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Rule	8 2	Judicial	Officials
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- (a) A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the <u>judicial system</u>, or the qualifications or integrity of a judge, <u>an</u> adjudicatory officer or a candidate for election or appointment to judicial office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

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- g [1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office.
- Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.
 - [2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.
 - [3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges, and courts, and the judicial system whenever they are unjustly criticized.
 - [3a] Utah has not adopted ABA Model Rule 8.2 because the Utah Rule 8.2 provide appropriate protection to the judiciary.

Utah State Courts Rules - Published for Comment

Comments: Rules of Professional Conduct

I write in opposition to the proposed amendment to Rule 8.2 of the Rules of Professional Conduct. The constitutional and policy reasons for opposing this amendment are congently stated by the previous commentators, and I will not repeat them here. Simply put, political speech, including, in particular, speech that is critical of government, lies at the core of the First Amendment and deserves the highest level of protection. Expanding the reach of this rule to statements about the "judicial system" poses a substantial risk of chilling such speech, to the detriment of the bar and the public. This flaw is fundamental, not a drafting problem that can be fixed by tweaking the language of the rule, as a few commentators suggest.

The best way to "defend" the judicial system is to defend and protect the freedom of lawyers, judges, and the public to speak freely about that system. As Justice Black said in Bridges v. California, 314 U.S. 252, 62 S.ct. 190 (1941):

"The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, soley in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

urge the Judicial Council and the Supreme Court to reject this proposed amendment.

Jeffrey J. Hunt

Posted by Jeffrey J. Hunt June 14, 2010 08:36 PM

I oppose amending rule 8.2 to prohibit lawyers from making "false" public statements concerning "the judicial system."

The proposed amendment seriously threatens to deter lawyers from exercising the right "to communicate freely [one's] thoughts and opinions" Utah Const. art. I, § 1 and to criticize government, whether it be the executive, legislative, or judicial branch.

Our democratic society relies on vigorous political debate to improve our system of government and to effect necessary reform. Threatening to discipline lawyers for speaking up about perceived problems in the judicial system will serve only to silence the one group of people best able to note those problems.

It is one thing to discipline lawyers—as the rule now allows—for knowingly or recklessly making a public false statement about "the qualifications or integrity of a judge" or judicial candidate. Such statements are both factual and defamatory in nature. But comments—whether or not true—about a branch of government cannot be considered defamatory. Nor are they likely to be purely factual. Rather, such comments are opinion and the kind of political speech protected by both the First Amendment and article I, § 15 of the Utah Constitution.

I don't believe any other state has adopted such an ill-conceived and dangerous threat to our free speech rights. I urge the Committee not to recommend this amendment to the Utah Supreme Court and I urge the Court not to adopt it.

Posted by carolyn nichols June 14, 2010 10:33 AM

Dear Members of the Advisory Committee on the Utah Rules of Professional Conduct:

I write on behalf of the Utah Attorney General's office to oppose amending rule 8.2 to prohibit lawyers from making "false" public statements concerning "the judicial system."

The hallmark of any democracy is the right "to communicate freely [one's] thoughts and opinions." Utah Const. art. I, § 1. And the hallmark of American democracy is the right to criticize government, whether it be the executive, legislative, or judicial branch. The proposed amendment seriously threatens to deter lawyers from exercising both those rights.

It is one thing to discipline lawyers—as the rule now allows—for knowingly or recklessly making a public false statement about "the qualifications or integrity of a judge" or judicial candidate. Such statements are both factual and defamatory in nature. But comments—whether or not true—about a branch of government cannot be considered defamatory. Nor are they likely to be purely factual. Rather, such comments are most likely to be opinion and, as such, quintessentially the kind of political speech protected by both the First Amendment and article I, § 15 of the Utah Constitution.

Our democratic society relies on robust political debate to improve our system of government and to effect necessary reform. Threatening to discipline lawyers for speaking up about perceived problems in the judicial system will serve only to silence the one group of people best able to note those problems.

While it is true that the proposed amendment prohibits only "false" statements, the amendment will still have a chilling effect on lawyers' rights to freely express their thoughts and opinions on the judicial system for two reasons. First, the prohibition is vague. A lawyer may believe that the judicial system is too slow, too inefficient, or biased against minorities. But if that belief—based on the lawyer's personal experience—is rebutted by statistical data or other evidence, that lawyer has arguably recklessly expressed a falsehood about the system and could, therefore, be subjected to discipline. Second, the very system that the lawyer is criticizing will be the system that judges whether or not the statement was knowingly or recklessly false. It is difficult to believe that very many lawyers will be willing to put their bar license and livelihood on the line in order to criticize the judicial system, whether or not they believe their statements about the judicial system are true. Indeed, the comments already posted in opposition to this amendment bear this out.

Allingly, no state in the country has adopted such an ill-conceived and dangerous threat to our free speech rights. I urge the symmittee not to recommend this amendment to the Utah Supreme Court and I urge the Court not to adopt it.

Sincerely,

Mark L. Shurtleff Utah Attorney General

Posted by Mark L. Shurtleff June 14, 2010 09:56 AM

We write to oppose the proposed changes to Rule 8.2 of the Rules of Professional Conduct because the changes would have a chilling effect on a lawyer's participation in public discourse concerning government systems, they would uniquely harm lawyers who participate directly in governmental action concerning the judicial system, and the existing rule sufficiently addresses the harms caused by unfounded criticisms of judicial officers. Alternatively, we propose that the court adopt language that would clarify that the rule, as modified, does not apply to a lawyer's advice to legislative or executive governmental entities or participation in official legislative or executive proceedings.

Changes Chill Appropriate Public Discourse

Open and critical discourse concerning government systems and programs has long proven to be not merely tolerable, but a valuable mechanism for improving those systems. Chilling such criticism is unwise. The public interest in the effective administration of an entire branch of state government is significant. Lawyers are uniquely positioned to shine light on the judicial system's strengths and weaknesses. While we do not support false statements or those made with reckless disregard for their truth or falsity, we believe that the threat of professional sanction will chill a significant amount of criticism that falls far short of the standard of falsity or reckless disregard. This is especially so given the vagueness of the rule, both in terms of definition and methods of proof. If, indeed, defamatory statements are made that injure a person, a cause of action may exist under current law, with its accompanying well-developed standards of proof. However, when only a nebulous notion of faith in the system is at stake, a lawyer's right of free speech, and the public's interest in improvement of its government, ought not to be so quickly curtailed. The court should not squelch the free speech of those who have such a long history as its defenders. Not only would this institutional protection be unique, it is contradictory to the long tradition of open debate in this state and country.

A parallel to the legislative branch, while imperfect, is instructive. In the legislative setting, the Utah Supreme Court, under hority of Utah Constitution, Article VI, Section 8, has protected even defamatory statements made by members of the lic in legislative proceedings. See Riddle v. Perry, 2002 UT 10, ¶9. This is because "the greater good is served by ensuring that citizens who want to participate in the legislative process may do so without fear of liability for defamation." Id. at ¶10. While the Utah Constitution provides no judicial immunity, the rationale supporting the court's decision in Riddle v. Perry may apply to public debate concerning the judicial system. One can easily conceive of a situation in which legislation concerning the judicial system is before a legislative committee and a lawyer testifies bluntly about the legislation resulting in an accusation of violating the rule. It seems unreasonable to provide immunity in line with Riddle v. Perry and yet subject the lawyer to professional sanction. Lawyers ought not to be in such fear of offering their perspectives on the administration of the judicial system. The inevitable diminishment of speech concerning the judicial system by those best-suited to provide valuable insight is one reason why the proposed rule should be disapproved.

Changes Likely to Harm Public Lawyers

An additional concern exists for those lawyers whose job it is to participate in the policymaking process concerning the judicial system. Many lawyers work or serve in government positions that require them to take positions on matters concerning the governance of the judicial system. The proposed rule places those lawyers in unique jeopardy because of its vagueness. The proposed changes should be disapproved or, at a minimum, revised to address the unique challenges that government lawyers face. Given the governor's role in judicial appointments, this list could include a governor who is a lawyer or a lawyer representing the governor. It could include a lawyer who is a legislator or a lawyer representing a legislator or the legislature, given the legislature's roles in funding the judicial system, confirming judicial appointments, and otherwise making law applicable to the judicial system. It could also apply to a local government lawyer.

If the court adopts the proposed changes, these lawyers are best served by greater clarity and protection than the changes provide. Whether by text or comment, the rule should be crafted in such a way so as to not prevent these lawyers from effective service in their office or representation of the officials or institution they serve. Clarifying that legislative immunity will apply to shield some of these lawyers from professional sanction is one example, but is not sufficient because both legislative and executive branch lawyers may be involved in various settings in connection with their official positions. One possible clarifying comment is suggested below:

This rule may not be applied against a lawyer who honestly and candidly participates in an official executive or legislative proceeding at the state or local level concerning the judicial system or provides advice to an executive or legislative client. A government lawyer's clients deserve frank and candid advice when the subject of the advice is the governance of the judicial system. A government lawyer's honest and candid advice and participation in official proceedings are means by which the lawyer can contribute to improving the administration of justice and should not be discouraged or chilled by an unjust application of this rule."

Current Rule Provides Adequate Protection

The existing Rule 8.2 is designed to prevent inappropriate criticism of judicial officials, not systemwide criticism that serves the valid public purposes of identifying areas of concern and helping address them. There are good reasons for the existing rule's protections, including the protection of public faith in individual judicial decisions. Public faith in the individual decisions rendered by courts is essential to the effective rule of law. Public faith in the administration of the judicial system is less related to the effective rule of law and should not be divorced from the forms of criticism that apply to the administration of other government institutions. Criticism poses much less jeopardy to faith in the fair administration of justice than the proposed changes seem to contemplate. Our system of government is designed to encourage, not stifle, broad discourse. The robust public debate is meant to sift the truth from the lies, misapprehensions, and differences of opinion. Subjecting the judicial system to the same forces of criticism and correction as the other branches of government bolsters, rather than diminishes, the public's faith in the institution. The proposed changes should be disapproved because they would unwisely extend the current, appropriate protection for individual judicial officials to insulate an entire branch of government from criticism.

Conclusion

By discouraging criticism of an imperfect system (no system is perfect), the judicial system stands to lose critical information that can help it improve. While some may abuse the right of speech, lawyers ought not to have to tread so carefully at the risk of professional sanction for criticizing the judicial system when speaking on matters concerning the administration of the judicial system. The proposed changes will prevent lawyers' speech and deprive the public and the judicial system of valuable insight. Further, the proposed rule creates unique uncertainty for many government lawyers whose jobs may require a firm stand on matters concerning the judicial system. Lastly, the current rule sufficiently protects against the harms of unfounded criticism. For all of these reasons, we oppose the proposed changes to Rule 8.2 of the Rules of Professional Conduct. In the event the proposed changes are adopted, we propose that additional text or a clarifying comment be added to exempt from the rule's application a lawyer's advice to an executive or legislative client and participation in official executive or legislative proceedings concerning the administration of the judicial system.

John Fellows

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Jim Wilson

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Posted by Chris Parker June 11, 2010 01:18 PM

The proposed changes to USBRPC 8.02 would make this rule substantially overbroad and vague and thus unconstitutionally speech-restrictive. The Utah Supreme Court and Utah Judicial Council should not adopt these proposed amendments.

In the amended form currently proposed, USBRPC 8.02 would read, in relevant part, "(a) A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the judicial system, or the qualifications or integrity of a judge, an adjudicatory officer or a candidate for election or appointment to judicial office."

These amendments, if adopted, would unconstitutionally restrict the First Amendment and due process rights of Utah lawyers through their substantial overbreadth and vagueness.

The current form of 8.02 restricts, perhaps appropriately, false statements about identifiable individuals: judges, adjudicatory officers, or a candidate for election or appointment to judicial office. The proposed amendments, however, widen the

restriction to encompass general criticism of "the judical system." These amendments exponentially widen the scope of this triction and would make the rule unconstitutionally overbroad by encompassing speech unambiguously protected by the Amendment. BYU Law Professor Margaret Tarkington recently addressed this issue in her article The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation, in which she argues that "Speech critical of the judiciary falls within the central purposes and core protection of the First Amendment. As Cass Sunstein has stated: 'There can be little doubt that suppression by the government of political ideas that it disapproved, or found threatening, was the central motivation for the [speech] clause. The worst examples of unacceptable censorship involve efforts by government to insulate itself from criticism.' " *

The current form of USBRPC 8.02 incorporates language from the Supreme Court's New York Times v. Sullivan holding, where the Court established that public officials could not recover for defamation unless the "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 254, 279—80 (1964). The proposed amendments, however, do away with a crucial piece of the defamation doctrine: identification. Utah, like most if not all states, requires a plaintiff to prove identification as an element of the tort: "To state a claim for defamation, [the plaintiff] must show that defendants published the statements concerning him." West v. Thomson Newspapers, 872 P.2d 999, 1007 (Utah 1994). When, for example, a complaint about a statement made by a lawyer about a judge is filed under the current form of 8.2, the Utah State Bar must determine whether the lawyer made a statement about an identifiable individual: "a judge, adjudicatory officer or a candidate for election or appointment to judicial office." This is a relatively simple finding of fact and narrowly tailors the rule to meet the interest in protecting the reputation of judicial officers from false accusations. If the lawyer's statement was directed at one of the listed individuals, the Bar must then examine whether the lawyer knew the statement was false or acted in reckless disregard of its falsity.

It is difficult to imagine, however, how (1) the Bar could possibly identify the boundaries and limits of "the judicial system" and (2) how any lawyer could know whether a given statement about "the judicial system" was true or false. Unlike a judge or an adjudicatory officer, "the judicial system" is not easy to identify. Utah's judiciary is a complex network with connections to the administrative and legislative functions of the state, as well as long-established contractual ties to the private sector. The term "system" is inherently vague, which raises additional due process constitutional concerns. The United States Supreme Court has repeatedly held that "a law forbidding or requiring conduct in terms so vague that men of common intelligence must eccessarily guess at its meaning and differ as to its application violates due process of law." Bagget v. Bullitt, 377 U.S. 360, 37 (1964). It is not difficult to see how people applying the proposed amendments would have to "guess at its meaning and differ as to its application."

Moreover, it would be even more difficult for a lawyer to determine the truth or falsity of a statement made about a "system." If, for example, a lawyer accused a certain judge of accepting bribes, that lawyer, and the Bar, could easily perform some sort of investigation into the judge's conduct, establishing a basis for the truthfulness or falsity of the accusation. On the other hand, if a lawyer accused the judicial system of being "corrupt," the entire network of courts, judges, clerks, paralegals, police officers, ad infinitum, would have to be investigated to demonstrate the falsity of the accusation. Such an investigation would be, of course, both impossible and impracticable for disciplinary purposes. Any reasonable lawyer, fearing disciplinary action under the rule, would likely refrain from making any statement about the judicial system at all, even if he or she was certain the statement was not false. The proposed amendments, therefore, would undoubtedly chill truthful speech protected by the First Amendment and would thus be unconstitutionally overbroad.

In Broadrick v. Oklahoma, the United States Supreme Court set the standard for challenging a governmentally-imposed regulation as facially overbroad. 413 U.S. 601 (1973). In Broadrick, the Court emphasized that "the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Id. at 611—12. A law that sweeps in protected speech along with unprotected speech is unconstitutional if its overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615.

The overbreadth of the proposed amendments is both real and substantial. These amendments would destroy the legitimate sweep of USBRPC 8.02 and cause the rule to be facially overbroad and thus unconstitutionally speech-restrictive, exposing the Utah State Bar to potential lawsuits and sullying its reputation throughout the country. For these reasons, the Utah Supreme Court and Utah Judicial Council should reject the proposed amendments to USBRPC 8.02.

* Margaret Tarkington, The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation, Geo. L.J. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270268.

Posted by The American Civil Liberties Union of Utah June 11, 2010 11:08 AM

I'm strongly opposed to the adoption of RPC 08.02, for the following reasons:

ague and ambiguous.

- 2) Violative of the First Amendment.
- 3) Hostile to public transparency.

The public, (which has a large stake in a fair and efficient courts system) relies in large part upon practicing lawyers to blow the whistle when problems arise within in the justice system; and a draconian rule of this order will not only chill constitutionally protected speech, but further result in placing a de facto gag order upon wary practitioners who'll inevitably choose to keep their mouths shut, rather than to risk State Bar disciplinary proceedings involving fuzzy issues like determining what is "knowingly false."

This proposed amendment to the Utah Rules of Professional Responsibility is the most extreme example of State Bar overreaching I've seen in quite a long while; and it should quickly and summarily have a stake driven through its heart.

Posted by TL Feeny June 10, 2010 10:11 AM

The proposed addition RPC 08.02, the Utah Rules of Professional Conduct to prohibit knowingly making a false statement about the judicial system and requiring lawyers to defend the judicial system, should not be adopted. It is unconstitutionally vague and ambiguous, at best.

Who determines when a statement about the judicial system is 'knowingly false?" Who is to say that whatever person, committee, panel, or other entity that decides a statement about the judicial system is false, much less "knowingly false," is more qualified to determine if the statement is false or "knowingly false" than the person making the statement?

then I became a lawyer, I never dreamed that it meant giving up my Constitutional right to free speech under the First nendment to the Constitution of the United States. However, it is very apparent that in Utah lawyers are a subclass of citizens who have no rights under the First Amendment to the Constitution of the United States.

What is next? Will lawyers be required to kneel before entering court buildings? Will CLE mandate that lawyers take a class on how wonderful, marvelous, and perfect the judicial system is? Will a lawyer's letterhead be required to contain a reference stating how lucky he or she is to be permitted to be associated with such a wonderful and marvelous institution as the judicial system. Before they are permitted to enter a court building, will lawyers be required to kneel, and give thanks for being permitted to associate with such a holy and venerated institution as the judicial system?

Will lawyers be required to call judges "Your Worship, Your Holiness, Your Majesty," or some other reverent term?"

I also hope the proposed Rule does not include "revenue courts." Although I know it does, and in fact, the motivation of this proposed rule is in response to the various articles written about what a joke and mockery of the legal system "revenue courts" are.

I shall never say anything good about "revenue courts!" I will accept any punishment rather than say anything good about "revenue courts!" In fact I will be disbarred before I will say anything good about "revenue courts!" It is a very sad commentary on the state of the legal system in Utah when the powers that be feel the need to adopt a rule requiring lawyers to lie about the legal system.

Well, at least the proposed change does not use the phrase "Justice System." That would truly be an oxymoron.

Posted by Charles Schultz June 6, 2010 12:16 PM

In reviewing my last comment I should be grateful that this new rule is not yet in place. The next step will be to implement the rule ex post facto.

