IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

Tallahassee Division

CHRISTIAN D. SEARCY; EARL DENNEY, JR.; JOHN SCAROLA; F. GREGORY BARNHART; JOHN SHIPLEY; and SEARCY DENNEY SCAROLA BARNHART & SHIPLEY PA,

Plaintiffs,

v.

THE FLORIDA BAR; JOHN F. HARKNESS, in his official capacity as Executive Director of The Florida Bar; ELIZABETH TARBERT, in her official capacity as Chief Ethics Counsel of the Legal Division of The Florida Bar; JAMES N. WATSON, JR., in his official capacity as Chief Disciplinary Counsel of the Tallahassee Branch of the Legal Division of The Florida Bar; and ADRIA E. QUINTELA, in her official capacity as Chief Disciplinary Counsel of the Fort Lauderdale Branch of the Legal Division of The Florida Bar;

Defendants.

No. _____

COMPLAINT

Introduction

For decades, the Florida Bar has stood apart from the rest of the nation in the restrictiveness of its rules governing lawyer advertising. The rules prohibit a range of common advertising of the sort that lawyers in other states use as a matter of course and that poses no risk of misleading consumers. But until recently, lawyer websites were exempt from these prohibitions. As long as they complied with the general restriction on false and misleading advertising, Florida lawyers could set up websites, publish blogs, and participate in popular social-media sites like LinkedIn, Facebook, and Twitter without fear of professional discipline.

That has now changed. Under amendments that became effective earlier this year, websites are subject for the first time to *all* of the rules' restrictions. Just how far these restrictions go in restraining lawyers' speech is shown by their application to the plaintiff law firm here, Searcy Denney Scarola Barnhart & Shipley PA. According to the Bar, Searcy Denney's website and blog violate a rule requiring statements to be "objectively verifiable" because the websites express *opinions* on issues of public concern, including statements that the days "when we could trust big corporations … are over," that "[g]overnment regulation of … consumer safety has been lackadaisical at best," and that "when it comes to 'tort reform' there is a single winner: the insurance industry." The Bar also found garden-variety statements about the firm's services and past cases to be "inherently misleading" because the statements do not include all "pertinent" facts of each case, while at the same time refusing the firm's requests to clarify what facts the Bar considers pertinent. And it concluded that the firm's pages on the social-media site LinkedIn.com violate several of the rules' provisions because—among other things—LinkedIn automatically lists the firm's "specialties" and includes an unsolicited review posted by a former client.

Nothing about the statements singled out by the Bar distinguishes them from statements that thousands of other lawyers routinely include in their advertising—statements that nobody could reasonably claim to be misleading. Indeed, Florida's rules are so broad that they would have subjected Abraham Lincoln to discipline for stating, in an 1852 newspaper advertisement, that his firm handled business with "promptness and fidelity"—two words that are no more "objectively verifiable" than those the Bar concludes violate its ethics rules here. *See* American Bar Association, *Laywer Advertising at the Crossroads* 32 (1995).

The plaintiffs seek a declaration that the rules violate the First Amendment and are unconstitutionally vague, as well as an injunction preventing the state's disciplinary authorities from enforcing the rules against them.

Jurisdiction

1. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

Parties

2. Plaintiffs Christian D. Searcy, Earl Denney, Jr., John Scarola, F. Gregory Barnhart, and John Shipley are members of the Florida Bar and the named partners of Searcy Denney Scarola Barnhart & Shipley PA. Each has decades of civil-litigation experience and has been Board Certified in civil litigation by the Florida Bar—the Bar's "highest level of evaluation of a [lawyers'] competency and experience." The Florida Bar, *Board Certification for Lawyers: What Does It Mean?*, available at floridabar.org/certification.

3. Plaintiff Searcy Denney Scarola Barnhart & Shipley PA is a law firm with offices in Tallahassee and West Palm Beach, Florida. The firm maintains an extensive website at searcylaw.com, on which it has posted thousands of pages of information about the firm and its cases, a newsletter, press releases, and a blog devoted primarily to legal issues affecting Florida consumers. The firm also administers several separate sites devoted to particular practice areas, participates in popular online social networks like LinkedIn, Facebook, and Twitter, and occasionally produces print and television advertisements. The firm competes for legal work within its areas of practice with other firms both in Florida and other states.

4. Defendant The Florida Bar is an arm of the Florida Supreme Court. It is responsible for approving lawyer advertising, issuing advisory opinions related to lawyer advertising, and investigating and prosecuting alleged violations of the advertising rules.

