IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 94-9021

ORDER OF THE COURT APPROVING A REFERENDUM OF THE MEMBERSHIP OF THE STATE BAR OF TEXAS ON VARIOUS ISSUES PERTAINING TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, THE TEXAS RULES OF DISCIPLINARY PROCEDURE, AND THE MANDATORY CONTINUING LEGAL EDUCATION RULES

WHEREAS, the Board of Directors of the State Bar of Texas, in a regularly called and posted meeting at which a quorum was present, on January 21, 1994, voted unanimously to recommend and request that the Supreme Court of Texas order a referendum of the membership of the State Bar of Texas on the various issues set forth on the ballot hereinafter ordered pertaining to the amendment of various rules and the adoption of others affecting the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, and the Mandatory Continuing Legal Education Rules.

After due consideration, it is hereby ORDERED that such petition be granted and the requested referendum be submitted to a vote of the registered members of the State Bar of Texas.

It is further ORDERED that the Executive Director of the State Bar of Texas shall prepare and mail on April 14, 1994, to each registered member of the State Bar of Texas a ballot for the purpose of affording each member an opportunity to vote on the various proposed amendments and rules. The form and content of such ballot shall be as follows:

OFFICIAL BALLOT

OF THE

STATE BAR OF TEXAS

SPRING '94 REFERENDUM

A. **Lawyer Advertising:** Do you favor the proposed amendment, as published in the March 1994 issue of the *Texas Bar Journal*, of Parts VII and VIII, and the adoption of Part IX, of the Texas Disciplinary Rules of Professional Conduct limiting certain advertisements and direct mail solicitation practices of lawyers?

B. **Filing of Advertisements:** Do you favor the adoption of proposed Rule 7.07 of the Texas Disciplinary Rules of Professional Conduct, as published in the March 1994 issue of the *Texas Bar Journal*, requiring the filing of certain advertisements and written solicitation communications with the State Bar of Texas for review and enforcement?

C. **MCLE Reporting:** Do you favor the proposed amendment, as published in the March 1994 issue of the *Texas Bar Journal,* of MCLE rules to eliminate the mandatory return of the Annual Verification Report where there is no disagreement between the lawyer and State Bar records as to CLE credits?

D. **Trial Publicity, etc.:** Do you favor the proposed amendment, as published in the March 1994 issue of the *Texas Bar Journal*, of Rule Nos. 3.07, 3.08(a), 5.05, 6.01, 8.03, and 8.04 of the Texas Disciplinary Rules of Professional Conduct?

E. **Prohibited Discriminatory Activities:** Do you favor the adoption of proposed Rule 5.08 of the Texas Disciplinary Rules of Professional Conduct, as published in the March 1994 issue of the *Texas Bar Journal*, prohibiting certain discriminating activities in connection with adjudicatory proceedings?

F. **Disciplinary Procedures:** Do you favor the proposed amendment, as published in the March 1994 issue of the *Texas Bar Journal*, of Parts I, II, III, IV, V, VI, VIII, XI, XII and XVI of the Texas Rules of Disciplinary Procedure?

G. **Board of Disciplinary Appeals:** Do you favor the proposed amendment, as published in the March 1994 issue of the *Texas Bar Journal,* of Part VII of the Texas Rules of Disciplinary Procedure pertaining to the Board of Disciplinary Appeals?

H. **Availability of Sanctions:** Do you favor the adoption of proposed Rule 15.13 of the Texas Rules of Disciplinary Procedure, as published in the March 1994 issue of the *Texas Bar Journal*, establishing restrictions on the availability of certain sanctions?

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Balloting shall be closed at 5:00 o'clock p.m. on Monday, May 16, 1994, and no ballot thereafter received by the State Bar of Texas shall be counted.

Chief Justice Phillips, Justice Doggett, Justice Gammage, and Justice Spector dissent from the submission of Issues A and B.

No vote by any justice for or against the submission of any issue constitutes a predetermination of any legal question by any justice.

SIGNED this 3rd day of February, 1994.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

Misc. Docket No. 94-9021

Craig Enoch, Justice

Rose Spector, Justice

Misc. Docket No. 94-9021

IN THE SUPREME COURT OF TEXAS

MISC. NO.94-9021

DISSENTING OPINION TO SUPREME COURT ORDER

JUSTICE GAMMAGE, joined by JUSTICE SPECTOR, dissenting.

Contrary to the Order's notation of dissent, I decline to participate in any referendum including the propositions regarding lawyer advertising.

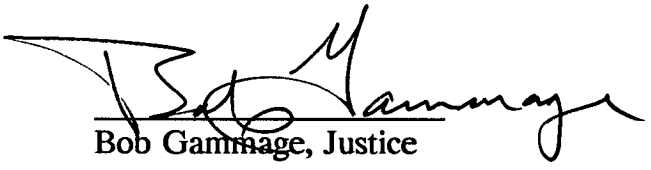
There are several reasons for this. To begin with, virtually identical proposals failed to generate the necessary votes in a Bar referendum conducted less than three months ago. If these items are again to be submitted so soon after their recent failure, they should be submitted separately, and not placed before the Bar membership packaged with other measures deliberately calculated to generate the required percentage of votes. They should pass or fail on their own merits. To have them considered in any other context is a subterfuge.

Perhaps a greater problem is the disingenuous approach by the Bar in putting this court in the position of rubber-stamping proposals the Bar leadership concedes may have constitutional problems, all in the name of public relations. When questions of the proposals' constitutionality arose and it was noted that the advertising restrictions currently in effect are not being effectively enforced by the Bar, the response was that the court should not be concerned about that; that despite the statutory requirement that no item should be placed on the ballot without this court's approval -- presumably after a thorough

review and examination -- we should approve anything the Bar proposed, regardless of merit or constitutional consequences.

This approach is so totally lacking in propriety and integrity that I will not lend my name or signature to any order so contrived.

It would, indeed, be appropriate for an attentive Bar membership to send a clear message to its leadership that the lawyers of this state demand the same candor and forthrightness of their leaders as the public has the right to demand of all lawyers.



Bob Gammage, Justice

OPINION DELIVERED: February 9, 1994

IN THE SUPREME COURT OF TEXAS

MISC. NO. 94-9021

Dissenting Opinion to Supreme Court Order

At the January 11, 1994 Administrative Meeting of this Court, I was once again reassured that each Justice would receive written notice of no less than twenty-four hours regarding all nonemergency administrative business. Nevertheless, on January 24, a day when the Court was not in session, Justice Gonzalez, the Court's designated liaison with the State Bar, circulated a memo that apparently allowed no more than four hours for response concerning the scheduling of another closed meeting with State Bar leaders. This meeting was then held on a day when the Court had agreed to take no action and at a time when I had previously advised Chief Justice Phillips of my unavailability. Only after I circulated on January 25 a written objection to Justice Gonzalez's continued insistence on secrecy was this meeting opened, and then only on unreasonably short notice.

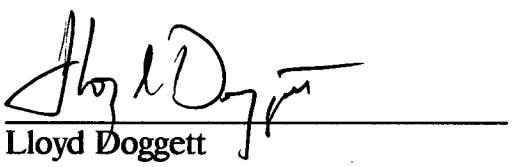
The instant order was apparently signed by five members of the Court and released to the State Bar by Justice Gonzalez on February 3. Neither notice of this action nor a copy of the order was provided to me until February 7, by which time Justice Hecht had appended his signature.

This is the very kind of gamesmanship by which the majority elevated a campaign worker to the State Bar Board of Directors. *See* Misc. Order 92-0008 (Doggett, J., dissenting); (Gammage, J., concurring). More recently, this same approach was taken in the

totally unjustified suspension of our new Code of Judicial Conduct. *See* Misc. Order 93-0233 (Doggett, J., dissenting).

I am pleased that the State Bar leadership remains concerned about lawyer advertising and solicitation. This new choice of a referenda date corresponding with the election of officers is what I recommended to them last year, long before the December referendum was scheduled. Nevertheless, I believe that the sustained *ex parte* contact on this issue, while not illegal since this is an administrative matter, raises real questions about the ability of some members of this Court to act as impartial arbiters.

I have never felt a great need for others to do my dissenting for me, but the signing justices were kind enough to record me as dissenting anyway on one aspect of the referendum. This is an error. Not having had an opportunity to participate in the relevant meeting, I have made no final decision on the merits of these proposals. Rather, my dissent is to the antics at this Court.



Lloyd Doggett
Justice

Opinion delivered: February 9, 1994

ORIGINAL

No. _____

MARY MOORE	)(	IN THE SUPREME COURT
vs.	)(	OF THE
THE STATE BAR OF TEXAS	)(	STATE OF TEXAS

RELATED MATTERS PENDING ON DOCKET

MISC. DOCKET NO: 94-9021

IN RE: PETITION OF THE STATE BAR OF TEXAS FOR ORDER OF PROMULGATION

CORRECTION TO CITATION IN APPLICATION FOR WRIT OF PROHIBITION

TO THE CLERK OF THE SUPREME COURT OF TEXAS:

Please file the following correction to the APPLICATION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, MOTION TO DECLARE PROPOSED BAR RULES UNCONSTITUTIONAL and MEMORANDUM filed on June 28, 1994, in the above styled cause.

On page 3, under paragraph I, and on page 11 under the JURISDICTION paragraph please change:

Article 5, Section 5 of the Texas Constitution

to the following:

Article V, Section 3 of the Texas Constitution

Respectfully submitted,

Kenneth R. Poland
Texas Bar No. 16088550
405 Main, Suite 510
Houston, Texas 77002
Phone: (713) 224-5426

CERTIFICATE OF SERVICE

I, Kenneth R. Poland, certify that a true and correct copy of the above Correction to Citation was mailed via United States First Class Mail by me to each of the Respondents at the address as stated in the application on the 28th day of June, 1994.

Kenneth R. Poland

ORIGINAL

No. _____

MARY MOORE	)(	IN THE SUPREME COURT
vs.	)(	OF THE
THE STATE BAR OF TEXAS	)(	STATE OF TEXAS

RELATED MATTERS PENDING ON DOCKET

MISC. DOCKET NO: 94-9021

IN RE: PETITION OF THE STATE BAR OF TEXAS FOR ORDER OF PROMULGATION

TO THE CLERK OF THE SUPREME COURT OF TEXAS:

Enclosed is the Motion for Leave to File, Application for Writ of Prohibition/Motion to Declare Proposed Rules Unconstitutional and Memorandum of Law of Applicant Mary Moore. Please file the original and 11 copies and present same to the Supreme Court of Texas. Per telephone conversation with Hon. John Adams, Clerk, Supreme Court of Texas, no filing fee is enclosed at this time.

TABLE OF CONTENTS

No. _____

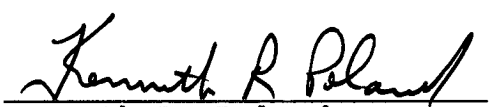
MARY MOORE	)(	IN THE SUPREME COURT
vs.	)(	OF THE
THE STATE BAR OF TEXAS	)(	STATE OF TEXAS

MOTION FOR LEAVE TO FILE:
APPLICATION FOR WRIT OF PROHIBITION
OR IN THE ALTERNATIVE
MOTION TO DECLARE PROPOSED BAR RULES UNCONSTITUTIONAL

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Comes now Mary Moore, Applicant in the above entitled and numbered cause, by and through her attoreny, Kenneth R. Poland, and respectfully moves this Court pursuant to Texas Rule of Appellate Procedure 211(a) **and the Inherent Powers of the Texas Supreme Court to Regulate the State Bar of Texas**, to grant Applicant's Writ of Prohibition, or in the alternative, consider the Motion to Declare Bar Rules (Ballot Items A & B) unconstitutional.

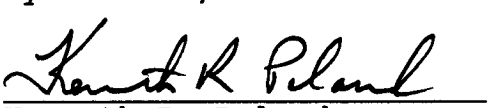
Respectfully submitted,



Kenneth R. Poland
Texas Bar No. 16088550
405 Main, Suite 510
Houston, Texas 77007
Phone: (713) 224-5426
Fax: (713) 224-5519

CERTIFICATE OF SERVICE

I, Kenneth R. Poland, certify that a true and correct copy of the above Motion for Leave was mailed via United States Express Mail by me to each of the Respondents at the addresses as stated in the attached application on the 27th day of June, 1994.



Kenneth R. Poland

No. _____

MARY MOORE	)(	IN THE SUPREME COURT
vs.	)(	OF THE
THE STATE BAR OF TEXAS	)(	STATE OF TEXAS

APPLICATION FOR WRIT OF PROHIBITION
OR IN THE ALTERNATIVE
MOTION TO DECLARE PROPOSED BAR RULES UNCONSTITUTIONAL

Now comes MARY MOORE, Applicant, by and through her attorney, Kenneth R. Poland, and applies to this Court under Its Extraordinary Relief Jurisdiction to issue a Writ of Prohibition prohibiting the State Bar of Texas from promulgating or enforcing the proposed rules from the recent referendum or, in the alternative, moves the Supreme Court of Texas to declare the proposed bar rules relating to regulation of advertising (Ballot Items A & B) unconstitutional and in support of such application shows:

I.

This Court has jurisdiction to issue a Writ of Prohibition under the provisions of Article 5, Section 5 of the Texas Constitution and its inherent powers to regulate the lawyers of this state. In fact, **the Supreme Court of Texas has an inherent duty not to approve unconstitutional rules for its State Bar.**

II.

Applicant is an attorney in good standing with the Texas State Bar. She is the Mary Moore, named plaintiff in **Moore v. Morales**, 843 F. Supp. 1124 (S.D. Tex. - Houston, 1994). Applicant practices criminal defense law in Houston, Harris County, Texas. Applicant has advertised in the past by direct mail to inform

potential clients of the services she can provide to criminal defendants. She targets her advertising by obtaining names and addresses of persons recently arrested for various criminal offenses in Harris County, Texas, from the public records of the Harris County District Clerk's Office. The procedure is to mail a letter advertising her services to selected potential clients. A copy of the letter mailed and affidavit are attached hereto and incorporated herein for all purposes.

Applicant engages in truthful, non-deceptive, targeted direct mail advertising.

III.

Applicant comes to this Honorable Court complaining of the State Bar of Texas and Ballot Items A & B which propose to place unconstitutional restrictions of Applicants free speech. Applicant wishes to continue direct mail advertising without being subject to threat of prosecution or sanctions by the State Bar of Texas. Applicant requests extraordinary relief as she has no other adequate remedy at law. It is unreasonable that she wait until she is subject of a grievance to challenge this unconstitutional set of rules relating to advertising.

IV.

Article I, section 8 of the Texas Constitution in no uncertain terms provides: **EVERY PERSON SHALL BE AT LIBERTY TO SPEAK, WRITE OR PUBLISH HIS OPINIONS ON ANY SUBJECT, BEING RESPONSIBLE FOR THE ABUSE OF THAT PRIVILEGE; AND NO LAW SHALL EVER BE PASSED CURTAILING THE LIBERTY OF SPEECH OR OF THE PRESS.** The

proposed State Bar Rules (Ballot Items A&B) are unconstitutional on their face and as applied to the law practice of Applicant. Applicant is in fear of being prosecuted or sanctioned by the State Bar of Texas grievance system for violations of the unconstitutional proposed rules in A and B. These rules also impose restraints on Applicant's liberty not shared by the public generally.

Applicant requests the Court to take judicial notice of the proposed rules (Ballot Items A & B) relating to advertising, for the purposes of this Application and any notices hereon.

V.

Applicant designates as Respondents, the State Bar of Texas, the Director of the State Bar of Texas, Hon. Karen Johnson, and the President of the State Bar of Texas, Hon. Jim Branton at the following address: 1414 Colorado St., Austin, Texas 78701.

PRAYER

WHEREFORE, Applicant prays that this Court:

a. issue a Writ of Prohibition directing that the above named Respondents refrain from enforcing the State Bar of Texas proposed advertising rules (Ballot Items A & B), against Applicant, her associates or employees;

b. declare proposed advertising rules (Ballot Items A & B), unconstitutional on their face and as applied to the direct mail advertising practices of the Applicant;

c. effective immediately, enjoin or stay Respondents from enforcing the proposed advertising rules (Ballot Items A & B),

against Applicant and her employees or associates;

d. provide other relief the Court deems appropriate.

Respectfully submitted,

Kenneth R. Poland
Texas Bar No. 16088550
405 Main, Suite 510
Houston, Texas 77002
Phone: (713) 224-5426
Fax: (713) 224-5519

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Kenneth R. Poland, Applicant, and after being duly sworn stated:

"I am the I am the attorney for the Applicant herein. I have read the foregoing Application for Writ and swear that all of the facts contained therein are true and correct to be best of my knowledge and belief."

Kenneth R. Poland

SUBSCRIBED AND SWORN TO BEFORE ME on this 27th day of June, 1994.

BETTE ODALE
NOTARY ★ PUBLIC
COMMISSION EXPIRES 10-27-97

Notary Public

CERTIFICATE OF SERVICE

I, Kenneth R. Poland, certify that a true and correct copy of the above application and supporting documentation was mailed via United States Express Mail - Next Day Delivery, by me to the above listed Respondent at the above address on the 27th day of June, 1994.

Kenneth R. Poland

No. _____

MARY MOORE	)(	IN THE SUPREME COURT
vs.	)(	OF THE
THE STATE BAR OF TEXAS	)(	STATE OF TEXAS

AFFIDAVIT OF APPLICANT MARY MOORE

My name is Mary Moore. I am over the age of 18 years and have never been convicted of a felony. I am the Applicant in the above styled and numbered lawsuit. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein, all of which are true and correct.

I am an attorney duly licensed by the Supreme Court of Texas to practice law in the State of Texas. My law practice is concentrated in the area of criminal defense law. I represent clients charged with criminal offenses.

I advertise my services to prospective clients by sending the prospective client a letter identifying myself and inviting them to contact me for an initial consultation at no charge. I do not advertise in any other way. I send my letters primarily to prospective clients in Harris county. My letter is truthful and non-deceptive. A copy of the letter I have mailed is attached to my affidavit and made a part hereof for all purposes.

I associate with another licensed attorney, Paul Weinstein, on some occasions to provide a joint representation of some of his clients charged with a criminal offense. These clients come from direct mail solicitations by Paul Weinstein and provide a great deal of my income.

Under the proposed State Bar Rules relating to advertising (Ballot Items A & B), I will be prohibited from contacting potential clients as I currently do, without changing my letter, submitting same to some committee and incurring great expense to change and modify the procedures I now use. Direct mail clients are about 50% of my business. I anticipate my irreparable harm from this loss will begin as soon as the proposed rules are promulgated by the Texas Supreme Court.

Many defendants are unaware of where or how to find an attorney. Most have limited funds with which to hire an attorney. The direct mail attorneys do a great service to these defendants. There is a limited amount of education in the letters, the offer of a free conference, and the opportunity to get free information about the criminal justice system and their cases.

Being able to quickly make contact with the criminal defendant assists him in preserving his rights, preventing the loss of evidence favorable to his case, and giving him competent representation in **all** his court appearances. His constitutional and due process rights are insured by this early contact.

In my professional legal opinion, these proposed rules (Ballot Items A & B) serve no beneficial purpose. There is no valid state interest involved. The proposed rules harm most the citizens who receive the letters, the persons who need the information in the letters the most. This makes Ballot Items A & B censorship at its worst.

Each of the above and foregoing facts is within my knowledge true and correct.

Mary Moore, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this 27th day of June, 1994.

Notary Public

BETTE ODALE
NOTARY ★ PUBLIC
COMMISSION EXPIRES 10-27-97

6-27-94

MARY MOORE
Attorney-at-Law
405 Main, Suite 510
Houston, Texas 77002
(713) 224-8204

I am an attorney engaged primarily in the practice of criminal law. I have been licensed since 1979. If you would like to speak with me regarding any criminal matters, I urge you to contact my office. Initial consultations are free.

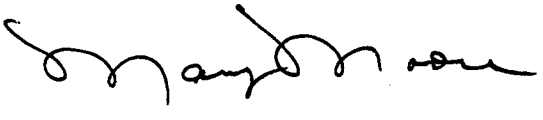
If you are charged with a misdemeanor and it can be settled by a plea bargain, my total fee is $100.00. Any court-ordered fines and costs are not included in my fee. Should your case need to be reset, there will be no additional charge.

If you have more than one case pending against you or any past convictions, a felony case, or if you want a trial or other evidentiary hearing, my fee will be increased accordingly. Payment plans are available.

I am a former felony district court prosecutor. I am familiar with all Harris County Misdemeanor and Felony Criminal Courts and have handled everything from traffic tickets to capital murder cases.

My telephone is answered 24 hours a day, 7 days a week. If I am not at the office when you call, I will personally return your call as soon as possible.

Very truly yours,



Mary Moore

Not certified by Texas Board of Legal Specialization

Advertisement for Legal Services

No. _____

MARY MOORE	)(	IN THE SUPREME COURT
vs.	)(	OF THE
THE STATE BAR OF TEXAS	)(	STATE OF TEXAS

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE MOTION TO DECLARE PROPOSED BAR RULES UNCONSTITUTIONAL

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Comes now Kenneth R. Poland, attorney for Applicant, Mary Moore, in the above entitled and numbered cause, and respectfully submits this Memorandum of Law in support of the Application.

JURISDICTION

This Court has jurisdiction to issue either a Writ of Prohibition or consider this application as a motion to declare proposed rules unconstitutional under the provisions of Article 5, Section 5 of the Texas Constitution and **the Inherent Powers of the Texas Supreme Court to regulate the State Bar of Texas.** This subject matter is properly within the subject matter jurisdiction of this Court.

ISSUE TO BE DECIDED

WHETHER, AS A MATTER OF LAW, THE PROPOSED ADVERTISING RULES (BALLOT ITEMS A & B) VIOLATE ART. I, SEC. 8 OF THE TEXAS CONSTITUTION.

ADOPTION OF BRIEF ALREADY ON FILE BY ANOTHER PARTY

In the interest of brevity in this matter, Applicant seeks to adopt for purposes of argument, the **Brief submitted by TEXANS AGAINST CENSORSHIP.** Their brief is an excellent commentary of the law in this area and Applicant requests that it be considered along

with this Memorandum of Law. Applicant will address issues and only cite cases not covered in that brief.

