertising searching for clients (patients or consumers) who may have been injured by a medicine or device to join a lawsuit against the manufacturer of the product. Television advertisements sponsored by attorneys or their agents seeking such clients are commonplace in the U.S., during late night network and cable broadcasts, and have proliferated in recent years. While the advertisements vary, typically, they warn potential clients (patients or consumers) only of the possible risks or complications of a product and do so in a manner that is not balanced and that could frighten or mislead a patient and cause them to stop taking necessary medicines, which could lead to significant adverse health effects.

As Chairman Goodlatte highlighted in his March 7, 2017 letters to professional bar associations, there is a need to take a closer look at whether attorney advertising seeking clients who may have been harmed by medicines and devices is scaring patients into stopping life-saving medications. The potential harmful public health consequences are real as documented by a recent study of safety reports to the FDA concerning Xarelto funded by Janssen Pharmaceuticals. The review detected 28 cases of strokes and other serious side effects, including two deaths, of patients who healthcare professionals say stopped taking Xarelto after viewing attorney television advertisements. The results of that report were featured in an article published in the Heart Rhythm Journal in 2016 and referenced by Chairman Goodlatte in his March 7 letters. "A Medwatch review of reported events in patients who discontinued

1962 Kefauver-Harris Amendment to the FDCA. 21 U.S.C. § 352(n) specifically states that no prescription drug advertisement shall be subject to the Federal Trade Commission Act.[2] In 2007, Congress further expanded FDA's authority over DTC advertising regulation through the Food and Drug Administration Amendments Act (FDAAA), including authorizing the FDA to require pre-dissemination review of any television advertisements for drugs and providing for civil penalties for false or misleading advertising.

Under the FDCA, a prescription drug is misbranded if the labeling or advertising fails to reveal material facts. 21 U.S.C. § 321(n). Given FDA's broad statutory mandate to protect the public from misbranded drugs, it has promulgated an extensive regulatory framework to implement these provisions of the FDCA, including an entire part devoted to requirements for prescription drug advertising. FDA regulations implementing the FDCA as it relates to prescription drug advertising are found at 21 C.F.R. Part 202. Regulations specify, among other things, that prescription drug advertising cannot omit material facts, including risk information, and the materials must present a "fair balance" between benefit and risk information. These rules govern both the content and format of advertising and are intended, among other things, to ensure that prescription drug advertising is neither false nor misleading and that it is consistent with the drug's FDA-approved labeling. In determining whether an advertisement represents a fair balance or is false or misleading, the FDA looks at the net impression of the advertisement, taking into consideration all reasonable interpretations of the advertisement and the overall message from the perspective of a reasonable consumer.

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[2] A memorandum of understanding between FDA and FTC reflects that FDA "has primary responsibility with respect to the regulation of the truth or falsity of prescription drug advertising. In the absence of express agreement between the two agencies to the contrary, the Food and Drug Administration will exercise primary jurisdiction over all matters regulating the labeling of [ ] drugs." *See* Memorandum of Understanding between the Federal Trade Commission and the Food & Drug Administration, MOU 225-71-8002, available at https://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandumofUnderstandingMOUs/DomesticMOUs/ucm115791.htm.

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, my name is Dr. Michael Ybarra and I'm the Deputy Vice President for Advocacy and Strategic Alliances of the Pharmaceutical Research and Manufacturers of America (PhRMA). I am a diplomat of the American Board of Emergency Medicine, and Fellow of the American College of Emergency Physicians and the Academy of Physicians in Clinical Research. It is my pleasure to submit this statement today on behalf of PhRMA. Thank you for considering this statement for inclusion at this hearing.

PhRMA represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier and more productive lives. From 2000 to 2015, PhRMA members obtained approval for over 550 new medicines and invested over half a trillion dollars in R&D. In 2015 alone, PhRMA members' R&D expenses exceeded an estimated $58.8 billion—or roughly one quarter of total domestic sales of pharmaceuticals. Accounting for setbacks, it takes 10-15 years and costs $2.6 billion to bring a medicine to market.[1] PhRMA supports public policies that protect these innovations, the public health and the patients that our members serve. We commend Chairman Goodlatte for his leadership on this important topic and applaud the Committee for taking an interest in the effect of attorney advertising on public health and considering potential solutions. It is important to ensure that attorney advertising is neither deceptive nor misleading and does not cause patients to stop taking necessary medicines, which could lead to significant, adverse health effects.

[1] DiMasi JA, Grabowski HG, Hansen RA. "Innovation in the pharmaceutical industry: new estimates of R&D costs." Journal of Health Economics 2016; 47:20-33.