Posted by Roger A. Kraft May 8, 2010 04:38 PM

Are we really heading down this path? Really? What a waste of valuable time in preparing and proposing the rule. Just try exforcing it and see that waste of time magnified ten fold. What is a false statement about the judicial system? I assume we require the judicial system to appear in court to prosecute a complaint. Remember, truth is a viable defense.

What blows my mind is the fact that lawyers are actually proposing this rule!! I should not be surprised to find, upon examination of their credentials and law school transcripts, these lawyers failed terribly in their constitutional law classes and in their attempts to secure meaningful employment upon their accidental passing of the bar exam.

Posted by Roger A. Kraft May 8, 2010 04:35 PM

This strikes me as excessively or obsessively over-controlling. Also, it looks certain to draw First Amendment-based challenges. The rule seems to target individual opinions about matters of public interest, which by nature are neither "true" nor "false." Who will draw the unlucky task of enforcing this rule, and who will decide whether an accused lawyer has made a knowingly or recklessly false statement. -Kevin Murphy (5768)

Posted by Kevin Murphy May 7, 2010 08:07 PM

Regarding proposed USBRPC 08.02, the proposed rule unnecessarily and unreasonably chills the first amendment rights of attorneys. The requirements that an attorney intentionally lie, and defend a justice system that many attorneys believe to be seriously flawed, is repulsive. There is no justification to require an attorney to participate in a fraud on the public. This is a return to the notorious Alien and Sedition Acts, which President Thomas Jefferson wisely allowed to expire. The proponent of this rule apparently believes that Utah is in the former USSR or the People's Republic of China.

Posted by Richard King May 7, 2010 04:40 PM

The proposed amendments to USB 14-0516 should not be adopted. If the Bar is going to publish admonitions and public reprimands in the Bar Journal, then the entire contents of the file, including all responses in opposition to discipline, should be published as well. The entire story should be published. Publishing such actions will have an anticompetitive impact, and raises antitrust implications. Attorneys are increasingly abusing ethical rules by filing complaints for anticompetitive reasons.

Posted by Richard King May 7, 2010 04:29 PM

So, if I'm not mistaken, the purpose of the rule (or at least one of them) is to protect the reputation/feelings of the "system"? Is this an Orwellian slip? Or an Onion headline?

Posted by Shane Johnson May 7, 2010 02:36 PM

Silly. Such a vague and broad-based rule is a waste of ink. Sounds like judges trying to force attorneys to protect them when, perhaps, they don't deserve it. Free speech?

Posted by Mike May 7, 2010 02:28 PM

Of course, the real question is: who proposed this nonsense?

Posted by ROBERT BREEZE May 6, 2010 06:35 PM

Regarding proposed amendment RPC 08.02 to the Utah Rules of Professional Conduct, a rule that would prohibit lawyers from "knowingly making a false statement about the judicial system" and which would additionally "encourage lawyers to defend the judicial system," I have the following comments and observations.

Having practiced law for 28 years and comparing the practice of law 28 years ago to now, it is disturbing to me to observe the Litah State Bar's relentless efforts to exert more and more control over lawyers and the legal profession—and in ways that not make no sense but in ways that may in fact harm the legal profession, the practice of law and the judicial branch of government.

As a practical matter, how does one disprove that he or she "knowingly made a false statement about the judicial system"? At a Screening Panel Hearing, will a lawyer be bullied into admitting that he didn't have much basis for the statement for which he is being required to face charges? How far does the Bar really want to go to muzzle professional speech and opinion, all in order to insulate the judiciary from criticism? Is one of the new goals of the Rules of Professional Conduct to now insulate the judiciary from criticism by those persons uniquely competent to critique it?

Whoever is pushing this proposed amendment, this proposal seems to reveal a paranoid and totalitarian view of the world, namely, that the public at large is so stupid and ignorant that we need to do whatever is necessary to control the public's view of the judiciary, even if that means silencing licensed professionals. Since when did the public's view or impression of the judiciary become something that has to be controlled and manipulated by anyone, let alone the entire legal profession?

None of us should feel comfortable about the idea of a branch of government trying to insulate itself from criticism from those very people it essentially regulates and that is precisely what this new rule is directed at. What is the judiciary actually worried about anyway? So what if a lawyer says something false or exaggerated about a particular judge or the judicial system? Are members of the public who might hear such statements no longer able to think for themselves? Why should anyone even care?

The Bar has no business, it seems to me, trying to manipulate or censor, in advance, potential criticism of the judiciary by licensed professionals. That is what this proposed rule seeks to do and because a violation of it would be virtually impossible to prove or disprove, its purpose is obviously to empower the Bar to censor and discipline anyone it wishes to discipline and for just about anything it considers to be derogatory, offensive or slanderous. Is forcing us to all be "politically correct" the next step after this?

Then I first began practicing law, judges were generally outgoing and cordial to lawyers outside of the courtroom. Judge David Winder would go out of his way to talk to you whenever you'd run into him. He would learn your first name and always call you by it when he saw you on the street. Many judges today, apparently on account of their collective fear of the Judicial Conduct Committee or whatever, are hard pressed to say "Hello" to a lawyer in the frozen foods section at the grocery store. And when they do, they look around to see if anyone saw them do so. This proposed rule would unfortunately separate us lawyers from the judiciary even further than we have become over the last several years and would surely give the judiciary even less reason to interact or be cordial with a practicing lawyer outside the courtroom. Is this what we want? A judiciary that lives in an even bigger and more fortified ivory tower and which shall be completely impervious to criticism or critical observation from those very persons who have firsthand experience with it?

I had a Constitutional law professor who used to say that Americans have a Constitutional right to lie. And what if we do? What if he was right?

It seems to me that if someone wants to knowingly disparage the judiciary or any other branch of government, that is his or her right. If the Bar, a particular judge or a judicial candidate wants to bring a slander or defamation suit in response, let them. And let them do so at their own expense just like the rest of us would have to do. The alleged defamer can face the consequences in a court of law. But to regulate professional speech, institutionally, through the back door because the judiciary, or the people in control of it, don't want any criticism of themselves or their friends or Comrades is, quite obviously, an outrageous abuse of power. This proposed rule is a sterling example of what Alexis de Tocqueville meant when he spoke of "soft tyranny."

In Abraham Lincoln's time, there were strict slander laws, a reality that encouraged people to watch their mouths. Under the old common law, there are also criminal slander and libel. Under the common law, slandering a person in his business or profession is slander per se and does not require proof of damages. Damages are presumed. Last time I looked, this was still the law in Utah. The tort of slander per se, which has been around a few hundred years and which is already in place, is a far more effective way to regulate defamation by lawyers than creating some self-serving, arbitrary institutional rule or club to hold over everyone's head, a rule that will likely know no bounds and which will eventually lead to abuse by those having the exclusive power to wield it at their leisure. Maybe not now but sooner or later.

I believe this is a dark and sinister rule that is trying to be foisted upon us while most of us aren't paying attention (notice how innocuously it has been presented), a rule with enormous potential to be used for great mischief and harm. No one should be allowed to create an institution of government that can insulate itself from criticism from those very persons who know more

about it than anyone else. How will the public ever become aware, from lawyers, that the judicial system is broken in some white it is adopted and strictly enforced or enforced with a vengeance? Would not lawyers be afraid to speak and be honest for fear of being disciplined?

As to the second part of the proposed rule, I have these questions: From where or from whom does the Utah State Bar get the power or other authority to affirmatively force lawyers to make members of the public FEEL GOOD about our judicial system? I didn't know that any of us lawyers had an obligation to do that. That almost smacks to me of an effort to make us lawyers all Propaganda Ministers for the judiciary. Why should we be doing that? Is that one of the other purposes of this rule? If not, what it is? And if we are going to be forced to act as Propaganda Ministers for the judiciary, we ought to be paid as full-fledged Public Relations Agents. I see nothing in the rule to compensate us in that regard. If we are going to be conscripted and forced to act as PR agents, it seems to me that we should all get paid for it.

Posted by J. Michael Coombs May 5, 2010 12:40 PM

I am very concerned about this proposed new Rule.

Of course, we all think the justice system is a wonderful thing. We work in it. It is, in my personal opinion, the best system for the administration of justice and for the allowance of freedom and free private enterprise ever devised. I will say that to anyone who asks.

With that said, there are also numerous problems with the system. Are we never to acknowledge the problems? Are we all to walk along now like the King's tailors and insist that he has clothes when it is qhite evident he does not?

As this may apparently be my last ethical opportunity to say that anything needs fixing at the Courts, let me give examples of what we may no longer be able to say:

. The courts are currently woefully understaffed. I am having problems with clerks' offices that do not return calls, and filings lost in the courthouse. Lost fillings and unreturned calls are a big problem.

2. The system is too slow in many kinds of cases. For instance, if you believe you are actually innocent of a misdemeanor charge and want a trial in the Justice Courts of Utah, it takes sometimes 6 or 8 trial settings, from which you are bumped by an older case or a defendant in custody, before a defendant can get to his own trial. A defendant may have to wait a year or more to prove himself innocent of charges. There should be more judges in Justice Court. A man should not have to wait a year for a trial.

There. Have I been unethical? Is it wrong of me to say this stuff? I personally believe it all to be true. Others may disagree. I guess after this Rule is adopted, I will not be able to bring these issues up again.

Posted by Mary Corporon May 3, 2010 02:41 PM

My primary concern is with the portion of the proposed rule that encourages lawyers "to defend the judicial system." This requirement is completely unconstitutional. Does the rules committee really think that we should be required to surrender our first amendment rights to free speech in exchange for the ability to practice law in Utah? We as attorneys are in a position to see many of the shortcomings of the judicial system. Our system is good, but it is certainly not perfect. Who is more qualified to point out, and assist in correcting, problems in the judicial system then those who interact with it most frequently? It's not hard to see glaring examples of the absurdity of this proposed rule. For example, this rule would arguably restrict any attorney from responding negatively on judicial performance evaluations, because judges are part of the judicial system. Why does the judicial system think that it should be exempt from legitimate critiques from individuals that work within it?

I also share the previously listed concern that the rule as a whole is extremely vague. Further, I believe that the rule would be extremely difficult to enforce in practice, gutting it of its usefulness.

Posted by Richard Larsen April 28, 2010 03:37 PM

I inadvertently left a typo in my first post. I, of course, am referring to junior high school "illusions" regarding the best most

Utah State Courts Rules - Published for Comment: Comment on Rules of Professional Conduct

perfect judicial system in the world, and its protection of our civil liberties including speech.

ted by R. Clayton Huntsman April 28, 2010 01:27 PM

Are judges going to be encouraged to defend prosecutors? I believe this part of the rule is innappropriate. Are lawyers being asked to defend something that is not defense-able at times? This is America. If someone, even a judge, does something wrong, all should be free and feel free to speak out against such action. In America, it is a government "of the people" and "for the people" not a regime that is not to be questioned.

Posted by Brandon P. April 28, 2010 12:00 PM

Although the rule is certainly a best practice lawyers should follow, I have serious questions about the constitutionality of the rule, as written. It is vague and overboaod, lacks sufficient specificity and could be interpreted as encompassing false opinions. I suggest revising the rule to prohibit "knowingly making a material false statement of fact about the judicial system."

Posted by Randy Dryer April 27, 2010 02:56 PM

I have an additional comment to RPC 8.2. Our judicial system consists of those appointed by politicians subject to senate confirmation. Those who choose those who choose also are subject to some political influence. Does this new rule mean that we cannot criticize legislators or governors because they are also part of the judicial system? Again, this is a very slippery slope trying to chill free speech just because we are regulated by a judicial system which in itself is highly political.

Posted by R. Clayton Huntsman April 27, 2010 02:38 PM

The amendment to RPC 8.2 goes way too far. It is appropriate to curb defamatory comments regarding a person, such as a judge. But to attempt to censor commentary about the judicial system smacks of totalitarianism and repression. If I were to say that the judicial system allows lawyers and investment bankers who are too rich and powerful to fail, or who can buy their way out of trouble, to get away with murder, I would be expressing an opinion which would violate this rule, because I know that not all social criminals who buy their way out of trouble have committed murder. There must be some anxiety by our regulators that people may damage the junior high school elusions of our judicial institutions requiring such a rule but I think it's best to let people, including lawyers, not be chilled in their free expression regarding this imperfect judicial system.

Posted by R. Clayton Huntsman April 27, 2010 12:53 PM

ABA Model Rule

Rule 8.2 Judicial and Legal Officials

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

- [1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.
- [2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.
- [3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Draft: June 24, 2010

Rule 14-802. Authorization to practice law.

(a) Except as set forth in subsection (c) of this rule, only persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah.

(b) For purposes of this rule:

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- (b)(1) The "practice of law" is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person's facts and circumstances.
- (b)(2) The "law" is the collective body of declarations by governmental authorities that establish a person's rights, duties, constraints and freedoms and consists primarily of:
- (b)(2)(A) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and
- (b)(2)(B) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person's rights, duties, constraints and freedoms.
- (b)(3) "Person" includes the plural as well as the singular and legal entities as well as natural persons.
- (c) Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:
- (c)(1) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.
- (c)(2) Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies, but not specific advice related to another person's facts or circumstances.
- (c)(3) Providing clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so.

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31 (c)(4) When expressly permitted by the court after having found it clearly to be in the 32 best interests of the child or ward, assisting one's minor child or ward in a juvenile court 33 proceeding. 34 (c)(5) Representing a natural person party in small claims court without 35 compensation and upon the express approval of the court or representing a legal entity 36 as an employee representative in small claims court as permitted by Rule of Small 37 Claims Procedure 13. 38 (c)(6) Representing without compensation a natural person or representing a legal 39 entity as an employee representative of that entity in an arbitration proceeding, where 40 the amount in controversy does not exceed the jurisdictional limit of the small claims 41 court set by the Utah Legislature. 42 (c)(7) Representing a party in any mediation proceeding. 43 (c)(8) Acting as a representative before administrative tribunals or agencies as authorized by tribunal or agency rule or practice. 44 45 (c)(9) Serving in a neutral capacity as a mediator, arbitrator or conciliator. 46 (c)(10) Participating in labor negotiations, arbitrations or conciliations arising under 47 collective bargaining rights or agreements or as otherwise allowed by law. 48 (c)(11) Lobbying governmental bodies as an agent or representative of others. 49 (c)(12) Advising or preparing documents for others in the following described 50 circumstances and by the following described persons: 51 (c)(12)(A) a real estate agent or broker licensed by the state of Utah may complete 52 State-approved forms including sales and associated contracts directly related to the 53 sale of real estate and personal property for their customers. 54 (c)(12)(B) an abstractor or title insurance agent licensed by the state of Utah may 55 issue real estate title opinions and title reports and prepare deeds for customers. 56 (c)(12)(C) financial institutions and securities brokers and dealers licensed by Utah 57 may inform customers with respect to their options for titles of securities, bank accounts, 58 annuities and other investments.

(c)(12)(D) insurance companies and agents licensed by the state of Utah may

recommend coverage, inform customers with respect to their options for titling of

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Draft: June 24, 2010

ownership of insurance and annuity contracts, the naming of beneficiaries, and the adjustment of claims under the company's insurance coverage outside of litigation.

(c)(12)(E) health care providers may provide clerical assistance to patients in completing and executing durable powers of attorney for health care and natural death declarations when no fee is charged to do so.

(c)(12)(F) Certified Public Accountants, enrolled IRS agents, public accountants, public bookkeepers, and tax preparers may prepare tax returns.

Advisory Committee Notes

Rule 13. Representation.

A party in a small claims action may be self-represented, represented by an attorney admitted to practice law in Utah, represented by an employee, or, with the express approval of the court, represented by any other person who is not compensated for the representation.

1	Tackling Lawyer Advertising Issues University of Utah Style
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8 LAWYER ADVERTISING – UTAH'S CURRENT ADVERTISING RULES – RULE 7.1, *ET SEQ.*

RULE 7.1 – Communications concerning a lawyer's services

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 statements considered as a whole not materially misleading.

RULE 7.2 – Advertising

A lawyer may advertise services through written, recorded or electronic communications, including public media.

RULE 7.3 – Direct contact with prospective clients

Generally prohibits direct contact unless the individual contacted is a lawyer, a close personal or family friend or a professional relation.

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SEVERAL STATE SUPREME COURTS HAVE ADOPTED REGULATIONS IN AN EFFORT TO PROHIBIT OR LIMIT THE USE OF MISLEADING AND DECEPTIVE ADVERTSING.

Some states are also attempting to limit the utilization of advertising that is considered to be "in bad taste." There are, of course, First Amendment issues that are evolving from the aggressive efforts of other states to upgrade the quality of lawyer advertising and minimize the utilization of misleading and deceptive advertising.

Nevada, Florida and Texas are three of the states that have been on the cutting edge of attempting to regulate lawyer advertising.

10 MEVADA

Nevada adopted new regulations concerning lawyer advertising on September 1, 2007.

Nevada defines a false or misleading communication as follows:

RPC 7.1 – Communications concerning a lawyer's services.

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:

- (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) It is likely to create an unjustified or unreasonable expectation about results the lawyer can or has achieved, which will be considered inherently misleading for the purposes of this rule, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
- (c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or
- (d) Contains a testimonial or endorsement which violates any portion of this rule. $11\square$

SUMMARY OF NEVADA'S RULES

- Lawyers may advertise services through the public media, including telephone directory, legal directory, newspaper, billboards, radio, television and recorded messages and through written or electronic communication (internet exempt).
- Rules do not apply to an advertisement broadcast in another jurisdiction in which the advertising lawyer is admitted to practice law. The lawyer must comply with other jurisdiction's rules.
- Any person appearing in an advertisement as a lawyer must in fact be a lawyer in good standing and must be a lawyer who will actually perform the services advertised or a lawyer associated with the firm. The person who appears as an employee of a law firm whose services are advertised must in fact be an employee of the law firm. If an actor appears in any of the above roles, the advertisement must disclose that the person appearing is an actor.
- All advertisements and written communications must include the name of at least one lawyer or the law firm responsible for the content of the advertisement.
- Every advertisement and communication that indicates one or more areas of law in which the lawyer or law firm practices shall conform with the specialty requirements of the Rules.
- Rule 7.4 Communication of fields of practice and specialization.
 A lawyer may communicate that the lawyer is a specialist or expert or that he or she practices in particular fields of law, provided the lawyer complies with this rule. This rule will not prohibit the communication of fields of practice unless the communication is false or misleading.
- Patent law A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation patent attorney.
- Admiralty law A lawyer engaged in admiralty practice may use the designation admiralty or proctor in admiralty.

- Specialist or expert In addition to the designations permitted above, a lawyer may
 communicate he or she is a specialist or expert in a particular field of law if the
 lawyer complies with the provisions of this Rule.
- The lawyer must be certified as a specialist or expert by an organization that has been approved in accordance with the rules promulgated by the Board of Governors.