BURDEN OF JUSTIFICATION

It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. **Bolger v. Youngs Drug Products Corp.**, 463 U.S. 60, 71 n.20 (1983); **Fox**, 492 U.S., at 480. This 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 harms it recites are real and that its restriction will in fact alleviate them to a material degree.

The thrust of any ban or limitation would be to prevent misleading, deceptive and fraudulent advertising.

There is no valid justification for the levels of restriction of commercial speech contained in Ballot Items A & B. No harm can be demonstrated by the State Bar in this case. There is no "State" interest justifying these unconstitutional proposed Bar rules.

From their content, these rules are not content neutral. These are not reasonable time, place, and manner restrictions.

PUBLIC'S RIGHT TO RECEIVE INFORMATION

The United States Supreme Court has recognized the public's right to receive truthful commercial information under the First Amendment, in addition to the speaker's right to disseminate information helpful to his or her commercial interests. "[T]he First Amendment protects the public's interest in receiving information." **Pacific Gas & Elec. Co.**, 475 U.S. at 8, 106 S.Ct. at 907.

Applicant asks this Honorable Court to delineate a rule in

this State similar to the federal rule that citizens of this State have a right under Art. 1, Sec. 8 to receive information.

SPECIFIC COMPLAINTS ABOUT ITEM A RULES

While applicant objects to the entire content of Ballot Item A, specific objections are discussed here. Objections will be numbered to match the proposed rule number.

7.04(k) Required Staffing of Office: The requirement that an office be staffed 3 days a week is completely without State interest. It is a sad attempt to limit competition among zealous hardworking lawyers. This probably flies in the face of the federal laws on limiting competition and probably should be referred to the Justice Department for investigation of attempted illegal restraint of trade. The State should have an interest in lawyers having branch offices to service the poor (pro bono perhaps) or to work in poor areas. This rule appears to fly smack in the face of encouraging lawyers to assist in outreach type clinics or pro bono work!! It appears the "good ole boys" were thinking only of how to protect their own pocket books here.

7.05 PROHIBITED WRITTEN SOLICITATIONS:

(a) (4) OBJECTION TO PUBLIC MEDIA RULES APPLYING: "appeals to emotions" is a vague and over broad statement that could be interpreted as meaning everything, as everything in our lives has some emotional characteristic. No valid state interest has been shown and other rules and laws cover this area adequately without the need for new rules.

(b) All this subsection: Requiring the 3/8 inch size word "ADVERTISEMENT" requires extra printing costs, some office printers will not print that size. No other profession is required to do

this. The objections are favoritism, placing burden on one particular professional element in the state, and no valid state interest. We should not insult the intelligence of our citizens; they are very apt at trashing the garbage they don't want.

(7) This section is vague and not subject to clear meaning. There is absolutely no state interest in having the attorney disclose where he got the information. This is objectionable on the basis of violating trade secrets as well.

(d) This section is vague in that it appears to require a copy of each letter sent. Or does it mean a sample of the copies sent? Again, what is the State's interest? Do not the current rules cover this adequately?

SPECIFIC COMPLAINTS ABOUT ITEM B RULES

Objection is made to all the Item B rules changes.

The Ballot Item B rules relating to preapproval and paying a fee to advertise cannot withstand the favoritism test. If doctors and candlestick makers don't have to pay a fee, then lawyers are being disfavored. Once again, where is the State interest demonstrated? It's not!

EXISTING LAWS SUFFICIENT TO PROTECT ANY STATE INTEREST

What is it the proponents of these advertising rules are trying to protect? There are sufficient laws on the books already to protect the valid "State" interests. The Texas Deceptive Trade Practices Act will allow sufficient damages if a lawyer misbehaves in most cases. The plain old tort law dealing with malpractice is alive and well. The untouched barratry statutes can put a deceptive lawyer in jail for a year the first time, and up to 10 years for the second time. There are the existing bar rules that

have plenty of teeth to deal with misconduct, deceit, dishonesty, and misbehavior.

What then is it the proponents of these rules are after? The "good ole boy" pocket books have been stepped on by the advertising lawyers and the only way they can figure out to fight back is by getting their legislators or others to help make laws or rules that prohibit effective advertising. Their goal is not to protect the public, but to protect their personal pocket books. They don't care if the means is unconstitutional, they just want advertising stopped!

There is no legitimate state interest in these proposed rules that is not adequately addressed in other laws or rules. Existing remedies for any harmed citizen are adequate.

COST OF FIRST AMENDMENT FIGHTS IN FEDERAL COURTS

When a plaintiff on a first amendment ground prevails in federal court, he is awarded liberal attorney fees. The legislature was told that SB 1227 had unconstitutional law. They didn't listen, not even to two of their own constitutional law experts who advised against the 30 day rules. The law was passed. Applicant and others sought relief in Federal court. Applicant was given every bit of the relief she asked for. The same bar directors and leaders that pushed SB 1227 are pushing these unconstitutional rules. The **Moore** case has cost the State of Texas over $200,000.00 in attorney's fees to the plaintiff's lawyers so far. The cost of the State's defense attorney's fees, expert witness fees, etc, is not known to applicant. In short, these "good ole boys" are wasting the State's money.

If these unconstitutional rules are adopted and then

successfully challenged in federal courts, the costs to the State Bar will be tremendous.

LEGISLATIVE MANDATE VIOLATES SEPARATION OF POWERS

In their Brief in Support of Immediate Promulgation, the State Bar argues that SB 1227 mandates approval of the rules by June 1, 1994. Section 7, SB 1227 states:

(a). Not later than June 1, 1994, the State Bar of Texas shall adopt rules governing lawyer advertising and written solicitations to prospective clients.

(b). A rule adopted under this section shall not conflict with any other law.

It is noticed that the Bar did not include subsection (b) in their brief. That **is** a legislative mandate not to promote a rule that violates **any other law.** Since Ballot Items A & B are unconstitutional, and the Bar leadership advocates passing them anyway, the leadership of the Bar is asking this Honorable Court to do something it cannot do - pass unconstitutional or unlawful rules.

Any legislate mandate requiring this Honorable Court to do an act that is only within the jurisdiction of this Honorable Court, even if through legislation signed by the governor, is unconstitutional based on the Separation of Powers Doctrine. Therefore, any deadline to pass any rules would be unconstitutional on those grounds.

PRAYER

Not every lawyer who wishes to advertise his practice chooses to utilize television, radio, or print advertising. Applicant uses targeted direct mail in her practice. Targeted direct mail is an

effective, non-intrusive, relatively low-cost way to provide information to potential users of legal services. Applicant Prays this Honorable Court to strike down as unconstitutional Ballot Items A & B.

Respectfully submitted,

Kenneth R. Poland
Texas Bar No. 16088550
405 Main, Suite 510
Houston, Texas 77007

Phone: (713) 224-5426
Fax: (713) 224-5519

CERTIFICATE OF SERVICE

I, Kenneth R. Poland, certify that a true and correct copy of the above Memorandum of Law was mailed via United States Express Mail by me to each of the Respondents at the addresses as stated in the attached application on the 27th day of June, 1994.

Kenneth R. Poland

JACKSON & WALKER, L.L.P.
ATTORNEYS AND COUNSELORS
901 MAIN STREET
SUITE 6000
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June 27, 1994

VIA FEDERAL EXPRESS DELIVERY

Mr. John Adams
Clerk of the Supreme Court
of Texas
P.O. BOX 12248
Austin, Texas 78711

Re: **State Bar Petition to Amend the Texas Rules of Disciplinary Conduct, Part VII.**

Dear Mr. Adams:

Enclosed for filing are the original and twelve copies of the Brief of Texans Against Censorship Replying to the State Bar's Brief Concerning Rules on Lawyer Advertising.

In conjunction with the brief, we respectfully request a hearing before the Texas Supreme at a time convenient to the Court.

Please file the original with the Court and return the file-marked copy in the envelope I have provided for you.

Very truly yours,

Alan N. Greenspan

ANG:tfb:343814d
Enclosures

cc: VIA FEDERAL EXPRESS
Ms. Karen Johnson, Executive Director
The State Bar of Texas
P.O. Box 127487
Capital Station
Austin, Texas 78711

Misc. Docket No. 94-9021

IN THE SUPREME COURT OF TEXAS

IN RE PETITION TO AMEND THE TEXAS RULES OF DISCIPLINARY CONDUCT PART VII

BRIEF OF TEXANS AGAINST CENSORSHIP REPLYING TO THE STATE BAR'S BRIEF CONCERNING PROPOSED RULES ON LAWYER ADVERTISING

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June 27, 1994

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IN THE
SUPREME COURT OF TEXAS

IN RE PETITION TO AMEND THE TEXAS RULES OF DISCIPLINARY CONDUCT PART VII

BRIEF OF TEXANS AGAINST CENSORSHIP REPLYING TO THE STATE BAR'S BRIEF CONCERNING PROPOSED RULES ON LAWYER ADVERTISING

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW Texans Against Censorship, Inc. ("TAC") and files this Brief Replying to the State Bar's Brief Concerning Proposed Rules on Lawyer Advertising (filed June 23, 1994), and in support thereof respectfully would show the following:

I.

INTRODUCTION AND SUMMARY OF REPLY

The sole issue before this Court should be, and is, whether the proposed rules on lawyer advertising (the "Proposed Rules") are unconstitutional under either the federal or Texas

constitution. To the extent the brief of the Bar addresses other issues, it is irrelevant. And as TAC's initial brief demonstrates, the Proposed Rules are not constitutional and should not be promulgated. Thus, the Bar's Brief is an indefensible request for this Court to ignore constitutional mandates that each member of the State Bar, including the honorable members of this Court, has sworn to uphold. TAC therefore urges the Court to exercise its inherent power to reject constitutionally offensive State Bar rules and refuse to promulgate the proposed rules regulating constitutionally protected speech.

II.

RESPONSE TO FACTUAL BACKGROUND SECTION OF BAR'S BRIEF

The Bar's Brief provides an extensive rendition of the facts leading up to the second referendum on lawyer advertising. While TAC does not concede the accuracy of the factual allegations made by the Bar, inasmuch as the facts are well-known to the Court, it is not necessary to offer a controverting version. More importantly, at this point, the factual details surrounding the referendum are wholly immaterial. The results of the referendum and the amount of money expended by the Bar to ensure the result obtained are irrelevant. For even if the Proposed Rules had garnered the vote of every lawyer in Texas and had the unanimous support of the public at large, they would still have to survive the crucible of constitutional inquiry. As the United States Supreme Court has explained:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . free speech . . . may not be submitted to a vote; [it] depend[s] on the outcome of no elections.

Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

III.

PROCEDURAL AND PRACTICAL CONSIDERATIONS DO NOT JUSTIFY PROMULGATION OF THE PROPOSED RULES

The State Bar urges several reasons why the Proposed Rules should be promulgated without regard to their unconstitutionality. These reasons range from perceived procedural impediments to speculative practical justifications. All these reasons, of course, pale when the Proposed Rules are examined under the microscope of the constitutional protections accorded speech. Nevertheless, an examination of the Bar's reasons for requesting immediate promulgation reveals that they do not justify enactment of the Proposed Rules.

A. Judicial Formalities Are Not Required

The Bar argues that the Court should not decide the constitutionality of the Proposed Rules because of the lack of a justiciable controversy. The Bar asserts that there will be no appellate review, no res judicata effect of this Court's decision, that the TAC lacks standing, and that there is, according to the Bar, an insufficient record. These arguments fail to recognize that the Court is not performing an adjudicative function when making the decision whether to promulgate the Proposed Rules. The promulgation authority is administrative and stems from the Court's constitutional, statutory and inherent power to regulate the practice of law and the conduct of attorneys whom it licenses.

Courts exercise two different, distinct types of functions: (1) adjudicative, by which they decide disputes through a system of legal actions, proceedings and remedies, and (2) administrative, by which they supervise various aspects of the judicial system, including the practice of law. *Gomez v. State Bar of Texas*, 856 S.W.2d 804 (Tex. App. -- Austin 1993, writ granted). The Supreme Court has exclusive administrative, regulatory and supervisory control

over the practice of law pursuant to its inherent powers under the Texas Constitution. *Id.* at 808, n.2. In addition, section 81.011 of the State Bar Act provides: "The Supreme Court of Texas, on behalf of the judicial department, shall exercise *administrative control* over the State Bar under this chapter." Tex. Gov't Code Ann. §81.011(c) (West 1988) (emphasis added). The State Bar Act is merely an aid in the Supreme Court's exercise of its inherent power to regulate and control the practice of law. *Gomez*, 856 S.W.2d at 808 n.2 (citing *State Bar of Texas v. Heard*, 603 S.W.2d 829, 831 (Tex. 1980)). The *Gomez* court recognized that the Texas Supreme Court's promulgation of disciplinary rules clearly involves its administrative function. *Id.* at 811.

With all due respect to the Court, its role in this context is no different than that of any regulatory body considering the adoption of new regulations. Where, as here, an administrative entity propounds or refuses to propound regulations, there is never a case or controversy, and there is no right of direct appeal, res judicata effect or adjudicative record. The fact that the administrative entity in this situation is the Supreme Court does not mean that all the procedures normally attendant when an issue comes before the Court must be present. Because TAC is the most outspoken and organized group opposing the promulgation of the Proposed Rules, this administrative proceeding has all the earmarks of an adversarial dispute between the State Bar and TAC. This appearance should not lead the Court to require adjudicative prerequisites.

The Bar also warns that the promulgation decision will result in an advisory opinion. However, in this administrative context, TAC is not seeking any opinion -- let alone an advisory opinion. The only relief requested is that the Court decline to promulgate unconstitutional rules.

While the Court may wish to explain the rationale supporting its refusal to promulgate the Proposed Rules, no opinion, judgment or order is actually necessary.

In the section of its brief addressing the issue of an advisory opinion, the Bar raises two additional arguments. First, the Bar argues that the severability provision in the Proposed Rules constrains this Court with respect to its promulgation of those rules. However, Proposed Rule 9.01 has not itself been promulgated; therefore, the Court is not bound by that provision. In any event, if the Court does not find the entire set of Proposed Rules unconstitutional, its inherent power would permit the deletion or revision of any Proposed Rule found to be constitutionally defective.

The Bar's second argument is that the Court should promulgate the Proposed Rules and delay making a constitutional determination until after the State Bar has enacted comments on the rules. In light of the Bar's concern for wasted judicial resources, this suggestion seems particularly illogical. While a comment cannot correct an unconstitutional rule, a rule that appears on its face constitutional, may be rendered unconstitutional by an interpretation in the comments. And of course, the Bar's arguments regarding majority rule and self-regulation are substantially weakened in light of the fact that the comments were never submitted to the Bar membership and, indeed, never were mentioned throughout the Bar's campaign. Thus, before the Court promulgates the Proposed Rules, the State Bar should be required to compose and submit the accompanying comments.

B. Statutory Procedures

The Bar urges that section 81.024 of the Texas Government Code mandates that the Court promulgate the Proposed Rules and that failure to do so would constitute a conflict with

statutory procedures. This is a new development in the Bar's attack. In fact, it is the recollection of counsel for TAC that the President of the State Bar, at the hearing before this Court prior to the second referendum, advised the Court that it would have an opportunity to review the constitutionality of the Proposed Rules after the referendum.

In any event, the irony of the Bar's position is self-evident. The Bar contends that the Court should ignore the conflict between the Proposed Rules and the Constitution in order to avoid a conflict with section 81.024(e). However, as far back as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it has been accepted "that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Id.* at 180. Thus, to the extent that section 81.024(e) might otherwise require promulgation of the Proposed Rules, it must yield to the demands of the First Amendment and Article I, section 8.

The Legislature and Governor recognized the constraints imposed by the Constitution when they set a June 1, 1994, deadline for the adoption of rules governing lawyer advertising and written solicitations to prospective clients. *See* Act of May 27, 1993, 73d Leg., R.S., ch. 723, § 7, 1993 Tex. Sess. Law Serv. 2832, 2836 (Vernon). The second section of the Act, which was not cited by the Bar in its brief, provides as follows: "A rule adopted under this section shall not conflict with any other law." *Id.* at § 7(b). Clearly, because the rules governing lawyer advertising are unconstitutional, they will not satisfy the dictates of Chapter 723 and any attempt to fulfill its requirements by promulgation of the Proposed Rules is futile.

C. Practicality Concerns Are Irrelevant

The Bar's next argument for promulgation of the Proposed Rules is so insensitive to the constitutional duty of this Court that it borders on frivolity. The Bar contends that

considerations of delay and wasted resources demand that the Court ignore the constitutional inadequacies of the Proposed Rules. The potential for wasted resources and money are problems of the Bar's own making. The Bar is the proponent of the Proposed Rules and, if after months of campaigning and hundreds of thousands of dollars expended, the Proposed Rules cannot pass constitutional muster, it is not the fault of TAC. The Bar should have ensured constitutionality before setting out on the referendum course. The fact is, however, that the Bar itself apparently engaged in no constitutional analysis of the Proposed Rules prior to the second referendum. (An Open Records Request by TAC for such analysis yielded no documents in response.) The President of the Bar also urged the Court to forego constitutional analysis before the second referendum. Instead of eschewing this Court's guidance, the Bar should have welcomed the Court's contribution. It is remarkably disingenuous for the Bar to argue that the time for the Court's input was before the second referendum, and that it is now too late. This is especially true since the State Bar successfully argued in *Musslewhite v. State Bar of Texas*, 786 S.W.2d 437, at 441 (Tex. App. -- Houston [14th Dist.] 1990, writ denied), *cert. denied*, 111 S.Ct. 2891 (1991), and *Daves v. State Bar of Texas*, 691 S.W.2d 784, 789 (Tex. App. -- Amarillo 1985, writ ref'd n.r.e.), *appeal dism'd*, 474 U.S. 1043 (1986), that promulgation by the Supreme Court is an implicit determination that the rule is constitutional. The Court in *Musslewhite* held:

> We presume the court intended that DR 2-101 comply with the restraints constitutionally permitted to prevent false, deceptive, or misleading advertising. Accepting the supreme court's inherent power to adopt the rule, it is not our function as an intermediate appellate court to nullify or alter it, for once the court decides on a rule of law, the decision is, in the absence of a controlling decision by the United States Supreme Court, binding on lower courts until the court changes the rule.

Musslewhite, 786 S.W.2d at 441. *See also Banales v. Jackson*, 601 S.W.2d 508, 512 (Tex. Civ. App. -- Beaumont), *writ denied*, 610 S.W.2d 732 (Tex. 1980) (holding that court of appeals lacks authority to review disciplinary orders entered by the Texas Supreme Court). Constitutional scrutiny now will clarify the status of the Proposed Rules for the Bar, its membership and the lower courts of this state.

The Bar also argues that, had the Legislature not permitted the Bar to attempt to regulate lawyer advertising, it would have passed its own restrictions which would not have been subject to immediate constitutional review. Based upon this hypothetical scenario, the Bar concludes that the unconstitutionality of the Proposed Rules should be ignored by this Court in order to avoid, in the Bar's opinion, unjustified, substantial delay. *See* Bar's Brief, at 18. TAC can conceive of no more justifiable delay than the delay necessary to determine that the Proposed Rules are unconstitutional. The notion that this process is a waste of time and energy is incomprehensible.

According to the Bar, there is a "pressing public problem" from so-called abuses in lawyer advertising and direct mail solicitation. Bar's Brief, at 18. As discussed in TAC's brief, the history of lawyer advertising enforcement in Texas and the nation shows that such abuses are not borne out by statistics. Moreover, promulgating unconstitutional rules is not a solution to any problem -- real or perceived.

IV.

ANY DISCUSSION ON "THE DEVELOPMENT OF APPLICABLE FEDERAL LAW CONCERNING REGULATION OF LAWYER ADVERTISING" SHOULD INCLUDE THE MOST RECENT UNITED STATE SUPREME COURT DECISION ON THE SUBJECT

Section IV of the Bar's Brief purports to track the "development of applicable Federal law concerning regulation of lawyer advertising." The Bar, however, does not address the most recent decision of the United State Supreme Court regarding lawyer advertising, *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084, 62 U.S.L.W. 4503 (1994).[1] In that case, Ms. Ibanez, an attorney, advertised herself as a certified financial planner and certified public accountant on business cards, law office stationery and yellow pages advertisements. The Florida Board of Accountancy reprimanded her for engaging in false, deceptive and misleading advertising and a Florida court affirmed. The United States Supreme Court struck down the Board's action on First Amendment commercial speech grounds.

The Bar's failure to discuss *Ibanez* in detail is striking given that the holding of the case and the broad statements of law contained within the Court's opinion are so at odds with the Bar's positions. For example, at page 21 of its Brief, the Bar predicts that the recent additions of Justices Souter, Thomas and Ginsburg to the Court, means that the "law as it is" may be substantially more favorable to the State Bar than the "law as it was." It seems that predicting the future direction of the Supreme Court by reference to its newest members is hardly an appropriate measure for making important constitutional decisions, but, in any event, *Ibanez* would seem to put to rest the Bar's futuristic argument. It was, after all, Justice Ginsburg who

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[1] For the Court's convenience, a copy of the *Ibanez* decision is attached hereto as Exhibit 1. The Bar could not have been unaware of this recent decision because the case is cited at page 28 of its brief.

authored the opinion for a unanimous court with respect to Part II-B of the decision and by a 7-2 majority with respect to the remainder of the opinion. Both Justices Souter and Thomas were in the majority.

The Bar also seems to misunderstand *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny (including *Ibanez*) when it complains that it is "unnecessarily but severely handicapped if it is expected to convincingly show, without the benefit of record, that the rules adopted by referendum are reasonable means to advance the legitimate concerns and interests which led to their adoption." Bar's Brief, at 24. This is precisely what the Bar must do and what it has failed to do. The United States Supreme Court decisions repeatedly have held that "it is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993). *Ibanez* describes the State Bar's burden as follows:

> The State's burden is not slight; the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. Mere speculation or conjecture will not suffice; rather the State must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."[2]

62 U.S.L.W. at 4505 (citations omitted).

The Bar only offers the most sweeping and conjectural justification for these prohibitions and restrictions on lawyer advertising, for example, "[t]he State Bar of Texas has a legitimate interest in seeing that statements and representations in lawyer advertisements and solicitations

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[2] The *Ibanez* Court applied this standard to a disclosure requirement similar to the many disclosure requirements contained in the State Bar's rules.

are true." Bar's Brief, at 37. The *Ibanez* decision makes clear that such conclusory justifications are insufficient. As the Court wrote:

> If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words "potentially misleading" to supplant the Board's burden to demonstrate that the harms it recites are real and its restrictions will in fact alleviate them to a material degree.