5. Defendant John F. Harkness is Executive Director of The Florida Bar and is responsible for overseeing all of the Bar's activities, including its regulation of lawyer advertising.

6. Defendant Elizabeth Tarbert is Chief Ethics Counsel of the Legal Division of The Florida Bar. Her responsibilities include reviewing advertisements submitted for review by

Florida lawyers for compliance with the advertising rules and issuing opinions either approving or disapproving of those ads.

7. Defendants James N. Watson, Jr. and Adria E. Quintela are the Chief Disciplinary Counsels of the Florida Bar's Tallahassee and Fort Lauderdale branches. They are responsible for investigating and prosecuting attorneys for alleged violations of the advertising rules.

Factual Background

I. Florida's history of broad restrictions on lawyer advertising

8. Members of the Florida Bar are required to comply with extensive restrictions on the content of lawyer advertising in the Florida Rules of Professional Conduct. *See* Rules Regulating The Fla. Bar § 3-4.2. Violations of the rules are grounds for discipline, including public reprimand, suspension, and disbarment. *Id.* §§ 3-4.2, 3-5.1.

9. Before the U.S. Supreme Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), Florida's lawyer-advertising rules followed the American Bar Association's Model Code of Professional Responsibility in prohibiting almost all forms of advertising by lawyers in the state. *See The Fla. Bar Amendment to Fla. Bar Code of Prof'l Responsibility*, 380 So. 2d 435, 435-36 (Fla. 1980).

10. The Court in *Bates* held Arizona's version of the Model Code unconstitutional, holding that the First Amendment protects a lawyer's truthful and non-misleading commercial speech. 433 U.S. 350. The Court rejected Arizona's argument that commercialization had harmed the profession, finding Arizona's "postulated connection between advertising and the erosion of true professionalism to be severely strained." *Id.* at 368. It also found unpersuasive Arizona's alternative argument that lawyer advertising is "inherently misleading" because it "does not provide a complete foundation on which to select an attorney." *Id.* at 374. That

argument, the Court wrote, "assumes that the public is not sophisticated enough to realize the limitations of advertising" and "is better kept in ignorance than trusted with correct but incomplete information." *Id.* at 374-75.

11. In response to *Bates* and subsequent decisions, the ABA adopted a series of amendments to the Model Rules of Professional Responsibility—the successor to the Model Canons—to gradually eliminate restrictions unrelated to protecting consumers from false and misleading advertising. In particular, the ABA amended the rules following *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990)—which declared unconstitutional a blanket prohibition on claims of specialization or certification in particular areas of law—to allow truthful statements that a "lawyer is a 'specialist,' practices a 'specialty,' or 'specializes in' particular fields." *See* ABA, *A Legislative History: The Development of the Model Rules of Professional Conduct* 766-67 (2006).

12. While the ABA worked to loosen advertising restrictions in response to U.S. Supreme Court precedents, the Florida Bar took the opposite tack. The Florida Supreme Court initially adopted a modified version of the ABA's amended rules. *The Florida Bar re Rules Regulating The Fla. Bar*, 494 So. 2d 977 (Fla. 1986). But just a few years later, the Florida Bar responded to the "proliferation of attorney advertising in the wake of the *Bates* decision" by proposing a "complete overhaul" of the rules. The Florida Bar Advertising Task Force 2004, *Report and Recommendations* 12-13 (2005) (2004 Task Force Report). The proposed amendments, adopted by the Florida Supreme Court in 1990, included a range of new restrictions on common advertising content, including client testimonials and statements that "describ[e] or characteriz[e] the quality of the lawyer's services." *See In re Petition to Amend the Rules Regulating The Fla. Bar*, 571 So. 2d 451 (Fla. 1990). And despite the U.S. Supreme Court's recent decision in *Peel*, the rules retained a

prohibition on "stat[ing] or imply[ing] that [a] lawyer is a specialist" unless the lawyer had been certified or met one of the rules' other narrow exceptions. *See id.* at 470-71.

13. Dissenting from the amendments, Chief Justice Shaw pointed out that each of the newly prohibited advertising devices "can be, and undoubtedly has been, used effectively to provide the consumer with clear and truthful information concerning the availability of important legal services." *Id.* at 474. Justice Barkett also dissented on the ground that many of the rules "only regulate[d] decorum," writing that "a lawyer cannot be forced to surrender all first amendment freedom as the price of practicing law." *Id.* at 475.