13 PRACTICE HOURS; CLE; LIABILITY COVERAGE; REPORTING

- A lawyer must meet the following requirements for practice hours devoted to each field of specialization:
- The lawyer shall devote at least one-third (1/3) of his or her practice to each designated field of specialization for each of the preceding two calendar years.
- The lawyer shall have completed ten (10) hours of accredited CLE in each designated field of specialization to practice during the preceding calendar year.
- The lawyer shall carry a minimum of \$500,000 in professional liability insurance, with the exception of lawyers who practice exclusively in public law. The lawyer shall provide proof of liability coverage to the State Bar as part of the Bar's reporting requirements.
- The lawyer shall submit written confirmation annually to the State Bar Board of Continuing Legal Education demonstrating the lawyer has complied with these requirements. The reports are public information.

14 Rules Governing Statements About Fees

- Every advertisement and written communication indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall contain the following disclaimer: "You may have to pay the opposing party's attorney's fees and costs in the event of a loss."
- If a lawyer advertises a specific fee or range of fees, he must include all possible terms and fees and the duration for such fees. This disclosure shall be presented with equal prominence.
- The lawyer may make statements describing or characterizing the quality of the lawyer's services. However, such statements are subject to proof and verification to be provided at the request of the Bar, a client or a prospective client.

15 The following information in advertisements and written communications shall be presumed not to violate the provisions of this rule:

- (1) The name of the lawyer or law firm and a listing of lawyers associated with the firm.
- (2) Date of admission to the Bar and any other Bar and listings in federal courts in jurisdictions other than Nevada where the lawyer is licensed.
- (3) Technical and professional licenses granted by the state or other recognized licensing authorities.

- (4) Foreign language ability.
- (5) Fields of law in which the lawyer is certified or designated, subject to the requirements of these Rules.
- (6) Prepaid approved legal service plans in which the lawyer participates.
- (7) Acceptance of credit cards.
- (8) Fee charged for consultation and fee schedule.

16

- A copy or recording of an advertisement or written recorded communication shall be submitted to the State Bar in accordance with Rule 7.2(a) and shall be retained by the lawyer or law firm which advertises for four years after its last dissemination, along with a record of when and where it was used.
- A lawyer shall not give anything of value to a person for recommending the lawyer's services, except the lawyer may pay the reasonable cost of advertising as permitted by these rules.
- RULE 7.2(a) ADVERTISING FILING REQUIREMENTS
- A copy or recording of an advertisement or written recorded communication shall be submitted to the State Bar in both hard copy and electronic format within fifteen (15) days of first dissemination, along with a form supplied by the State Bar.
- A lawyer or law firm's failure to file an advertisement in accordance with the above paragraph is grounds for disciplinary action. The four-year limitations period will begin to run on the date the advertisement was actually known to Bar counsel.

17 RULE 7.2(b) – VOLUNTEER ADVISORY COMMITTEES; PREDISSEMINATION REVIEW

- Standing Lawyer Advertising Advisory Committees: The Board of Governors shall
 create two standing lawyer advertising advisory committees, one for each district,
 north and south and respond to written requests from an advertising lawyer or law
 firm seeking an advance opinion regarding that lawyer's compliance with the
 advertising rules.
- A State Bar staff member or members shall be designated to assist with implementing this rule, including but not limited to providing administrative support to the standing committees and receiving and coordinating requests submitted pursuant to this rule.
- <u>Committee Composition</u> Each committee shall have a minimum of five volunteer members, four of whom shall be members of the Bar and one of whom may be a nonlawyer. Each committee shall also have a minimum of five members to serve as ad hoc or conflict replacements when needed. Members must have a full-time business or residential presence in the respective districts.

 <u>Appointment</u> – Members shall be appointed by the Board of Governors and serve two-year terms, subject to reappointment at the Board's discretion. No member shall serve a lifetime total of more than twelve (12) years. Members may be removed for cause.

18 RULE 7.2(b) - VOLUNTEER ADVISORY COMMITTEES; PREDISSEMINATION REVIEW

- Minimum Duties Each committee shall meet at least monthly on a predetermined date, and as often thereafter as necessary to review all matters before it in a timely fashion. Advance opinion shall be provided within thirty (30) days of submission of the request or sooner.
- Review of Filing Advisory Opinions to Bar Counsel The Committee may issue advisory opinions on any advertisement filed with the State Bar. If the committee finds that an advertisement does not comply with these rules, it may issue an advisory opinion to Bar counsel within thirty (30) days of its review. The opinion must contain the basis for the committee's finding of noncompliance and a recommendation that Bar counsel issue a notice to the lawyer or law firm requesting a correction or withdrawal of the advertisement. If Bar counsel accepts the committee's recommendation and issues the notice, the advertising lawyer or law firm has thirty (30) days to respond to Bar counsel's notice. Bar counsel may initiate appropriate disciplinary action if the lawyer or law firm fails to file a timely response.
- <u>Predissemination Review</u> A lawyer or law firm may file a written request with the State Bar seeking an advance opinion on whether a proposed advertisement complies with these rules.
- <u>Advance Opinion</u> Within thirty (30) days of submission the committee shall issue an advance opinion to the lawyer or law firm submitting the request for predissemination review. The opinion shall include a finding of whether the proposed advertisement is in compliance with these rules. An adverse opinion must notify the lawyer or law firm with an opportunity for a hearing on the committee's finding of noncompliance and the procedure for requesting such a hearing.

19 RULE 7.2(b) - VOLUNTEER ADVISORY COMMITTEES; PREDISSEMINATION REVIEW

- <u>Appeal</u> An adverse advance opinion of one committee may be appealed by the requestor in writing to the other committee, which decision shall be controlling.
- When Advance Opinion is Binding on Discipline Authority These committees are
 created to provide independent and volunteer peer advance opinions to lawyers upon
 request as a safe harbor to future disciplinary action only. No request for an advance
 opinion shall be granted after a disciplinary investigation is commenced on the
 subject advertisement.
- An advance opinion of noncompliance issued with this rule shall not be binding on any disciplinary panel or Bar counsel. An advance finding of compliance is binding on the disciplinary panel and Bar counsel in favor of the advertising lawyer, provided that the representations, statements, materials, facts and written assurances received in connection therewith are true and not misleading. An advance opinion of compliance constitutes admissible evidence if offered by a party.

<u>Annual Report</u> – The Board of Governors shall file an annual report with the clerk of
this court that addresses, among other things, the State Bar's efforts to enforce
these rules, the operation of the standing committees, the effectiveness of the
current rules and any changes to the rules that this court should consider.

20 Comments from the Nevada Bar regarding their Rules

- Number of ads submitted monthly varies from approximately 50 to 114. The number of submissions goes in cycles, including the telephone book publication and special offers from television stations.
- Ads are usually submitted on a disk and are converted to a format that may be used by the respective committees. Letters acknowledging receipt of the disks are sent to every attorney and tracked by number.
- The monthly committee meetings last one to two hours. A computer monitor is used in the Bar's board room.
- The Bar looks for ads that have not been filed with the Bar. The Bar staff reviews the yellow pages and fields calls from other lawyers or the public complaining about ads.
- The committees referred approximately 271 ads to the Bar counsel in 2009. The number will increase for 2010. Generally, Bar counsel will write the offending lawyer. Ninety-nine percent (99%) of the attorneys contacted comply with Bar counsel's request to change the ad. Occasionally some ads are sufficiently egregious that disciplinary action is initiated immediately.
- They have a number of foreign language ads where the disclaimers are in English. This is a problem.

21 Comments from the Nevada Bar regarding their Rules (Cont.)

- Internet ads are exempt at the moment. If this rule changes, the work load of the State Bar office will be increased significantly. Advertising on Craig's List is now an issue.
- State Bar is going to create CLE classes on advertising.
- An advertisement that states how much a particular client received in settlement is considered misleading unless the amount only reflects what the client actually received. That is attorneys fees, costs, and subrogation payments must be deducted from the total recovery.
- Statements that a firm is the best law firm or the only law firm for a particular area of practice are also considered misleading.
- The safe harbor provisions are used only once or twice a month.
- One of the current problems is that an ad that runs for a month usually yields the full benefit of the ad.
- Nevada does not charge a filing fee. The cost of the program is carried by Bar dues

and is run out of their OPC. Florida on the other hand, does charge fees to cover the cost of administering their program.

22 FLORIDA'S ADVERTISING RULES

- Over the last several years, Florida has become increasingly aggressive in its efforts to prohibit misleading advertising practices.
- The latest Rule requires that television and radio advertisements be submitted to the Bar in advance for approval was recently challenged in the United States District Court on several constitutional grounds. The Court granted summary judgment in the Bar's favor. The law firm of Harrell and Harrell, P.A. appealed to the Eleventh Circuit. The Eleventh Circuit ruled on June 17, 2010. The cite to the opinion is: Harrell v. The Florida Bar, 608 F.3d 1241 (11th Cir. 2010). Harrell was reversed in part, affirmed in part and remanded. Florida requires that all television and radio advertisements be filed at least twenty days prior to the lawyer's first dissemination of the advertisement so as to provide a fifteen day evaluation period plus five days mailing time.
- The task force on advertising in Florida recommended that all television and radio advertising in the State be banned. Thereafter, the Supreme Court of Florida amended its Rules to place additional prohibitions on visual or verbal descriptions that are "manipulative" or likely to "confuse the viewer."

23 FLORIDA'S ADVERTISING RULES (Cont.)

- There is a provision in the Florida Rules that allows for advance opinions on proposed ads. A script of any onscreen text, description of any visual images to be used must be submitted for review. The voluntary submission does not satisfy the mandatory filing requirements. The fee for the mandatory filing is waived if an advance filing was made.
- The State Bar evaluates all advertisements filed with it pursuant to its applicable
 Rules and notifies an attorney within fifteen days of receipt of a complete filing plus
 five days mailing time. If the Bar does not send a communication to the filer within
 fifteen days of receipt, the advertisement is deemed approved.
- A lawyer who disseminates an advertisement that is not in compliance, whether the advertisement was filed or not, is subject to discipline and sanctions.
- A finding of compliance by the Bar with respect to television and radio ads is binding on the Florida Bar in a grievance proceeding unless the advertisement contains a misrepresentation that was not apparent on the face of the material submitted to the Bar.
- All other advertisements required to be filed for review must be filed either prior to or concurrently with the lawyer's first dissemination of the advertisement or communication.
- The fifteen day rule applies to these other mediums of advertising.

24 Procedural and Substantive Rules Used in Florida

• The Florida Bar has a three-tiered administrative review structure.

A department staff member for the Bar issues an advisory opinion.

Any adverse opinion of the Department may be appealed to the Standing Committee on advertising.

Any adverse opinion of the Standing Committee may be appealed to the Board of Governors.

- The Florida Rules are designed to limit permissible advertising content to "useful factual information presented in a non-sensational manner." The following Rules are designed to flush out the requirements of the above general statement:
- Statements which by themselves imply falsely that the lawyer possesses a qualification not common to virtually all lawyers practicing in Florida.
- · Statements of unsubstantiated fact are prohibited.

25 Procedural and Substantive Rules Used in Florida (Cont.)

- · Statements which promise results are prohibited.
- Lawyers are forbidden from comparing their services with other attorney services unless the comparison can be factually substantiated.
- Statements describing or characterizing the quality of the lawyer's services are banned.
- Visual or verbal depictions, descriptions, illustrations or portrayals or persons, things or events that are manipulative or likely to confuse the viewer are prohibited.
- Similarly, any television or radio advertisement that is deceptive, misleading, manipulative or is likely to confuse the viewer is prohibited.
- Any background sound other than instrumental music is prohibited.

The Harrell Opinion

- Harrell challenged nine of these Rules as being unconstitutionally vague and a violation of his First Amendment rights. There was a major ruckus at the District Court and at the Circuit Court level over whether Harrell had presented a justiciable controversy. Harrell did not appeal the Bar's determination to the Standing Committee and/or to the Board of Governors. The statement at issue in Harrell's slogan was, "Don't settle for anything less." The Bar informed Harrell the slogan impermissibly "created unjustified expectations about results the lawyer can achieve." The Bar, however, told Harrell he could use the slogan, "Don't settle for less than you deserve." Five years after the Bar had authorized that slogan, the Bar informed Harrell that "Don't settle for less than you deserve" improperly characterized the quality of his firm's services and therefore was prohibited.
- The Court held the vagueness challenge to five of the Rules was justiciable, without
 expressing an opinion as to the merits of Harrell's claims. They simply held that
 Harrell had made a sufficiently credible showing that the Rules are unconstitutionally
 vague on their face. The Court said if they are, we decline to let the Bar hammer

them out case by case and thereby provide them with a patina of determinancy. The Court of Appeals also held that Harrell's challenge to the rejection of his slogan, "Don't settle for less than you deserve" should be heard by the District Court and was not "moot."

27 Harrell Opinion (Cont.)

- As to the prior restraint argument, the Court of Appeals upheld the twenty day provision.
- "Florida Bar's advertising rule requiring a lawyer to submit any television or radio advertisement for review at least twenty days before its first planned dissemination or airing date, so as to give the Bar approximately fifteen days in which to review the ad and five days mail and transit time, did not amount to an unconstitutional imposition on commercial speech under the First Amendment. The Rule directly advanced the Bar's substantial interest in curbing practices that negatively impacted the administration of justice, protected the public from abusive practices and preserved the reputation and integrity of the legal profession, and the twenty day delay placed minimal burden on attorneys."
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- There is a law review article written about a version of the evolving Florida Rules located at 18 U.Fla. J. L. & Pub. Pol'y 259. Interestingly, this article concluded that the Florida Rules did constitute prior restraint.
- One must admire the aggression with which the Florida Bar has attempted to limit manipulative and deceptive advertising. It appears that Florida is using deceptive advertising as a tool to improve the professionalism of television and radio ads.
- I do not think we have the problems they have been having in Florida. On the other hand, I think Utah is beginning to suffer from deceptive advertising creep. That is, we are getting more and more lawyer advertisements on cable TV and elsewhere that may be considered misleading and certainly some are unprofessional.
- The Commission should consider requesting the Supreme Court to establish or authorize a committee to further study the problem and recommend rule changes where needed.



STATE BAR OF NEVADA MANDATORY ADVERTISING FILING FORM PURSUANT TO RPC 7.2A

(updated 12/07)

Effective September 1, 2007, Rule of Professional Conduct ("RPC") 7.2A (Advertising Filing Requirements) requires that a lawyer <u>file</u> with the state bar a copy or recording of an advertisement or written or recorded communication within 15 days of first dissemination along with a form supplied by the state bar, except those advertisements exempt pursuant to Advertising Committee Rule ("ACR") 2(o). If desired, advance opinion may be obtained pursuant to RPC 7.2(B) by submitting a copy of the advertisement with an application form and the fee required by ACR 8. If an advance opinion is requested, the committee shall issue a written opinion within 30 days of submission.

For SBN Use Only
Ad. #:
Date Rec'd
District
Type of Ad
Ackn. Letter Sent
1

INSTRUCTIONS FOR SUBMISSION OF THE FILING FORM

- Complete Filing Form in full. Please print or type. Application may be reproduced.
- A separate Filing Form must be submitted for each advertisement or writing.
- 3. Attached advertisement or writing.
 - > Each form regarding a written, recorded or other electronic media advertisement or solicitation shall be accompanied by a copy of the advertisement or solicitation.
 - > An audio or video advertisement shall be accompanied by a recording of the advertisement and a written transcript of the recording.
 - > Audio and video recordings shall be submitted in DVD, CD or e-mail format.
 - Any public media advertisement or solicitation communication in a non-English language shall be accompanied by a complete, accurate English translation.
- If requesting a waiver of the electronic filing requirement, submit written explanation of good cause. This only applies to television or radio ads.

4. Mail an original of each completed Filing Form with all attachments to:

Advertising Administrator State Bar of Nevada 9456 Double R Blvd. Suite B Reno, NV 89521

or send electronically to:

jodim@nvbar.org

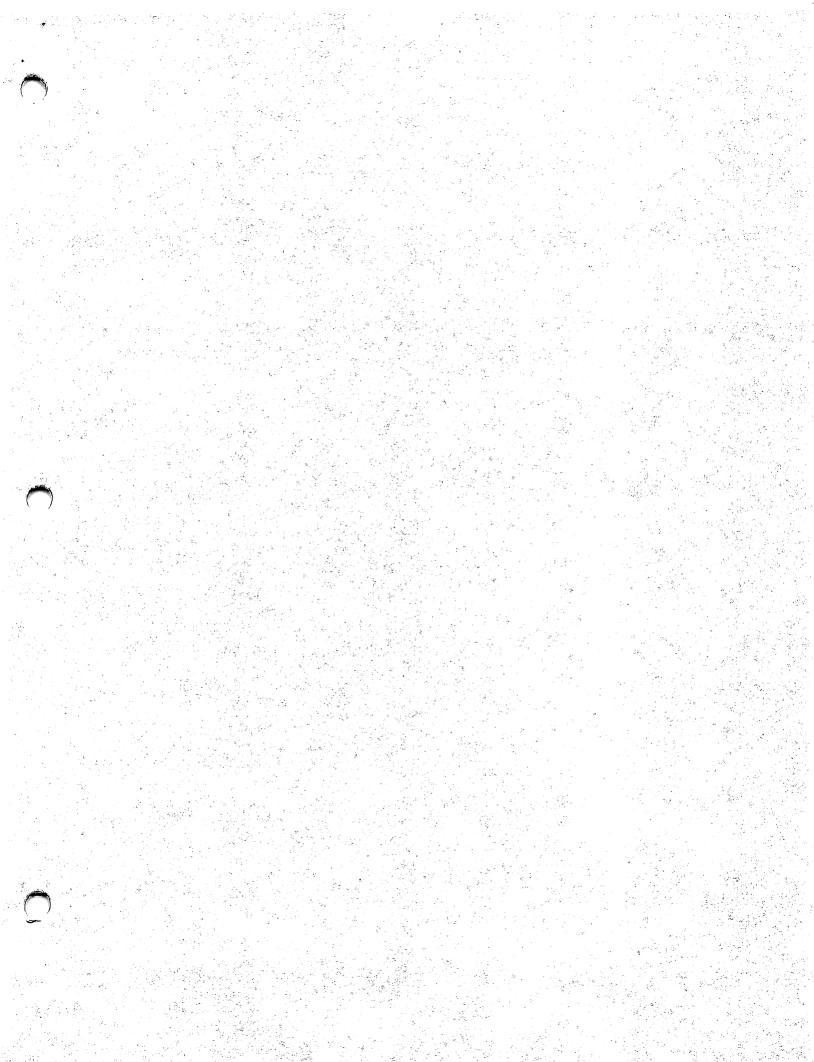
A separate Filing Form must be submitted for each advertisement or writing.