62 U.S.L.W. at 4506.

The real reason the Bar wants to "sanitize advertisements," Bar's Brief, at 40, is to improve the image of the Bar, sometimes referred to as counteracting "the adverse effect on professionalism." Elsewhere in its brief, the Bar relies on the most current study of the public's perception of advertising, a 1993 study by Peter D. Hart Research Associates, Inc., to claim that "'Americans seem to dislike the concept of lawyer advertising' and feel that 'advertising is damaging to the legal system.'" Bar's Brief, at 34. The Bar fails to mention, though, that the survey revealed that those who get most of their information from television have a more favorable view of lawyers than those who get their information from newspapers. *VOX Populi -- The Public Perception of Lawyers: ABA Poll*, 79 A.B.A.J. 60, 61 (1993). Those who get information from television gave lawyers a 46% favorable rating and a 28% unfavorable rating. *Id.* This finding tends "to undercut the view that lawyers merely suffer from an 'image' problem, as opposed to dissatisfaction with actual aspects of the practice of law. Television, after all, is the essence of imagery." *Id.*

The Bar also fails to include the report's conclusion that the basis for Americans' alleged dislike of lawyer advertising "is not because the advertisements themselves are objectionable but because the perceived effect of the advertising is undignified and more importantly, damaging

to the legal system." *Id.* at 63. In any event, image/professionalism has been rejected as a basis for advertising prohibitions. In *Bates*, the Supreme Court said: "[W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained." *Bates*, 433 U.S. at 368.

Beyond the issue of image, the Bar seeks to justify these regulations because slightly over 51 percent of the lawyers voted and, of those voting, most voted in favor.[3] Bar's Brief, at 5. The Bar also points out that the referendum received media attention, although it fails to note that much of it was critical. *See, e.g., Lawyer's Ads: Distasteful as Some Are, No Good Reason to Self-Censor*, Houston Chron., Apr. 30, 1994, at 32A (a copy of this editorial is attached hereto as Exhibit 2). As discussed *supra*, these reasons are insufficient to overcome the constitutional issues at stake. The Bar has failed to meet its burden of justifying these regulations as required by the very Supreme Court cases cited by it.

TAC notes some additional observations regarding the Bar's treatment of the "development of applicable federal law." The Bar claims that TAC miscited *Bates* and its progeny by claiming that a state may only ban commercial speech that is false and misleading. *See* Bar's Brief, at 19-20. TAC's statement is, however, completely accurate, as *Bates*' most recent progeny -- *Ibanez* -- makes clear:

> Because "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information," only false, deceptive, or misleading commercial speech may be banned.

62 U.S.L.W. at 4505 (citation omitted).

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[3] Although supported by a majority of those lawyers who voted in the referendum, Propositions A and B garnered the approval of only 46% and 39%, respectively, of the Bar membership.

The Bar cites *Bates* several times as saying that "'special problems of advertising on the electronic broadcast media *will* warrant special consideration.'" *See, e.g.*, Bar's Brief, at 19, 29. The Court, however, did not suggest, as the State Bar assumes, that attorney advertisers would be given less First Amendment protection if they utilized the electronic media. Rather, the Court seemed to recognize that the electronic broadcast media is an industry regulated by the Federal Communications Commission and subject to regulatory legislation by the United States Congress, and, therefore, has special considerations associated with federal, not state, regulation. This is evident from the Supreme Court's citation to *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.C. 1971), *summarily aff'd sub. nom., Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), immediately after the language cited by the Bar. The *Capital Broadcasting* case dealt with regulation of the broadcast media by Congress.

TAC also notes the irony of the Bar's citation of the "important case" of *Friedman v. Rogers*, 440 U.S. 1 (1979), a case which the Bar correctly points out upheld the ban of trade names by Texas optometrists. *See* Bar's Brief, at 22. But, as the Supreme Court's opinion in that case makes clear, there was a substantial record of actual deception regarding the optometry profession in Texas at the time of the regulation. There is no similar record of abuse with respect to Texas attorney use of trade names at this time. The irony, of course, is that it was Article 4552-5.13(d) prohibiting the use by optometrist of a trade name that was at issue in *Friedman*. In 1993, Article 4552-5.13(d) was amended by the Texas Legislature and now reads, in pertinent part:

> An optometrist or therapeutic optometrist may practice optometry or therapeutic optometry under a trade name or an assumed name or under the name of a professional corporation or a professional association.

Tex. Rev. Civ. Stat. Ann. art. 4552-5.13(d).

Finally, the Bar is mistaken in its arguments that TAC lacks standing and should not be permitted to be a "surrogate litigator." *See* Bar's Brief, at 29. *Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469 (1989), does not address these circumstances at all. But the *Fox* case does make clear that state regulation can implicate both commercial speech and core speech at the same time. As further discussed *infra*, this has occurred here where the Proposed Rules sweep up not only speech which "proposes a commercial transaction," but also cover attorney newsletters, charitable activities and advertisements in the public media which contain pure political speech.

In summary, each of the cases discussed by the Bar struck down the efforts of the state to restrict attorney advertising. The Bar states that the advertising practices at issue in the Supreme Court cases are "mild and innocuous compared to the advertising practices which resulted in the passage of Senate Bill 1227 and the adoption of Propositions A and B." *See* Bar's Brief, at 29. But nowhere in its brief, or in any of the material filed with this Court, does the Bar attempt to describe those "advertising practices" and thereby provide a substantial justification -- indeed any justification -- for these sweeping restrictions on the commercial and core speech rights of Texas attorneys.

V.

THE PROPOSED RULES ARE UNCONSTITUTIONAL IN GENERAL, AS ARE THE SPECIFIC RULES CITED AS EXAMPLES BY TAC

As the discussion in TAC's initial brief demonstrated, the Proposed Rules unconstitutionally ban certain forms of truthful, non-deceptive, non-misleading commercial

speech. Moreover, the oppressive regulatory scheme of the Proposed Rules constitutes an unjustifiable restraint on commercial speech. While the Bar now argues that the Court should "rubber-stamp" the referendum results, TAC urges the Court to carefully consider each and every rule before making the promulgation determination. In addition to TAC's belief that this is a constitutional obligation of the Court, it is clear that promulgation of the Proposed Rules may be misconstrued as a decision on the constitutionality. *See Musslewhite v. State Bar of Texas*, 786 S.W.2d 437 (Tex. App. -- Houston[14th Dist.] 1990, writ denied); *Daves v. State Bar of Texas*, 691 S.W.2d 784, 789 (Tex. App. -- Amarillo 1985, writ ref'd n.r.e.), *appeal dism'd*, 474 U.S. 1043 (1986).

Likewise, it is for this reason that the Court should entertain TAC's overbreadth challenge to the commercial speech regulated by the Proposed Rules. While it is true that an overbreadth challenge is not available in a judicial proceeding concerning the constitutionality of commercial speech, *see Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469 (1989), in this administrative context an overbreadth analysis is permissible. Moreover, as discussed *infra*, the Proposed Rules reach non-commercial speech, and, to this extent, an overbreadth challenge is permissible. *Id.* at 481. Now is the time to carefully consider all the consequences and ramifications of the Proposed Rules.

The Bar's Brief fails to sufficiently rebut the challenges made by TAC in its brief. With or without a record, it is clear that these rules are invalid on their face. To the extent that a reply to the Bar's attempted justification of these rules is necessary, it is provided below.

A. Rules 7.02(a)(3), 7.04(n), and 7.04(q)

TAC challenged these rules on the grounds that they use undefined, subjective and ambiguous terms such as "factually substantiated," Proposed Rule 7.02(a)(3), 7.04(n), and "readily subject to verification." Proposed Rule 7.04(q). The Bar's response to this challenge, distilled to its essence, is that the undefined terms in these rules have "common meanings and are used in that sense." Bar's Brief, at 36. Thus, in response to TAC's question whether these rules forbid advertisements stating that a particular attorney is "dependable, hardworking, a tough negotiator, loyal or smart," the Bar responded that such advertisements would be forbidden unless they could be "factually substantiated."

The Bar's response is simplistic and fails to address the issue with seriousness. How does an attorney factually substantiate or readily verify that she is "hardworking"? In some law firms, "hardworking" lawyers bill in excess of 2500 hours each year, whereas in other law firms, "hardworking" lawyers bill 1600 hours per year, and in other law firm cultures, "hardworking" means playing golf only on the weekends. Which of the aforementioned lawyers has the right to call himself "hardworking" in an advertisement or written solicitation? Likewise, how does a lawyer factually substantiate or readily verify that he is "smart"? Will lawyers be required to submit I.Q. tests in support of their advertisements? And will a lawyer who considers herself a "tough negotiator" need to submit testimonials from her adversaries to that effect? These are difficult questions and the Bar's inability to answer them illustrates that the Bar has not fully considered the problems.

It should be clear from these examples that while the "truth of commercial speech. . .may be more easily verifiable by its disseminator than . . . news reporting or political commentary,"

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, n.13b (1976), not all statements made in the course of commercial speech are factually verifiable. And while the Supreme Court, in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), hypothesized that a reviewing agency "might, for example, require the lawyer to prove the truth of the *fact* stated," *Id.* at 477 (emphasis added), Proposed Rules 7.02(a)(3), 7.04(n) and 7.04(q) require that facts *and opinions, rhetoric and hyperbole* be equally subject to proof. *See* discussion *infra* at Part VI. In short, the ambiguity inherent in the terms used in these rules demonstrates that the rules are unconstitutionally vague and overly broad.

B. Proposed Rules 7.04(g) and 7.04(o)

TAC challenged Proposed Rules 7.04(g) and 7.04(o) on the grounds that the use of the phrase "appeals primarily to the emotions" in these rules was too ambiguous to be enforceable. TAC hypothetically asked in its brief whether appeals to fears of financially unmanageable medical bills or fears of frivolous lawsuits were emotions addressed by these Proposed Rules. Much like its simplistic response to the previous challenge, the Bar again stated that if the "thrust" of the advertisement was not the "conveyance of ideas, information, argument, and positions," Bar's Brief, at 40, the advertisement would be prohibited. But as the Supreme Court has recognized, sometimes the most effective way of conveying ideas is through an emotional appeal. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 408-409 (1989) (recognizing the value of speech stirring people to anger; quoting *Terminiello v. Chicago*, 337 U.S. 1, 3 (1949)). Unless the emotional appeal is deceptive, false or misleading, it cannot constitutionally be prohibited. *See Ibanez v. Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084, ____, 62 U.S.L.W. 4503, at 4506 (1994). Since the Proposed Rules would effect a ban on all

advertising which appeals primarily to the emotions, the Bar's argument that legitimate interests and goals will be fulfilled by such a ban is irrelevant.

C. Proposed Rule 7.04(j)

TAC challenged this Proposed Rule on the grounds that it was an unreasonable time, place and manner restraint. The Proposed Rule conditions an attorney's ability to advertise price by restricting the attorney's ability to change the advertised price for ninety days, and, with respect to media published annually, for one year. Contrary to the Bar's contention, price advertising is speech, as recognized by the Supreme Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976). This Proposed Rule regulates only speech relating to prices. Any other statements made in a written advertisement are subject to change without notice. For example, an attorney may withdraw from an organization accredited by the Texas Board of Legal Specialization, may change his practice specialty, may move his offices, or change the members of his firm, without regard to any time limit. Clearly, therefore, Proposed Rule 7.04(j) is content-based and cannot survive constitutional scrutiny.

D. Proposed Rule 7.04(h)

TAC contended that this Proposed Rule prohibiting the use of actors and narrators to portray lawyers in advertisements was unjustifiable. The Bar does not respond to this challenge. Accordingly, a rebuttal is not necessary.

E. Proposed Rule 7.05(a)

TAC challenged Proposed Rule 7.05(a) as an unconstitutional restraint on direct mail solicitation by lawyers. The Bar correctly surmises that the challenge is directed at subparts (1) and (4) of that Proposed Rule. Subpart (4) is objectionable because it incorporates all of

Proposed Rule 7.02 and portions of Proposed Rule 7.04. Inasmuch as these Proposed Rules are unconstitutional, subpart (4) also is unconstitutional.

Proposed Rule 7.05(a)(1) is similar to the provisions struck down by the court in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), *McHenry v. The Florida Bar*, 21 F.3d 1038 (11th Cir. 1994), and *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Tex. 1994). In *Shapero*, *McHenry* and *Moore*, the proponents of the restrictive direct mail rules all argued that the circumstances indicated that the prospective client might have difficulty exercising reasonable judgment. *See Shapero*, 486 U.S. at 474; *McHenry*, 21 F.3d at 1042; *Moore*, 843 F. Supp. at 1127-1128. The argument failed in each case. In any event, "the Supreme Court has clearly stated that merely because an individual is potentially more susceptible to undue influence or poor decision-making skills, does not warrant state regulation of truthful, non-deceptive speech." *Moore*, 843 F. Supp. at 1128 (citing *Shapero*, 486 U.S. at 474); *see also McHenry*, 21 F.3d at 1042 (also citing *Shapero*).

F. Proposed Rule 7.07

TAC contends that Proposed Rule 7.07 is unconstitutionally vague and overly broad, and creates a bureaucratic burden on constitutionally protected speech which will result in a substantial chilling effect. Proposed Rule 7.07(a) requires the filing of a copy of each "written solicitation communication" utilized by an attorney. Proposed Rule 7.07(b) requires the filing of each "advertisement in the public media" utilized by an attorney. However, nowhere in Proposed Rule 7.07 is "written solicitation communication" or "advertisement in the public media" defined. Proposed Rule 7.07(d)(5) indicates that newsletters will be considered subject to the filing rules unless they are sent to existing or former clients, other lawyers or

"professionals," and certain non-profit organizations. It is far from clear whether a widely disseminated newsletter constitutes a "written solicitation communication" or "advertisement in the public media." The Bar argues in its brief that, to the extent a newsletter constitutes a "written solicitation communication" it would not be subject to filing under Proposed Rule 7.07(d)(6) if it was "not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware." Contrary to the statements by the Bar, this exception to the filing requirements does not allay concerns relating to newsletters addressing specific legal issues and directed to potential clients likely to be most interested in those areas. In other words, the most useful type of newsletter still would be subject to the filing requirements.

Proposed Rule 7.07(e) does not provide any exception for newsletters. Indeed, every statement in a newsletter, including legal analysis and opinions, must be subject to substantiation, and information demonstrating the substantiation must be submitted if requested. This type of intrusion into pure speech, i.e. speech that does more than propose a commercial transaction, *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976), is unconstitutional and cannot survive even the most cursory constitutional analysis.

VI.

ARTICLE I, SECTION 8 OF THE TEXAS CONSTITUTION PROVIDES AN INDEPENDENT BASIS TO FIND THE ADVERTISING REGULATIONS UNCONSTITUTIONAL

Even if the Court believes that some or all of the advertising regulations are constitutional under the First Amendment, nevertheless, as the Bar concedes, the Texas Constitution provides broader free speech rights than the United States Constitution. *See* Bar's Brief, at 30. The Bar complains that "TAC has not briefed, under the Texas Constitution, any point." *Id.* But all of TAC's arguments under the United States Constitution apply with equal force under Article I, Section 8. As discussed more fully below, moreover, Rules 7.02(a)(3), 7.04(n) and 7.04(q) are unconstitutional under Article I, Section 8 of the Texas Constitution.[4]

One way in which the Texas Constitution affords greater free speech protection than the United States Constitution is that the Texas Constitution specifically protects expression of opinions. The guaranty of free expression, Article I, Section 8 of the Texas Constitution, provides that "[e]very person shall be at liberty to speak, write or publish his *opinions* on any subject." Tex. Const., Art. I, § 8 (emphasis added). These regulations reach both commercial and core speech and do so in a way that is imprecise and vague. As this Court recently held:

> The uncertainty of not knowing what speech may subject the speaker or writer to liability would have an unacceptable chilling effect on freedom of speech. Such liability is incongruent with the high priority this state has placed on freedom of expression. *Davenport v. Garcia*, 834 S.W.2d 4, 7 (Tex. 1992).

Cain v. Hearst Corporation, 1994 Westlaw 278365, at * 8 (Tex. 1994).

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[4] These rules require, in certain instances, that communications concerning a lawyer's services and advertisements in the public media be "factually substantiated," "readily subject to verification," and "presented without appeals primarily to emotions."

The Bar admits that advertisements stating that a particular attorney is "dependable, hardworking, a tough negotiator, loyal or smart," would be forbidden unless they could be "factually substantiated." Bar's Brief, at 36. But the Bar fails to recognize that in this state "every person" (which presumably includes lawyers) has the right to "speak, write or publish his *opinions* on *any* subject." Tex. Const., art. I, § 8 (emphasis added). This certainly means that a lawyer has the right to express his opinion on the subject of his toughness or loyalty.

The essence of an opinion is that it can be proven neither false nor true; in other words, it *cannot* be factually substantiated. "Opinions and beliefs reside in an inner sphere of human personality and subjectivity that lies beyond the reach of the law and is not subject to its sanctions." *Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp.*, 784 F.2d 674, 679 (5th Cir. 1986). Texas law has long recognized this distinction between fact and opinion. *See, e.g., El Paso Times, Inc. v. Kerr*, 706 S.W.2d 797, 798 (Tex. App. -- El Paso 1986, writ ref'd n.r.e.), *cert. denied*, 480 U.S. 932 (1987); *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341 (Tex. App. -- San Antonio 1988, writ denied), *cert. denied*, 493 U.S. 1021 (1990). These regulations violate the Texas Constitution because they withdraw the right of a Texas citizen to give his opinion on a given subject. It does not matter under the Texas Constitution whether the speech is commercial or not -- Article I, Section 8 protects speech on "any subject." Thus, these rules violate the affirmative rights granted in Article I, Section 8 of the Texas Constitution of all persons to express their opinions.

Terms such as "smart," "intellectual," "hardworking" and "tough negotiator" are protected rhetoric and hyperbole, too. They are not capable of proof one way or the other. *See Yiamouyiannis*, 764 S.W.2d at 341 (stating that references to plaintiff as a quack, a hoke artist

and a fearmonger are "assertions of pure opinion . . . are vintage hyperbole, and are not capable of proof one way or the other"). These terms are not intended to be statements of fact, and thus, they are impossible to prove or disprove. The category of rhetoric and hyperbole covers "concepts whose content is so debatable, loose and varying, that they are insusceptible to proof of truth or falsity." *Buckley v. Littell*, 539 F.2d 882, 894 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *see also A. H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. Civ. App. -- Fort Worth 1982, writ ref'd n.r.e.) (where statements in news articles were found to be no more than "rhetorical hyperbole" and contained only opinions). Rhetoric and hyperbole fall within the protection of the opinion category. Consequently, because these terms are protected opinion, rhetoric and hyperbole, and because the rules require such terms to be "factually substantiated" and "readily" subject to verification when such terms are incapable of such proof, the rules violate Article I, Section 8 of the Texas Constitution.

VII.

APPLICATION OF PROPOSED RULES TO PURE POLITICAL SPEECH

In its initial brief filed after the referendum, TAC warned that the breadth of the Proposed Rules and the ambiguity of some terms used in those rules rendered the rules applicable to pure, non-commercial speech. This was most obvious with respect to newsletters, which are specifically mentioned in Proposed Rule 7.07.[5] Upon further reflection, it has become apparent that the scope of the rules goes well beyond newsletters and reaches other types of non-commercial speech.

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[5] For discussion of the applicability of Rule 7.07 to newsletters, see TAC's initial brief, at 19, and subpart V(F) *supra*.

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Supreme Court defined commercial speech as "speech which does 'no more than propose a commercial transaction.'" *Id.* at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). But in *Virginia State Board*, the Court was careful to distinguish the speech at issue there with non-commercial speech. For example, the court noted that the

> pharmacist does not wish to editorialize on any subject, cultural, philosophical or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."

Id. at 761. The Court further distinguished that speech for profit may still be fully protected by the First Amendment. As the Court explained:

> No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection.

Id. at 761-762.

More recently, in *Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469 (1989), the Court reiterated that commercial speech is defined as "speech that *proposes* a commercial transaction," and cautioned that "[s]ome of our most valued forms of fully protected speech are uttered for a profit." *Id.* at 482 (emphasis original). Thus, the mere fact that an attorney engages in speech with an underlying profit motive would not convert such speech into commercial speech and subject it to lesser scrutiny under the First Amendment.

Notwithstanding the full protection available to non-commercial speech uttered for profit, the Proposed Rules infringe upon pure political speech. This is best understood by way of a hypothetical. Consider the imaginary law firm of Smith & Jones, P.C. which, as an institution, feels that judicial elections exclude minorities from the judiciary. After a meeting of its management committee, Smith & Jones purchases a full page advertisement in several daily newspapers with large circulation in Houston, Dallas, Austin and Lubbock. The advertisement directly appeals to the general public's emotionally-based aversion to discrimination and argues that judicial elections in Texas should be abolished in favor of an appointed judiciary. The advertisement makes no references to the services provided by Smith & Jones; however, it does identify Smith & Jones.

The hypothetical advertisement by Smith & Jones would be *banned* under the Proposed Rules because it appeals primarily to the emotions. Even if it were not banned, it would be subject to a multitude of regulations. For example, the hypothetical ad would have to be reviewed and approved in writing by an attorney, *see* Proposed Rule 7.04(e), and a copy of the ad, and the approval, together with a record of when and where the ad appeared would need to be kept for four years. *See* Proposed Rule 7.04(f). In addition, a copy of the ad, a statement of when and where it was used, and a fee would have to be submitted to the State Bar. *See* Proposed Rule 7.07(b)(1), (3), (4). Moreover, the explicit statements in the hypothetical advertisement that judicial elections result in discrimination must be subject to factual substantiation by Smith & Jones, *see* Proposed Rule 7.04(n), and the substantiation would have to be submitted to the State Bar, if requested. *See* Proposed Rule 7.07(e).