14. The Bar proposed a second set of comprehensive advertising restrictions in 1997 that it argued were necessary in response to continued "blatant commercialization of the legal profession." The Florida Bar Joint Presidential Advertising Task Force, *Final Report & Recommendations* 27-28 (May 1997) (1997 Task Force Report). Among many other restrictions, the amendments, adopted by the Florida Supreme Court in 1999, restricted "reference[s] to past successes or results obtained" in most forms of advertising, prohibited "manipulative" ads, and required all lawyer advertising to "provide only useful, factual information presented in a nonsensational manner." *Amendments to Rules Regulating The Fla. Bar*, 762 So. 2d 392 (Fla. 1999).

15. Since adopting the rules, the Bar has rigidly enforced the rules' language to prohibit a wide range of innocuous advertising without considering whether the advertising was misleading or whether restricting it would violate the First Amendment. For example, the Bar interpreted a former rule against "background sounds" in broadcast advertisements to prohibit the "sounds of kids playing with a bouncing ball" and the "sound of a seagull." *Harrell v. The Florida Bar*, 608 F.3d 1241, 1251 (11th Cir. 2010). And it interpreted another former rule allowing only "objectively relevant" illustrations to prohibit images of an American flag, the Statue of Liberty, and a cactus. *The Florida Bar v. Pape*, 918 So. 2d 240, 242 (Fla. 2005).

16. Federal courts have twice held that the rules and the Bar's enforcement violated the First Amendment. In *Mason v. The Florida Bar*, the Eleventh Circuit held that the Bar had failed to meet its burden of proving that consumers were misled by statements about the quality of a lawyer's services, noting that the Bar had "presented no studies, nor empirical evidence of any sort" to back up its alleged concern. 208 F.3d 952, 957–58 (11th Cir. 2000). A later version of the same rule was again held unconstitutional on remand from the Eleventh Circuit in *Harrell v. The Florida Bar*, 915 F. Supp. 2d 1285 (M.D. Fla. 2011). *Harrell* held that the Bar violated the First Amendment when it applied the rule to prohibit the slogan "Don't settle for less than you deserve." *Id.* at 1308. It also held the rule against background sounds unconstitutional under the First Amendment, and declared the rules prohibiting "manipulative" ads and allowing only "useful, factual information" to be unconstitutionally vague. *Id.* at 1310-12.

II. The Florida Bar's "long and convoluted" history of website regulation

A. The Bar adopts an "intermediate" level of regulation for websites.

17. The amendments proposed by the Bar in 1997 and adopted by the Florida Supreme Court in 1999 were the first lawyer ethics rules in the country to specifically govern Internet advertising. The rules treated lawyer websites as "information obtained by a viewer at a viewer's request," and thus exempt from the rules prohibiting statements about past results and the quality of a lawyer's services. *See In re Amendments to Rules Regulating The Fla. Bar*, 762 So. 2d 392, 395-96 (1999). The Bar's task-force report proposing the change explained that such information is "inherently misleading" when included in "short ad[s]" that "cannot give a complete picture of the lawyer's past history," but that "less restrictive treatment" is justified when the client seeks out the information. 1997 Task Force Report at 27-28.

18. The Bar revisited regulation of lawyer websites in 2004, creating a new task force "charged with reviewing the attorney advertising rules and recommending changes to the rules if

deemed necessary." *In re Amendments to Rules Regulating The Fla. Bar*, 971 So. 2d 763, 763 (Fla. 2007). The task force proposed maintaining the status of websites as "information obtained by a viewer at a viewer's request," explaining that "viewers would not access a lawyer's website by accident, but would be searching for that lawyer, a lawyer with similar characteristics, or information about a specific legal topic." 2004 Task Force Report at 12-13. It proposed eliminating the rules governing such information, thus exempting websites entirely from the rules' requirements. *Id.* at 16.

19. The Bar's Board of Governors rejected the task force's recommendation. Instead, the Bar petitioned the Florida Supreme Court to maintain the status quo by regulating websites "at an intermediate level," subject to most of the advertising rules but exempt from the rules governing quality of services and past results. Petition 10-11, *In re. Amendments to Rules Regulating The Fla. Bar*, No. 05-2194 (Dec. 14, 2005).

20. A comment to the proposed rule explained that lesser restrictions were justified for websites because they "generally contain much more information than can be included in the context of a television, radio, or print advertisement." *Id.* Because "information about prior results and statements characterizing the quality of legal services … [are] contained in the much larger context of the full website," they are "less likely to mislead the public." *Id.* at 11.