For questions concerning filing requirements visit www.nvbar.org, or call 702-382-2200.

Lawyer:	Bar Number			
Firm:				
Firm's Principal Office Address				
Phone:	Fax:		_ E-mail:	
Nature of advertisement or w	ritten solici	tation:		
ALetter	C	Newspaper/Periodical	E	Billboards and other signs
B Telephone Directory				
State the date the advertisem	ent or writii	ng was first dissemina	ted or mail	ed:
	s, there ma	y be more than one):		
ls a waiver of the electronic f	•			
Does the advertisement or w	_			_

	ement or writing dis es No		f an office other than the firm's			
Does the advertisement or writing designate or allude to one or more specific areas of practice? Yes No						
Identify any lawyers depicted in the advertisement:						
Identify any actual employees of the lawyer/firm depicted in the advertisement with job title:						
Identify any actual clients depicted in the advertisement along with such clients' addresses and phone numbers:						
Identify any actors	used in the advertiser	ment:				
Additional or Substantiating information:						
Note: the Advertising Review Committee may request substantiation of any statement or representation made in the submitted advertisement.						
ATTEST: I HAVE REVIEWED THE ADVERTISEMENT OR WRITING SUBMITTED AS REQUIRED BY NEVADA RPC 7.2A. THE REPRESENTATIONS CONTAINED THEREIN AND THE INFORMATION IN THIS FORM ARE TRUE AND CORRECT.						
;						
Signature			Date			
FOR COMMITTEE USE: ONLY						
NO ACTION TAKEN AFTER REVIEW	ADD'L INFORMATION REQUESTED	ADD'L INFORMATION REVIEWED/APPROVED	REFERRED TO OFFICE OF BAR COUNSEL WITHIN 30 DAYS OF REVIEW			
DATE	DATE	DATE	DATE			
BY	BY	BY	BY			

This check list is provided for your benefit only and does not need to be returned with your filing form. This check list is provided in an effort to help you identify the most common problem areas with compliance in advertisements before filing.
Have you done following?
☐ Included disclaimers for any statements regarding past results, such as, "this does not guarantee, warranty or predict the outcome of your case." (7.1b)
☐ Not made any claims comparing your service to those of other attorneys which can not be validated. If you have made comparative statements, have you included substantiating information on your filing form? (7.1c)
\square Not included any client testimonials or endorsements which would be either fictional or scripted? Can your testimonials be validated? (7.1d)
☐ Included actor disclaimers for all actors portraying either clients or staff? Have you identified any spokesmen as such? Have you only used attorneys to portray attorneys? (7.2b)
☐ Included the name of a lawyer or law firm in the ad? (7.2d)
☐ Included a prominently displayed contingency fee disclaimer if a contingency fee is advertised? (7.2e)
☐ Included a disclaimer regarding a specific fee or range of fees which indicates any limiting conditions to the availability of the fee. (7.2f)
☐ Included "This is an advertisement" on all written solicitations? (7.3c)
□ Not used the word specialist or expert or any derivative thereof unless the advertising attorney has been certified a specialist or expert by an organization approved under RPC 7.4A. (7.4d)
☐ Included biographical information on all written solicitations? (1.4 c-3)



608 F.3d 1241 United States Court of Appeals, Eleventh Circuit.

William H. HARRELL, Jr., Harrell & Harrell, P.A., et al., Plaintiffs-Appellants,

v.

THE FLORIDA BAR, et al., Defendants-Appellees.

No. 09-11910. June 17, 2010.

Synopsis

Background: Attorney, joined by his law firm and a nonprofit organization, brought action seeking a declaratory judgment and injunctive relief, alleging that nine separate provisions of the Florida Bar's advertising rules imposed unconstitutional content-based restrictions on his commercial speech, and that the rules were impermissibly vague and, therefore, facially invalid under the Fourteenth Amendment's due process clause. The United States District Court for the Middle District of Florida, No. 08-00015-CV-J-34TEM, Marcia M. Howard, J., granted summary judgment in the Bar's favor. Attorney, law firm, and nonprofit organization appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

l attorney had standing to challenge five of nine rules on vagueness grounds;

2 attorney's vagueness challenge was ripe;

3 attorney had standing to bring as applied First Amendment challenge to all nine rules;

4 only one of attorney's as applied First Amendment challenges was ripe for review;

5 attorney's challenge to Florida Bar's rejection of his slogan "Don't settle for less than you deserve" was not moot; and

6 advertising rule requiring a lawyer submit advertisements for review did not amount to an unconstitutional imposition on protected commercial speech.

Affirmed in part, reversed in part, and remanded.

West Headnotes (41)

1 Constitutional Law Occupation, employment, and profession

To demonstrate standing to bring a vagueness challenge to a state Bar's rules under the Fourteenth Amendment, an attorney must show that: (1) he has suffered, or imminently will suffer, an injury-in-fact; (2) the injury is fairly

traceable to the operation of the rules; and (3) a favorable judgment is likely to redress the injury. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

2 Constitutional Law Coccupation, employment, and profession

An attorney bringing a vagueness challenge to a state Bar's rules under the Fourteenth Amendment must demonstrate standing with respect to each Bar rule that he challenges. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

3 Federal Courts Trial de novo

Whether an attorney has standing to challenge a state Bar's rules is a legal issue subject to *de novo* review

Cases that cite this headnote

4 Constitutional Law Freedom of Speech, Expression, and Press

A court applies the injury-in-fact standing requirement most loosely where First Amendment rights are involved, lest free speech be chilled even before the law or regulation is enforced, U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

5 Constitutional Law Freedom of Speech, Expression, and Press

An actual injury can exist for standing purposes when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences; in such an instance, the injury is self-censorship. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

6 Constitutional Law—Occupation, employment, and profession

In order to substantiate his claimed selfcensorship injury, attorney challenging Florida Bar's advertising rules under the First Amendment was required to establish that: (1) he seriously wished to advertise his services, (2) such advertising would have arguably been affected by the rules, but the rules were at least arguably vague as they applied to him, and (3) there was at least a minimal probability that the

rules would have been enforced, if they were violated; if attorney could make this threshold showing, he could claim an injury-in-fact to his First Amendment rights that recurred each day and was irreparable, since it was the existence, not the imposition, of standardless requirements that caused the injury. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

7 Constitutional Law—Occupation, employment, and profession

Attorney challenging Florida Bar's advertising rules on vagueness grounds under the First Amendment provided ample proof that he intended to advertise the services of his firm, as required to substantiate his claimed selfcensorship injury for standing purposes; attorney was a practicing personal injury lawyer in Florida who had advertised in a variety of media for many years, and he depended on advertising for the success of his firm, so much so that the firm could not pull its television ads entirely without facing almost certain bankruptcy, and attorney averred that, were it not for the rules' prohibitions on the use of various advertising techniques, he would have used those techniques in his ads. U.S.C.A. Const. Amend. 1.

Cases that cite this headnote

8 Constitutional Law—Occupation, employment, and profession

Attorney challenging Florida Bar's advertising rules on vagueness grounds under the First Amendment made an adequate threshold showing that rules prohibiting advertisements that were manipulative, promised results, characterized the quality of the lawyer's services, and provided anything other than useful, factual information seemed to apply to his proposed advertisements, but failed to provide meaningful standards and thus chilled his speech, as required to substantiate his self-censorship injury claim for standing purposes, by pointing to the ambiguity in the language of the rules themselves, presenting examples of contradictory advisory rulings by the Bar, and suggesting that the contradictory rulings revealed a measure of arbitrariness in the rules themselves, U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

9 Constitutional Law Occupation, employment, and profession

There was sufficient evidence of Florida Bar's intent to enforce its advertising rules if it perceived a violation, to support, for standing

purposes, self-censorship injury claim of attorney challenging the rules on vagueness grounds under the First Amendment; the Bar recently revised the rules, the Florida Supreme Court had on multiple occasions upheld them, and the Bar was defending them in attorney's action, and had explicitly warned attorney that running impermissible advertisements might subject him to discipline. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

10 Constitutional Law Freedom of Speech, Expression, and Press

If a law or rule challenged under the First Amendment was recently enacted, or if the enforcing authority is defending the challenged law or rule in court, an intent to enforce the rule may be inferred for purposes of establishing a self censorship injury as an element of standing. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

11 Constitutional Law Occupation, employment, and profession

Attorney lacked an injury-in-fact flowing from any supposed vagueness in Florida Bar's advertising rules prohibiting statements that were unsubstantiated, any communication that compared the lawyer's services with other lawyers' services, unless the comparison could be factually substantiated, and any background sound other than instrumental music, or in the rule against misleading advertisements, and therefore lacked standing to challenge them on vagueness grounds under the First Amendment, absent evidence that attorney could not derive the core meaning from the rules. U.S.C.A. Const.Amend.

Cases that cite this headnote

12 Federal Courts Case or Controversy Requirement

The "ripeness doctrine" protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes.

Cases that cite this headnote

13 Constitutional Law Ripeness; prematurity

Federal courts apply the ripeness doctrine most permissively in the First Amendment context. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

14 Federal Courts Case or Controversy Requirement

To determine whether a claim is ripe, courts assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial review; the fitness prong is typically concerned with questions of finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed, while the hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal.

Cases that cite this headnote

15 Constitutional Law—Ripeness; prematurity

Attorney was not required, for purposes of ripeness, to obtain an opinion from the Florida Bar applying advertising rules to his proposed advertisements before he could challenge the rules facially on vagueness grounds under the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

16 Constitutional Law—Ripeness; prematurity

It is immaterial in determining ripeness whether a party challenging an allegedly vague statute under the First Amendment applied for permission to engage in the challenged conduct; since the very existence of censorial power is unacceptable, there is little reason for a court to forbear entertaining an anticipatory challenge in order to allow that power to be exercised. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

17 Administrative Law and Procedure Finality; ripeness

The hardship prong of a ripeness assessment is not an independent requirement divorced from the consideration of the institutional interests of the court and agency, and where there are no significant agency or judicial interests militating in favor of delay, lack of "hardship" cannot tip the balance against judicial review.

Cases that cite this headnote

18 Constitutional Law Overbreadth

In the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

19 Constitutional Law Freedom of Speech, Expression, and Press

In the context of a First Amendment claims, where the complaint alleges an actual prohibition rather than the absence of any standard at all, to establish injury-in-fact from chilled speech, a plaintiff must show that, as a result of his desired expression, (1) he was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

20 Constitutional Law Freedom of Speech, Expression, and Press

In the context of a First Amendment claim, where the complaint alleges an actual prohibition rather than the absence of any standard at all, to establish injury-in-fact from chilled speech based on a credible threat of prosecution, a plaintiff is required to establish: first, that he seriously wishes to engage in expression that is at least arguably forbidden by the pertinent law; and second, that there is at least some minimal probability that the challenged rules will be enforced if violated. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

21 Constitutional Law Occupation, employment, and profession

Attorney bringing as applied challenge to Florida Bar's advertising rules, alleging the rules specifically prohibited constitutionally protected advertising conduct in violation of the First Amendment, adequately showed that he would face a credible threat of prosecution if he engaged in the desired speech for purposes of establishing an injury-in-fact based on chilled speech, by describing a number of advertising campaigns he proposed to develop and run, and explaining how the rules seemed to proscribe those advertisements, and by showing that there was at least a minimal probability that the Bar would enforce the rules if he was deemed to have violated them. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

22 Federal Civil Procedure Causation; redressability

Redressability of an injury is established, for standing purposes, when a favorable decision would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.

Cases that cite this headnote

23 Constitutional Law Ripeness; prematurity

Given the distinct possibility that agency review will eliminate the need for judicial review, and given the role of the ripeness doctrine in protecting agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties, a court may require that First Amendment plaintiffs seek determinations with varying degrees of finality from agencies whose rules or decisions they seek to challenge on an as-applied basis. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

24 Administrative Law and Procedure Finality; ripeness

Since few, if any, institutional interests would be served by asking an agency to interpret a rule whose application is utterly clear, the absence of an agency opinion ordinarily will not affect whether a challenge to such a rule is fit for immediate judicial review.

Cases that cite this headnote

25 Constitutional Law Ripeness; prematurity

Attorney's as applied challenge to Florida Bar's advertising rule prohibiting any background sound other than instrumental music, alleging the rule specifically prohibited constitutionally protected advertising conduct in violation of the First Amendment, was ripe for review, even though attorney had not sought an advisory opinion from the Florida Bar; any ambiguity in what constituted a "background sound" or "instrumental music" was *de minimis*. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

26 Constitutional Law Ripeness; prematurity

Attorney's as applied challenges to eight advertising rules of the Florida Bar, alleging they specifically prohibited constitutionally protected advertising conduct in violation of the First Amendment, were not ripe for judicial review; there was a substantial measure of uncertainty about the fundamental factual issue of how the Bar would apply the rules to attorney's proposed advertisements, and the Florida Bar provided a relatively expeditious means of testing the reach of the rules through an advisory opinion process, for which even a script or outline of a proposed advertisement would suffice, and attorney gave no substantial reason to believe that submitting a bare script of outline of the advertisements he proposed would have constituted a hardship. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

27 Federal Courts Case or Controversy Requirement

A federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

Cases that cite this headnote

28 Federal Courts ← Case or Controversy Requirement

Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot; since the defendant is free to return to his old ways, he bears a heavy burden of demonstrating that his cessation of the challenged conduct renders the controversy moot.

Cases that cite this headnote

29 Federal Courts Case or Controversy Requirement

A defendant's burden of demonstrating that his voluntary cessation of challenged conduct renders a controversy moot will have been borne only if:(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation; in other words, when a party abandons a challenged practice freely, the case will be moot only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

Cases that cite this headnote

30 Federal Courts Case or Controversy Requirement

In general, the repeal of a challenged statute is one of those events that makes it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, so as to render moot an action challenging the statute.

Cases that cite this headnote

31 Federal Courts—Case or Controversy Requirement

A challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated.

Cases that cite this headnote

32 Federal Courts Case or Controversy Requirement

Where the circumstances surrounding the voluntary cessation of challenged conduct suggest that the defendant is attempting to manipulate the court's jurisdiction to insulate a favorable decision from review, courts will not deem a controversy moot; more generally, the timing and content of a voluntary decision to cease a challenged activity are critical in determining the motive for the cessation and therefore whether there is any reasonable expectation that the alleged violation will recur.

Cases that cite this headnote

33 Federal Courts Case or Controversy Requirement

A defendant's voluntary cessation of conduct before receiving notice of a legal challenge to that conduct weighs in favor of mootness, while cessation that occurs late in the game will make a court more skeptical of voluntary changes that have been made.

Cases that cite this headnote

34 Federal Courts Case or Controversy Requirement

With respect to content of a voluntary decision to cease a challenged activity in a mootness determination, a court looks for a well-reasoned justification for the cessation as evidence that the ceasing party intends to hold steady in its revised and presumably unobjectionable course.

Cases that cite this headnote

35 Federal Courts Case or Controversy Requirement

The timing and content of a voluntary decision to cease challenged conduct are relevant in assessing whether the defendant's termination of the challenged conduct is sufficiently unambiguous to warrant application of the *Troiano* presumption in favor of governmental entities, that a challenge to a government policy that has been unambiguously terminated is moot; short of repealing a statute, if a governmental entity decides in a clandestine or irregular manner to cease a challenged behavior, it can hardly be said that its termination of the behavior is unambiguous.

Cases that cite this headnote

36 Constitutional Law Mootness

Attorney's constitutional challenge to Florida Bar's rejection of his slogan "Don't settle for less than you deserve" under Bar's advertising rules was not rendered moot by the Board of Governors declaration that the slogan was permissible, at least as used in the advertisements that attorney originally submitted for review; Board acted in secrecy, meeting behind closed doors, and failing to disclose any basis for its decision, and Board took up the matter of attorney's advertisements only at the urging of the Bar's counsel after the litigation had commenced, and, in doing so, may have departed from its own procedures.

Cases that cite this headnote

37 Attorney and Client Advertising or soliciting Constitutional Law Advertising

Florida Bar's advertising rule requiring a lawyer to submit any television or radio advertisement for review at least 20 days before its first planned dissemination or airing date, so as to give the Bar approximately 15 days in which to review the ad and five days mail and transit time, did not amount to an unconstitutional imposition on protected commercial speech under the First Amendment; rule directly advanced Bar's substantial interests in curbing practices that negatively impacted the administration of justice, protected the public from abusive practices, and preserved the reputation and integrity of the legal

profession, and 20-day delay placed minimal burden on attorneys. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Constitutional Law Difference in protection given to other speech

Commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

39 Constitutional Law Commercial Speech in General

Under the "intermediate scrutiny" standard governing the regulation of non-deceptive commercial speech set forth in *Central Hudson*, a court asks whether an imposition on commercial speech (1) promotes a substantial governmental interest; (2) directly advances the interest asserted; and (3) is not more extensive than necessary to serve that interest. U.S.C.A. Const.Amend, 1.

Cases that cite this headnote

40 Constitutional Law—Reasonableness; relationship to governmental interest

Unlike rational basis review, the *Central Hudson* standard governing the regulation of non-deceptive commercial speech does not permit a court to supplant the precise interests put forward by the State with other suppositions. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

41 Constitutional Law Reasonableness; relationship to governmental interest

Burden of demonstrating that the challenged regulation advances asserted interests in a direct and material way, under Central Hudson test governing regulation of non-deceptive commercial speech, is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the rule at issue targets a concrete, nonspeculative harm. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

*1246 Gregory A. Beck, Brian Wolfman, Public Citizen Lit. Group, Washington, DC, *1247 David Michael Frank, Law Office of David M. Frank, P.A., Tallahassee, FL, for Plaintiffs-Appellants.

Barry Richard, Mary Hope Keating, Greenberg Traurig, P.A., Tallahassee, FL, Elliott B. Kula, Greenberg Traurig, P.A., Miami, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before EDMONDSON and MARCUS, Circuit Judges, and BARBOUR, *District Judge.

Opinion

MARCUS, Circuit Judge:

Plaintiff William H. Harrell, Jr., joined by his law firm Harrell & Harrell and the nonprofit organization Public Citizen, appeals from the district court's grant of summary judgment in favor of defendant The Florida Bar ("the Bar"). Harrell, who advertises the services of his firm extensively, claims in a broad facial challenge that nine advertising-related provisions of the Rules Regulating the Florida Bar ("the rules") are so vague as to violate his due process rights. He also claims in an as-applied challenge that the same rules violate his First Amendment rights by prohibiting him from advertising in a variety of specific ways, including through the use of a slogan-"Don't settle for less than you deserve"-that he has included in his advertisements for years. Finally, he challenges as an unconstitutional burden on his speech a requirement that lawyers submit proposed radio and television advertisements to the Florida Bar for review at least twenty days before their dissemination.