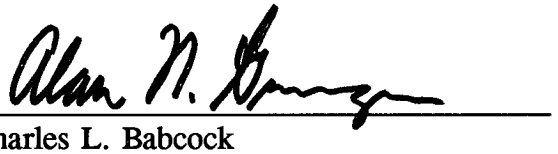
Because the term "advertisement in the public media" is undefined, and applies, therefore, at least to any advertisement placed in a newspaper by an attorney, the ad in the foregoing hypothetical illustrates the danger of these Proposed Rules. There is no question that the hypothetical ad is pure, political speech subject to the full protection of the First Amendment. Nonetheless, the ad would be banned or subject to strict regulation under the Proposed Rules. Regardless of whether an overbreadth challenge can be made to commercial speech, it is clear that an overbreadth challenge can be made to non-commercial speech. *See Fox*, 492 U.S. at 481. Consequently, the regulations relating to "advertisements in the public media" must not be promulgated.

VIII.

CONCLUSION

In its zeal to restrain lawyer advertising and direct mail solicitation, the Bar has demonstrated a willingness to trample the fundamental rights preserved in the constitutions of Texas and the United States. Expediency and economy can never serve as justification for the infringement upon free speech. Yet, throughout its Brief, the Bar offers these objectives as grounds for promulgation of the Proposed Rules. When the Bar eventually addresses the constitutionality of the Proposed Rules, it fails to satisfy its substantial burden to justify the regulation of commercial speech. And there is no possible constitutional basis for the outright ban on some types of commercial speech and the ban or regulation of pure speech. Ultimately, therefore, despite the Bar's entreaties to the contrary, the Court should not promulgate the Proposed Rules on lawyer advertising and direct mail solicitation.

Respectfully submitted,

By: 

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ATTORNEYS FOR TEXANS AGAINST CENSORSHIP

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Texans Against Censorship Replying to the State Bar's Brief Concerning Proposed Rules on Lawyer Advertising was served on The Executive Director of the State Bar of Texas, Ms. Karen Johnson, 1414 Colorado St., Austin, Texas, 78701 by overnight courier, on this the 27th day of June, 1994.

Alan N. Greenspan

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to resort to "peaceful methods of . . . economic pressure," *id.*, at 112 (internal quotation marks omitted) which we had recognized as implicit in the structure of the Act, could support §1983 liability in the same manner as official abridgment of those rights enumerated in the text would do. *Ibid.* The Court majority said yes, explaining that "[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute." *Ibid.*

The right Livadas asserts, to complete the collective-bargaining process and agree to an arbitration clause, is, if not provided in so many words in the NLRA, see n. 10, *supra,* at least as imminent in its structure as the right of the cab company in *Golden State II.* And the obligation to respect it on the part of the Commissioner and others acting under color of law is no more "vague and amorphous" than the obligation in *Golden State.* Congress, of course, has given no more indication of any intent to foreclose actions like Livadas's than the sort brought by the cab company. Finding no cause for special caution here, we hold that Livadas's claim is properly brought under §1983.

IV

In an effort to give wide berth to federal labor law and policy, the Commissioner declines to enforce union-represented employees' claims rooted in nonwaivable rights ostensibly secured by state law to all employees, without regard to whether the claims are valid under state law or pre-empted by LMRA §301. Federal labor law does not require such a heavy-handed policy, and, indeed, cannot permit it. We do not suggest here that the NLRA automatically defeats all state action taking any account of the collective-bargaining process or every state law distinguishing union-represented employees from others. It is enough that we find the Commissioner's policy to have such direct and detrimental effects on the federal statutory rights of employees that it must be pre-empted. The judgment of the Court of Appeals for the Ninth Circuit is accordingly.

Reversed.

RICHARD G. MCCRACKEN, San Francisco, Calif. (MICHAEL T. ANDERSON, and DAVIS, COWELL & BOWE, on the briefs) for petitioner; H. THOMAS CADELL JR., Chief Counsel, California Division of Labor Standards Enforcement, San Francisco, Calif., for respondent; MALCOLM L. STEWART, Assistant to Solicitor General (DREW S. DAYS III, Sol. Gen., LAWRENCE G. WALLACE, Dpty. Sol. Gen., AMY L. WAX, Asst. to Sol. Gen., DANIEL SILVERMAN, National Labor Relations Board Acting Gen. Counsel, YVONNE T. DIXON, Acting Dpty. Gen. Counsel, LINDA SHER, Acting Assoc. Gen. Counsel, and NORTON J. COME, Dpty. Assoc. Gen. Counsel, on the briefs) for U.S. as amicus curiae.

No. 93–639

SILVIA S. IBANEZ, PETITIONER *v.* FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

Syllabus

No. 93–639. Argued April 19, 1994—Decided June 13, 1994

Petitioner Ibanez is a member of the Florida Bar; she is also a Certified Public Accountant (CPA) licensed by respondent Florida Board of Accountancy (Board), and is authorized by the Certified Financial Planner Board of Standards (CFPBS), a private organization, to use the designation "Certified Financial Planner" (CFP). She referred to these credentials in her advertising and other communication with the public concerning her law practice, placing CPA and CFP next to her name in her yellow pages listing and on her business cards and law offices stationery. Notwithstanding the apparent truthfulness of the communication—it is undisputed that neither her CPA license nor her CFP authorization has been revoked—the Board reprimanded her for engaging in "false, deceptive, and misleading" advertising. The District Court of Appeal of Florida, First District, affirmed.

Held: The Board's decision censuring Ibanez is incompatible with First Amendment restraints on official action.

(a) Ibanez' use of the CPA and CFP designations qualifies as "commercial speech." The State may ban such speech only if it is false, deceptive, or misleading. See, *e.g., Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U. S. 626, 638. If it is not, the State can restrict it, but only upon a showing that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. See, *e.g., Central Hudson Gas & Electric* v. *Public Service Comm'n of N. Y.,* 447 U. S. 557, 564, 566. The State's burden is not slight: It must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. See, *e.g., Edenfield* v. *Fane,* 507 U. S. ___, ___. Measured against these standards, the order reprimanding Ibanez cannot stand.

(b) The Board asserts that Ibanez' use of the CPA designation on her commercial communications is misleading in that it tells the public she is subject to the Florida Accountancy Act and to the Board's jurisdiction "when she believes and acts as though she is not." This position is insubstantial. Ibanez no longer contests the Board's assertion of jurisdiction over her, and in any event, what she "believes" regarding the reach of the Board's authority is not sanctionable. See *Baird* v. *State Bar of Arizona,* 491 U. S. 1, 6. Nor can the Board rest on the bare assertion that Ibanez is unwilling to comply with its regulation; it must build its case on specific evidence of noncompliance. It has never even charged Ibanez with an action out of compliance with the governing statutory or regulatory standards. And as long as she holds a currently active CPA license from the Board, it is difficult to see how consumers could be misled by her truthful representation to that effect.

(c) The Board's justifications for disciplining Ibanez based on her use of the CFP designation are not more persuasive. The Board presents no evidence that Ibanez' use of the term "certified" "inherently mislead[s]" by causing the public to infer state approval and recognition. See *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.,* 496 U. S. 91 (attorney's use of designation "Certified Civil Trial Specialist By the National Board of Trial Advocacy" neither actually nor inherently misleading). Nor did the Board advert to key aspects of the designation here at issue—the nature of the authorizing organization and the state of knowledge of the public to whom Ibanez' communictions are directed—in reaching its alternative conclusion that the CFP designation is "potentially misleading." On the bare record made in this case, the Board has not shown that the restrictions burden no more of Ibanez' constitutionally protected speech than necessary.

621 So. 2d 435, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court with respect to Part II–B, and the opinion of the Court with respect to Parts I, II–A, and II–C, in which BLACKMUN, STEVENS, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., joined.

JUSTICE GINSBURG delivered the opinion of the Court.

Petitioner Silvia Safille Ibanez, a member of the Florida Bar since 1983, practices law in Winter Haven, Florida. She is also a Certified Public Accountant (CPA), licensed by Respondent Florida Board of Accountancy (Board)[1] to "practice public accounting." In

[1]The Board of Accountancy, created by the Florida Legislature, Fla. Stat. Ann. §473.303 (Supp. 1994), is authorized to "adopt all rules necessary to administer" the Public Accountancy Act (chapter 473 of

"EXHIBIT 1"

addition, she is authorized by the Certified Financial Planner Board of Standards, a private organization, to use the trademarked designation "Certified Financial Planner" (CFP).

Ibanez referred to these credentials in her advertising and other communication with the public. She placed CPA and CFP next to her name in her yellow pages listing (under "Attorneys") and on her business card. She also used those designations at the left side of her "Law Offices" stationery. Notwithstanding the apparently truthful nature of her communication—it is undisputed that neither her CPA license nor her CFP certification has been revoked—the Board reprimanded her for engaging in "false, deceptive, and misleading" advertising. Final Order of the Board of Accountancy (May 12, 1992) (hereinafter Final Order), App. 178, 194.

The record reveals that the Board has not shouldered the burden it must carry in matters of this order. It has not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes. We therefore hold that the Board's decision censuring Ibanez is incompatible with First Amendment restraints on official action.

I

Under Florida's Public Accountancy Act, only licensed CPAs may "[a]ttest as an expert in accountancy to the reliability or fairness of presentation of financial information," Fla. Stat. Ann. §473.322(1)(c) (1991),[2] or use the title "CPA" or other title "tending to indicate that such person holds an active license" under Florida law. §473.322(1)(b). Furthermore, only licensed CPAs may "[p]ractice public accounting." §473.322(1)(a). "Practicing public accounting" is defined as an "offe[r] to perform . . . one or more types of services involving the use of accounting skills, or . . . management advisory or consulting services," Fla. Stat. Ann. §473.302(5) (Supp. 1994), made by one who either *is,* §473.302(5)(a), or "*hold[s] himself . . . out as,*" §473.302(5)(b) (emphasis added), a certified public accountant.[3]

The Board learned of Ibanez' use of the designations CPA and CFP when a copy of Ibanez' yellow pages listing was mailed, anonymously, to the Board's offices; it thereupon commenced an investigation and, subsequently, issued a complaint against her. The Board charged Ibanez with (1) "practicing public accounting" in an unlicensed firm, in violation of §473.3101 of the Public Accountancy Act;[4] (2) using a "specialty designation"—CFP—that had not been approved by the Board, in violation of Board Rule 24.001(1)(g), Fla. Admin. Code §61H1–24.001(1)(g) (1994);[5] and (3) appending the CPA designation after her name, thereby "impl[ying] that she abides by the provisions of [the Public Accountancy Act]," in violation of Rule 24.001(1)'s ban on "fraudulent, false, deceptive, or misleading" advertising. Amended Administrative Complaint (filed June 30, 1991), 1 Record 32–35.

At the ensuing disciplinary hearing, Ibanez argued that she was practicing law, not "public accounting," and was therefore not subject to the Board's regulatory jurisdiction. Response to Amended Administrative Complaint (filed Aug. 26, 1991), ¶25, 1 Record 108.[6] Her use of the CPA and CFP designations, she argued further, constituted "nonmisleading, truthful, commercial speech" for which she could not be sanctioned. ¶24, *ibid.* Prior to the close of proceedings before the Hearing Officer, the Board dropped the charge that Ibanez was practicing public accounting in an unlicensed firm. Order on Reconsideration (filed Aug. 22, 1991), ¶2, 1 Record 103–104. The Hearing Officer subsequently found in Ibanez' favor on all counts, and recommended to the Board that, for want of the requisite proof, all charges against Ibanez be dismissed. Recommended Order (filed Jan. 15, 1992), App. 147.

The Board rejected the Hearing Officer's recommendation, and declared Ibanez guilty of "false, deceptive, and misleading" advertising. Final Order, *id.*, at 194. The Board reasoned, first, that Ibanez was "practicing public accounting" by virtue of her use of the CPA designation and was thus subject to the Board's disciplinary jurisdiction. *Id.*, at 183. Because Ibanez had insisted that her law practice was outside the Board's regulatory jurisdiction, she had, in the Board's judgment, rendered her use of the CPA designation misleading:

> "[Ibanez] advertises the fact that she is a CPA, while performing the same 'accounting' activities she performed when she worked for licensed CPA firms, but she does not concede that she is engaged in the practice of public accounting so as to bring herself within the jurisdiction of the Board of Accountancy for any negligence or errors [of which] she may be guilty when delivering her services to her clients.
>
> "[Ibanez] is unwilling to acquiesce in the requirements of [the Public Accountancy Act] and [the Board's rules] by complying with those requirements. She does not license her firm as a CPA firm; forego certain forms of remuneration denied to individuals who are practicing public accountancy; or limit the ownership of her firm to other CPAs. . . . [She] has, in effect, told the public that she is subject to the provisions of [the Public Accountancy Act], and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not." *Id.*, at 184–185.

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the Florida Statutes). Fla. Stat. Ann. §473.304 (Supp. 1994). The Board is responsible for licensing CPAs, see Fla. Stat. Ann. §473.308 (1991), and every licensee is subject to the governance of the Act and the rules adopted by the Board. Fla. Stat. Ann. §473.304 (Supp. 1994).

[2] This "attest" function is more commonly referred to as "auditing."

[3] Florida's Public Accountancy Act is known as a "Title Act" because, with the exception of the "attest" function, activities performed by CPAs can lawfully be performed by non-CPAs. See Brief for Respondent 11–12. The Act contains additional restrictions on the conduct of licensed CPAs. For example, a partnership or corporation cannot "practice public accounting" unless all partners or shareholders are CPAs, Fla. Stat. §473.309 (Supp. 1994), nor may licensees "engaged in the practice of public accounting" pay or accept referral fees, Fla. Stat. Ann. §473.3205, or accept contingency fees, §473.319.

[4] Florida Stat. Ann. §473.3101 (Supp. 1994) requires that "[e]ach partnership or corporation or limited liability company seeking to engage in the practice of public accounting" apply for a license from the Board, and §473.309 requires that each such partnership or corporation hold a current license.

[5] Rule 24.001(1) states, in pertinent part, that "[n]o licensee shall disseminate . . . any . . . advertising which is in any way fraudulent, false, deceptive, or misleading, if it . . . (g) [s]tates or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy unless . . . [the] recognizing agency is approved by the Board." Fla. Admin. Code §61H1–24.001(1) (1994). The CFP Board of Standards, the "recognizing agency" in regard to Ibanez' CFP designation, has not been approved by the Board.

[6] Ibanez pointed out that she does not perform the "attest" function in her law practice, and that no service she performs requires a CPA license. See *supra*, at 3, n. 3.

Next, the Board addressed Ibanez' use of the CFP designation. On that matter, the Board stated that any designation using the term "certified" to refer to a certifying organization other than the Board itself (or an organization approved by the Board) "inherently mislead[s] the public into believing that state approval and recognition exists." *Id.*, at 193–194. Ibanez appealed to the District Court of Appeal, First District, which affirmed the Board's final order *per curiam* without opinion. *Id.*, at 196. As a result, Ibanez had no right of review in the Florida Supreme Court. We granted certiorari, 510 U. S. ___ (1994), and now reverse.

II

A

The Board correctly acknowledged that Ibanez' use of the CPA and CFP designations was "commercial speech." Final Order, App. 186. Because "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information," *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 91, 108 (1990), only false, deceptive, or misleading commercial speech may be banned. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 638 (9185), citing *Friedman* v. *Rogers*, 440 U. S. 1 (1979); see also *In re R. M. J.*, 455 U. S. 191, 203 (1982) ("Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely.").

Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.[7] *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N.Y.*, 447 U. S. 557, 566 (1980); see also *id.*, at 564 (regulation will not be sustained if it "provides only ineffective or remote support for the government's purpose"); *Edenfield* v. *Fane*, 507 U. S. ___, ___ (1993) (slip op., at 5–6) (regulation must advance substantial state interest in a "direct and material way" and be in "reasonable proportion to the interests served"); *In re R. M. J.*, *supra*, at 203 (State can regulate commercial speech if it shows that it has "a substantial interest" and that the interference with speech is "in proportion to the interest served").

The State's burden is not slight; the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, *supra*, at 646. "[M]ere speculation or conjecture" will not suffice; rather the State "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, *supra*, at ___ (slip op., at 9); see also *Zauderer*, *supra*, at 648–649 (State's "unsupported assertions" insufficient to justify prohibition on attorney advertising; "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force"). Measured against these standards, the order reprimanding Ibanez cannot stand.

B

We turn first to Ibanez' use of the CPA designation in her commercial communications. On that matter, the Board's position is entirely insubstantial. To reiterate, Ibanez holds a currently active CPA license which the Board has never sought to revoke. The Board asserts that her truthful communication is nonetheless misleading because it "[tells] the public that she is subject to the provisions of [the Accountancy Act], and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not." Final Order, App. 185; see also Brief for Respondent 20 ("[T]he use of the CPA designation . . . where the licensee is unwilling to comply with the provisions of the [statute] under which the license was granted, is inherently misleading and may be prohibited.").

Ibanez no longer contests the Board's assertion of jurisdiction, see Brief for Petitioner 28 (Ibanez "is, in fact, a licensee subject to the rules of the Board"), and in any event, what she "believes" regarding the reach of the Board's authority is not sanctionable. See *Baird* v. *State Bar of Arizona*, 401 U. S. 1, 6 (1971) (First Amendment "prohibits a State from excluding a person from a profession or punishing him solely because . . . he holds certain beliefs"). Nor can the Board rest on a bare assertion that Ibanez is "unwilling to comply" with its regulation. To survive constitutional review, the Board must build its case on specific evidence of noncompliance. Ibanez has neither been charged with, nor found guilty of, any professional activity or practice out of compliance with the governing statutory or regulatory standards.[8] And as long as Ibanez holds an active CPA license from the Board we cannot imagine how consumers can be misled by her truthful representation to that effect.

C

The Board's justifications for disciplining Ibanez for using the CFP designation are scarcely more persuasive. The Board concluded that the words used in the designation—particularly, the word "certified"—so closely resemble "the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead[s] the public into believing that state approval and recognition exists." Final Order, App. 193–194. This conclusion is difficult to maintain in light of *Peel*. We held in *Peel* that an attorney's use of the designation "Certified Civil Trial Specialist By the National Board of Trial Advocacy" was neither actually nor inherently misleading. See *Peel*, 496 U. S., at 106 (rejecting contention that use of NBTA certification on attorney's letterhead was "actually misleading"); *id.*, at 110 ("State may not . . . completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA"); *id.*, at 111 (Marshall, J., joined by Brennan, J., concurring in judgment) (agreeing that attorney's letterhead was "neither actually nor inherently misleading"). The Board offers nothing to support a different conclusion with respect to the CFP designa-

[7] "It is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" *Edenfield* v. *Fane*, 507 U. S. ___, ___ (1993) (slip op., at 9), quoting *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 71, n. 20 (1983).

[8] Notably, the Board itself withdrew the only charge against Ibanez of this kind, viz., the allegation that she practiced public accounting in an unlicensed firm. See *supra*, at 4.

tion.[9] Given "the complete absence of any evidence of deception," *id.*, at 106, the Board's "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Id.*, at 111.[10]

The Board alternatively contends that Ibanez' use of the CFP designation is "potentially misleading," entitling the Board to "enact measures short of a total ban to prevent deception or confusion." Brief for Respondent 33, citing *Peel, supra,* at 116 (Marshall, J., joined by Brennan, J., concurring in judgment). If the "protections afforded commercial speech are to retain their force," *Zauderer,* 471 U. S., at 648–649, we cannot allow rote invocation of the words "potentially misleading" to supplant the Board's burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U. S., at ___ (slip op., at 9).

The Board points to Rule 24.001(1)(j), Fla. Admin. Code §61H1–24.001(1)(j) (1994), which prohibits use of any "specialist" designation unless accompanied by a disclaimer, made "in the immediate proximity of the statement that implies formal recognition as a specialist"; the disclaimer must "stat[e] that the recognizing agency is not affiliated with or sanctioned by the state or federal government," and it must set out the recognizing agency's "requirements for recognition, including, but not limited to, educational, experience[,] and testing." See Brief for Respondent 33–35. Given the state of this record—the failure of the Board to point to any harm that is potentially real, not purely hypothetical—we are satisfied that the Board's action is unjustified. We express no opinion whether, in other situations or on a different record, the Board's insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion, rather than one imposing "unduly burdensome disclosure requirements [that] offend the First Amendment." *Zauderer, supra,* at 651. This much is plain, however: The detail required in the disclaimer currently described by the Board effectively rules out notation of the "specialist" designation on a business card or letterhead, or in a yellow pages listing.[11]

The concurring Justices in *Peel*, on whom the Board relies, did indeed find the "[NBTA] Certified Civil Trial Specialist" statement on a lawyer's letterhead "potentially misleading," but they stated no categorical rule applicable to all specialty designations. Thus, they recognized that "[t]he potential for misunderstanding might be less if the NBTA were a commonly recognized organization and the public had a general understanding of its requirements." *Peel, supra,* at 115. In this regard, we stress again the failure of the Board to back up its alleged concern that the designation CFP would mislead rather than inform.

The Board never adverted to the prospect that the public potentially in need of a civil trial specialist, see *Peel, supra*, is wider, and perhaps less sophisticated, than the public with financial resources warranting the services of a planner. Noteworthy in this connection, "Certified Financial Planner" and "CFP" are well-established, protected federal trademarks that have been described as "the most recognized designation[s] in the planning field." Financial Planners: Report of Staff of United States Securities and Exchange Commission to the House Committee on Energy and Commerce's Subcommittee on Telecommunications and Finance 53 (1988), reprinted in Financial Planners and Investment Advisors, Hearing before the Subcommittee on consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs, 100th Cong., 2d Sess., 78 (1988). Approximately 27,000 persons have qualified for the designation nationwide. Brief for Certified Financial Planner Board of Standards, Inc., et al. as *Amici Curiae* 3. Over 50 accredited universities and colleges have established courses of study in financial planning approved by the Certified Financial Planner Board of Standards, and standards for licensure include satisfaction of certain core educational requirements, a passing score on a certification examination "similar in concept to the Bar or CPA examinations," completion of a planning-related work experience requirement, agreement to abide by the CFP Code of Ethics and Professional Responsibility, and an annual continuing education requirement. *Id.*, at 10–15.

Ibanez, it bears emphasis, is engaged in the practice of law and so represents her offices to the public. Indeed, she performs work reserved for lawyers but nothing that *only* CPAs may do. See *supra*, at 3, n. 3. It is therefore significant that her use of the designation CFP is considered in all respects appropriate by the Florida Bar. See Brief for The Florida Bar as *Amicus Curiae* 9–10 (noting that Florida Bar, Rules of Professional Conduct, and particularly Rule 4–7.3, "specifically allo[w] Ibanez to disclose her CPA and CFP credentials [and] contemplate that Ibanez must provide this information to prospective clients (if relevant)").