21. Two members of the task force filed comments objecting to the proposed amendments. Member Bill Wagner objected that both the task force and Board of Governors relied on their members' "personal experiences and personal preconceived interests" instead of "empirical studies and expert objective opinion regarding how advertising is received by its intended audience." Comments of Bill Wagner 5-6, *In re. Amendments to Rules Regulating The Fla. Bar*, No. 05-2194 (Jan. 13, 2006). And member W.F. Ebsary, Jr. noted that "[t]here is absolutely no record of complaints or bar grievances based upon existing websites" and "thus no legal basis

for restricting protected commercial speech." Comment & Notice of Objection 1-2, *In re. Amendments to Rules Regulating The Fla. Bar*, No. 05-2194 (Jan. 31, 2006). Ebsary also complained that regulating websites would subject to regulation thousands of lawyer blogs discussing the "issues of the day," and would thus infringe "core First Amendment speech." *Id.* at 3.

22. The Florida Supreme Court declined to adopt the Bar's proposal on the ground that the Bar's Special Committee on Website Advertising was still reviewing the rules. *In re Amendments to Rules Regulating The Fla. Bar*, 971 So. 2d at 764. The Court invited the Bar to submit new proposed amendments after the committee had submitted its recommendations. *Id.* The Court also ordered the Bar to "undertake an additional and contemporary study of lawyer advertising, which shall include public evaluation and comments about lawyer advertising, as recommended by Mr. Bill Wagner in his … comments to the Court." *Id.* at 765.

B. The Bar fails to reach consensus, leaving websites unregulated.

23. While the Bar's 2004 task force had recommended exempting websites from review, its new special committee recommended the polar opposite approach. The committee proposed subjecting websites to *all* the advertising rules, including the rules from which they had previously been excluded regarding past results and quality of services. *See Final Report to the Board of Governors by the Special Committee on Website Advertising Rules*, Petition App. D, *In re. Amendments to Rules Regulating The Fla. Bar*, No. 08-1181 (Feb. 26, 2008). The committee did not explain its decision and its minutes do not show that it considered studies, surveys, or evidence showing that the prohibited statements would mislead consumers. *See id.* Committee-member Timothy Chinaris voted against the proposal and would have "allow[ed] such statements with appropriate explanation or disclaimers, partly on constitutional grounds and partly because it is information that consumers would want to know." *Id.* at 56.

24. The Bar's Board of Governors, as it had with the prior task force, rejected the committee's proposal in favor of an "intermediate" position. Petition 2, *In re. Amendments to Rules Regulating The Fla. Bar*, No. 08-1181 (Feb. 26, 2008). This time, the Bar decided that all of the rules' prohibitions should apply to a lawyer's *home page*. *Id.* The remainder of a lawyer's website, on the other hand, would be exempt from the prohibitions on statements of quality, statements of past results, and client testimonials. *Id.* at 2-3. Other than describing the proposed rule as a compromise position, the Bar's petition did not explain why it recommended imposing stricter limits on lawyer home pages or why lawyer websites justified regulation at all.

25. Former committee member Chinaris filed comments opposing the distinction between a lawyer's home page and the rest of a website on the ground that it "would needlessly keep valuable and desired information from prospective clients." Comments of Timothy P. Chinaris 3, *In re. Amendments to Rules Regulating The Fla. Bar*, No. 05-2194 (Jan. 13, 2006). "It is not clear from the Bar's petition and accompanying documents," he wrote, "why this distinction has been drawn." *Id.* at 2.

26. Staff of the Federal Trade Commission also filed comments opposing the amendments, explaining that applying the advertising rules' restrictions to a lawyer's home page would "unnecessarily restrict[] truthful and non-misleading advertising" and might "result in higher prices paid for legal services and less consumer choice." Letter from FTC Staff to Elizabeth Clark Tarbert 1 (Mar. 23, 2007), *available at* http://www.ftc.gov/policy/policy-actions/advocacy-filings/2007/03/ftc-staff-comment-florida-bar-concerning-proposed. The comments specifically advised against requiring websites that describe or compare a lawyer's services to be "objectively verified." *Id.* at 4 & n.17. To require objective verification, the comments warned, would "demand substantiation for representations that, although not misleading, concern subjective qualities that are not easy to measure and for which substantiation may not normally

be expected," and thus risk prohibiting "messages that consumers may find useful." *Id.* at 4. Any concern about misleading representations, the agency wrote, "would be better addressed by a rule requiring that advertising claims that consumers would normally expect to be substantiated, must be substantiated." *Id.*