The bulk of this case, as it comes to us on appeal, concerns the "[t]hree strands of justiciability doctrine"-standing, ripeness, and mootness-that go to the heart of the Article III case or controversy requirement. Socialist Workers Party v. Leahy, 145 F.3d 1240, 1244 (11th Cir.1998). The district court, in an order of final summary judgment, concluded that all of Harrell's claims except for his challenge to the twenty-day pre-filing rule were nonjusticiable on one of those three grounds. On the merits of the sole claim it considered justiciable, the district court held that the Bar's pre-filing rule did not violate the First Amendment.

After thorough review, we conclude that Harrell's facial vagueness challenge is justiciable with respect to five of the nine challenged rules. As to all but one of the nine rules, however, we agree with the district court that Harrell's asapplied First Amendment challenge is not ripe, and therefore is nonjusticiable. Turning to the question of Harrell's slogan, we agree with Harrell that his challenge to the Bar's rejection

of "Don't settle for less than you deserve" is not moot. Finally, we conclude on the merits that the Florida Bar's twenty-day pre-filing rule is constitutional. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.

William Harrell is an attorney in Jacksonville, Florida, and the managing partner of the law firm of Harrell & Harrell. P.A. The firm, which specializes in personal injury law, depends heavily on advertising to generate business, and advertises through a variety of media such as television, radio, billboards, and a website. Like all Florida lawyers, Harrell is subject to the Bar's extensive attorney advertising rules. Those rules, which are found in the Rules Regulating the Florida Bar, apply *1248 expansively to a wide range of common advertising content, such as statements of quality, comparisons, background sounds, and other stock advertising techniques. To promote compliance with the rules, Florida lawyers like Harrell must file proposed advertisements with the Florida Bar for a determination of whether the advertisement is permissible. Disseminating a non-compliant advertisement provides grounds for discipline, including public reprimand, suspension, and even disbarment. Rules 3-4.2 & 3-5.1.

The present version of the rules reflects a long and undeniable trend towards increasingly restrictive measures to control attorney advertising. The goal of these measures is to protect the public from misleading advertising and to preserve the reputation of the legal profession in the face of what some perceive as increasingly unscrupulous advertisements. Thus, for example, in 1990, the Florida Supreme Court adopted a range of new rules and explanatory comments that prohibited forms of advertising content such as slogans, jingles, references to past "results obtained," testimonials, statements that "describ [e] or characteriz[e] the quality of the lawyer's services," statements that would be considered true for most lawyers practicing in Florida, statements of comparison like "one of the best" or "one of the most experienced," depictions that "create[] suspense" or contain "exaggerations" or "call[s] for legal services," and "audio or video portrayal[s] of an event or situation." See In re Petition to Amend the Rules Regulating The Fla. Bar, 571 So.2d 451, 460-64 (Fla.1990) ("In re 1990 Amendments"). In contrast to the previous set of rules, which had excluded from their purview "[q]uestions of effectiveness and taste," In re Rules Regulating The Fla. Bar, 494 So.2d 977, 1071-72 (Fla.1986), the new amendments required that lawyers "provide only useful, factual information presented in a nonsensational manner." In re 1990 Amendments, 571 So.2d at 464; see also Rule 4-7.1, cmt.

In 1997, again concerned about a loss of public confidence in lawyers and the legal system, the Bar petitioned the Florida Supreme Court for further restrictions. While rejecting a wholesale ban on all television and radio advertising in the state, as advocated by a task force of the Bar, the court amended the rules to place additional prohibitions on "visual or verbal descriptions" or illustrations that are "manipulative"

or likely to "confuse" the viewer. *In re Amendments to Rules Regulating The Fla. Bar*, 762 So.2d 392, 395-96, 409-10 (Fla.1999).

In 2004, the Bar proposed still more amendments to the rules, notably including a prohibition on advertisements that "promise[]] results," Rule 4-7.2(c)(1)(G), and a rule that appeared to be a pre-screening requirement, pursuant to which a lawyer who sought to air a television or radio advertisement would have to submit the ad for the Bar's review twenty days *prior* to the date of airing. See Rule 4-7.7(a)(1)(C). The Florida Supreme Court adopted the Bar's recommendations. In re Amendments to The Rules Regulating The Florida Bar. 971 So.2d 763, 764-65 (Fla.2007).

To help attorneys comply with these elaborate rules governing advertising, the Bar provides a three-tiered administrative review structure. An attorney ordinarily must submit a proposed advertisement to the Bar's Ethics and Advertising Department, where a Department staff member issues an advisory opinion. Any adverse opinion of the Department may be appealed to the Standing Committee on Advertising, see Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation ("Procedures") § 4(a), and any adverse decision of the Standing Committee in turn may be appealed *1249 to the Board of Governors ("the Board"), which is the chief governing body of The Florida Bar, id. § 4(h). The Board may also review decisions of the Standing Committee sua sponte under limited circumstances. An attorney cannot be disciplined for filing a non-compliant advertisement with the Bar, Tarbert Aff. ¶ 13, and indeed, a favorable determination by the Ethics and Advertising Department or any superior body generally acts as a safe harbor against discipline on the basis of the advertisement submitted, Rule 4-7.7(a)(1)(F); Rule 4-7.7(a)(2)(F).

Harrell is intimately acquainted with the administrative review process. According to his affidavit, the Bar has over the years repeatedly rejected his firm's advertising submissions for containing elements that he considers harmless, such as an illustration of stick people, a statue of Lady Justice, the scenery outside a window behind him, and a picture of one of his Bar-approved telephone-book advertisements. Harrell Aff. ¶ 5, Sept. 15, 2008. Harrell submits that the Bar's reasons for rejecting his advertisements are often opaque or hyper-technical. Thus, for example, he notes that in rejecting his proposed slogan "You Need an Attorney Fighting for Your Rights," the Bar claimed that the advertisement was misleading because, "[w]hile an attorney can certainly be most helpful to injured individuals, they do not have to have an attorney to bring or settle a civil negligence claim." Id.

Harrell has on four occasions appealed the Ethics and Advertising Department's rejection of his advertisements to the Standing Committee, arguing that the ads were harmless to consumers, and the Bar's restrictions themselves unconstitutional. Harrell Aff. ¶¶ 6, 14. Each time, the committee affirmed the decision below without addressing his arguments. Harrell Aff. ¶¶ 6, 15. After several appeals to the Board of Governors lasting between seven and

nine months each, two of the rejections were eventually reversed. The Board, however, affirmed without explanation the rejection of an advertisement depicting Harrell standing in front of his office building. Harrell Aff. ¶ 7.

Similar vicissitudes ultimately gave rise to this lawsuit, beginning with Harrell's proposed use in 2002 of the advertising slogan "Don't settle for anything less." Around that time, the Bar informed Harrell that the slogan impermissibly "create[d] unjustified expectations about results the lawyer can achieve," in violation of former Rule 4-7.2(b)(1)(B), Harrell Aff. ¶¶ 8-9, but told him that "Don't settle for less than you deserve" was acceptable, id. ¶ 9. The Bar did not explain its reasoning, but Harrell adopted the Bar's proposal and used "Don't settle for less than you deserve" as the centerpiece of the firm's new marketing campaign. Harrell Aff. ¶¶ 9-10. The slogan remains on Harrell & Harrell's website to this day.

Five years after it had authorized the slogan, however, the Bar informed Harrell that "Don't settle for less than you deserve" improperly characterized the quality of his firm's services and therefore was prohibited under Rule 4-7.2(c)(2). Harrell Aff., Ex. 3, at 2. Harrell appealed to the Standing Committee, reminding it that the Bar had itself suggested the slogan several years earlier, but, by letter dated November 28, 2007, the Standing Committee affirmed the decision of the Ethics and Advertising Department, noting that the Committee had previously rejected "Do not settle for anything less" and similar slogans. Harrell Aff. Ex. 5, at 2.

Governors, but instead filed this lawsuit in the United States District Court for the Middle District of Florida on January 7, 2008, seeking a declaratory judgment and injunctive relief. He claimed not only that the Bar's application of Rule 4-7.2(c)(2) to his slogan violated his First Amendment rights, but that nine separate provisions of the Bar's advertising rules imposed unconstitutional content-based restrictions on his commercial speech. He also claimed more broadly that these rules were impermissibly vague and, therefore, facially invalid under the Fourteenth Amendment's due process clause. He objected to the following rules:

- Rule 4-7.1, a general prefatory rule, the comment to which limits permissible advertising content to "useful, factual information presented in a nonsensational manner";
- The comment to Rule 4-7.2(c)(1), which bans statements that, "[s]tanding by [themselves,] ... impl[y] falsely that the lawyer possesses a qualification not common to virtually all lawyers practicing in Florida";
- Rule 4-7.2(c)(1)(D), which prohibits statements that are "unsubstantiated in fact";
- Rule 4-7.2(c)(1)(G), which prohibits statements that "promise[] results";
- Rule 4-7.2(c)(1)(I), which forbids lawyers to "compar[e] [their] services with other lawyers' services, unless the comparison can be factually substantiated";

- Rule 4-7.2(c)(2), which bans "statements describing or characterizing the quality of the lawyer's services";
- Rule 4-7.2(c)(3), which prohibits the use of "visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events" that are "manipulative, or likely to confuse the viewer";
- Rule 4-7.5(b)(1)(A), which similarly prohibits any television or radio advertisement that is "deceptive, misleading, manipulative, or that is likely to confuse the viewer"; and
- Rule 4-7.5(b)(1)(C), which prohibits "any background sound other than instrumental music."

Separately, Harrell also claimed that by requiring him to file proposed radio and television advertisements for review twenty days prior to airing them, the Bar had erected an invalid prior restraint on his speech.

In support of his speech and due process claims, Harrell explained at length how a number of advertisements he desired to run appeared to be prohibited by the rules. These proposed ads fall into three general categories: an ad campaign based on the theme of "family"; another campaign based on the theme of "choices" that a prospective client must make in choosing representation; and a loosely defined group of ads in which Harrell intends to feature one or more individual slogans.

Harrell's family-themed advertisements, for example, would have featured Harrell, his family, and his mastiff dogs, and would have "emphasized the family-friendly nature of the firm and its charitable contributions." Harrell Aff. ¶ 28. To humanize the firm, the ads would have shown the firm's facilities, including an "on-site gymnasium established to promote the health of its employees," and would have mentioned the complimentary personal trainers and nutritional counselors available to employees. *Id.* "Other advertisements in the campaign would have sought to humanize the firm's individual lawyers by telling their personal stories." *Id.*

Harrell explained, however, that the ads appeared to be prohibited or severely limited by the operation of several of the challenged rules. For one, he claimed that *1251 an advertisement focused on the personal narratives and quality of life of a law firm's attorneys would seem to go beyond providing "only useful, factual information presented in a nonsensational manner." Rule 4-7.1, cmt. Separately, with its heavy emphasis on the personality and character of Harrell and the firm's other attorneys, he argued that the ad might well run afoul of the prohibition on "statements describing or characterizing the quality of the lawyer's services," see Harrell Aff. ¶ 28(c), which the Florida Supreme Court has applied to statements about a lawyer's "character and personality traits," Fla. Bar v. Pape. 918 So.2d 240, 244 (Fla.2005).

Harrell also explained how the family-themed advertisements that he proposed arguably would offend Rule 4-7.2(c)(3),

which prohibits "visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events that are deceptive, misleading, manipulative, or likely to confuse the viewer." In particular, Harrell's attempt to attract clients by visually depicting his law firm as a "family" may be viewed as "manipulative." Furthermore, as Harrell explains, although his mastiff dogs are in fact "friendly, loyal, and easy-going," Harrell Aff. ¶ 28(b), they also "are popularly known as guard dogs that ferociously defend their territory, id., and therefore might fall within the Florida Supreme Court's determination that the use of aggressive dogs, such as the pit bull, is manipulative, Pape, 918 So.2d at 244. For these same reasons, Harrell suggested that his ads arguably would violate Rule 4-7.5(b)(1)(A), too, which prohibits in any television or radio ad "any feature that is deceptive, misleading, manipulative, or that is likely to confuse the viewer."

Finally, Harrell said, nearly every aspect of his advertisements plausibly could be deemed "unsubstantiated in fact" in violation of Rule 4-7.2(c)(1)(D), since the notions of a firm being "family friendly" or "like family" are impossible to measure in a fact-bound way. Harrell added that his family-themed advertisements would also contain "background noises caused by [his] dogs, by gym equipment, and by other activities in the firm," Harrell Aff. ¶ 28(d), and therefore almost certainly would violate Rule 4-7.5(b) (1)(C), which prohibits the use in television and radio ads of "any background sound other than instrumental music." Indeed, while the Bar has predictably invoked this rule to prohibit the sound of honking horns, traffic, the sound of squealing breaks, and other potentially inflammatory auditory references to accident scenes, it has also applied the rule to seemingly innocuous sounds such as the "sounds of kids playing with [a] bouncing ball; [the] sound of a computer turning off; [the] sound of a light switch turning off[;] [the] [s]ound of a seagull in the background[;] ... [and] [the] [s]ound of a telephone ringing that interrupts an attorney speaking in a television advertisement." Florida Bar, Recent Decisions on Lawyer Advertising, Dec. 15, 2006, First Harrell Aff., Ex. 6, at 7. Given all of these concerns, Harrell abandoned the proposed advertisement, even though he "still wish[es] to develop and run [it], and would do so if not prohibited by the advertising rules." Harrell Aff. ¶ 28.

Harrell's second proposed advertising campaign would have been "based on the theme of 'choices.' "Harrell Aff. ¶ 29. As he described it, the campaign

would have emphasized that consumers would benefit from the relative size and experience of Harrell & Harrell as compared to other firms in the market, and that the firm's rates compared favorably to the rates of other firms. The advertisement would have emphasized the firm's experience in diverse areas of personal injury practice and the thousands *1252 of cases in which it has represented consumers.

Id. Harrell noted, however, that parts of this advertisement would violate the prohibition of Rule 4-7.2(c)(1)(I) on any communication that "compares the lawyer's services with other lawyers' services, unless the comparison can be

factually substantiated." The reason is that Harrell would not be able to substantiate as a matter of objective fact precisely how his firm's small size and "experience" would make it superior to other firms.

Third, Harrell claimed that he intended to use a number of slogans in various advertisements that seemed to be prohibited by the rules. Thus, for example, he wanted to run advertisements containing the phrases "I can help," "we can help," "we fight to win," "we're committed to fight ... to right those wrongs," "you need strong legal representation," and "we help accident victims fight for justice every day." Id. ¶ 21(d), (f). But the Bar has previously applied the rule against statements characterizing the "quality of the lawyer's services," Rule 4-7.2(c)(2), to prohibit even implicit statements of quality, such as "Come and experience the Nation difference" and "When who you choose matters most." See Harrell Aff., Ex. 12, at 14, 36. Since his slogans arguably characterize the quality of his services in the same manner as the prohibited ads, Harrell believed that these past interpretations of the rule by the Bar spelled rejection for his own proposed slogans.

Similarly, Harrell claimed that he wanted to run advertisements containing statements such as "don't give up" and "call Harrell & Harrell." *Id.* ¶ 21(e). Yet, the Bar has previously applied the rule against statements that "promise[] results," Rule 4-7.2(c)(1)(G), to prohibit implicit or inherently unprovable "promises," such as "Don't let an incident like this one ruin your life"-implicitly promising that the lawyer can prevent that result-or "Don't allow the American dream to turn into a nightmare." Harrell Aff., Ex. 12, at 28, 36. Harrell's proposed slogans again appeared to fall within the proscription. Ultimately, Harrell concluded that the rules prohibited all but a "minimalist" campaign consisting of a black background, instrumental music, and images of attorneys speaking. Harrell Aff. ¶ 24.

Notwithstanding Harrell's explanations of his proposed advertisements, the Bar moved to dismiss his claims for lack of subject matter jurisdiction, arguing that except as to his as-applied challenge to the rejection of his slogan, Harrell lacked standing because he had not first sought an advisory opinion from the Bar on any of the advertisements he wished to run. For the same reasons, the Bar also claimed that none of Harrell's claims was ripe for review, and, therefore, none was justiciable.

The district court ultimately denied the motion, reasoning that the lack of an advisory opinion did not deprive the court of a justiciable case or controversy because the Bar was free to articulate in court whether it thought that Harrell's proposed ads violated the rules. Separately, however, while the motion to dismiss was pending, Harrell received a letter from the Bar's Ethics Counsel, Elizabeth Tarbert, informing him that the Board of Governors had taken up the matter of his slogan sua sponte and reversed the Standing Committee's judgment that the slogan "Don't settle for less than you deserve" characterized the quality of Harrell's services in violation of Rule 4-7.2(c)(2). Harrell Aff. ¶ 18 & Ex. 7. As a result, when the district court ultimately denied the motion to dismiss, the Bar moved a second time, arguing

that the Board's recent decision deprived the court of a live controversy. The district court deferred ruling on that motion while discovery proceeded.

*1253 In September 2008, the parties filed cross-motions for summary judgment. In a lengthy opinion, the district court granted summary judgment in the Bar's favor, holding that Harrell's challenge to the rejection of his slogan was moot, that he lacked standing to challenge the application of the nine aforementioned rules, that such a challenge in any event was not ripe, and that, while his attack on the Bar's twenty-day prefiling rule was justiciable, on the merits that requirement did not violate the First Amendment because, at least as construed by the district court, it did not constitute an illegal priorrestraint on speech.² See Harrell v. The Florida Bar, No. 3:08-cv-15-J-34TEM (M.D.Fla. Mar. 30, 2009) (Howard, J.) (Order granting motion for summary judgment, at 24-66) ("Summary Judgment Order"). The district court entered final judgment in the Bar's favor and Harrell filed this timely appeal.

II.

Although the rejection of his slogan ("Don't settle for less than you deserve") may have spurred Harrell to file this lawsuit, the heart of his case is a broad challenge to nine provisions of the Bar's advertising rules on First and Fourteenth Amendment grounds. We begin our discussion with Harrell's Fourteenth Amendment void-for-vagueness challenge, a facial attack in which Harrell claims that all nine rules are "invalid in toto[,] and therefore incapable of any valid application." Steffel v. Thompson, 415 U.S. 452, 474, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). Harrell claims effectively that these rules specify "no standard of conduct ... at all [and] simply ha[ve] no core." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n. 7, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (emphasis and citations omitted). Because the district court rejected Harrell's voidfor-vagueness claim on standing and ripeness grounds, we limit our review to those two jurisdictional issues. We first take up the issue of standing, which pertains to whether Harrell is a proper plaintiff to raise this void-for-vagueness challenge. See Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 760 n. 3 (11th Cir.1991). We then proceed to the issue of ripeness, which concerns the timing of Harrell's suit. See id.