Beyond question, this case does not fall within the caveat noted in *Peel* covering certifications issued by

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[9] The dissent writes that "[t]he average consumer has no way to verify the accuracy or value of [Ibanez'] use of the CFP designation" because her advertising, "unlike the advertisement in *Peel*, . . . did not identify the organization that had conferred the certification." *Post*, at ___. We do not agree that the consumer of financial planning services is thus disarmed.

To verify Ibanez' Certified Financial Planner credential, a consumer could call the Certified Financial Planner Board of Standards. The Board that reprimanded Ibanez never suggested that such a call would be significantly more difficult to make than one to the certifying organization in *Peel*, the National Board of Trial Advocacy. We note in this regard that the attorney's letterhead in *Peel* supplied no address or telephone number for the certifying agency. Most instructive on this matter, we think, is the requirement of the Rules of Professional Conduct of the Florida Bar, to which attorney Ibanez is subject, that she provide "written information setting forth the factual details of [her] experience, expertise, background, and training" to anyone who so inquires. See Florida Bar, Rules of Professional Conduct, Rule 4–7.3(a)(2).

[10] The Board called only three witnesses at the proceeding against Ibanez, all of whom were employees or former employees of the Department of Professional Regulation. Neither the witnesses, nor the Board in its submissions to this Court, offered evidence that any member of the public has been misled by the use of the CFP designation. See *Peel*, 496 U. S., at 100–101 (noting that there was "no contention that any potential client or person was actually misled or deceived," nor "any factual finding of actual deception or misunderstanding").

[11] Under the Board's regulations, moreover, it appears that even a disclaimer of the kind described would not have saved Ibanez from censure. Rule 24.001(i) flatly bans "[s]tat[ing] a form of recognition by any entity other than the Board that uses the ter[m] 'certified.'" Separate and distinct from that absolute prohibition, the regulations further proscribe "[s]tat[ing] or impl[ying] that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains" a copiously detailed disclaimer. Rule 24.001(j).

organizations that "had made no inquiry into petitioner's fitness," or had "issued certificates indiscriminately for a price"; statements made in such certifications, "even if true, could be misleading." *Peel*, 496 U. S., at 102. We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here. See *Edenfield*, *supra*, at ___ (slip op., at 9) (striking down Florida ban on CPA solicitation where Board "presents no studies that suggest personal solicitation . . . creates the dangers . . . the Board claims to fear" nor even "anecdotal evidence . . . that validates the Board's suppositions"); *Zauderer*, *supra*, at 648–649 (striking down restrictions on attorney advertising where "State's arguments amount to little more than unsupported assertions" without "evidence or authority of any kind"). To approve the Board's reprimand of Ibanez would be to risk toleration of commercial speech restraints "in the service of . . . objectives that could not themselves justify a burden on commercial expression." *Edenfield*, *supra*, at ___ (slip op., at 9).

Accordingly, the judgment of the Florida District Court of Appeal is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

Once again, we are confronted with a First Amendment challenge to a state restriction on professional advertising. Petitioner, who has been licensed as an attorney and as a certified public accountant (CPA) by the State of Florida, and who also has been recognized as a "Certified Financial Planner" (CFP) by a private organization, identified herself in telephone listings under the "attorneys" heading as "IBANEZ SILVIA S CPA CFP." App. 4. Respondent, the Florida Board of Accountancy, determined that petitioner's use of both the CPA and the CFP designations was inherently misleading, and sanctioned her for false advertising. Fla. Stat. 473.323(1)(f) (1991) (accountants subject to disciplinary action if they "[a]dvertis[e] goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content").

I

Because petitioner's use of the CFP designation is both inherently and potentially misleading, I would uphold the Board's sanction of petitioner. I therefore respectfully dissent from Parts II-A and II-C of the opinion of the Court.

A

States may prohibit inherently misleading speech entirely. *In re R. M. J.*, 455 U. S. 191, 203 (1982). In *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 91 (1990), we considered an attorney advertisement that proclaimed the lawyer to be a "'Certified Civil Trial Specialist By the National Board of Trial Advocacy.'" See *id.*, at 96. A majority of the Court concluded that this statement was not inherently misleading, although the discussion of this issue was joined by only four Justices. See *id.*, at 100–106 (plurality opinion); *id.*, at 111 (Marshall, J., concurring in judgment). The plurality reasoned that the certification was a statement of verifiable fact; that the certification had been conferred by a reputable organization that had applied objectively clear standards to determining the attorney's qualifications; and that consumers would not confuse the attorney's claim of certification as a specialist with formal state recognition.

Although the Certified Financial Planner Board of Standards, Inc., appears to be a reputable organization that applies objectively clear standards before conferring the CFP designation on accountants, the other factors relied on by the *Peel* plurality are not present in this case. First, it was important in *Peel* that "[t]he facts stated on [the attorney's] letterhead are true *and verifiable*." *Id.*, at 100 (emphasis added); see also *id.*, at 101 ("A lawyer's certification by [the recognizing organization] is a verifiable fact, as are the predicate requirements for that certification"). Of course, petitioner's recognition as a CFP can be verified—but only if the consumer knows where to call or write. Unlike the advertisement in *Peel*, petitioner's advertisements did not identify the organization that had conferred the certification. The average consumer has no way to verify the accuracy or value of petitioner's use of the CFP designation.

Related to this point is the fact that, in the absence of an identified conferring organization, the consumer is likely to conclude that the CFP designation is conferred by the State. The *Peel* plurality stressed that "it seems unlikely that [the attorney's] statement about his certification as a 'specialist' *by an identified national organization* necessarily would be confused with formal state recognition." 496 U. S., at 104–105 (emphasis added). Because here there is no such identification, the converse is true. It is common knowledge that "many States prescribe requirements for, and 'certify' public accountants as, 'Certified Public Accountants.'" *Id.*, at 113 (Marshall, J., concurring in judgment). Petitioner has of course been licensed as a CPA by the State of Florida. But her use of the CFP designation in close connection with the identification of herself as a CPA ("IBANEZ SILVIA S CPA CFP") would lead a reasonable consumer to conclude that the two "certifications" were conferred by the same entity—the State of Florida.

The Board of Accountancy has recognized this likelihood of consumer confusion: "[The term 'certified'] in conjunction with the term 'CPA' and the practice of public accounting, [is] so close to the terms protected by state licensure itself, that [its] use, when not approved by the Board, inherently mislead[s] the public into believing that state approval and recognition exists." App. 193–194. For this reason, the Board's regulations provide that an advertisement will be deemed misleading if it "[s]tates a form of recognition by any entity other than the Board that uses the ter[m] 'certified.'" Fla. Admin. Code 61H1–24.001(1)(i) (1994). Petitioner's advertising is in clear violation of this prohibition. Because the First Amendment does not prevent a State from protecting consumers from such inherently misleading advertising, in my view the Board's blanket prohibition on the use of the term "certified" in CPA advertising is constitutional as applied to petitioner.

B

But even if petitioner's use of "certified" was not inherently misleading, it seems clear beyond cavil that *some* consumers would conclude that the State conferred the CFP designation, just as it does the CPA license, and thus that the advertisement is *potentially* mislead-

ing. Indeed, this conclusion follows *a fortiori* from *Peel*, where five Justices concluded that the attorney's specialty designation was at least potentially misleading. See 496 U. S., at 118 (White, J., dissenting). The advertisement in *Peel*, which identified the certifying organization, provided substantially more information to consumers than does petitioner's advertisement; if the one was potentially misleading (and we said that it was), so too is the other.

States may not completely ban potentially misleading commercial speech if narrower limitations can ensure that the information is presented in a nonmisleading manner. *In re R. M. J.*, *supra*, at 203. But if a professional's certification claim has the potential to mislead, the State may "requir[e] a disclaimer about the certifying organization or the standards of a specialty." *Peel*, *supra*, at 110 (plurality opinion); see also *id.*, at 116–117 (Marshall, J., concurring in judgment); *In re R. M. J.*, *supra*, at 203. The Board has done just that: An advertisement that "[s]tates or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting" will be deemed false or misleading, "unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government." Fla. Admin. Code 61H1–24.001(1)(j) (1994). "The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist." *Ibid.* There is no question but that the CFP designation "implies that [petitioner] has received formal recognition as a specialist" in financial planning, an "aspect of the practice of public accounting," and her advertisements do not contain the required disclaimer. If the absolute prohibition on the use of the term "certified" cannot be applied to petitioner (as the Court today holds), then the disclaimer requirement applies to petitioner's advertising that she is a specialist in financial planning. Because petitioner failed to comply with it, the Board properly disciplined her.

II

Petitioner *is* a certified public accountant, and her use of the CPA designation in advertising conveyed this truthful information to the public. I agree with the Court that the State of Florida may not prohibit petitioner's use of the CPA designation under the circumstances in which this case is presented to us, and I therefore join Part II-B of the Court's opinion. I would only point out that it is open to the Board to proceed against petitioner for practicing public accounting in violation of statutory or regulatory standards applicable to Florida accountants. See Brief for Petitioner 28 ("Petitioner is, in fact, a licensee subject to the rules of the Board of Accountancy"). And if petitioner's public accounting license is revoked, the State may constitutionally prohibit her from advertising herself as a CPA.

SILVIA SAFILLE IBANEZ, Winter Haven, Fla. (J. LOFTON WESTMORELAND and ROBERT J. SHAPIRO, on the briefs) for petitioner; LISA S. NELSON, Deputy General Counsel, Department of Business and Professional Regulation, Tallahassee, Fla. (KATHRYN L. KASPRZAK, Asst. Gen. Consel, on the briefs) for respondent.

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LAWYERS' ADS

Distasteful as some are, no good reason to self-censor

Once again, Texas lawyers are being asked, via referendum conducted by the State Bar, to decide whether to place certain restrictions on lawyer advertising.

The state's attorneys should not agree to do so. There are First Amendment concerns in this matter which override the various worries about good taste and propriety expressed by proponents of regulation. In any case, other laws already in place covering deceptive advertising appear more than adequate to protect the public from particularly offensive attorneys' ads.

Among other things, the proposed new rules would prevent lawyers from contacting a person because of a specific event such as an automobile accident and making claims to be "one of the best" in a certain field.

Last fall, a virtually identical effort to self-regulate lawyer advertising failed when less than half of the Bar membership voted in a statewide referendum. A majority of the membership is required to cast a ballot before any such change can be enacted.

While this directly concerns attorneys only, the principle involved appears to go well beyond the immediate situation. The U.S. Supreme Court has previously held that lawyer advertising is constitutionally protected commercial free speech. Earlier this year, a federal district judge in Houston struck down a state law restricting the ability of lawyers and others to solicit clients by mail. Judge David Hittner ruled that such restrictions violate constitutional guarantees of free speech.

They do. Maintaining the constitutionally guaranteed right of free speech is more important than any perceived need to shield citizens from unwanted solicitations.

Whenever government, or an organization such as the State Bar (which is acting under veiled threat from the Legislature to regulate itself or else) starts telling people to whom they can write and when, there is cause for concern.

It is particularly objectionable that the Bar has lumped this issue with several others on its ballot in order to try to get the needed 51 percent response. As Texas Supreme Court Justice Bob Gammage has rightly noted, the issues should pass or fail on their own merits. To have them considered in any other context is too much like subterfuge.

Some of the communicating that some lawyers do in circumstances such as death or injury in an automobile or work-related accident is by any standards distasteful. Much free speech is. But the country long ago learned that sometimes the distasteful must be tolerated because the alternative is to nibble away at the First Amendment. That is what these regulations would do.

Texas attorneys, who have until May 16 to return their referendum ballots, would do well to reject this lawyer-advertising proposal.

"EXHIBIT 2"

Misc. Docket No. 94-9021

IN THE SUPREME COURT OF TEXAS

IN RE:
PETITION OF THE STATE BAR OF TEXAS
FOR ORDER OF PROMULGATION

REPLY BRIEF OF THE STATE BAR OF TEXAS

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June 23, 1994

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Misc. Docket No. 94-9021

IN THE SUPREME COURT OF TEXAS

IN RE:
PETITION OF THE STATE BAR OF TEXAS
FOR ORDER OF PROMULGATION

REPLY BRIEF
OF THE
STATE BAR OF TEXAS

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW the State Bar of Texas and respectfully responds to the Brief of Texans Against Censorship (herein sometimes referred to as "TAC") filed in the above referenced matter.

Factual Background

On April 16, 1993, the Board of Directors of the State Bar of Texas (the "State Bar") appointed a Special Committee on Lawyer Advertising to consider a draft of proposed rules submitted at that meeting and to hold public hearings around the State for inquiry and comment. The committee included plaintiff's lawyers and defense lawyers; lawyers who advertised and lawyers who did not; male lawyers and female lawyers; ethnic minority and Anglo lawyers; city lawyers and rural lawyers; and lawyers who served on the Board of Directors as well as lawyers who did not.

The committee conducted eight public hearings and heard many views. The hearings were held in El Paso, Dallas, Brownsville, Houston, Tyler, Austin, Lubbock and San Antonio.

On June 16, 1993, the Governor signed Senate Bill 1227 (Chpt. 723, Vernon's 1993 Tex. Sess. Law Serv., 2832) passed by the Texas legislature. Section 7(a) of that act reads as follows:

> Not later than June 1, 1994, the State Bar of Texas shall adopt rules governing lawyer advertising and written solicitations to prospective clients.

On September 11, 1993, the rules governing lawyer advertising and direct mail solicitation practices were unanimously approved by the Board of Directors of the State Bar. The rules were subsequently endorsed by the Texas Trial Lawyers Association and by the Texas Association of Defense Counsel.

On September 17, 1993, this Court entered an Order of Referendum, in response to the State Bar's petition, directing that the proposed rules governing lawyer advertising and direct mail solicitation practices be submitted by referendum to the membership of the State Bar during the period of November 19, 1993, to December 20, 1993. Miscellaneous Docket No. 93-0178. The referendum measure was approved, overwhelmingly, by those who voted but the percentage of members who voted was less than the 51% minimum level of participation required by Tex. Gov't Code Ann. § 81.024(d). As a result, the referendum result was invalid. The State Bar did not request the Court to adopt the rules by an exercise of inherent

power, although some suggested it should. In explanation, see Morrison, Inherent Power Is Not A Safety Net, 57 Tex. B.J. 112 (1994).

On January 21, 1994, the Board of Directors of the State Bar voted unanimously to request a second referendum on the proposed rules governing lawyer advertising and direct mail solicitation practices, together with other unrelated referendum measures. A public hearing was held by this Court on the State Bar's petition. Opposition to the State Bar's petition was presented by attorneys for "Texans Against Censorship" and various of its members. A brief, substantially similar in substance and form to the brief filed in this proceeding on June 1, 1994, by Texans Against Censorship was made available to the Court and mentioned in oral argument at the hearing on the State Bar's Petition For Referendum.

On February 3, 1994, this Court granted the Bar's petition for referendum and ordered that the referendum be submitted to a vote of the registered members of the State Bar. Misc. Docket No. 94-9021. Propositions A and B pertained to rules governing lawyer advertising and direct mail solicitation practices (herein referred to for brevity as the "advertising rules"). The Court's Order stated that no Justice had made any determination on any legal question involving the subject matter of the referendum. In addition, the Court approved an amendment of the State Bar budget to authorize expenditures up to $250,000.00 for the purpose of conducting the referendum, educating State Bar members about the specifics of the referendum propositions, and activating State Bar members to participate in the referendum process by voting. This referendum became commonly known as "Referendum '94."

As in the Fall 1993 referendum, propositions A and B were endorsed by the Texas Trial Lawyers Association and by the Texas Association of Defense Counsel.

Before and during the balloting period for Referendum '94, Texans Against Censorship ran paid advertisements in the *Texas Lawyer* urging State Bar members to refrain from voting on the propositions in the referendum governing advertising and direct mail solicitation practices (i.e., propositions A and B). Lawyers were urged not to vote in an attempt to defeat the required 51% minimum participation for a valid referendum. Tex. Gov't Code Ann. § 81.024(d) (Vernon 1988). Other opposition, some of which urged lawyers not to vote, included letters to the editor of both the *Texas Bar Journal* and the *Texas Lawyer*, an article by Charles L. Babcock (an attorney for Texans Against Censorship) in the *Texas Bar Journal*, an article by Jim Adler (an officer of Texans Against Censorship) in the *Texas Bar Journal*, and a guest editorial in the *Texas Lawyer* by Charles L. Babcock and Alan N. Greenspan (an attorney for Texans Against Censorship).

The State Bar countered the efforts to dissuade lawyers from voting with the argument that lawyers have an ethical duty to participate in the process of self-governance that requires participation by voting. The State Bar's position was premised upon the Preamble to the Texas Disciplinary Rules of Professional Conduct which provides that "[a] lawyer should ... help the bar regulate itself in the public interest" (Paragraph 5) and that "[n]eglect of these responsibilities compromises the independence of the profession and the public interest which it serves" (Paragraph 8).

Tex. Disciplinary R. Prof. Conduct preamble (1989), reprinted in Tex. Gov't Code Ann., Title 2, Subtitle G app. (Vernon Supp. 1994) (State Bar Rules art. X, §9). Such rules, including the Preamble, were promulgated by this Court.

Even with organized opposition encouraging lawyers not to vote on the advertising rules, more than 51% of the State Bar's members voted in Referendum '94 and on each of the propositions pertaining to lawyer advertising and direct mail solicitation practices. An overwhelming percentage of those voting in Referendum '94 voted in favor of adopting the proposed rules now before this Court pursuant to the Petition of the State Bar of Texas For Order Of Promulgation. The referendum results are summarized as follows:

	Votes	Participation	Yes	No
Advertising Rules (Proposition A)	30,705	52.8%	88.5%	11.5%
Filing of Advertisements (Proposition B)	30,587	52.6%	74.9%	25.1%

The advertising rules adopted in Texas by Referendum '94 have received media attention from the *New York Times*, the *Wall Street Journal*, the *National Law Journal*, the *ABA Journal* and virtually every metropolitan newspaper in Texas. The rules adopted have been acclaimed by bar leaders, nationally, as a model set of rules governing lawyer advertising and have been endorsed, unanimously, by the Board of Directors of the State Bar of Texas. In addition to local bar groups, the rules adopted have been endorsed by the Texas Trial Lawyers Association and by the Texas

Association of Defense Counsel. Each such association significantly assisted in obtaining adoption of the advertising rules.

ARGUMENT AND AUTHORITIES

I

Lack Of Standing

The promulgation of the advertising rules adopted by referendum is contested by "Texans Against Censorship" which alleges that it is "a non-profit group opposed to unconstitutional restrictions on freedom of speech." TAC Brief, p.2. The State Bar of Texas is also a non-profit group opposed to unconstitutional restrictions on freedom of speech.

As a general rule of law, only one whose rights are injuriously affected by a law may challenge its constitutionality. Gann v. Keith, 151 Tex. 626, 253 S.W.2d 413, 417 (1952). In order to contest constitutionality, one must ordinarily show that the law in issue will have some significant impact upon the contestant. It is not sufficient to simply show that a law might be unconstitutional as to others. Oil Well Drilling Co. v. Associated Indemnity Corp., 153 Tex. 153, 264 S.W.2d 697, 699-700 (1954). The overbreadth doctrine allows a First Amendment attack, as an exception to the standing requirements set forth above, on restrictions of core speech. However, this doctrine is not applicable in commercial speech cases involving professional advertising. Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977). The Supreme Court, has held that " ... a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that

ground --- our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators." Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 481 (1989).

Further, Texans Against Censorship has failed to establish that it has standing as an organization to sue on behalf of its members. This Court in Texas Assn. of Business v. Texas Air Control Bd., 852 S.W.2d 440 (Tex. 1993), recently adopted the test for "associational standing" set out by the U. S. Supreme Court in International Union, UAW v. Brock, 477 U.S. 274, 281 (1986); and Hunt v. Washington State Apple Advertising Comm'n., 432 U.S. 333 (1977). In Texas Assn. of Business v. Texas Air Control Bd., this Court wrote (852 S.W. 2d at 447) (citation omitted):

> [A]n association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

The first prong of this test requires that TAC's pleadings and the rest of the record demonstrate that TAC's members have standing to sue in their own behalf. 852 S.W.2d at 447. The record before this Court is void of any documentation as to the membership of TAC. The only statement as to the nature of this organization is that "Texans Against Censorship is a non-profit group opposed to unconstitutional restrictions on freedom of speech." TAC Brief, p. 2. Based on this state of the record, TAC has failed to establish that any of its members would otherwise have

standing to sue in their own right. Therefore, TAC lacks standing as an association in connection with this matter.

The Brief of TAC, p. 2, contains a section entitled "Statement of Interest and Concern." Therein it is alleged that "[t]he proposed amendments will have a severe chilling effect on free speech rights of *all* attorneys." TAC Brief, p. 2. TAC is obviously not an attorney but is before this Court seeking to apply the overbreadth doctrine since the rules adopted by referendum establish standards of conduct for the assessment of professional discipline against attorneys. TAC, therefore, has failed to show that it has standing in connection with this matter and should not be heard on the matter before this Court. There is no other opposition on file to the promulgation of the rules adopted in Referendum '94.

II

The Separate Means By Which Rules Governing The State Bar Of Texas And The Conduct Of Its Members May Be Adopted Or Amended

There are three means by which rules governing the State Bar of Texas or the conduct of its members may be adopted or amended. Those means are as follows:

A) By legislation;

B) By referendum of the members of the State Bar of Texas, submitted with Supreme Court approval, in accordance with Tex. Gov't Code Ann. § 81.024; or

C) By Supreme Court Order in the exercise of its inherent power.

Each such method is discussed briefly below.

A. Rule Change By Legislation.

The legislature has, of course, some authority to enact laws regulating the State Bar and the conduct of its members provided that such legislation does not impede the Supreme Court's ability to perform its duty to oversee the profession. State Bar of Texas v. Heard, 603 S.W.2d 829, 831 (Tex. 1980). Although the legislature has directed the State Bar by Senate Bill 1227 (quoted on p. 2 hereof) to adopt rules governing lawyer advertising and direct mail solicitation practices, the legislature has not enacted any such rules. Legislative leaders have, however, made it clear to all parties that if the State Bar fails to exercise its privilege of self-regulation by adopting rules governing lawyer advertising and direct mail solicitation practices, the legislature will enact laws governing these practices. The State Bar has adopted rules governing lawyer advertising and direct mail solicitation practices, as directed by Senate Bill 1227 (Chpt. 723, Vernon's 1993 Tex. Sess. Law Serv., 2832), but such rules, to become effective, must be promulgated by this Court.