27. In February 2009, the Florida Supreme Court for the second time rejected the Bar's proposed amendments. *In re Amendments to Rules Regulating The Fla. Bar*, 24 So. 3d 172 (Fla. 2009). The Court concluded that the proposed rules would not sufficiently restrict access to information about a lawyer's past results and quality of services, suggesting instead that the Bar formulate rules that would require consumers to submit their names, addresses, and phone numbers, and click a button accepting a disclaimer, before accessing any part of a lawyer's website that includes such information. *In re Amendments to Rules Regulating The Fla. Bar*, No. 08-1181, 2009 WL 485105 (Fla. Feb. 27, 2009). *amended by* 24 So. 3d 172 (Fla. 2009). Lacking any such proposal, the Court adopted amendments that subjected lawyer websites to the same treatment as broadcast and print advertisements. *Id.*

28. Before the amendments went into effect, the Court stayed their effective date based on the Bar's representation that it was preparing a "comprehensive" proposal to further amend the advertising rules. Order, *In re Amendments to Rules Regulating The Fla. Bar*, No. 10-1014 (Feb. 28, 2011).

C. The Florida Bar proposes its "comprehensive" amendments.

29. In May 2011, the Bar's Board of Governors submitted its promised proposal. *See* Petition, *In re Amendments to Rules Regulating The Fla. Bar*, No. 11-1327 (July 5, 2011). Recognizing the "long and convoluted" history of the amendment process, the Board proposed that the rules should apply to "*all* forms of communication in any print or electronic forum, including but not limited to newspapers, magazines, brochures, flyers, television, radio, direct mail, electronic mail,

and Internet, including banners, pop-ups, websites, social networking, and video sharing media." *Id.* App. D at 23 (Rule 4-7.1(a) (emphasis added)). The rules would thus treat websites, and all other forms of lawyer communication, "the same as other advertising media"—subject "to the general lawyer advertising requirements." *Id.* at 25-26 (Rule 4-7.1, cmt.).

30. The Board also recommended revising the prohibitions against statements of quality and past results, noting that the "U.S. Supreme Court has generally struck down regulations restricting advertising truthful information" and that such "an outright prohibition … may run afoul of First Amendment jurisprudence." *Id.* at 22-23. It acknowledged that a change was needed to "encourage the free flow of truthful information to the public that is necessary for the selection of a lawyer" and that "the public wants this information available to them." *Id.* at 23. In a Bar-sponsored survey, 74% of respondents said that past results were an important consideration in choosing a lawyer. *Id.* at 15.

31. Rather than eliminating these rules, however, the Board proposed that statements of quality and past results be allowed only when "objectively verifiable." *Id.* at 22-23. The Board gave no reason for the restriction, which has never been adopted by any other state, other than asserting its view that "[s]ubjective statements of quality" and "ability" are not constitutionally protected. *Id.* at 13. The Board did not identify any evidence from its survey or elsewhere demonstrating that the limit serves any valid purpose. Nor did it examine whether the rule, even if justified when applied to some forms of advertising, makes sense with respect to lawyer websites, blogs, and social media sites.

32. Although the proposed rule on its face imposed the "objectively verifiable" requirement only on statements of quality and past results, the Bar has interpreted the phrase "inherently misleading" to include an implicit objective-verifiability requirement. It thus applies

the requirement to *all* lawyer communications, regardless of whether the communication includes a statement of past results or quality.

33. The rules do not define "objectively verifiable," and neither the Bar nor the Florida Supreme Court has previously interpreted the phrase. The only guide to the rule's meaning appears in a comment, which explains that "general statements"—such as "I have successfully represented clients" and "I have won numerous appellate cases"—"*may or may not be* sufficiently objectively verifiable" because "a lawyer may interpret the words 'successful' or 'won' in a manner different from the average prospective client." *Id.* (emphasis added).

34. Another comment to the rule provides that it prohibits statements of past results if the "advertised result … is atypical of persons under similar circumstances" or if the statement omits "pertinent information" about the circumstances of the result. Rule 4-7.3, cmt. But other than listing a couple of examples—including the "fail[ure] to disclose that the judgment is far short of the client's actual damages"—the comment does not explain what information the Bar considers "pertinent." In decisions applying the requirement, the Bar has interpreted it to prohibit "statements regarding collective or aggregated results"—such as "we've recovered millions for accident victims"—even where the statement is truthful. "Such statements are … inherently misleading," the Bar wrote, because "there is no way for the viewer to know how many cases, clients, and/or lawyers are involved or the amounts and facts of individual matters that would permit consumers to make informed decisions regarding them." *See* Exh. 8.