A.

challenge (or any other challenge, for that matter), Harrell must show that: (1) he has suffered, or imminently will suffer, an injury-in-fact; (2) the injury is fairly traceable to the operation of the rules; and (3) a favorable judgment is likely to redress the injury. Kelly v. Harris, 331 F.3d 817, 819-20 (11th Cir.2003). Harrell must do so with respect to *1254 each Bar rule that he challenges. See CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1273 (11th Cir.2006); Falanga v. State Bar of Ga., 150 F.3d 1333, 1335 n. 1 (11th Cir.1998). Whether Harrell has standing to challenge the Bar

rules is a legal issue subject to *de novo* review. *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir.1993).

4 5 Under controlling case law, we apply the injury-in-fact requirement most loosely where First Amendment rights are involved, lest free speech be chilled even before the law or regulation is enforced. *Hallandale*, 922 F.2d at 760. Thus, it is well-established that

an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences. In such an instance ..., the injury is self-censorship.

Pittman v. Cole, 267 F.3d 1269, 1283 (11th Cir.2001) (citation omitted).

In challenging the Bar's rules on vagueness grounds, Harrell claims that they powerfully chill his commercial speech, not because they necessarily prohibit the advertisements that he wants to run, but because they give neither him nor any "person of ordinary intelligence a reasonable opportunity to know what is prohibited," and fail to "provide explicit standards for those who apply them." Leib v. Hillsborough County Pub. Transp. Comm'n, 558 F.3d 1301, 1310 (11th Cir.2009) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). He claims essentially that the rules' broad terms-terms like "useful," Rule 4-7.1, cmt., "manipulative," or "likely to confuse," Rules 4-7.2(c)(3) & 4-7.5(b)(1)(A)-"have forced [him] to steer wide of any possible violation lest [he] be unwittingly ensnared." Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 820 (5th Cir.1979).4

6 In order to substantiate this claimed self-censorship injury, Harrell must establish that: (1) he seriously wishes to advertise his services, Eaves, 601 F.2d at 818; (2) such advertising would arguably be affected by the rules, but the rules are at least arguably vague as they apply to him, see Wilson v. Taylor, 658 F.2d 1021, 1031 n. 17 (5th Cir. Unit B 1981) ("[O]ne may not challenge the vagueness of rules as they might hypothetically be applied to others if one's actions fall squarely within the ambit of the prohibitions."),⁵ and (3) there is at least a minimal probability that the rules will be enforced, if they are violated, Eaves, 601 F.2d at 819 n. 6. If Harrell can make this threshold showing, he can claim an injury-in-fact to his First Amendment rights that recurs each day and is irreparable, id. at 821, since "it is the existence, not the imposition, of standardless requirements that causes [the] injury." CAMP Legal Defense Fund, Inc., 451 F.3d at 1275.

We conclude that Harrell has satisfied the injury-in-fact requirement with respect to *five* of the challenged rules: Rules 4-7.2(c)(3), 4-7.5(b)(1)(A), 4-7.2(c)(1)(G), 4-7.2(c)(2), & 4-7.1, cmt. *First*, Harrell has provided ample proof that he intends to advertise the services of his firm. He is a practicing personal injury lawyer in Florida who has advertised in a variety of media for many years, Harrell Aff. ¶¶ 1-4, and he "depend[s] on advertising for the *1255 success of [his] firm," *id.* ¶ 31, so much so that the firm "could"

not pull its television ads entirely without facing almost certain bankruptcy," id. ¶ 17. Indeed, by his own account, he "intend[s] to run many more advertisements in the future," and he avers that, were it not for the rules' prohibitions on the use of various advertising techniques, he would use those techniques in his ads, which would make them more effective and professional. Id. ¶¶ 24, 31.

8 Second, Harrell has made an adequate threshold showing that five of the rules-those prohibiting advertisements that are "manipulative," Rules 4-7.2(c)(3) & 4-7.5(b)(1)(A), "promise[] results," Rule 4-7.2(c)(1)(G), "characteriz[e] the quality of the lawyer's services," Rule 4-7.2(c)(2), or provide anything other than "useful, factual information," Rule 4-7.1, cmt.-seem to apply to his proposed advertisements, but fail to provide meaningful standards and thus chill his speech. Harrell makes this threshold showing of vagueness in two ways. With respect to three of the rules-the rule prohibiting ads that provide anything other than "useful, factual information," Rule 4-7.1, cmt., and the two rules banning advertisements that are "manipulative," Rules 4-7.2(c)(3) & 4-7.5(b)(1)(A)-Harrell points to ambiguity in the language of the rules itself. Concerning the prohibition on ads that "promise[] results," Rule 4-7.2(c)(1)(G), or "characteriz[e] the quality of the lawyer's services," Rule 4-7.2(c)(2), and again with respect to the ban on "manipulative" ads, Harrell also has gathered examples of inexplicably contradictory advisory rulings by the Bar, and he suggests that these contradictions reveal a measure of arbitrariness in the rules themselves.

Focusing first on textual ambiguity, Harrell points to Rule 4-7.1; although the rule is largely general and prefatory, its accompanying comment indicates that the rule prohibits all but "useful, factual information." At a minimum, Harrell can credibly claim to be confused in determining whether his proposal to advertise the family-like qualities of his firm satisfies this highly subjective requirement. Similarly, Harrell has convincingly explained why the prohibition against "manipulative" radio or television advertisements, see Rule 4-7.5(b)(1)(A); see also Rule 4-7.2(c)(3), reasonably might cause him to "steer wide of any possible violation lest [he] be unwittingly ensnared," Eaves. 601 F.2d at 820: almost every television advertisement employs visual images or depictions that are designed to influence, and thereby "manipulate," the viewer into following a particular course of action, in the most unexceptional sense.

The rule against "manipulative" advertisements leads us to Harrell's second category of evidence, because that rule is also one of several for which Harrell has shown evidence of substantially inconsistent applications by the Bar, in ways potentially suggesting that the rules themselves may be indeterminate and run afoul of the proscription against vagueness. On the subject of manipulation, for example, the Standing Committee held that a close-up image of a tiger's eyes, Harrell Aff., Ex. 12, at 79, and a claim to have the "strength of a lion in court," id., Ex. 12, at 53, were manipulative, whereas the Board held that an image of two panthers was not manipulative. Conversely, the Standing Committee noted that a photograph of a man looking out of a window, representing victims of drunken driving collisions,

was not manipulative, *id.*, Ex. 12, at 79, while the Board held that an image of an elderly person looking out of a nursing home window, suggesting nursing home neglect, was manipulative, *id.*, ex. 16, at 5-6. The Ethics and Advertising Department, for its part, said that an image of a fortune teller was "deceptive, misleading, or manipulative," *id.*, ex. 11, at 9-10, and the Standing *1256 Committee similarly held that an image of a wizard violated the applicable rule, *id.*, ex. 12, at 17, but the Board ultimately concluded that the image of the wizard was not "deceptive, misleading, or manipulative," *id.*, ex. 12, at 17.

Similarly, in applying Rule 4-7.2(c)(2) against characterizing the quality of the lawyer's services, the Standing Committee held that the phrases "When who you choose matters most" and "MAKE THE RIGHT CHOICE!" violated the rule, id., Ex. 12, at 14; Ex. 14, at 3, but that the phrase "Choosing the right person to guide you through the criminal justice system may be your most important decision. Choose wisely" did not, id., Ex. 15, at 3. The Standing Committee also ruled that the slogan "you need someone who you can turn to, for trust and compassion with this delicate matter" improperly characterized the quality of the lawyer's services, id., Ex. 12, at 51, even though the Standing Committee's Handbook on Lawyer Advertising and Solicitation expressly approves of the slogan "Caring Representation in Family Law Matters. I Want to Help You Through this Difficult Time," Florida Bar, Standing Committee on Advertising, Handbook on Lawyer Advertising and Solicitation, at 4 (6th ed. Mar. 2000, revised May 2004), Harrell Aff., Ex. 8, at 4. And of course, Harrell has already been subject to arguably inconsistent applications of this rule: the Bar rejected his proposed use of the slogan "Don't settle for anything less," suggested without explanation that he use "Don't settle for less than you deserve" instead, but later rejected the latter slogan as an improper characterization of his services.

Next, in applying the rule against statements that "promise[] results," Rule 4-7.2(c)(1)(G), the Standing Committee held that a claim to "fight ... insurance companies" impermissibly offered such a promise, Harrell Aff., Ex. 12, at 31, but the Board of Governors decided that a claim to "stand up" to insurance companies did not, id., Ex. 12, at 26. The Standing Committee also found that the phrase "let us take care of you' impermissibly promised results, id., Ex. 12, at 40, but wrote in its advertising handbook that the phrase "An Attorney Who Cares For Your Rights!" did not, id., Ex. 8, at 5. The Committee held that the slogan "People make mistakes. I help fix them," promised results, but that "People make mistakes. I help them," did not. Id., Ex. 12, at 2. The Standing Committee further found that the phrase "We'll help you get a positive perspective on your case and get your defense off on the right foot quickly" promised results, id., Ex. 12, at 29, whereas the Board independently determined that there was no such promise in the phrase "If an accident has put your dreams on hold we are here to help you get back on track," id., Ex. 12, at 25. Finally, the Standing Committee ruled that the phrase "your lawyer's knowledge of the law and talents in the courtroom can mean the difference between a criminal conviction and your freedom" violated the rule, id., Ex 12., at 71, but the Board found that the phrase "the lawyer you

choose can help make the difference between a substantial award and a meager settlement" did not, id., Ex. 23, at 9-10.

Having considering the text of the five foregoing rules-Rules 4-7.2(c)(3) & 4-7.5(b)(1)(A) ("manipulative" ads); Rule 4-7.2(c)(1)(G) (ads that "promise [] results"); Rule 4-7.2(c)(2) (ads that "characteriz[e] the quality of the lawyer's services"); Rule 4-7.1, cmt. (ads that contain other than "useful, factual information")-and the evidence presented by Harrell of their inconsistent application, we are satisfied that Harrell has made an adequate threshold showing of vagueness in the application of the rules to his proposed advertisements, so that he may credibly claim to have *1257* suffered an injury-in-fact in the form of self-censorship.

9 10 Third, and finally, there can be no doubt that the Bar intends to enforce the rules if it perceives a violation. If a challenged law or rule was recently enacted, or if the enforcing authority is defending the challenged law or rule in court, an intent to enforce the rule may be inferred. See Eaves, 601 F.2d at 821 (explaining that a court can "assume that law enforcement agencies will not disregard ... a recent expression of the legislature's will"). Here, the Bar revised the rules as recently as 2004, the Florida Supreme Court has on multiple occasions upheld them, see Pape, 918 So.2d at 244; Fla. Bar v. Gold, 937 So.2d 652, 656 (Fla.2006), the Bar is once again defending them in the instant action, and the Bar has explicitly warned Harrell that running impermissible advertisements may subject him to discipline, see Harrell Aff. ¶¶ 13, 15. All of this is sufficient evidence of an intent to enforce the rules.

Under these circumstances, Harrell at least has an arguable claim that the five aforementioned rules are sufficiently vague and indeterminate that he must "steer wide of the danger zone," even if his proposed speech is constitutionally protected. Universal Amusement Co. v. Vance, 587 F.2d 159, 166 (5th Cir.1978). In other words, it is at least arguable that the rules' alleged vagueness exerts a chilling effect on Harrell's proposed commercial speech, which is enough for Harrell to show an injury-in-fact in the form of selfcensorship. And, as for these five rules, Harrell's claims also plainly satisfy the causation and redressability components of the standing inquiry. By definition, Harrell's cognizable selfcensorship injury, as we have just described it, is arguably caused by the challenged rules' alleged vagueness. As for the redressability prong, if the challenged rules are stricken as unconstitutional, Harrell simply need not contend with them any longer. Thus, we hold that Harrell has standing to facially challenge Rules 4-7.1, 4-7.2(c)(1)(G), 4-7.2(c)(2), 4-7.2(c) (3), and 4-7.5(b)(1)(A) on vagueness grounds.

As for the remaining four rules, however, Harrell has not shown an injury-in-fact, and he therefore lacks standing to challenge them. Specifically, he has not explained, either textually or by example, how there is any arguable *vagueness* in the rule prohibiting statements that are "unsubstantiated in fact," Rule 4-7.2(c)(1)(D); in the rule prohibiting any communication that "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated," Rule 4-7.2(c)(1)(I); in the rule prohibiting "any background sound other than instrumental

music," Rule 4-7.5(b)(1)(C); or in the rule against misleading advertisements, to the extent it prohibits a statement that, "[s]tanding by itself[,] ... implies falsely that the lawyer possesses a qualification not common to virtually all lawyers practicing in Florida," Rule 4-7.2(c)(1), cmt. Just as we will not address a "cursory contention" of vagueness on the merits, Falanga. 150 F.3d at 1335 n. 3, we will not merely assume for purposes of standing that these phrases are sufficiently vague to cause Harrell an injury-in-fact in the form of self-censorship. Indeed, we are fairly confident that Harrell can derive the core meaning from these rules, and, absent some indication to the contrary, we hold that Harrell lacks an injury-in-fact flowing from any supposed vagueness in these rules, Wilson, 132 F.3d at 1430, and therefore lacks standing to challenge them broadly on vagueness grounds.

В.

12 13 The district court also held that Harrell's vagueness challenge was not ripe. "The ripeness doctrine protects federal *1258 courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." Digital Props., Inc. v. City of Plantation. 121 F.3d 586, 589 (11th Cir.1997). Again, we apply the doctrine most permissively in the First Amendment context. Beaulieu v. City of Alabaster, 454 F.3d 1219, 1227-28 (11th Cir.2006); Hallandale, 922 F.2d at 761 n. 5 ("[T]he broader the first amendment right and, therefore, the more likely it is that a governmental act will impinge on the first amendment, the more likely it is that the courts will find a justiciable case when confronted with a challenge to the governmental act.").

To determine whether a claim is ripe, we assess both the *fitness* of the issues for judicial decision and the *hardship* to the parties of withholding judicial review. *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1315 (11th Cir.2000). The fitness prong is typically concerned with questions of "finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir.1995). The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal. *Id.*

15 16 We fail to discern any ripeness problems concerning Harrell's void-for-vagueness challenge to the five rules that he has standing to challenge. See Rules 4-7.1, 4-7.2(c)(1)(G), 4-7.2(c)(2), 4-7.2(c)(3), and 4-7.5(b)(1)(A). Harrell's claimed injury is immediate. As the former Fifth Circuit said in binding precedent,

[a]ll vague statutes are unacceptable partly because they encourage ... arbitrary and discriminatory application; similarly, vague measures regulating first amendment freedoms enable low-level administrative officials to act as censors, deciding for themselves which expressive activities to permit. The very existence of this censorial

power, regardless of how or whether it is exercised, is unacceptable.

Eaves. 601 F.2d at 822-23 (citations and quotation marks omitted). For this reason, "it [is] immaterial ... whether the party challenging the measure even applied for" permission to engage in the challenged conduct. Id. at 823. "[S]ince the very existence of [censorial] power is unacceptable, there is little reason [for a court] to forbear entertaining an anticipatory challenge in order to allow that power to be exercised." Id. It follows that there is no need for Harrell to obtain an opinion from the Bar applying the rules to his proposed advertisements before he may challenge the rules facially on vagueness grounds.

There are several important reasons why a challenge such as the one Harrell has mounted typically will be considered fit for immediate review. For one, the fact that there is even a "credible threat" of enforcement of vague rules-i.e., "one that is not chimerical, imaginary[,] or speculative," *id.* at 821 (citations and quotation marks omitted)-militates in favor of hearing the challenge. Further,

[s]omething will be gained, but much will be lost if we permit the contours of regulation to be hammered out case by case in a series of enforcement proceedings, as state courts gloss the allegedly vague terms to render them precise, or as the enforcement agencies provide [them] with a patina of less formalized custom and usage. While the "hammering out" continues so do the vices of vagueness; the appellants' uncertainty about the reach of the ordinance will force them to continue to restrict their ... activities.

*1259 Id. at 822 (quotation marks and citations omitted). In other words, the relevant institutional considerations favor immediate review of Harrell's vagueness claims. If the Bar's rules are indeed vague, there is no point in allowing the Bar to issue a series of necessarily arbitrary opinions applying the rules to Harrell's proposed advertisements.

17 We are left, then, to consider the hardship prong of ripeness. Although "the relationship between the fitness and hardship prongs of the ripeness inquiry is not entirely clear" and raises several "complex issue[s]," Pittman, 267 F.3d at 1280 n. 8, it is readily apparent that "[t]he 'hardship' prong ... is not an independent requirement divorced from the consideration of the institutional interests of the court and agency," AT&T Corp. v. FCC, 349 F.3d 692, 700 (D.C.Cir.2003), and that "[w]here ... there are no significant agency or judicial interests militating in favor of delay, [lack of] 'hardship' cannot tip the balance against judicial review," Consol. Rail Corp. v. United States, 896 F.2d 574, 577 (D.C.Cir.1990) (quotation marks and citation omitted); see also AT&T, 349 F.3d at 700 ("[W]here there are no institutional interests favoring postponement of review, a petitioner need not satisfy the hardship prong."). Accordingly, we need not consider whether Harrell would suffer any hardship if we were to condition judicial review

upon his pursuit of some further action, administrative or otherwise.

In sum, we hold that Harrell's vagueness challenges to Rules 4-7.1, 4-7.2(c)(1)(G), 4-7.2(c)(2), 4-7.2(c)(3), and 4-7.5(b)(1) (A) are ripe and therefore justiciable. In so doing, we express no opinion as to the merits of these claims; all we hold today is that Harrell has made a sufficiently credible showing that the rules are unconstitutionally vague on their face; if they are, we decline to let the Bar "hammer[] [them] out case by case" and thereby "provide [them] with a patina" of determinacy. Eaves, 601 F.2d at 822 (citation omitted). The district court should hear these claims now.

III.

18 We turn to Harrell's First Amendment claim that the nine challenged rules specifically prohibit advertising conduct that is constitutionally protected. Although Harrell characterizes this challenge as a facial one as well, we are not bound by Harrell's designation of his claims, and we look to the complaint to determine what claims, if any, his allegations support. Jacobs v. The Florida Bar, 50 F.3d 901, 905 n. 17 (11th Cir.1995). We read this challenge to be an asapplied one. While it is "well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable," Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 129, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (emphasis added), Harrell "has never raised such a challenge," Opening Br. at 19 n. 4. Rather, because he "seek[s] to vindicate [his] own rights, the challenge is as-applied." Jacobs, 50 F.3d at 906 (noting Supreme Court's characterization of challenge as being asapplied when the plaintiff "alleged that but for the prohibition, he would engage in the prohibited behavior" (citation omitted)).