B. Rule Change By Referendum.

The second means of making rule changes governing the practice of law is by referendum. This procedure, provided by Tex. Gov't Code Ann., § 81.024, is an arduous process. The process, as it currently exists, requires the Bar to motivate at least 51% of its registered members to cast a vote and for the majority of those members who vote, to vote in favor of the proposed change. The difficulty of rule change by referendum is attributable to several inherent factors. First, the status quo provides some degree of comfort to the members of any profession and any change

is likely to be resisted by some. Second, the proposed changes involve restrictions and prohibitions not favored by some lawyers. Third, the forces of apathy, unavailability, fear of the unknown, and other natural resistors to change make the 51% minimum participation requirement a very high hurdle. In addition, in Referendum '94, there was organized opposition. For example, Texans Against Censorship, in an effort to defeat the already difficult 51% minimum participation, ran paid advertisements in lawyer periodicals urging lawyers not to vote.

C. Rule Change By Inherent Power.

The Supreme Court of Texas has inherent power to regulate the practice of law. State Bar of Texas v. Heard, 603 S.W.2d 829 (Tex. 1980). This includes the power to adopt disciplinary rules of professional conduct without a successful referendum. Order of the Supreme Court of Texas, 635 S.W.2d at XLI (1982). The State Bar unsuccessfully attempted, in 1980 and in 1982, to amend by referendum the provisions of its disciplinary rules pertaining to lawyer advertising to bring them into conformity with the Supreme Court's decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Promptly after the second failed attempt, this Court observed that "it appears unlikely that any future referendums on this subject would receive the vote of at least 51% of the registered members of the State Bar of Texas" and adopted rules by the exercise of its inherent power. 635 S.W.2d at XLI (1982).

An exercise of inherent power to now reject or significantly alter the advertising rules adopted by a valid referendum submitted pursuant to this Court's Order would seriously damage the process of self-regulation.

III

An Exercise Of Inherent Power Conflicts With Statutory Procedures, Is Unnecessary, And Is Unwise

This Court is now urged by the Texans Against Censorship to subvert the referendum process and exercise its inherent power to alter or reject the rules adopted instead of promulgating them. For this Court, in an exercise of its inherent power, to now alter or reject the rules adopted by referendum conducted pursuant to an Order of this Court would be an abusive use of that sacred power. Never in the history of this Court has it submitted a matter to referendum and then refused to promulgate a favorable result. Should the Court now exercise its inherent power to thwart the promulgation of rules adopted by referendum? Some considerations are discussed below:

A. Conflict With Statutory Procedures.

When the enormous difficulty of obtaining meaningful change by referendum is overcome, Tex. Gov't Code Ann. § 81.024, provides that the "Supreme Court *shall* promulgate each rule and amendment that receives the majority of the votes cast in an election." (emphasis added). According to *Webster*, to promulgate means "... 1: to make known by open declaration: PROCLAIM 2a: to make known or public the terms of (a proposed law) b: to put (a law) into action or force." *Webster's Ninth New Collegiate Dictionary*, 942 (1991).

Texans Against Censorship argues (p. 21 of its brief) that because Tex. Gov't Code Ann. § 81.024(b) provides that the Court *may* submit matters to

referendum, the Court has no duty to promulgate rules adopted by referendum even though Tex. Govt Code Ann. § 81.024(e) provides that the "Supreme Court *shall* promulgate each rule and amendment that receives a majority of the votes cast in an election" (emphasis added). Clearly, the legislative contemplation is that the Court *may* or *may not* submit a requested referendum but that, once submitted and passed, the Court shall promulgate each rule and amendment adopted by a majority vote in a valid referendum. This Court will clearly be at odds with a statutory directive if it should now refuse to promulgate the rules adopted by referendum conducted in accordance with the Court's Order of Referendum.

B. Untimely Action.

When the Petition for Referendum of the State Bar of Texas was heard and considered by this Court on the proposed rules governing lawyer advertising and direct mail solicitation, there were those who suggested that an independent review of constitutionality of the proposed rules should be conducted prior to submission of the referendum. The State Bar contended that the Court should defer to the Board of Directors of the State Bar on the content of the rules and reserve any ruling on constitutionality until presented with a case or controversy after promulgation. The Court submitted the referendum, as requested, although not without dissent. While one might argue the issue of whether an independent constitutional review by the Court should precede a referendum, it is inconceivable that one would argue that such a review should be conducted following adoption by referendum conducted pursuant to the Court's Order of Referendum.

C. Preclusion Of Appellate Review.

The advertising rules have been lawfully adopted by the members of the State Bar in accordance with the legislatively prescribed procedures and this Court's Order of Referendum dated February 3, 1994, Misc. Docket No. 94-9021. The lawyers of Texas have a right to adopt the most restrictive rules constitutionally permitted governing lawyer advertising and direct mail solicitation practices. The rules adopted may or may not go that far. If this Court, which is obviously not a court of last resort on federal constitutional issues, should mistakenly alter or delete a rule adopted by referendum, to whom can the State Bar appeal? The answer is obvious. This Court should not address constitutional objections to the rules adopted until there is a case or controversy involving a party with justiciable interests. Otherwise, members of the State Bar and the Citizens of Texas may be deprived of constitutionally permitted rights without an opportunity of appeal.

D. Preclusion Of Res Judicata.

Any alterations or deletions to the rules adopted by referendum prior to promulgation will bind the State Bar, without a right of appeal. However, in the absence of a case or controversy, any provisions of the rules upheld by this Court will have no res judicata or other effect upon any individual lawyer in any subsequent litigation.

E. Preclusion Of A Record.

Every decision of the Supreme Court of the United States dealing with the issue of lawyer advertising has been decided on very narrow grounds with almost

microscopic attention to the specific facts of the case. Yet this Court is being urged by the Texans Against Censorship to decide broad issues of constitutional law in the abstract, on hypothetical terms, without being case specific. To do so would grossly diminish the quality of justice. For this Court to be asked to make rulings of constitutionality on hypothetical facts, in a single case involving multifarious issues, without the benefit of a record, is unfair to the Court, unfair to the State Bar, and unfair to the intended and ultimate beneficiaries of the rules adopted by referendum -- the Citizens of Texas. To decide issues of constitutionality without a record of factual development deprives the State Bar of any meaningful opportunity to justify a regulation on lawyer advertising by a "record [which] indicates that a particular form or method of advertising has in fact been deceptive." In re RMJ, 455 U.S. 191, 202 (1982).

F. Perils Of An Advisory Opinion.

If this Court should now choose to address the constitutionality of rules prior to promulgation, the decision process would suffer from the same perils that preclude advisory opinions. While this Court has inherent power to regulate the practice of law, the advertising rules have been adopted by referendum in accordance with a specific statutory process (Tex. Gov't Code Ann. § 81.024) that exists independently of the Court's inherent power.

Once the Court promulgates the advertising rules according to the unambiguous directives of Tex. Gov't Code Ann. § 81.024(e), the rules may be challenged through a suit originating in the district court. An action to promulgate

rules, whether pursuant to the statutory process of referendum or pursuant to inherent judicial power, properly begins in the Supreme Court of Texas. This is true whether the rule governs lawyer advertising or whether the rule concerns mandatory pro bono service. Thus, this Court alone may promulgate a rule but the district court alone is properly the place for an attack to be initiated upon the constitutionality of the rule promulgated.

As noted in Morrow v. Corbin, 122 Tex. 553, 646 S.W.2d 641 (1933), this Court lacks jurisdiction to render advisory opinions. Although this Court clearly has inherent power to promulgate, alter, or reject the rules adopted by referendum, to alter or reject the rules adopted by referendum would subject the Court to the same perils as those which have precluded courts from rendering advisory opinions. TAC completely ignores the justiciability concerns so important to all courts in the United States. If courts were to offer advisory opinions, according to an article written by Justice Frankfurter during his days as a Professor of Law at Harvard, they would be forced to ignore the often controlling importance of specific facts in determining constitutional questions, courts would be deprived of the benefit of legislative judgment, and the process would inevitably weaken legislative and public responsibility. Felix Frankfurter, A Note On Advisory Opinions, 37 Harv. L. Rev. 1002 (1924). Each of the perils inherent in an advisory opinion would be present if this Court were to hear the opposition of Texans Against Censorship to the rules adopted by referendum.

First, the danger of ignoring specific facts in determining constitutional questions would be present because TAC attacks "the entire scheme presented by the proposed amendments." (TAC Brief, p. 16). If the action requested by TAC of this Court were granted, it would require a determination that each and every provision, in each and every factual setting imaginable, is unconstitutional. Such a broad judgment would clearly breach the separation of functions between legislative and judicial branches of government, in derogation of a uniquely American relationship. Flast v. Cohen, 392 U.S. 83, 95-98 (1968). Also, see 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure §§ 3524, 3529.1 (1984). This is particularly true in light of Rule 9.01, adopted by referendum, which provides as follows:

> If any provision of these Rules or any application of these Rules to any person or circumstances is held invalid, such invalidity shall not affect any other provision or application of these Rules that can be given effect without the invalid provision or application and, to this end, the provisions of these Rules are severable.

Second, the peril of depriving the Court of legislative judgment upon facts would apply since the Comments on the rules have not yet been adopted. The Comments are an invaluable component to be used in considering the application and interpretation of the rules. A full constitutional review should include legislative judgment on the facts in question and the Comments provide the record of that background. "The Comments also frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules...." Paragraph 10 of the Preamble, as promulgated by this Court, to the Texas Disciplinary Rules of

Professional Conduct. The advertising rules adopted by referendum will, when promulgated, become a part of the Texas Disciplinary Rules of Professional Conduct and thus expressly subject to such Preamble. Comments to bar rules are not adopted by the Board of Directors of the State Bar until after promulgation of the rules.

Third, the evil of weakening legislative and public responsibility would apply since the actions of the membership of the State Bar would be totally thwarted. As previously noted in the Factual Background at pages 1 to 5, great time, effort and resources have gone into the preparation and ultimate adoption by referendum of the advertising rules now before this Court for promulgation. Altering or rejecting the content of this major product of professional self-regulation in Texas would clearly weaken, indeed severely damage, the public responsibility of the membership of the State Bar for its own disciplinary governance. Why should one bother to vote in a referendum on rules that may subsequently be altered or rejected (perhaps in unexpected or unacceptable ways) after the referendum but prior to promulgation without even the benefit of a trial?

G. Legislative Mandate.

The legislature has directed that "not later than June 1, 1994, the State Bar of Texas shall adopt rules governing lawyer advertising and written solicitations to prospective clients." Senate Bill 1227, §7 (Chapter 723, Vernon's 1993 Tex. Sess. Law Serv., 2832). Although the State Bar has complied, it seems obvious that the legislature contemplated that this Court would promptly promulgate rules adopted in a valid referendum conducted pursuant to Order of this Court. The State Bar, and

we submit its members, certainly contemplated prompt promulgation of all rules adopted by referendum conducted pursuant to Order of this Court.

H. Inevitable Delay.

The Texas legislature found there to be a pressing public problem resulting from current abuses in lawyer advertising and direct mail solicitation practices. The legislature's direction that advertising rules be adopted by June 1, 1994, includes an implicit legislative finding that delay is contrary to the public interest. The problem was severe enough that the House passed a bill regulating lawyer advertising and the Senate would have likely have done the same but for the efforts of the State Bar, the Texas Trial Lawyers Association, and the Texas Association of Defense Counsel to persuade legislative leaders that the State Bar, in the process of self-regulation, should have an opportunity to seek adoption by referendum prior to legislative intervention in the process of our governance. Had the legislature proceeded, there would have been no constitutional attack on the rules considered, in the absence of a case or controversy. Likewise, there should not be now. Where the need for reform has been clearly demonstrated and the rules have been adopted by referendum conducted pursuant to an Order of this Court, for this Court to then undertake a course of independent constitutional review, which inevitably will result in substantial delay, is unjustified.

I. Summary - Part III.

To alter, delete, or refuse to promulgate rules which have, with this Court's approval, been submitted on two occasions to the membership of the State

Bar, which have been overwhelmingly approved in the face of organized opposition by members of the State Bar voting in Referendum '94, and which resulted in expenditures of approximately $250,000.00 in the two referendums, would be unprecedented, in contravention of established statutory procedures, wasteful, contrary to established jurisprudence, and unfair to the lawyers of Texas.

IV

The Development Of Applicable Federal Law Concerning Regulation Of Lawyer Advertising

The Supreme Court of the United States in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), held that a blanket prohibition of lawyer advertising unconstitutionally infringes upon the First Amendment right of commercial speech. In a ruling the Court considered "narrow" (433 U.S. at 366), the Court held that a truthful newspaper advertisement of the availability and prices of routine legal services could not be absolutely prohibited. The Court was careful to point out that the bar could regulate advertising that was false, deceptive or misleading (433 U.S. at 383); that warning or disclaimer requirements might be appropriately imposed on lawyer advertising (433 U.S. at 384); that "there may be reasonable restrictions on the time, place, and manner of advertising" (433 U.S. at 384) that "special problems of advertising on the electronic broadcast media *will* warrant special consideration" (Emphasis added, 433 U.S. at 384); and that potentially misleading advertisements, such as those pertaining to the quality of professional services, might be inappropriate (433 U.S. at 383-384). Bates and its progeny are miscited by TAC when it states (TAC brief p. 7):

> It is clear from Bates and its progeny that a state may *only* prohibit commercial speech that is false or misleading. (Emphasis added.)

Rather, as the Supreme Court recently noted in Edenfield v. Fane, 113 S. Ct. 1792 (1993), where blanket bans "snare" truthful and nonmisleading expression along with fraudulent or deceptive commercial speech, "the State must satisfy the ... Central Hudson test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end." 113 S.Ct. at 1799.

The Court's decision in Bates has been harshly criticized, even by members of the Supreme Court. See, e.g., Justice O'Connor's dissent, joined by Chief Justice Rehnquist and Justice Scalia, in Shapero v. Kentucky Bar Assn., 486 U.S. 466, 487 (1988) where it was said:

> Bates was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its application. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The Central Hudson test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider Bates in the light of that doctrine.

The latest criticism of Bates, supra, from a member of the Supreme Court was the dissent of Justice O'Connor in Edenfield v. Fane, 113 S.Ct. 1792, 1804 (1993) where she wrote:

> "I continue to believe that this Court took a wrong turn with Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L. Ed 2d 810 (1977)...."

In addition to the criticisms of Chief Justice Rehnquist and of Justices O'Connor and Scalia, the lead cases from the Supreme Court of the United States dealing with the subject of lawyer advertising were decided prior to the confirmation of Justices Souter, Thomas and Ginsburg. Furthermore, Justice Blackmun's continued tenure on the Supreme Court is of short duration. The "law as it is" may be substantially more favorable to the State Bar than "the law as it was" when last declared. Nevertheless, the advertising rules adopted by referendum comply fully with the law as last declared.

In Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978), the Court held that the purpose of the Ohio Bar's rule prohibiting in-person solicitation was to protect consumers and that an attorney's right of commercial speech was outweighed by the state's interest in protecting prospective clients. 436 U.S. at 464. Accordingly, the Court held that the state or appropriate bar association "constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." 436 U.S. at 449. As this Court observed in O'Quinn v. State Bar of Texas, 763 S.W.2d 397 (Tex. 1988), "[w]e further assume, and Ohralik holds, that the state has a strong and substantial interest in protecting the public from 'overreaching and other forms of misconduct' as well as 'invasions of the individual's privacy.' " 763 S.W.2d at 401.

Concurrently with Ohralik, the Court decided In re Primus, 436 U.S. 412 (1978). In Primus, a lawyer associated with the American Civil Liberties Union solicited a client in violation of the disciplinary rules of the Supreme Court of South

Carolina. The Court held that this solicitation, unlike that in Ohralik, was constitutionally protected because the attorney was not motivated by an expectation of monetary gain. 436 U.S. at 438-39. This exception to the ban on solicitation has been institutionalized in Rule 7.03(a), adopted by referendum.

Friedman v. Rogers, 440 U.S. 1 (1979), involved the constitutionality of a Texas statute prohibiting the use of a trade name in the practice of optometry. The Court distinguished Bates and other commercial speech cases in holding that, because of a history, reflected in the record, of the deceptive use of trade names, Texas could constitutionally prohibit the use of trade names by optometrists. 440 U.S. at 13-15. This is an important case because the Court upheld a substantial infringement of commercial speech on the basis of a record of actual deception found by the Supreme Court of Texas in Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex.), cert. denied, 389 U.S. 52 (1967).

In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), the Court held unconstitutional a prohibition, adopted during the energy crisis, on advertising which promoted the use of electricity. The Court emphasized that the constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." 447 U.S. at 563. The Court in Central Hudson, articulated a four point test for determining whether a restriction upon commercial speech violates the constitutional protection provided by the First Amendment. The four point test is as follows (447 U.S. at 566):

> In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the

> expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

"The Central Hudson commercial speech test is less rigorous than the strict scrutiny level of judicial review normally applied to content-based regulation of speech. Under the strict scrutiny test, laws regulating the content of speech will be upheld only when they are justified by compelling governmental interests and are narrowly tailored to achieve those interests. The test for commercial speech differs in two ways: (1) The regulation need not by [sic] justified by a compelling governmental interest; a substantial interest will suffice. see Posadas de P.R. Assocs. v. Tourism Co. 478 U.S. 328, 341 (1986); (2) the means employed by the government need not be the least restrictive method of achieving its objective." TAC Brief, p. 20, dated September 21, 1993, Misc. Docket No. 93-0178.

Although the fourth prong of the Central Hudson test suggests that restrictions on commercial speech meet a "least restrictive means" test, the Court has since made it clear that such restrictions need only be a reasonable means to achieve an important or substantial state interest. Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989). That is, the manner of restriction need not be "absolutely the least severe that will achieve the desired end." 492 U.S. at 480. Rather, what is required is "a 'fit' between the legislature's ends and the means chosen to accomplish those ends – a fit that is not necessarily perfect, but

reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." (Citation omitted), 492 U.S. at 480. The State Bar is unnecessarily but severely handicapped if it is expected to convincingly show, without the benefit of a record, that the rules adopted by referendum are reasonable means to advance the legitimate concerns and interests which led to their adoption.

The next of the lead cases on lawyer advertising to come before the Supreme Court of the United States was In re RMJ, 455 U.S. 191 (1982). RMJ involved a Missouri disciplinary rule which permitted a lawyer to advertise his willingness to perform legal services in twenty-three separate categories of law and prohibited the use of other descriptions of areas of practice. In addition, the Missouri disciplinary rules prohibited general mailings of professional announcements. RMJ, a Missouri lawyer, violated the bar's rule by advertising that he handled "real estate" matters (an unauthorized category description) instead of that he handled "property" matters (a permitted category). The Court found that the advertisement in issue was not misleading and that the compulsory use of only authorized categories of practice in lawyer advertisements did not promote a substantial state interest. 455 U.S. at 205. The Court said: "We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice." 455 U.S. at 207. The Supreme Court, in RMJ, applied the four point test of Central Hudson without the lesser standard subsequently articulated by the Supreme Court in Board of Trustees of the State

University of New York v. Fox, supra, as being the appropriate standard. The Court held that the state failed to demonstrate any significant interest to justify its classification limitations or its announcement limitations. Obviously, a record showing that a failure to use the prescribed categories of classification had proven to be misleading in practice would have changed the result. Constitutionality is far too important to be decided in the abstract, on hypothetical assumptions, without an adequate record.

In Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985), the issue was whether nondeceptive illustrations in advertisements could be prohibited; whether employment resulting from unsolicited legal advice contained within lawyer advertisements could be prohibited; and whether a state could require attorneys to disclose potential liability for costs when contingent fee arrangements were advertised. The majority of a sharply divided Court in Zauderer held that there was no justification shown in the record for Ohio's prohibition on illustrations in lawyer advertising or its prohibition of employment following unsolicited legal advice in advertisements. However, the Court also held that Ohio could properly require an attorney advertising contingent fees to disclose information relative to liability for costs in the event that a lawsuit was unsuccessful. In Zauderer, the Court announced that a disclosure could be required "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651. This standard, which is obviously easier for the state to satisfy than the standard for restrictions on commercial speech, was explained by

the Court on the basis that an advertiser has a greater constitutional right to utter truthful and non-misleading commercial speech than such person's constitutional right to resist making a required disclosure. The Court said (471 U.S. at 651):

> Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, ... appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception." (Citations omitted.)

Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Humphrey, 355 N.W. 2d 565 (Iowa 1984) concerned the constitutionality of an Iowa State Bar rule prohibiting television advertisements containing background sounds, visual displays, and employment of more than a single, nondramatic voice. The Supreme Court of Iowa, when the rule was challenged, held the same to be a constitutional restraint on the exercise of commercial speech. The Supreme Court of the United States vacated the Iowa ruling and remanded the case for further consideration in light of Zauderer. Humphrey v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association, 472 U.S. 1004 (1985). On remand, the Supreme Court of Iowa applied Zauderer and again upheld the constitutionality of the Iowa Bar rule prohibiting background sounds, visual displays, dramatic voices, and multiple voices in television advertisements. Committee on

Professional Ethics and Conduct of the Iowa State Bar Association v. Humphrey, 377 N.W.2d 643 (Iowa 1985). The Supreme Court of the United States then denied certiorari. Humphrey v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association, 475 U.S. 1114 (1986).

In Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988), the Court held that a state may not categorically prohibit lawyers from sending truthful and nondeceptive solicitation letters to potential clients. 486 U.S. at 471. However, the Court indicated that a state could regulate lawyers' written communications to potential clients through 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." Id. at 476. This is the procedure employed in Rule 7.07, adopted by referendum in proposition B. The Court further indicated that various requirements could be imposed to enable such a reviewing agency to investigate such matters as the veracity of information about a potential client contained in a written solicitation (486 U.S. at 477-78):

> [A reviewing agency] might . . . require the lawyer to prove the truth of the fact stated (by supplying copies of the court documents or material that led the lawyer to the fact); it could require the lawyer to explain briefly how he or she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, . . . or directing the recipient how to report inaccurate or misleading letters.