35. The amendments also maintained the existing rule prohibiting lawyers from "stating or implying" that they are a "specialist, an expert, or other variations of those terms" unless the lawyer has been certified by the Florida Bar or a recognized certifying body. Rule 4-7.14(a)(4). The comment to the rule clarifies that it prohibits uncertified lawyers from "describ[ing] themselves as a 'specialist,' 'specializing,' 'certified,' 'board certified,' being an

'expert,' having 'expertise,' or any variation of similar import." *Id.*, cmt. Again the Bar gave no reason for the restriction and did not explain why it was needed for lawyer websites, including social-media websites like LinkedIn that automatically categorize lawyers based on their "specialties."

36. The Florida Supreme Court adopted the proposed amendments in a per curiam opinion joined by four of the Court's seven justices. The Court's opinion rejected the concerns of commenters that the "objectively verifiable" requirement is vague: "If the attorney can show, by objective facts, that the statement is true," the majority wrote, "then he has presented an objectively verifiable statement in the advertisement." *In re Amendments to Rules Regulating The Fla. Bar*, 108 So. 3d 609, 611 (Fla. 2013). But "a *subjective* statement such as 'the best trial lawyer in Florida,'" according to the Court, "is a misleading statement that fails to meet the requirement because it is neither objective nor verifiable." *Id.* (emphasis added). The Court also noted that, in any disciplinary proceeding, the Bar would retain "the burden of proving that the statement is … not objectively verifiable." *Id.*

37. Justice Pariente dissented from the rules' "one-size-fits-all approach." *Id.* Websites, she reasoned, "must be affirmatively sought out and have the ability to provide a potential client with an abundance of information." *Id.* at 611. Although the Bar adopted its advertising restrictions based on its claims that advertising hurts the image of the legal profession and the courts, "there is absolutely no evidence that lawyers' websites have contributed to the decline in the way the public views lawyers—or been the subject of abuse by the thousands of lawyers who utilize websites." *Id.* at 614. "Rather, a well-done and comprehensive website could give a potential client an abundance of meaningful information from which to make a decision as to that particular lawyer or law firm." *Id.* Justice Canady dissented on the ground that the proposed rules were "unduly restrictive." *Id.* at 615. He would have instead "reject[ed] the proposed rules

and direct[ed] that the Bar propose revised rules that go further to address concerns related to the protection of First Amendment rights and of prospective clients' interest in having unimpeded access to information that they consider useful." *Id.* Like Justice Pariente, Justice Canady expressed particular concern "about the impact of the application of the advertising rules to lawyer websites." *Id.*

III. The Bar's prohibition of the plaintiffs' website, blog, and LinkedIn page

A. Searcy Denney requests guidance.

38. Following adoption of the amendments, Searcy Denney began reviewing the thousands of pages on its websites in an attempt to bring them into compliance. But the firm found itself unable to determine which statements would violate the undefined "objectively verifiable" requirement. The firm also realized that strict compliance with the rules' broad language would require it to take down substantial portions of its websites at a cost of tens of thousands of dollars, as well as to remove political opinions from its blog and to cancel its social media profiles on sites like LinkedIn.com.

39. Before the new rules went into effect, Searcy Denney therefore wrote to the Bar requesting an advisory opinion about the effect of the rules on its websites. Letter from Joan Williams to Elizabeth Clark Tarbert (April 26, 2013) (Exhibit 3). Because the amended rules prohibit submission of an "entire website for review," Rule 4-7.19(d), the firm chose a sample of thirteen individual web pages from the thousands it maintains, including content from the firm's home page; a page from a separate, topic-driven website; the firm's profile page from the social media site LinkedIn.com; and articles from the firm's newsletter and blog. *Id.* at 1-2; *id.* Attachs. 1-5. Its letter requested clarification of the rules' meaning and "guidelines to follow while evaluating the rest of the content on our websites, as well as future material that is continuously

being added to the sites." *Id.* at 2. "[A]fter much thought and internal discussion," it wrote, "we simply can't figure out whether these sections violate the amended rules." *Id.*