Harrell's as-applied challenge on First Amendment grounds embodies a constitutional theory that is markedly different from his void-for-vagueness challenge, see Rios v. Lane, 812 F.2d 1032, 1039 (7th Cir.1987) (noting that First Amendment claims and void-for-vagueness due process claims are "completely distinguishable from [one another] and not dependent upon" the same considerations), and it yields a different justiciability calculus. In *1260 particular, there are powerful ripeness concerns that flow from Harrell's attempt to challenge the application of the rules' apparent prohibitions to his desired speech, without first having sought an advisory opinion from the Bar. Once again addressing the issues of standing and ripeness in turn, we conclude that while Harrell has standing to challenge all nine of the rules on First Amendment grounds, his challenge is ripe as to only one of the rules.

A.

19 20 As with his vagueness challenge, Harrell claims that the Florida Bar's nine challenged rules cause him an injury-

in-fact by chilling his speech, specifically by causing him to engage in self-censorship. Although the analysis differs slightly, we again conclude that Harrell has standing. In the context of his First Amendment claims, where his complaint alleges an actual prohibition rather than the absence of any standard at all, he must show that, as a result of his desired expression, "(1) he was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution." *Id.* (quoting *ACLU v. The Florida Bar*, 999 F.2d 1486, 1492 (11th Cir.1993)). Here, he suggests a credible threat of prosecution, which in turn requires that he establish: *first*, that he seriously wishes to engage in expression that is "at least arguably forbidden by the pertinent law," *Hallandale*, 922 F.2d at 762; and *second*, that there is at least some minimal probability that the challenged rules will be enforced if violated, *Eaves*, 601 F.2d at 818 n. 6.6

21 22 Harrell has adequately shown that he would face a credible threat of prosecution if he engaged in the desired speech. First, he has shown a "definite[] and serious[]" desire to engage in certain forms of advertising for his law firm, see Hallandale, 922 F.2d at 762, which depends on advertising for its survival, Harrell Aff. ¶ 31. And, as we explained in our discussion of vagueness, Harrell's affidavit describes a number of advertising campaigns he proposes to develop and run-including the family-themed campaign, a campaign devoted to comparing the qualities of Harrell & Harrell with the qualities of other law firms, and other campaigns that would feature a variety of specific slogans-and he explains how the rules "seem[] to proscribe" these advertisements. Graham v. Butterworth, 5 F.3d 496, 499 (11th Cir.1993). Second, just as with his vagueness challenge, Harrell has shown that there is at least a minimal probability that the Bar will enforce the rules if he is deemed to have violated them. In short, he has demonstrated a cognizable self-censorship injury for purposes of standing.⁷

*1261 B.

The more difficult hurdle for Harrell's as-applied claims is ripeness. The Bar argues, and the district court agreed, that even if Harrell can demonstrate standing, his claims are still nonjusticiable-and specifically not ripe-because he has never sought an advisory opinion from the Bar. After assessing the fitness of the issues for judicial decision and the hardship to Harrell of withholding judicial review, Coal. for the Abolition of Marijuana Prohibition. 219 F.3d at 1315, we agree, with one exception, that Harrell's claims are not ripe.

A plaintiff who demonstrates standing by showing that he faces a "credible threat of prosecution" if he engages in certain speech often will succeed in showing that his claims are ripe as well, since the law generally will not force a choice between speech and sanction. Babbitt v. United Farm Workers Nat'l Union. 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). In the present case, however, although the appearance that the rules would prohibit Harrell's desired advertisements unquestionably has some chilling effect-one sufficient to constitute an injury-in-fact for purposes of standing-the Florida Bar undeniably provides an advisory opinion process, so that an attorney like Harrell is

actually "in no danger of being disciplined without having an opportunity to determine in advance whether [his] proposed advertisements are lawful." Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 538 (3d Cir. 1988). Indeed, a favorable determination by the Ethics and Advertising Department, the Standing Committee, or the Board of Governors generally acts as a safe harbor against discipline on the basis of an approved advertisement. And, if "[Harrell's] proposed advertisements [were to] meet with the [Bar's] approval, ... there would indeed be no case or controversy to adjudicate." Id. at 537. In other words, although Harrell is a "party [who] can appropriately bring suit," the fact that an opinion from the Bar could lend significantly more concreteness to his as-applied claims, while allowing the Bar to perform its interpretive role, fairly raises issues regarding the "timing of the suit." Elend v. Basham, 471 F.3d 1199, 1205 (11th Cir.2006) (explaining distinction between standing, which goes to identity of parties, and ripeness, which goes to timing).

23 Given the distinct possibility in such situations that agency review will eliminate the need for judicial review, and given the role of the ripeness doctrine in "protect[ing] ... agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," Pittman, 267 F.3d at 1278 (quoting Abbott Labs. v. Gardner. 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) (footnote omitted)); see also Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-33, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998), we *1262 may require that First Amendment plaintiffs seek determinations with varying degrees of finality from agencies whose rules or decisions they seek to challenge on an asapplied basis. See, e.g., Nat'l Adver. Co. v. City of Miami, 402 F.3d 1335, 1339 (11th Cir.2005); Pittman, 267 F.3d at 1277-78; Digital Props., Inc. v. City of Plantation, 121 F.3d 586, 590-91 (11th Cir.1997); Felmeister, 856 F.2d at 531. This requirement, which goes to the question of fitness for judicial review, is not a form of administrative exhaustion, but rather a requirement that "an administrative action must be final before it is judicially reviewable." Greenbrian, Ltd. v. City of Alabaster, 881 F.2d 1570, 1574 n. 8 (11th Cir.1989) (quoting Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 192, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)).

24 We have recognized an exception to this requirement in cases where there is nothing to be gained from an agency's interpretation of a rule because the rule's application is clear on its face. Thus, in Jacobs v. The Florida Bar, we explained that where, under the challenged rules, "advertising methodologies are prohibited in their entirety, the court would not benefit from [the plaintiffs'] production of" an advertisement employing that methodology. 50 F.3d 901, 906 n. 18 (11th Cir. 1995). "[S]uch an advertisement violates the rules regardless of the content precisely because of the method through which the message is communicated." Id. Since few, if any, institutional interests would be served by asking an agency to interpret a rule whose application is utterly clear, the absence of an agency opinion ordinarily will not affect whether a challenge to such a rule is fit for immediate judicial review.

Applying these general principles, we divide Harrell's First Amendment as-applied claims into two general categories to assess their fitness for review (and, ultimately, their ripeness): those claims that challenge a rule whose application is categorical and thus clear; and those that challenge a rule whose application leaves substantial room for reasonable interpretation by the Florida Bar.

25 We can discern only one rule that falls into the first category. That is the rule prohibiting "any background sound other than instrumental music." Rule 4-7.5(b)(1)(C). If there is any ambiguity in what constitutes a "background sound" or "instrumental music," that ambiguity is de minimis. Plainly, the district court would not benefit from Harrell's production of an otherwise permissible advertisement that contained the sounds of his mastiff dogs or his law firm's gym equipment, or from an opinion of the Bar inevitably holding that those sounds constitute background sounds and not instrumental music, and are therefore impermissible. Thus, we consider Harrell's as-applied First Amendment challenge to this rule fit for review. And, because "there are no significant agency or judicial interests militating in favor of delay," we need not consider whether requiring Harrell to pursue any of the several available options for administrative review would constitute a hardship. Consol. Rail Corp., 896 F.2d at 577.

26 The remaining eight rules, however, are not so clear in their application as to obviate the need for interpretation by the Bar. Indeed, Harrell's case for vagueness undermines any such suggestion, and the lack of any opinion from the Bar raises serious fitness concerns. In assessing the fitness of these remaining claims, we are guided by our decision in Pittman v. Cole, 267 F.3d 1269 (11th Cir.2001), where we addressed the ripeness of claims by Alabama state judicial candidates that the State Bar of Alabama's Canons of Judicial Ethics violated their First Amendment rights by preventing them from completing *1263 a judicial questionnaire. Concerned initially that the Canons might apply to the questionnaire, the plaintiffs obtained an informal opinion from the State Bar, in which the Bar advised them that responding to some of the questions would violate the Canons, Id. at 1274-75.

The plaintiffs did not, however, avail themselves of the Bar's administrative procedure for obtaining a formal, official advisory opinion from the Disciplinary Commission, which was the only arm of the Bar whose decisions on ethical matters were binding for enforcement purposes. *Id.* at 1275. Instead, the plaintiffs filed an action in federal court. A panel of this Court held that because the plaintiffs had failed to utilize the available formal review procedure and obtain a final opinion concerning the Bar's policy on the questionnaire, they were impermissibly "ask[ing] the district court and now this Court to speculate, without any evidentiary basis, that the Bar's Disciplinary Commission would agree with the general counsel's [informal] opinion concerning the application of the Canons of Judicial Ethics to candidates responding to the ... questionnaire." *Id.* at 1280.

In reaching that conclusion, the Court explained that although the issue of whether the rules prohibited certain conductspecifically, answering the questionnaire-appeared to be a purely legal question, "an important factual issue [had] initially [to] be resolved[,] [namely] what the actual policy of the Bar [was] concerning the questionnaire." *Id.* at 1278. Because an informal opinion did "not establish the Bar's policy" when higher levels of administrative review were available, *id.* at 1278-79, "the unresolved, fundamental factual issue of what the Bar's official position [was] in regard to the questionnaire counsel[ed] strongly against finding ripeness," *id.* at 1279. Relatedly, we explained that allowing the Bar to "crystallize its policies without undue interference from the federal courts is a good thing," which "also weigh[ed] strongly in favor of the conclusion that the plaintiffs' claims against the Bar [were] premature." *Id.*

Pittman teaches that where the application of certain challenged rules is less than obvious, and the plaintiff has a ready means of determining how they will be applied, there are "strong interests militating in favor of postponement." AT&T Corp. v. FCC, 349 F.3d 692, 700 (D.C.Cir.2003). The reason is simple: it would necessarily be speculative to assume that the Bar actually will apply the rules as Harrell believes. It is true that Harrell has attempted to reduce the degree of speculation by providing evidence of how the Bar has previously interpreted several of the rules in the context of similar advertisements. Yet, helpful as this information may be, it is no substitute for an opinion from the Bar, since the challenged rules by and large do not contain categorical prohibitions that would obviate the need for the Bar to interpret them. Thus, for example, although Harrell's familythemed advertisements arguably may violate the prohibition on all but "useful, factual information," Rule 4-7.1, cmt., the ban on statements "characterizing the quality of the lawyer's services," Rule 4-7.2(c)(2), or the rule against "visual or verbal ... depictions ... that are ... manipulative," Rule 4-7.2(c) (3), it is altogether conceivable that the Bar would not interpret these rules to apply to Harrell's advertisements.

As in Pittman, there remains a substantial measure of uncertainty about the "fundamental factual issue" of how the Bar will apply the rules to the proposed advertisements. Pittman, 267 F.3d at 1279. At the same time, and equally important, the Florida Bar, through the Ethics and Advertising Department, has provided a relatively "expeditious means of testing the reach of the rule through an advisory opinion *1264 process," Felmeister, 856 F.2d at 531, for which even a script or outline of a proposed advertisement will suffice. See Rule 4-7.7(a)(1)(B). Harrell, however, has not even submitted a bare script of his proposed advertisements to the Ethics and Advertising Department, "and hence ha[s] not availed [himself] of a relatively simple way of determining whether [his] ads run afoul of the rule[s]." Felmeister, 856 F.2d at 531. Quite simply, his as-applied claims raise serious fitness concerns.8

Turning to the related question of hardship, Harrell has not given us any substantial reason to believe that submitting a bare script or outline of the advertisements he proposes would constitute a hardship. While he asserts in his reply brief, at the highest order of abstraction, that "even the process of developing ideas, concepts, and scripts is expensive," Reply Br. at 11, an unsupported general assertion in a brief provides

precious little basis for finding hardship. Harrell also urges that an opinion based on a script would add nothing to the ripeness inquiry because it would not be conclusive and binding on the Bar. We are unpersuaded. Such an opinion obviously would provide a concrete indication of whether the Bar is likely to approve or reject Harrell's proposed advertisements. Given the serious fitness concerns raised by Harrell's claims, we think that at a bare minimum, Harrell had an obligation to obtain an opinion "from someone 'with the knowledge and authority to speak for the [Bar].' " See Am. Charities, 221 F.3d at 1215 (citation omitted). His unexcused failure to do so means that his challenges to all but Rule 4-7.5(b)(1)(C) concerning background noise are not now ripe for judicial review. 10 **1265* Accordingly, the district court properly rejected them as nonjusticiable.

IV.

The final justiciability question raised by this appeal concerns Harrell's specific challenge to the Bar's rejection of his slogan "Don't settle for less than you deserve." The Bar claims that the challenge has become moot because the Board of Governors has now declared that the slogan is permissible, at least as used in the advertisements that Harrell originally submitted for review. On the other hand, Harrell says that the Board cannot be trusted to maintain its new-found solicitude for his slogan because, among other things, the Board failed to act until after the lawsuit was filed, made its decision in a secretive and irregular manner without ever disclosing its reasoning, and has given no assurances in the instant proceedings that it will not later change its mind. The Bar, for its part, characterizes the Board's actions as an honest and unremarkable effort to correct an erroneous judgment by the Standing Committee, and says that as a governmental actor, it is entitled to rely on a presumption that it will not resume the challenged conduct.

27 28 29 "[A] federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " Church of Scientology of Cal. v. United States, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (quoting Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)). By the same token, however, "[i]t has long been the rule that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' " Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329, 1333 (11th Cir.2005); see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Since the defendant is "free to return to his old ways," United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), he bears a "heavy burden" of demonstrating that his cessation of the challenged conduct renders the controversy moot, Laidlaw, 528 U.S. at 189, 120 S.Ct. 693 (citation omitted). That burden will have been borne only if:

(1) it can be said with assurance that there is no reasonable expectation ... that the alleged violation will recur, and

(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Los Angeles County v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (citations omitted). In other words, when a party abandons a challenged practice freely, the case will be moot only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1131 (11th Cir.2005) (emphasis added) (quoting Laidlaw, 528 U.S. at 189, 120 S.Ct. 693).

30 31 "[I]n general, the repeal of a challenged statute is one of those events that makes it absolutely clear that the allegedly wrongful behavior ... could not reasonably be expected to recur." Coral *1266 Springs Street Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1331 n. 9 (11th Cir.2004) (citation and quotation marks omitted). Even short of so weighty a legislative act, we have applied a "rebuttable presumption" in favor of governmental actors, so that "a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." Troiano v. Supervisor of Elections in Palm Beach County, 382 F.3d 1276, 1283-85 (11th Cir.2004); see also Coral Springs. 371 F.3d at 1328-29 ("[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities."); Ragsdale v. Turnock, 841 F.2d 1358, 1365 (7th Cir.1988) ("[C]essation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.").

Conversely, where the circumstances surrounding the cessation suggest that the defendant is "attempting to manipulate the [c]ourt's jurisdiction to insulate a favorable decision from review," City of Erie v. Pap's A.M., 529 U.S. 277, 288, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), courts will not deem a controversy moot. Nat'l Adver. Co., 402 F.3d at 1333 ("[V]oluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction."). More generally, the "timing and content" of a voluntary decision to cease a challenged activity are critical in determining the motive for the cessation and therefore "whether there is [any] reasonable expectation ... that the alleged violation will recur." Burns v. PA Dep't of Corr., 544 F.3d 279, 284 (3d Cir.2008) (internal citation and quotation marks omitted).

33 34 As for timing, a defendant's cessation before receiving notice of a legal challenge weighs in favor of mootness, *Troiano*. 382 F.3d at 1285, while cessation that occurs "late in the game" will make a court "more skeptical of voluntary changes that have been made." *Burns*. 544 F.3d at 284. With respect to content, we look for a well-reasoned justification for the cessation as evidence that the ceasing party intends to hold steady in its revised (and presumably unobjectionable) course. *See Troiano*, 382 F.3d at 1285 (finding challenge moot where governmental defendant ceased challenged behavior on a "well reasoned"

basis); Christian Coal. of Ala. v. Cole, 355 F.3d 1288, 1292 (11th Cir.2004) (holding that challenge to application of state judicial canons to certain conduct was moot where governmental defendant represented to court that it would not file charges against the plaintiffs on the basis of recent Supreme Court precedent); Ragsdale. 841 F.2d at 1365-66 (finding one challenge moot where governmental defendant voluntarily ceased conduct because "enforcement [was] barred by clear Supreme Court precedent," but finding second challenge not moot because cessation was based on district court decision that did not squarely enjoin the challenged practice).

35 Similarly, the timing and content of the decision are also relevant in assessing whether the defendant's "termination" of the challenged conduct is sufficiently "unambiguous" to warrant application of the *Troiano* presumption in favor of governmental entities. *Cf. Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1333-34 (Fed.Cir.2005) (holding that *Troiano* presumption "d [id] not apply" because, inter alia, "the government ha[d] not provided sufficient evidence that the allegedly offending conduct w[ould] not recur"). Short of repealing a statute, if a governmental *1267 entity decides in a clandestine or irregular manner to cease a challenged behavior, it can hardly be said that its "termination" of the behavior is unambiguous.

Applying these principles, we agree with Harrell that his challenge to the Bar's rejection of his slogan is not moot. While we are generally disposed to credit the Bar's characterization of the Board's actions as a straightforward intervention in the advisory opinion process to correct several incorrect and possibly self-contradictory opinions of the Bar's inferior review bodies, we cannot do so here because the record neither yields absolute certainty that the challenged conduct has permanently ceased, nor, when one considers the "timing and content" of the Board's decision, supports the conclusion that the Board's policy was "unambiguously terminated," as required to invoke the governmental actor presumption.

First of all, the Board acted in secrecy, meeting behind closed doors and, notably, failing to disclose any basis for its decision. As a result, we have no idea whether the Board's decision was "well-reasoned" and therefore likely to endure. Cf. Troiano, 382 F.3d at 1285; Cole, 355 F.3d at 1292-93; Ragsdale, 841 F.2d at 1365-66. In fact, the Board's decision might reflect a range of possible judgments, and some of them would not warrant a finding of mootness. In ACLU v. The Florida Bar. 999 F.2d 1486 (11th Cir.1993), for example, we applied the voluntary cessation exception to a plaintiff's challenge to certain of the Bar's rules even though the Bar had "acquiesced in [the plaintiff's] position." Id. at 1490. We did so because, although the Bar had agreed that it would not enforce the rule against the plaintiff in that particular instance, it still maintained that the challenged rule was constitutional and that the plaintiff's conduct fell within it. See ACLU, 999 F.2d at 1494-95. In this case, the Bar's opaque decision fairly leaves open the possibility that, just as in ACLU. the Board agrees with the Standing Committee but has decided that it will not enforce the rule against Harrell in this case. Id.: see also Graham, 5 F.3d at 500 (interpreting ACLU, 999 F.2d at 1494). Such a course by the Bar would not suffice to moot the instant controversy.