Judge Hittner in Moore v. Morales, 843 F. Supp. 1124, 1129 (S.D. Tex. 1994) referred to this procedure suggested in Shapero and, apparently, considered it as an

example of how "the State may implement narrower regulations to limit the potential for misleading solicitation" than total preclusion of direct mail solicitation for a 30 day period following certain statutorily specified occurrences. 843 F. Supp. at 1129.

In Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990), the Court held that a state may not categorically ban statements concerning certification as a specialist by bona fide organizations such as the National Board of Trial Advocacy if such statements are not actually or inherently misleading. 496 U.S. at 110. This holding was recently reinforced by Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 1994 U.S. Lexis 4443 (decided June 13, 1994), in which the Court held that a person who is licensed as a CPA cannot be prohibited from making truthful representations to that effect. 1994 U.S. Lexis 4443 at 6. Peel is the basis for an expansion of the right to advertise certification in Texas. Rule 7.04(b)(ii), adopted by referendum, is an expansion of the right to advertise certification by an organization other than the Texas Board of Legal Specialization. It was the opinion of the State Bar's Special Committee on Lawyer Advertising that the current restriction of Rule 7.01(c)(2) is likely unconstitutional in light of Peel. Rule 7.04(b)(ii), adopted by referendum, is designed to cure this problem. Not all of the rule changes adopted by referendum are restrictions. In addition to Rule 7.04(b)(ii), compare Rule 7.03(a), adopted by referendum, with current Rule 7.02(a).

Not one of the major cases involving the constitutionality of rules governing lawyer advertising involves "surrogate litigators" as referred to in Board of

Trustees of the State University of New York v. Fox, 492 U.S. 469, 481 (1989). Texans Against Censorship is seeking to be a "surrogate litigator" even though the Supreme Court indicated in Fox, supra, that commercial speech cases are "not in need of surrogate litigators." 492 U.S. at 481.

Summary - Part IV.

Each of the opinions of the Supreme Court of the United States have been narrowly reasoned, on specific and detailed factual consideration, involving, generally, advertising practices that are relatively innocuous compared to the evils sought to be regulated by the rules adopted by referendum. For example, Bates involved a newspaper advertisement of prices for routine legal services; In re RMJ involved (1) a failure to use bar approved descriptions of the type of legal services offered, even though the descriptions used were not misleading and (2) the general mailing of announcement cards; Zauderer involved the use of nonmisleading illustrations in printed advertisements and required disclosures; Shapero involved a prohibition of direct mail solicitation letters; and Peel involved the inclusion on a lawyer's letterhead of National Board of Trial Advocacy certification. No Supreme Court case has dealt with either radio or television advertising except Humphrey (where the court denied cert.) although the Supreme Court acknowledged in Bates that advertising in the electronic media will warrant special consideration. The practices found to be constitutionally protected in these lead cases are so mild and innocuous compared to the advertising practices which resulted in the passage of Senate Bill 1227 and the adoption of propositions A and B, that the former pale in

comparison to the latter. None of these cases have involved "surrogate litigators" like Texans Against Censorship.

V

The Texas Constitution

TAC argues that the Texas Constitution provides broader rights of free speech than does the United States Constitution. We offer no argument to the contrary.

This having been recognized, TAC cites no authority nor makes any argument as to how the rights provided by the Texas Constitution differ from those provided by the United States Constitution with respect to any matter of commercial speech before this Court, how the mode of analysis should differ, how the advertising rules complained of allegedly violate the Texas Constitution, or how the rights of commercial speech under the Texas Constitution are balanced against the right of privacy under the Texas Constitution.

Since TAC has not briefed, under the Texas Constitution, any point applicable to this proceeding, we respond in the same way

VI

The Rule Changes Adopted By Referendum Do Not Violate Federal Or State Constitutions

A) The Rules Adopted, Individually And Collectively, Are Constitutional

"Texans Against Censorship contends that the entire scheme presented by the proposed amendments is unconstitutional" on the basis that "the heavy

disclosure, record keeping, and financial burdens imposed by these rules will chill the advertising of truthful, non-deceptive advertising." See TAC Brief, p. 16. In support of this incredibly broad attack, TAC devotes one-half page of its brief (p. 16) and cites three cases -- Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). TAC, in its argument that the entirety of the rules are unconstitutional never mentions the effect of Rule 9.01, adopted by referendum, which reads as follows:

> If any provision of these Rules or any application of these Rules to any person or circumstances is held invalid, such invalidity shall not affect any other provision or application of these Rules that can be given effect without the invalid provision or application and, to this end, the provisions of these Rules are severable.

As a result of Rule 9.01, adopted by referendum, each rule should be considered alone. We have responded, without the benefit of a record, to the arguments made by TAC to specific rules adopted by referendum.

In Zauderer, supra, an Ohio lawyer advertised his willingness to represent users of the Dalkon Shield, a defective birth control device, on a contingent fee basis. The advertisement included the following fee information (471 U.S. at 631):

> The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

The advertisement failed to inform prospective clients that they would be liable for costs if their claims were unsuccessful. The Ohio Bar alleged that this failure rendered

the advertisement "deceptive" in violation of Ohio Rule 2-101(A). 471 U.S. at 633. The rules adopted in Texas by referendum provide, similarly, as follows:

> Rule 7.04 (i):
>
> (i) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

The Supreme Court contrasted restrictions on advertising content with disclosure requirements. It noted that there are "material differences" between outright prohibitions of content and required disclosures. Although compulsions to speak may violate a person's right of political expression, compulsory disclosures of factual and uncontroversial information are not likely to violate rights of commercial speech. As the Supreme Court explains the difference: " ... the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides" ... but the constitutionally protected interest of an advertiser "in not providing any factual information in his advertising is minimal." 471 U.S. at 651.

Zauderer, supra, recognizes that unjustified or unduly burdensome disclosure requirements might chill protected commercial speech and thus violate the First Amendment but TAC has not attacked or asserted that any disclosure

requirements of the rules adopted by the State Bar referendum are either unjustified or unduly burdensome.

The reliance of TAC on Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) is unfounded. In Linmark, supra, the Court held that an absolute prohibition of posting "For Sale" signs on real estate to be an unconstitutional infringement on the right of commercial speech. Other signs were not prohibited. This content prohibition unconstitutionally prohibited the free flow of truthful information. 431 U.S. at 95.

Likewise, TAC's reliance on Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969) is unfounded. In Red Lion, the Court upheld a regulation which required a balanced presentation. It noted that the right of viewers and listeners to hear truth is paramount in considering whether forced balancing of views expressed in public broadcasts violates the First Amendment rights of broadcasters. The State Bar has consistently said and acted in a manner to clearly reflect its position that the public's right to truth and completeness in lawyer advertising is superior to the rights of advertising lawyers to "dodge and weave" through the course of a perhaps commercially effective but unhelpful advertisement hawking the unverifiable ability, intellect, or toughness of the advertising lawyer. Red Lion supports the position of the State Bar.

While TAC cites three articles from the mid-1980's supportive of lawyer advertising, it ignores the most current and comprehensive study of the public's perception of advertising. A 1993 study by Peter D. Hart Research Associates, Inc.,

commissioned by the American Bar Association, concluded that "Americans seem to dislike the concept of lawyer advertising" and feel that advertising is "damaging to the legal system." Public participants in ABA focus groups "suggest that lawyer advertising on television may be the most significant contributor to the public derision toward lawyers." Only 57% of the public thought lawyers should be allowed to advertise in newspapers and only 48% thought lawyers should be allowed to advertise on television. Gary A. Hengstler, Vox Populi - The Public Perception of Lawyers: ABA Poll, 79 A.B.A. J. 60 (1993).

In summary, there is no legitimate basis for TAC's argument that the "entire scheme" of the rules adopted by referendum are unconstitutional and TAC has failed to submit any legal basis for its suggestion to the contrary.

B) Analysis Of The "Most Offensive Aspects" To TAC Of The Rules Adopted By Referendum

The rules discussed below are argued by TAC to contain the "most offensive aspects" of the rules now before the Court. (TAC Brief, pp. 17-20) In addressing the constitutionality of these rules, one must not overlook the identity of those who the rules are designed to protect. These rules are designed to protect parties who frequently are approached via television or direct mail at a moment of high stress and vulnerability. As a group, they are not sophisticated or experienced business executives as were the targets of solicitation by a Certified Public Accountant in Edenfield v. Fare, 113 S. Ct. 1792 (1993). Those targeted prospective clients exercised caution, checked references and deliberated before deciding to act. 113 S. Ct. at 1803. Therefore, it is critical that the bar insure that whatever

information is conveyed is not only truthful and not deceptive, but likewise, that it is designed to facilitate "informed and reliable decisionmaking," Bates, supra, 433 U.S. at 364.

1. **Rules 7.02(a)(3) and 7.04(n).**

Rule 7.02(a)(3), adopted by referendum, reads as follows:

> A lawyer shall not make a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:
>
> * * *
>
> (3) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

Rule 7.04(n), adopted by referendum, reads as follows:

> No advertisement in the public media shall contain any statement or representation that cannot be factually substantiated or any statement or representation, express or implied, relative to the professional superiority of a lawyer or the professional services to be rendered unless the truth thereof can be factually substantiated.

Rule 7.02(a)(3) is claimed by Texan Against Censorship to be unconstitutional and one of the most offensive aspects of the rules adopted by referendum. TAC Brief, p. 17. Yet it is taken, verbatim, from current Rule 7.01(a)(3). It is, additionally, the verbatim text of Rule 7.1(c), ABA Model Rules of Professional Conduct.

Rules 7.02(a)(3) and 7.04(n) each require demonstrable truth in advertising. These rules are said by TAC to "rely on undefined, subjective, and therefore, ambiguous terms." (TAC Brief, p. 17). The terms used in these rules are not vague or ambiguous. They are not defined in the rules but they have common meanings and are used in that sense.

TAC asks whether these rules forbid advertisements stating that a particular attorney is dependable, hardworking, a tough negotiator, loyal, or smart? Rule 7.04(n) prohibits a lawyer from advertising that he or she is dependable unless it can be factually substantiated as true. Likewise, the rules adopted prohibit a lawyer from advertising that he or she is hardworking, a tough negotiator, loyal, or smart unless it can be factually substantiated as true. If lawyer X cannot factually substantiate that he or she is "tough" and that he or she is "smart," then an advertisement asserting the same violates Rule 7.04(n) adopted by referendum.

The purpose of these rules is simple. They aid in assuring truth in the dissemination of information. False, deceptive, or misleading commercial speech may be prohibited. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748. In Virginia Pharmacy, the Court noted by footnote 24, 425 U.S. at 771, that there are common sense differences between commercial speech and other protected speech that justify different degrees of protection to insure the flow of truthful and legitimate information. That difference results in a tolerance toward required disclosures and disclaimers in connection with commercial speech

that would not be permitted with other protected speech. As the Court explains (note 13b), 425 U.S. at 771:

> The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.

Likewise, in Bates, the Court said: "Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." 433 U.S. at 383. Later, in Zauderer, the Supreme Court of the United States noted that the use by lawyers of non-verifiable claims of quality in advertisements might be subject to prohibition. (Citing Bates, 433 U.S. at 366). Zauderer, 471 U.S. at 640, n.9. We contend that the public is entitled to receive advertising which can be factually substantiated as true by the advertising lawyer. There is no decision from any court to the contrary. Furthermore, the Supreme Court of the United States in Shapero v. Kentucky Bar Assn., 486 U.S. 466 (1988), suggested that if direct mail solicitation letters to prospective clients were required to be filed with an agency of the bar, the reviewing agency " ... might, for example, require the lawyer to prove the truth of the fact stated...." 486 U.S. at 477.

The State Bar of Texas has a legitimate interest in seeing that statements and representations in lawyer advertisements and solicitations are true. The single best, most reliable and efficient means to accomplish this objective is to require, as suggested in Shapero, supra, that the advertising lawyer be able to prove the truth of

the same. As the Court noted in Bates, " ... we have little worry that regulation to assure truthfulness will discourage protected speech." 433 U.S. at 383.

2. **Rules 7.04(g), 7.04(o), and 7.04(h)**

Rule 7.04(g), adopted by referendum, reads as follows:

> (g) All advertisements in the public media shall be presented without appeals primarily to emotions.

Rule 7.04(o), adopted by referendum, reads as follows:

> (o) No motto, slogan or jingle that is false or misleading or that appeals primarily to the emotions may be used in any advertisement in the public media.

Rule 7.04(h), adopted by referendum, reads as follows:

> In television advertising, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were a lawyer, shall be one or more of the lawyers whose services are being advertised. In radio advertising, any person who narrates an advertisement as if he or she were a lawyer, shall be one or more of the lawyers whose services are being advertised.

TAC, without citation to authority, says in its brief that " ... all effective advertising -- even truthful, non-deceptive advertising -- relies on an appeal to emotions. TAC Brief, p. 17. The question is not, however, whether a lawyer's advertisement can lawfully appeal to emotions. The question is: can a lawyer's advertisement be prohibited where that advertisement appeals primarily to emotions?

TAC cites Heffron v. International Society for Krishna Consciousness, 451 [sic] U.S. 640, 655 (1987) [the proper case citation is 452 U.S. 640 (1987)] for the proposition: "Free speech rights include the right to reach the attention of a potential listener." TAC Brief, p. 18. In Heffron, supra, the Supreme Court held that a rule which limited the geographical areas within the Minnesota State Fairgrounds where written materials could be sold, exhibited or distributed to be constitutional in spite of the conclusion that free speech includes the right to reach the attention of a potential listener. The Court relied upon Kovacs v. Cooper, 336 U.S. 77 (1949). In Kovacs, supra, the Court held a city ordinance prohibiting the operation of motor vehicles on city streets to transmit "loud and raucous noises" from sound amplifiers to be constitutional. The Court found there to be no restriction upon the communication of ideas or the discussion of ideas. 336 U.S. at 89. It is interesting that TAC should cite Heffron, supra. First, Heffron is not a commercial speech case. Second, a reasonable restriction on speech was upheld in Heffron. Third, Heffron relied upon Kovacs v. Cooper, 336 U.S. 77 (1949) for the statement TAC quotes. See 452 U.S. at 655. Fourth, Kovacs does not support TAC's position. Kovacs v. Cooper, supra, recognized the benefit of voice amplifiers in attracting attention. 336 U.S. at 88-89. Nevertheless, the Court upheld the ban on the use of the same when other means of publicity are available. 336 U.S. at 89.

The Iowa State Bar adopted a rule prohibiting television advertisements containing background sounds, visual displays, and employment of more than a single, nondramatic voice. The Supreme Court of Iowa applied Zauderer and upheld the

constitutionality of the Iowa Bar rule. Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Humphrey, 377 N.W.2d 643 (Iowa 1985). The Supreme Court of the United States then denied certiorari. Humphrey v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association, 475 U.S. 1114 (1986). Humphrey is an important case and it reflects the Supreme Court's willingness to allow State Bar rules to stand which sanitize advertisements from emotional pitches. Other than by denying certiorari in Humphrey, the Supreme Court has not ruled on a lawyer advertising case involving radio or television. Appeals made primarily to the emotions will, necessarily, be made more often in television ads (and radio to a lesser extent) than in the printed media. In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Court noted that " ... the special problems of advertising on the electronic broadcast media will warrant special consideration. (Emphasis added.) 433 U.S. at 384. The rules adopted by referendum give special consideration to the problems presented by electronic broadcasts.

The State Bar of Texas has adopted by referendum Rule Nos. 7.04(g), (o) and (h) to prohibit appeals primarily to emotion because the thrust of protected speech is the conveyance of ideas, information, argument, and positions. The rules adopted reasonably fit the legitimate interest and goal of providing potential consumers of legal services with reliable, verifiable, substantive and significant information for use in the recipient's decision making process.

3. **Rule 7.04(j)**

Rule 7.04(j), adopted by referendum, reads as follows:

> A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for a period of at least ninety (90) days, unless the advertisement specifies a shorter period; but if the advertisement is in the classified section, or "yellow pages," of telephone directories or in other media not published more frequently than annually, a lawyer shall conform to the advertised fee or range of fees for a period of at least one year after date of publication.

Rule 7.04(j), adopted by referendum, is not a commercial speech rule. It does not prohibit speech, nor does it require speech. Rule 7.04(j) is a rule of pure legal ethics. It is designed to assure that lawyers honor advertised fees for at least 90 days unless they inform the public that the fee advertised will be honored for a shorter period of time and that lawyers who advertise fees in phone books or other annual publications honor the advertised fee for at least one year after publication. This is clearly a rule designed to protect the public. To advertise a fee and refuse to honor it for these minimal periods of time is misleading. The right of commercial speech does not include the right to mislead. A record reflecting that some fee advertisements have been "misleading in practice" would be helpful if this rule were being reviewed in an actual case or controversy. TAC's objection to this rule is unjustified.

4. **Rule 7.05(a)**

Rule 7.05(a), adopted by referendum, reads as follows:

> A lawyer shall not send or deliver, or knowingly permit or cause another person to send or deliver on the lawyer's behalf, a

written communication to a prospective client for the purpose of obtaining professional employment if:

> (1) The lawyer knows or reasonably should know the prospective client could not exercise reasonable judgment in employing a lawyer;
> (2) The lawyer knows or reasonably should know that the prospective client has made known a desire not to receive communications from the lawyer or communications concerning professional employment of a lawyer;
> (3) The communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;
> (4) The communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04(a) through (c), (g), and (i) through (q) that would be applicable to the communication if it were an advertisement in the public media; or
> (5) The communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

This rule, in substantial part, is taken from present Rule 7.01(f) and is, in many respects, substantially similar to DR 2-103(D) promulgated by this Court, in an exercise of inherent power, after two referendums on advertising rules were unable to satisfy the 51% minimum participation requirement. See Order of the Supreme Court of Texas, 635 S.W.2d XLI (Tex. 1982).

TAC complains of Rule 7.05(a) suggesting that it restricts " ... the use of targeted direct mail solicitation similar to the barratry rules recently held unconstitutional in Moore v. Morales, 843 F. Supp. 1124 (S.D. Tex. 1994) and

McHenry v. The Florida Bar, 21 F. 3d 1038 (11th Cir. 1994)." Although TAC makes no attack on any specific part of Rule 7.05(a), one must assume the attack intended is not directed toward either 7.05(a)(2), which is similar to § 38.12(d)(2)(E) of Tex. Penal Code [the "Barratry Statute"], or to 7.05(a)(3) which is virtually identical to § 38.12(d)(2)(F) of the Barratry Statute, or to 7.05(a)(5), which is identical to § 38.12(d)(2)(G) of the Barratry Statute. None of these provisions of the Barratry Statute have been attacked in any of the cases involving the same. Rule 7.05(a)(1) is virtually identical in text, and is identical in meaning, to DR 2-103(D)(1) of the advertising rules adopted by this Court in 1982. 635 S.W.2d at XLIV. There is no indication in TAC's brief as to the nature of the complaint other than to say Rule 7.05(a) is similar to the barratry statutes, considered in McHenry and considered in Moore. In other words, TAC makes no direct factual or constitutional attack upon Rule 7.05(a).

TAC is incorrect in its assertion that Rule 7.05(a) is "remarkably similar" to the rule involved in McHenry v. The Florida Bar. The Eleventh Circuit's opinion in that case makes it clear that the only thing in issue was the constitutionality of Florida Bar Rule 4-7.4(b)(1)(A) which prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients unless the accident or disaster occurred more than 30 days prior to the mailings of the communication. Likewise, the Court's opinion in Moore v. Morales provides no basis to attack Rule 7.05(a).

The legitimate state interest in protecting the consumer's right of privacy was recognized by the U.S. Court of Appeals for the Tenth Circuit in Lanphere &

Urbaniak v. State of Colorado, 1994 WL 137009 (10th Cir. April 19, 1994). In Lanphere, the Plaintiffs claimed that a state statute limiting public access to criminal justice records such as reports concerning traffic violations and other offenses if such records were to be used for direct solicitation of business for pecuniary gain violated the First and Fourteenth Amendments to the Constitution. The Court of Appeals found that the State had a substantial interest in protecting individuals' rights of privacy and lessening the danger of overreaching by solicitors was directly advanced. Finally, the Court concluded that the statute "constitutes a 'reasonable fit' in advancing the State of Colorado's substantial interest in protecting privacy and avoiding abuse in direct mail solicitation for pecuniary gain." id at 6. The legitimate state interest in consumer protection and the reasonableness of Rule 7.05(a) to achieve such goal and interest is likewise apparent.

5. **Rule 7.07**

Rule 7.07, adopted by referendum, was the entirety of proposition B in Referendum '94. This rule contains the filing requirements of the advertising rules.

The Brief of TAC suggests that "Lawyer Newsletters" are entitled to "full First Amendment Protection," as opposed to the lesser protection provided under the commercial speech doctrine (TAC Brief, p. 19), and that the rules adopted by referendum impermissibly regulate political, as opposed to commercial speech. TAC's argument is erroneous and misleading as a careful reading of Rule 7.07 will clearly show.

Rule 7.07(a)(1) requires the filing of written solicitation communications, sent for the purpose of obtaining professional employment, unless such writing is exempt under Rule 7.07(d). Paragraph (d)(5) exempts newsletters sent only to: existing or former clients; lawyers or professionals; and members of certain nonprofit organizations. In addition, paragraph (d) exempts writings requested by a prospective client and additionally, writings "not motivated by or concerned with a particular past occurrence or event "and not motivated by the prospective client's specific known legal problem. A true political view, as opposed to an advertising pitch, will therefore be exempt from filing.

To strike terror, apparently, TAC says "the research materials and drafts supporting the newsletter must be promptly submitted to the Committee if requested....." citing Rule 7.07(e). Rule 7.07(e), in its entirety, reads as follows:

> If requested by the Lawyer Advertisement and Solicitation Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written solicitation.

Advertisements in the public media must be limited under Rule 7.04(n) to statements or representations that can be factually substantiated. Rule 7.04(a)(4) adopts the same requirement for written solicitations "to a prospective client for the purpose of obtaining professional employment." There is no basis for the suggestion that the Committee may request "research materials and notes and drafts supporting" a newsletter. The Committee may, however, " ... require the lawyer to prove the truth of the fact stated...." Shapero v. Kentucky Bar Assn., 486 U.S. 466, 477 (1988).