40. In particular, the firm sought guidance about what would be required to satisfy the "objectively verifiable" requirement. *Id.* The firm asked "what kind of evidence, if any," could be used to objectively verify statements that are inherently subjective, like the firm's claim to have a "record of significant successes for thousands of clients," "skilled paralegals, investigators, and professional staff," and a "national reputation as powerful client advocates." *Id.* at 3-4. Moreover, the letter explained that the firm "has been in business for more than 35 years, and the files in many of [its] older cases were long ago destroyed." *Id.* It asked whether, in those circumstances, an affidavit by the attorney who obtained the recovery" would be considered "objective" verification under the rule. *Id.*

41. The firm also attached a copy of its profile page from the social-media site LinkedIn.com. *Id.* Attach. 2. In addition to again asking how statements on the page could be objectively verified, the firm asked whether the page would be found to violate the rules because it displays the unsolicited recommendation of a former client, who wrote that Searcy Denney "is the best law firm anyone can ask for," and because it contains sections—standard to LinkedIn profiles—describing the firm's "specialties," "skills," and "expertise." *Id.*

42. Finally, the firm submitted articles from its blog covering issues of potential interest to its clients. As it explained to the Bar, "[t]he topics covered on the blog sometimes involve cases handled by [the] firm, … [b]ut the blog also includes more general discussions about issues of public health and safety, the justice system, and a wide variety of other subjects." *Id.* The firm attached as an example a blog post discussing "common misconceptions" about tort reform and frivolous lawsuits. *Id.* Attach. 5. The letter asked whether the Bar would apply the "objectively verifiable" requirement to the article, and, if so, whether it would violate the rule

because an opinion on a political issue is inherently incapable of being proved true or false. *Id.* at 5-6. "Although some would disagree with the author's conclusions," the firm wrote, "they are his sincerely held views and we believe them to be supported by the evidence." *Id.* at 6.

B. The Florida Bar finds that the firm's websites violate the rules.

43. The Bar initially responded that the firm's payment of a $750 filing fee ($150 for each of the five websites submitted) was insufficient because the rule required a separate fee for each "portion" of a website. Exh. 2. The Bar chose to treat each of the thirteen individual webpages submitted as a separate filing, requiring an additional $1200 in filing fees. *Id.* Searcy Denney paid the fees.

44. The Bar then concluded that the firm's submitted web pages, blog, and LinkedIn pages each violate some aspect of the amended rules. Exh. 3. The Bar singled out statements of opinion as violating the "objectively verifiable" requirement—including statements that the days "when we could trust big corporations … are over," that "[g]overnment regulation of Corporate America's disregard of consumer safety has been lackadaisical at best," and that "when it comes to 'tort reform' there is a single winner: the insurance industry." *Id.*

45. The opinion similarly concluded that truthful but subjective descriptions of the firm's services and record also violate the same rule—such as the firm's truthful claim to have "32 years of experience handling mass tort cases, resulting in justice for clients in a wide variety of circumstances" and to be "one of the few law firms in the country to successfully represent innocent victims of dangerous herbal supplements"—because words like "justice" and "successfully" are inherently subjective. *Id.*

46. The Bar informed the firm that even objective statements of fact about specific recoveries in past cases would violate the amended rules "unless [they are] objectively verifiable and omit[] no facts necessary to avoid misleading consumers." *Id.* But the Bar did not answer the

firm's questions about what evidence and surrounding facts would be required to satisfy that requirement.

47. The Bar's opinion also found that the firm's LinkedIn.com also violated the rules because the subjective opinion of a former client was not "objectively verifiable" and because LinkedIn.com automatically described the firm's practice areas as "Specialties." *Id.*

C. The Bar stands by its decision.

48. Searcy Denney appealed the Bar's decision by letter to the Bar's Standing Committee on Advertising. *See* Exh. 6. The firm explained that the statements on its blog and website identified by the Bar as requiring objective verification, although "not misleading," "would be difficult or impossible to objectively verify." *Id.* at 3. "It is difficult to imagine," the firm explained, "what evidence we could submit to prove that the days 'when we could trust big corporations ... are over.'" *Id.* The firm urged that the rule "not be interpreted to prohibit these types of statements." *Id.*

49. For a second time, the firm also requested guidance on what evidence is required to satisfy the "objectively verifiable" requirement. The firm offered to substantiate statements about its record and services, stating that it could "provide evidence of verdicts in past cases to demonstrate the firm's record of success" and "statements from clients and lawyers familiar with our work to show that the firm provides high-quality legal representation." *Id.* But "[w]ithout even considering the evidence we would be able to present," the firm wrote, "there is no basis for the conclusion that these statements cannot be objectively verified." *Id.*

50. Finally, the firm disputed the Bar's application of the rules to its LinkedIn pages, noting that LinkedIn, not the firm, was responsible for using the word "Specialties" and for displaying the former client's recommendation. *Id.*

51. Over the next several months, the Standing Committee met three times to deliberate over the thirteen web pages submitted by the firm. *See* Exh. 7. Ultimately, the Standing Committee affirmed the Bar's decisions in all respects relevant here, concluding that inherently unprovable statements and claims of specialization on the firm's websites, blog, and LinkedIn pages violate the amended rules. The committee also reiterated that statements of past results on the firm's webpages are prohibited unless "objectively verifiable," but again failed to give the requested guidance on what evidence it would require.