In fact, the circumstances here raise a substantial possibility that "the defendant has ... changed course simply to deprive the court of jurisdiction," which itself prevents us from finding the controversy moot. Nat'l Adver. Co., 402 F.3d at 1333. The record reveals that the Board took up the matter of Harrell's advertisements only at the urging of the Bar's counsel after this litigation had commenced, see Hr'g Tr. 85, Jan. 6, 2009, and that in doing so, it may have departed from its own procedures. Specifically, the Bar's own rules provide for review by the Board in only two instances: first, where an attorney objects to the Standing Committee's decision; and second, upon the Board's own initiative if the Board "determines that the application of the attorney advertising rules to a particular set of facts is likely to be of widespread interest or unusual importance to a significant number of Florida Bar members." Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation § 2(c)(2). Harrell did not seek review by the Board, and the Bar has not suggested that the application of Rule 4-7.2(c)(2) to Harrell's particular slogan, among many presumably similar permutations, would be "of widespread interest or unusual importance" to a significant number of Florida Bar members.

For the same reasons, we are unable to say that the Board, through its decision, "unambiguously terminated" the challenged application of Rule 4-7.2(c)(2) to *1268 Harrell's slogan, as required to invoke the presumption we identified in Troiano. Perhaps the Board believes with the firmest conviction that the Standing Committee's decision was wrong, but then again, perhaps the Board actually agrees with the Standing Committee and has merely decided "not [to] enforce [the Rule] against [Harrell] in this case." Graham, 5 F.3d at 500 (interpreting ACLU, 999 F.2d at 1494). In fact, the Board's "termination" of the standing committee's decision is very much clouded by ambiguity. As a result, we cannot apply the governmental presumption recognized in *Troiano*. In other words, the Bar has not borne its heavy burden of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Alabama v. Corps of Eng'rs, 424 F.3d at 1131 (emphasis added) (quoting Laidlaw, 528 U.S. at 189, 120 S.Ct. 693). Thus, we hold that Harrell's challenge to the rejection of his slogan "Don't settle for less than you deserve" is not moot.

V.

Harrell's final challenge-and the only one that we have occasion to review on the merits-is to the Bar's requirement that a lawyer submit any television or radio advertisement for review at least twenty days before its first planned dissemination or airing date, giving the Bar approximately fifteen days in which to review the ad and five days for mail transit time. See Rule 4-7.7(a)(1)(A). The rule states that during the fifteen-day review period, the Bar "shall" review the advertisement and notify the submitting lawyer whether it complies with the advertising rules, Rule 4-7.7(a)

(1)(C), and that the lawyer may disseminate the advertisement "upon receipt of notification by The Florida Bar that the advertisement complies with subchapter 4-7." Rule 4-7.7(a) (1)(E).

Harrell argued in the district court that the rule was an unconstitutional prior restraint under the First Amendment. The district court considered the claim justiciable, and in defending the rule on the merits, the Bar urged a construction of the rule under which a lawyer may disseminate a proposed advertisement upon receipt of any opinion by the Bar, rather than, as the text of the rule might suggest, only upon receipt of a favorable opinion. The district court accepted this narrowing construction, and, having thus construed the rule as a "pre-filing" rather than a "pre-clearance" requirement, it rejected Harrell's challenge to the rule as a prior restraint.

In this appeal, Harrell accepts the district court's construction of Rule 4-7.7(a)(1); he assumes, as do we, that the Bar is bound by its representations in the district court and will not attempt to enforce the rule as a prior restraint on speech. Nevertheless, Harrell argues that the pre-filing rule, even if not a prior restraint, is an imposition on commercial speech and, therefore, must be analyzed under the general test laid out in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). We agree with Harrell that a Central Hudson analysis is required, but we still can see no constitutional violation.

"Commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." Florida Bar v. Went For It. Inc., 515 U.S. 618, 623, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (quotation marks, brackets, and citations omitted). Indeed,

[s]ince advertising is the Sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes *1269 such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker[,] ... [and] may also make inapplicable the prohibition against prior restraints.

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n. 24, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

As a result, the Supreme Court has strongly suggested that the type of mandatory pre-distribution review of commercial speech imposed by Rule 4-7.7(a)(1) is constitutional. Thus, for example, the Court noted in *Central Hudson* itself that because traditional prior restraint principles may not fully apply to commercial speech, a state may require "a system of previewing advertising campaigns to insure that they will not defeat" state restrictions. *Cent. Hudson*, 447 U.S. at 571 n. 13, 100 S.Ct. 2343. Similarly, in striking down a "total ban"

on direct-mail solicitations by lawyers, the Supreme Court opined that

[t]he State can regulate ... abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses.

Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 476, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) (internal citations omitted); see also Felmeister, 856 F.2d at 536 (recognizing Supreme Court's "repeated[] suggest[ions] that in the area of commercial speech, prescreening or prepublication review of advertisements may be constitutionally sound").

If these unequivocal dicta in *Central Hudson* and *Shapero* were binding on us, it would follow a fortiori that the less intrusive "pre-filing" system imposed by Rule 4-7(a)(1)(A) is permissible. Although the aforementioned dicta do not alone make Rule 4-7.7(a)(1) constitutional, it is no surprise that the rule passes muster under *Central Hudson*.

39 Under the "intermediate scrutiny" standard governing the regulation of non-deceptive commercial speech set forth in *Central Hudson*, we ask whether an imposition on commercial speech (1) promotes a substantial governmental interest; (2) directly advances the interest asserted; and (3) is not more extensive than necessary to serve that interest. *Cent. Hudson*, 447 U.S. at 564, 100 S.Ct. 2343; see also Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).

40 "Unlike rational basis review, the Central Hudson standard does not permit us to supplant the precise interests put forward by the State with other suppositions." Went For It, 515 U.S. at 624, 115 S.Ct. 2371 (quoting Edenfield v. Fane, 507 U.S. 761, 768, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)). The Florida Bar asserts a number of interests in regulating attorney advertisement that the Supreme Court has recognized as "substantial" for purposes of Central Hudson. For one, the Bar has a "paramount ... objective of curbing activities that 'negatively affec[t] the administration of justice.' " Id. (quoting In re 1990 Amendments, 571 So.2d at 455). Specifically, the Bar has an interest in preventing "reputational harm to the profession," id. at 630, 115 S.Ct. 2371, and in "preserv[ing] [its] integrity," id. at 624 (quoting McHenry v. The Florida Bar, 21 F.3d 1038, 1043 (11th Cir.1994)). Thus, in Went For It, the Supreme Court recognized the Bar's interest in maintaining a rule designed to "protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that ... is universally regarded as deplorable and beneath common decency." *1270 Id. at 625, 115 S.Ct. 2371 (quotation marks and citation omitted). Beyond these general interests of the Bar in regulating attorney advertising, the Supreme Court has recognized that "the special problems of advertising on the electronic broadcast media will warrant special consideration." Bates v. State Bar of Ariz., 433 Û.S. 350, 384, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). See

also FCC v. Pacifica Found., 438 U.S. 726, 748, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) ("[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans.").

Under the second prong of Central Hudson, the Bar must "demonstrate that the challenged regulation advances [its asserted] interest[s] in a direct and material way." Went For It. 515 U.S. at 625-26, 115 S.Ct. 2371 (quotation marks and citation omitted). "That burden ... is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the rule at issue ... targets a concrete, nonspeculative harm." Id. at 626, 629, 115 S.Ct. 2371. We have no difficulty concluding that Rule 4-7.7(a) (1), as construed and limited by the district court, directly advances the Bar's substantial interests in curbing practices that negatively impact the administration of justice, protect the public from abusive practices, and preserve the reputation and integrity of the legal profession.

Under the Florida Bar's previous compliance regime, a lawyer was not required to submit a television or radio advertisement for review until he filed it. See In re Amendments to the Rules Regulating The Fla. Bar, 971 So.2d 763, 784 (Fla.2007). But a review of advertisements filed with the Bar revealed that nearly half of all television and radio advertisements in the years leading up to the revised regime had been found not to comply with the Rules. See Florida Bar, Petition to Amend the Rules Regulating the Florida Bar-Advertising Rules, filed Dec. 14, 2005, Harrell Aff., Ex. 9, at 14. In some years, the rate of non-compliance was as high as 60%. Id. Requiring lawyers to give the Bar a brief opportunity to advise them of whether their advertisements are compliant serves the rule's expressly stated purposes, namely, "to enhance ... the bar's ability to monitor advertising practices for the protection of the public and to assist members of the bar to conform their advertisements to the requirements of these rules." Rule 4-7.7, cmt. In other words, the rule helps reduce the number of non-compliant advertisements by giving lawyers the opportunity to comply voluntarily with the Bar's view of the rules. That, in turn, serves to minimize the number of advertisements that would, in the Bar's view, harm the public or its perception of the legal system as a whole. 11

The third prong of Central Hudson requires that there be an adequate "fit between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable." *1271 Went For It, 515 U.S. at 632, 115 S.Ct. 2371 (quotation marks and citation omitted). In other words, the regulation must be "reasonably well tailored to its stated objective." Id. at 633, 115 S.Ct. 2371. The plaintiffs in this case have neither suggested a less restrictive means of effectuating the Bar's important goals, nor explained how the twenty-day waiting period, which gives the Bar a brief opportunity to review advertisements before their transmission, imposes a burden that is unreasonable in relation to the goal of enforcing the rules' various substantive restrictions.

Indeed, we consider the burden placed on Florida attorneys to be minimal. In *Went For It.* the Supreme Court repeatedly characterized a "30-day blackout period" on attorney solicitation following an accident as "brief." *Id.* at 620, 633, 115 S.Ct. 2371. It also minimized the petitioners' non-frivolous argument that "the Rule may prevent citizens from learning about their legal options, particularly at a time when other actors-opposing counsel and insurance adjustersmay be clamoring for victims' attentions." *Id.* at 633, 115 S.Ct. 2371.

Here, by contrast, we face only a twenty-day delay, and we can see no pressing need for immediate dissemination of broadcast advertisements. As the Bar pointed out in its petition to the Florida Supreme Court seeking adoption of the current Rule 4-7.7, "[m]any lawyers who advertise do so on a regular basis with a series of advertisements that change over time." Florida Bar: Petition to Amend the Rules Regulating the Florida Bar-Advertising Rules, filed Dec. 14, 2005, Harrell Aff., Ex. 9, at 14. And even as to an unusually time-sensitive advertisement, we think that a twenty-day delay represents a constitutionally acceptable burden under the circumstances. Indeed, if the Supreme Court believes that an "obvious" alternative to a wholesale ban on lawyer advertising is "to require the lawyer to file any solicitation letter with a state agency," and if that methodology is designed to "giv[e] the State ample opportunity to supervise" attorney advertisements, Shapero, 486 U.S. at 476, 108 S.Ct. 1916 (emphasis added), we cannot imagine how the twentyday delay we face here could be impermissible. In short, Rule 4-7.7(a)(1)(A) does not amount to an unconstitutional imposition on protected commercial speech under the First Amendment.

VI.

In sum, Harrell has standing to challenge Rules 4-7.1, 4-7.2(c)(1)(G), 4-7.2(c)(2), 4-7.2(c)(3), and 4-7.5(b)(1)(A)on vagueness grounds, and those vagueness claims are also ripe for review. Further, Harrell's as-applied challenge to the rejection of his slogan "Don't settle for less than you deserve" is not moot. However, although Harrell has standing to challenge all nine of the Bar's identified rules as unconstitutional encroachments on his desired speech, these as-applied claims are not ripe for judicial review, with the single exception of Harrell's attack on Rule 4-7.5(b)(1) (C), prohibiting background sounds other than instrumental music. Harrell's constitutional challenge to the Bar's prefiling rule, Rule 4-7.7(a)(1)(A), fails because the rule is not a prior restraint and directly serves important state interests in a reasonably well-tailored fashion. Accordingly, we affirm in part, reverse in part, and remand to the district court for consideration of Harrell's justiciable claims on the merits.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Parallel Citations

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- * Honorable William Henry Barbour, Jr., United States District Judge for the Southern District of Mississippi, sitting by designation.
- Unless otherwise noted, all references to the "Harrell Affidavit" are to Harrell's second affidavit, filed on September 15, 2008, in support of Harrell's motion for summary judgment.
- Except as to the one issue that the district court addressed on the merits (the constitutionality of the Bar's twenty-day pre-screening rule), we treat the district court's ruling as if it had been made pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. See Sheelv v. MRI Radiology Network, P.A., 505 F.3d 1173, 1182 (11th Cir.2007) ("We have repeatedly said that when a district court disposes of a case on justiciability ... grounds we will treat the district court's determination as if it was ruling on a motion to dismiss for lack of subject matter jurisdiction under [Rule] 12(b)(1), even if the district court mistakenly has labeled its ruling a grant of summary judgment.").
- Harrell and his law firm are joined in this suit by the nonprofit organization Public Citizen. The district court held that Public Citizen lacked standing to challenge the advertising rules, but the plaintiffs do not challenge that determination here, since only one party need have standing to satisfy the case or controversy requirement. *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir.2006).
- In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent the decisions of the former Fifth Circuit rendered before the close of business on September 30, 1981.
- This Court has adopted as binding all decisions issued by a Unit B panel of the former Fifth Circuit. Stein v. Reynolds Sec., Inc., 667 F.2d 33, 34 (11th Cir.1982).
- 6 "[T]he probability of enforcement is relevant only to the non-jurisdictional, 'policy considerations' underlying justiciability and not to the existence of a case or controversy." *Eaves*, 601 F.2d at 818.
- The district court erroneously concluded that Harrell failed to establish any of the three of prongs of standing. First, citing Lujan 7 v. Defenders of Wildlife. 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), the district court concluded that Harrell's claimed injury-in-fact was not sufficiently concrete or imminent because he failed to identify a date on which he proposed to run his desired advertisements. Yet, unlike the vague, "some day" intentions of the wildlife enthusiasts in Lujan to return to Egypt and observe a Nile crocodile, id. at 563-64, 112 S.Ct. 2130, Harrell's intense professional dependence on advertising makes it very likely that he will attempt to run advertisements of the kind he describes in his declaration. See Eaves, 601 F.2d at 819. Second, the district court said that Harrell had not established causation because he had never sought the Bar's opinion on his proposed ads, and thus did not know whether the Bar would actually interpret the rules as he expected. Yet Harrell did demonstrate how the challenged rules seem to prohibit the ads he wishes to run, and for purposes of standing, we needn't know for certain how the rules will be applied to fairly conclude that they chill Harrell's speech. Finally, the district court held that Harrell's claimed injuries appeared not to be redressable because Harrell had "failed to demonstrate that [his] proposed advertisements complied with all of the other advertising rules, which have not been challenged in this action." Summary Judgment Order, at 50. Redressability is established, however, when a favorable decision "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered," Utah v. Evans, 536 U.S. 452, 464, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002), and here, it is likely that if the challenged rules are held unconstitutional, Harrell will be allowed to run many or all of the advertising campaigns he has outlined in his affidavit, at least in a form far closer to what he envisions than the "minimalist" campaign he has run thus far. Harrell Aff. ¶ 24.
- For purposes of ripeness, the relevance of an opinion from the Bar differs when we consider Harrell's as-applied challenge, rather than the facial one. As for his facial due process challenge, Harrell has shown that five rules are at least arguably vague, and if he is right-if the rules actually "ha[ve] no core," Village of Hoffman Estates, 455 U.S. at 495 n. 7. 102 S.Ct. 1186-there is no point in allowing the Bar to issue a series of necessarily arbitrary opinions applying them to Harrell's proposed advertisements. By contrast, Harrell argues through his First Amendment claim that the rules affirmatively prohibit certain conduct. In that context, it is very important to know whether the rules really do prohibit the desired conduct. Thus, this type of as-applied challenge is most likely to be ripe if the rules clearly apply on their face, or if the enforcing authority-here, the Bar-has told us that they apply. Ultimately, we recognize that there is a measure of tension between Harrell's two constitutional theories-one claiming that the rules lack a meaningful standard, the other claiming that they plainly and specifically prohibit what he wishes to do. Harrell is entitled to pursue both of these theories, but he is obligated to establish the justiciability of each of his claims.
- To this last point, Harrell responds that many appeals to the Bar's higher-level review bodies result in reversal, indicating that an opinion by one of the Bar's inferior bodies would be unreliable to the point of uselessness. Harrell notes, for example, that nearly twenty percent of appeals to the Standing Committee, and nearly fifty percent of appeals to the Board of Governors, result in at least a partial reversal. Reply Br. at 17 (citing Tarbert Aff. ¶ 5, 9 & 10). Harrell has not mentioned, however, that the Ethics and Advertising Department has issued over fifty thousand opinions since 1994, and that only three percent of those were appealed at all. Tarbert Aff. ¶ 9. Similarly, only slightly more than one-half of one percent of all opinions issued by the Ethics and Advertising Department were appealed to the Board. *Id.* ¶ 10. Given the various possible explanation for these statistics-it may be, for example, that only arguably incorrect opinions are appealed at all-we are thoroughly unconvinced that the administrative reversal rate demonstrates any "inherent unreliability [in] the Bar's own review process." Reply Br. at 17.

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- We express no opinion about whether, to make his claims ripe, Harrell must submit a finalized advertisement to the Bar for review or take an appeal of any adverse decision as far as the Board of Governors. We recognize that to produce a finalized television advertisement might cost Harrell tens of thousands of dollars, and that appealing an adverse ruling to the Board might take upwards of a year-both of which might qualify as the type of "practical" hardship that is relevant to the ripeness inquiry. *Pittman*, 267 F.3d at 1281. We do not weigh that hardship in the balance today, however, because the only question we face is whether Harrell's claims are ripe as presently presented.
- Harrell's principal explanation of why the pre-filing requirement fails to advance any legitimate state interest is no more than a veiled attack on the substance of the advertising rules themselves. Mainly, Harrell says that noncompliance with the rules is rampant precisely because the rules are vague and insusceptible of enforcement in a consistent and principled manner, and that for this reason, the Bar's guidance is useless anyway. This argument is properly the subject of Harrell's vagueness challenge, but it is not relevant to our present inquiry under *Central Hudson*. Harrell does not challenge every extant rule of the Florida Bar, and our task is only to decide whether the procedure that the Bar has chosen to ensure compliance with its rules places an unacceptable burden on the commercial speech of lawyers who are subject to the Bar's regulatory authority.

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