Claims for Relief

Claim One: Violation of the First Amendment (under 42 U.S.C. § 1983)

52. In extending its advertising regulations to websites, the Bar has failed to meet its burden of showing that its restrictions are necessary to protect consumers. The amendments make it effectively impossible for Florida lawyers to write articles on blogs, to publish their results in past cases, or to participate in social media sites like LinkedIn, without any evidence that restricting these activities serves any purpose.

53. The U.S. Supreme Court has repeatedly held that, to justify restrictions on commercial speech, states have the burden of proving that the prohibited forms of speech are false or misleading. *See., e.g., 44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996). Rule 4-7.1(a)'s requirement that advertisements be "objectively verifiable" reverses that constitutional burden, prohibiting all commercial speech by a lawyer unless the lawyer can prove it to be true.

54. The Bar also applies the "objectively verifiable" rule to prohibit even provable statements of a lawyer's past results when those statements are not accompanied by all the circumstances that the Bar considers relevant to the case's outcome. The rule makes it extremely burdensome to truthfully state the recovery obtained by a lawyer in a particular case and impossible to report the cumulative result of past cases.

55. The Bar requires objective verifiability not only of commercial speech, but also of expressions of political opinion on lawyer websites and blogs. For example, it prohibited Searcy Denney from expressing an opinion on the issue of tort reform, a subject of substantial public concern and active political debate, on the ground that political opinions cannot be objectively verified.

56. By barring truthful statements about the firm's record and services, and by censoring the opinions of former clients, the rules also infringe the First Amendment rights of Florida consumers by depriving them of information that the Bar acknowledges is important in selecting a lawyer.

57. Regardless of whether the prohibited speech is treated as commercial or political, Florida's restrictions cannot survive First Amendment scrutiny. There is no evidence that the prohibited speech is misleading or harmful to consumers. Florida has no legitimate interest in prohibiting the speech; and its advertising rules do not directly advance—and are far more extensive than necessary to serve—any interest it might claim. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

Claim Two: Void for vagueness (under 42 U.S.C. § 1983)

51. Rule 4-7.1(a)'s requirement that all statements be "objectively verifiable" does not provide guidance about what speech is permitted and invites arbitrary and discriminatory enforcement. The standard, which has never been adopted by any other state, is not explained in the rule, and the Bar declined the plaintiffs' request for guidance about what evidence the rule requires.

58. The rule makes the potential for professional discipline turn on whether a lawyer is able to satisfy an undefined level of proof and whether the lawyer has disclosed every one of a blurry set of surrounding circumstances that the Bar considers "pertinent" to a case's outcome.

The rule fails to provide lawyers with a reasonable opportunity to know what is prohibited or Bar officials with explicit standards for enforcement. It is therefore unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment.

Request for Relief

The plaintiffs request that the Court:

A. Declare unconstitutional and enjoin enforcement of Florida Rule of Professional Conduct 4-7.13's requirement that lawyer advertisements be "objectively verifiable;"

B. Declare unconstitutional and enjoin enforcement of Florida Rule of Professional Conduct 4-7.14's prohibition on stating or implying that a lawyer specializes or has expertise in an area of law;

C. Award the plaintiffs their reasonable costs, expenses, and attorney's fees under 42 U.S.C. § 1988; and

D. Grant the plaintiffs all other appropriate relief.

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Respectfully submitted,

/s/Richard Burton Bush

RICHARD BURTON BUSH (FBN 0294152)
BUSH & AUGSPURGER, PA
3375-C Capital Circle, NE, Suite 200
Tallahassee, FL 3208-3778
(850) 386-7666
rbb@bushlawgroup.com

GREGORY A. BECK
DEEPAK GUPTA
BRIAN WOLFMAN
GUPTA BECK PLLC
1625 Massachusetts Avenue, NW
Suite 500
Washington, DC 20036
(202) 888-1741
greg@guptabeck.com

Counsel for Plaintiffs