Rule 7.07 of the rules adopted by referendum clearly seeks to protect prospective consumers of legal services in accordance with a filing/review process suggested by the United States Supreme Court as appropriate for such purpose.

CONCLUSION

It would be extremely wasteful of time, energy, and expenditures to adopt a process so backward that rules governing the practice of law are first submitted by referendum and, if adopted by the membership, they may then be altered or rejected by the Supreme Court acting in a vacuum without a record, without a case or controversy, with no right of appeal on any restrictions erroneously believed to be constitutionally impermissible, and in contravention of an established statutory procedure. The proper - and only logical - alternative is for this Court to immediately promulgate the rules adopted by the referendum previously ordered by this Court.

Even if the Court were to consider the constitutionality of the proposed rules, the arguments presented above show both that the rules are constitutionally sound and that TAC has failed to demonstrate that the entire scheme or any individual provision under the proposed rules is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF CONCURRENCE

The undersigned, on behalf of the respective entities indicated, concur with the relief sought in the foregoing Reply Brief of the State Bar of Texas.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was forwarded on this 23rd day of June, 1994, by overnight delivery to Charles L. Babcock, counsel for the "Texans Against Censorship," at Jackson & Walker, 1100 Louisiana, Suite 4200, Houston, Texas 77002.

_____
Lonny D. Morrison

ORIGINAL

Misc. Docket No. 94-9021

IN THE SUPREME COURT OF TEXAS

IN RE:
PETITION OF THE STATE BAR OF TEXAS
FOR ORDER OF PROMULGATION

BRIEF IN SUPPORT OF IMMEDIATE PROMULGATION

STATE BAR OF TEXAS

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June 6, 1994

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Misc. Docket No. 94-9021

IN THE SUPREME COURT OF TEXAS

IN RE:
PETITION OF THE STATE BAR OF TEXAS
FOR ORDER OF PROMULGATION

BRIEF IN SUPPORT OF IMMEDIATE PROMULGATION

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF SAID COURT:

COMES NOW the State Bar of Texas and respectfully submits this response to the letter and brief of Texans Against Censorship which "urges this Court to exercise its inherent power to regulate and control the practice of law by conducting an independent review of the constitutionality of the proposed rules and thereafter, reject the same." This quote is from the June 1, 1994, letter of Charles L. Babcock, attorney for Texans Against Censorship, to John Adams, Clerk of this Court. The brief requests the same relief but uses different words.

Factual Background

On April 16, 1993, the Board of Directors of the State Bar of Texas appointed a Special Committee on Lawyer Advertising to consider a draft of proposed rules submitted at that meeting and to hold public hearings around the state for inquiry

and comment. The committee included plaintiff's lawyers and defense lawyers; lawyers who advertised and lawyers who did not; male lawyers and female lawyers; ethnic minority and majority lawyers; city lawyers and small town lawyers; and lawyers who served on the Board of Directors as well as lawyers who did not. The committee conducted eight public hearings and heard many views. The hearings were held in El Paso, Dallas, Brownsville, Houston, Tyler, Austin, Lubbock, and San Antonio.

On June 16, 1993, the Governor signed Senate Bill 1227 (Chapter 723, Vernon's 1993 Tex. Sess. Law Serv.). Section 7(a) of that act reads as follows:

> "Not later than June 1, 1994, the State Bar of Texas shall adopt rules governing lawyer advertising and written solicitations to prospective clients."

On September 11, 1993, the proposed rules were unanimously approved by the Board of Directors of the State Bar. The rules were endorsed by the Texas Trial Lawyers Association and by the Texas Association of Defense Counsel.

On September 17, 1993, this Court entered an Order directing that the proposed rules governing lawyer advertising and direct mail solicitation practices be submitted by referendum to the membership of the State Bar during the period of November 19, 1993, to December 20, 1993. Miscellaneous Docket No. 93-0178. The referendum measure was approved, overwhelmingly, by those who voted but the percentage of members who voted was less than the 51% minimum level of participation required by § 81.024 (d), Tex. Gov't Code. As a result, the referendum result was invalid. The State Bar did not request the Court to adopt the rules by an exercise of inherent

power, although some suggested it should. In explanation, see Morrison, "Inherent Power Is Not A Safety Net," 57 Tex. B.J. 112 (Feb. 1994).

On January 21, 1994, the Board of Directors of the State Bar of Texas voted unanimously to request a second referendum on the proposed amendments governing lawyer advertising and direct mail solicitation, together with other unrelated referendum measures. A public hearing was held on that petition with opposition to the petition voiced by attorneys for "Texans Against Censorship," various of its members, and perhaps other lawyers.

On February 3, 1994, this Court granted the Bar's petition for referendum and ordered that the referendum be submitted to a vote of the registered members of the State Bar of Texas. The Court's Order stated that no justice had made any determination on any legal question involving the subject matter of the referendum. In addition, the Court approved an amendment of the State Bar budget to authorize expenditures up to $250,000.00 for the purpose of educating State Bar members about the specifics of the proposed referendum measures and activating them to participate in the referendum process by voting.

Before and during the balloting period, Texans Against Censorship ran paid advertisements in the *Texas Lawyer* urging State Bar members to refrain from voting in the referendum on the proposed measures affecting lawyer advertising and direct mail solicitation practices. Other opposition, some of which urged lawyers not to vote, included letters to the editor of both the *Texas Bar Journal* and the *Texas Lawyer*, an article by Charles L. Babcock in the *Texas Bar Journal*, an article by Jim Adler in the *Texas Bar*

Journal, and a guest editorial by Charles L. Babcock and Alan N. Greenspan in the *Texas Lawyer.* Some of the opposition was directed toward an effort to defeat the 51% minimum participation requirement of § 81.024 (d), Tex. Gov't Code, for a valid referendum and some opposition was directed toward defeating the measures on the merits.

More than 51% of the Bar's members voted on each of the referendum measures pertaining to lawyer advertising and direct mail solicitation practices. An overwhelming percentage of those voting in the referendum voted in favor of adopting the proposed rules.

Texans Against Censorship now urges this Court to subvert the referendum process by refusing to promulgate the rule changes adopted by the membership in the referendum submitted pursuant to the Court's Order of February 3, 1994. To now refuse to promulgate rules which have with this Court's approval been submitted on two occasions to the membership of the State Bar, which have been overwhelmingly approved by members of the State Bar voting in the last referendum, and which resulted in expenditures of approximately $250,000.00 in the two referendums, would be unprecedented, wasteful, and in contravention of an established statutory procedure.

ARGUMENT AND AUTHORITIES

I

The Separate Means By Which Rules Governing The State Bar Of Texas And The Conduct Of Its Members May Be Adopted Or Amended

There are three means by which rules governing the State Bar of Texas or the conduct of its members may be adopted or amended. Those means are as follows:

A) By legislation;

B) By referendum of the members of the State Bar of Texas, submitted with Supreme Court approval, in accordance with § 81.024, Tex. Gov't Code; or

C) By Supreme Court Order in the exercise of its inherent power.

Each such means is discussed briefly below.

A. Rule Change By Legislation.

The legislature has, of course, authority to enact laws regulating the State Bar and the conduct of its members provided that such legislation does not impede the Supreme Court's ability to perform its duty to oversee the profession. State Bar of Texas v. Heard, 603 S.W.2d 829, 831 (Tex. 1980). Although the legislature has directed the State Bar by Senate Bill 1227 to adopt rules governing lawyer advertising and direct mail solicitation practices, the legislature has not yet enacted any such rules. Legislative leaders have, however, made it clear to all parties that if the Bar fails to exercise its privilege of self-regulation by adopting rules governing lawyer advertising and direct mail solicitation practices, the legislature will enact laws governing these practices. The State

Bar has adopted rules governing lawyer advertising and direct mail solicitation practices but such rules, to become effective, must be promulgated by this Court.

B. Rule Change By Referendum.

The second means of making rule changes governing the practice of law is by referendum. This procedure is provided by the provisions of § 81.024, Tex. Gov't Code and it is an arduous process. The process, as it currently exists, requires the Bar to motivate at least 51% of its registered members to cast a vote and for the majority of those members who vote, to vote in favor of the proposed change. The difficulty of rule change by referendum is attributable to several problems. First, the status quo provides some degree of comfort to the members of any profession and all change is resisted by some. Secondly, the proposed changes involve some restrictions and prohibitions. Thirdly, the forces of apathy, unavailability, fear of the unknown, and other natural resistors to change make the presently required high level of minimum participation a very substantial hurdle. In addition, in this referendum, there was organized opposition by the so-called Texans Against Censorship. Texans Against Censorship, in an effort to defeat the already difficult 51% minimum participation requirement, ran paid advertisements in lawyer periodicals urging lawyers not to vote.

C. Rule Change By Inherent Power.

The Supreme Court of Texas has inherent power to regulate the practice of law. However, the mere existence of such power does not justify its exercise. As Justice Doggett pointed out in a concurring opinion when this Court exercised its inherent power to adopt minor technical revisions to the Texas Disciplinary Rules of Professional

Conduct in Miscellaneous Docket No. 91-0065, "the overuse of inherent power is inherently dangerous." The exercise of inherent power is at odds with the concept of self-regulation where the change sought is substantial in nature. For this Court to now amend, rewrite, alter, or reject, by an exercise of inherent power, rules approved by referendum of the State Bar membership would be an abusive use of inherent power.

II

An Exercise Of Inherent Power Conflicts With Statutory Procedures, Is Unnecessary, And Is Unwise

This Court is now urged by the Texans Against Censorship to subvert the referendum process and exercise its inherent power to review and then reject the proposed rules instead of promulgating the rules adopted by referendum. For the Supreme Court to now, in an exercise of its inherent power, amend, rewrite, alter, or reject the rules adopted by referendum authorized by this Court would be an abuse of that sacred power. No such action has ever before been taken by this Court. Should the Court now exercise its inherent power to thwart the promulgation of rules adopted by referendum? Some considerations are discussed below:

A. <u>Conflict With Statutory Procedures</u>.

When the enormous difficulty of accomplishing meaningful change by referendum is accomplished, § 81.024, Tex. Gov't Code, provides that the "Supreme Court *shall* promulgate each rule and amendment that receives the majority of the votes cast in an election." (emphasis added). According to *Webster*, to promulgate means "... 1: to make known by open declaration: PROCLAIM 2a: to make known or public the

terms of (a proposed law) b: to issue or give out (a law) by way of putting into execution." *Webster's Seventh New Collegiate Dictionary* (1967).

Texans Against Censorship argue (p. 21 of its brief) that because 81.024(b), Tex. Gov't Code, provides that the Court *may* submit matters to referendum, the Court has no duty to promulgate rules adopted by referendum even though 81.024(e), Tex. Gov't Code, provides that the "Supreme Court *shall* promulgate each rule and amendment that receives a majority of the votes cast in an election" (emphasis added). Clearly, the legislative contemplation is that the Court *may* or *may not* submit a requested referendum but that, once submitted and passed, the Court shall promulgate each rule and amendment adopted by a majority vote. Thus, while the Court might have refused to allow the submission of this referendum, it will clearly be at odds with a statutory directive if it should fail to promulgate the rules adopted.

B. Absence Of Appellate Review.

The proposed rules have been lawfully adopted by the members of the State Bar in accordance with the legislatively prescribed procedures and this Court's Order of February 3, 1994. The lawyers of Texas have a right to adopt the most restrictive rules constitutionally permitted governing lawyer advertising and direct mail solicitation practices. The rules adopted may or may not go that far. If this Court, which is obviously not a Court of last resort on constitutional issues, should erroneously delete or alter a rule adopted by referendum, to whom can the State Bar appeal? The answer is obvious. This Court should not address constitutional objections to the rules adopted until there is a case or controversy involving a party with justiciable interests. Otherwise, the Bar

and the citizens of Texas may be deprived of constitutionally permitted rights without an opportunity of appeal.

C. Absence Of Res Adjudicata.

Any deletions, restrictions, or alterations to the rules prior to promulgation will bind the State Bar, without a right of appeal. However, in the absence of a case or controversy, any provisions of the rules upheld by this Court will have no res adjudicata or other effect upon any individual lawyer in any subsequent litigation.

D. Absence Of A Record.

This Court is being urged by the Texans Against Censorship to decide broad issues of constitutional law in the abstract, on hypothetical terms, without being case specific. To do so would grossly diminish the quality of justice. For this Court to be asked to make rulings of constitutionality on hypothetical facts, in a single case involving multifarious issues, without the benefit of a record, is unfair to the Court and unfair to the State Bar.

E. Inevitable Delay.

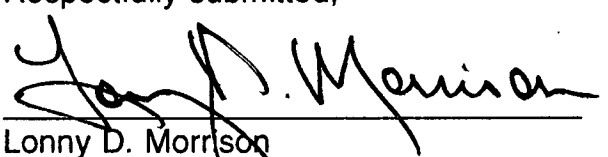
The Texas legislature found there to be a pressing public problem resulting from current abuses in lawyer advertising and direct mail solicitation practices. When the legislature directed adoption of rules by June 1, 1994, there is obviously a high degree of concern that delay is contrary to the public interest. The problem was severe enough that the House passed a bill dealing with those subjects and the Senate would have likely done the same but for the enormous efforts of the State Bar to allow the Bar, in a process of self-regulation, to seek adoption by referendum. Had the legislature

proceeded, there would have been no constitutional review, in the absence of a case or controversy, of the restrictions imposed prior to enactment. Likewise, there shouldn't be now. Where the need for reform has been clearly demonstrated, for this Court to undertake a course of constitutional review, which inevitably will result in substantial delay, is unjustified.

CONCLUSION

It would be extremely wasteful of time, energy, and expenditures to adopt a process so backward that rules governing the practice of law are first submitted by referendum and, if adopted by the membership, they may then be amended, rewritten, altered, or rejected by the Supreme Court acting in a vacuum without a record, without a case or controversy, with no right of appeal on any restrictions erroneously believed to be constitutionally impermissible, and in direct violation of an established statutory procedure. The proper - and only logical - alternative is for this Court to immediately promulgate the rules adopted by the referendum previously ordered by this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was forwarded on this 6th day of June, 1994, by overnight delivery to Charles L. Babcock, counsel for the "Texans Against Censorship," at Jackson & Walker, 1100 Louisiana, Suite 4200, Houston, Texas 77002.

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June 1, 1994

VIA FEDERAL EXPRESS DELIVERY
Mr. John Adams
Clerk, Texas Supreme Court
201 West 14th, Room 104
Austin, Texas 78701

Re: In Re State Bar Petition for Order of Promulgation of the Proposed Amendments to the Texas Rules of Disciplinary Conduct.

Dear Mr. Adams:

Enclosed for filing is the original and eleven copies of the brief of Texans Against Censorship ("TAC") opposing the State Bar's petition for Order of Promulgation of the Proposed Amendments to the Texas Rules of Disciplinary Conduct. TAC respectfully urges this Court to exercise its inherent power to regulate and control the practice of law by conducting an independent review of the constitutionality of the proposed rules and thereafter, reject the proposed rules.

In conjunction with the brief, we respectfully request a hearing before the Texas Supreme at any time convenient to the court.

Please file the original with the Court and return the file-marked copy in the envelope I have provided for you.

Thank you for your assistance in this matter.

Very truly yours,

Charles L. Babcock (s.l.w.)

Charles L. Babcock

CLB:mpf

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cc: **VIA FEDERAL EXPRESS DELIVERY**
Ms. Karen Johnson
Executive Director
The State Bar of Texas
1414 Colorado Street
Austin, Texas 78701

ORIGINAL

Misc. Docket No. 94-9021

IN THE SUPREME COURT OF TEXAS

IN RE PETITION TO AMEND THE TEXAS RULES OF DISCIPLINARY CONDUCT PART VII

BRIEF OF TEXANS AGAINST CENSORSHIP OPPOSING THE TEXAS BAR'S PROPOSED AMENDMENTS TO THE TEXAS RULES OF DISCIPLINARY CONDUCT PART VII

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June 1, 1994

Attorneys for Texans Against Censorship

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IN THE SUPREME COURT OF THE STATE OF TEXAS

IN RE PETITION TO AMEND TEXAS RULES OF DISCIPLINARY CONDUCT PART VII

BRIEF OF TEXANS AGAINST CENSORSHIP

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW Texans Against Censorship and respectfully submits this brief to show the Court as follows:

STATEMENT OF INTEREST AND CONCERN

On or about January 21, 1994, the Board of Directors of the State Bar of Texas (the "Board") filed a petition with this Court to authorize a second referendum on the proposed amendments to the Texas Disciplinary Rules of Professional Conduct, Part VII, governing lawyer advertising. This Court, by a 5-4 margin, granted the Board's petition to hold a second referendum which was held in conjunction with the election of the State Bar president-elect. The Bar has advised Texans Against Censorship that over 51% of the Bar voted in the referenda on the proposed amendments relating to attorney advertising and that the proposed amendments garnered a majority of that 51%.

Texans Against Censorship is a non-profit group opposed to unconstitutional restrictions on freedom of speech. Texans Against Censorship believes that the proposed amendments violate both the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution. The proposed amendments will have a severe chilling effect on free speech rights of *all* attorneys. For the reasons discussed herein, Texans Against Censorship urges this Court to exercise its inherent power to regulate and control the practice of law by conducting an independent review of the constitutionality of the proposed rules and thereafter rejecting the proposed rules.

ARGUMENTS AND AUTHORITIES

I. AN ANALYSIS OF THE PROTECTION AFFORDED TO SPEECH BY THE U.S. AND TEXAS CONSTITUTIONS

A. The First Amendment to the United States Constitution Guarantees the Unrestricted Dissemination of Truthful, Non-Deceptive Advertising of Legal Services.[1]

In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), the United States Supreme Court rendered the first of several rulings extending First Amendment protection to commercial speech; that is, speech which does "no more than propose a commercial transaction." In invalidating a state ban on advertisements by Virginia pharmacists, the Court stated:

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

Virginia State Board, 425 U.S. at 770 (citations omitted). The Court stressed the importance to the public and our society of a free flow of commercial information:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end the free flow of commercial information is indispensable.

Id. at 765.

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[1] The proposed advertising regulations generally regulate commercial speech, however, at least in one instance the rules regulate newsletters - a form of speech which demands full constitutional protection as we discuss, infra at 19-20.

In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the United States Supreme Court ruled that lawyer advertising falls under the rubric of constitutionally protected commercial speech. The Court held that attorney advertising enjoyed First Amendment protection against blanket suppression, and it emphasized that suppression of such speech would violate the public's fundamental right to receive useful commercial information. In particular, the Court stated:

> [A] consideration of competing interests reinforced our view that such speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts. The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.

Bates, U.S. at 363-64 (citations omitted).

The United States Supreme Court has continued to expand the Bates doctrine, for example, by providing constitutional protection to truthful and non-deceptive lawyer advertising using illustrations and self-recommending statements in the print media and by direct mail. For example, in In re RMJ, 455 U.S. 191 (1982), the Supreme Court considered a state's effort to regulate the language and content of attorney advertisements. There, the Missouri Supreme Court had disbarred an attorney for a newspaper advertisement that included information not expressly permitted by the Missouri Bar's rules. In reversing the Missouri Supreme Court, the Supreme Court stated:

> We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as

> well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, *in the absence of a finding that his speech was misleading,* does not meet these requirements.

In re RMJ, 455 U.S. at 207 (emphasis supplied).

In Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), the Court again affirmed the constitutional principle that the states may not ban or suppress truthful, non-deceptive advertisements regarding legal services. The Court there invalidated Ohio's attempted discipline of a lawyer who used an illustration to attract clients. According to the Court:

> The advertisements. . .concerning the Dalkon Shield were. . .neither false nor deceptive, in fact, they were entirely accurate. . . .The State's power to prohibit advertising that is "inherently misleading," thus cannot justify Ohio's decision to discipline appellant for running advertisements geared to persons with a specific legal problem.

Zauderer, 471 U.S. at 647 (citations omitted). The Court explained that illustrations and pictures attract the attention of an audience to the advertiser's message and provide information directly. The Court concluded that because illustrations serve such an important communicative function in advertising, they are entitled to the same First Amendment protection afforded verbal commercial speech. Id. The Zauderer Court condemned "broad prophylactic rules" which threaten "the protections afforded commercial speech." Id. at 649. The Zauderer Court further found that the Ohio Bar's absolute ban on self-recommending statements was unconstitutional:

> Although our decisions have left open the possibility that States may prevent attorneys from making non-verifiable claims regarding the quality of their services. . .they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

Id. at 639 (citing In re RMJ, 455 U.S. at 203-205).

In Shapero v. Kentucky Bar Association, 486 U.S.466 (1988), the U.S. Supreme Court struck down a Kentucky Bar rule prohibiting direct mail solicitation of prospective clients. The Court held that a "state may not categorically prohibit lawyers from soliciting legal business by sending truthful and nondeceptive letters to potential clients known to face a particular legal problem." Shapero, 486 U.S. at 478. The Court considered, but rejected the state's alleged substantial interest in preventing overreaching, undue influence and intimidation. The Court stated that "as long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient." Id. at 477.

The Court noted in Shapero that its lawyer advertising cases have never distinguished between different modes of written advertising to the general public. Id. at 473. Thus, a targeted direct mail campaign could not be prohibited since it possessed the same inherent qualities as any other written advertisements. The Court further stated that the First Amendment does not allow a complete prohibition of certain speech merely because it is more efficient. Id. at 476.

In Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990), the Court struck down Illinois' regulation prohibiting attorney advertising. The Court found that the state's belief that all advertising by professionals must be inherently misleading did not constitute a sufficient basis to ban such advertising. Peel, 496 U.S. at 110-111. The Court stated that "truthful advertising related to lawful activities is entitled to First Amendment protection." Id. The Court also noted that, although a State may prohibit misleading advertising entirely, it may not place an absolute prohibition on potentially misleading information if the information may also be presented in a manner that is not deceptive. Id. (citing In re RMJ, 455

U.S. at 203). Peel teaches that while the Board has the authority to regulate the practice of law, it must do so constitutionally:

> The Commission's authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a contribution to [consumer] decision-making than is concealment of such information. . . . The Commission's concern about the *possibility of deception* in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.

Peel, 496 U.S. at 108-109 (emphasis supplied).

It is clear from Bates and its progeny that a state may only prohibit commercial speech that is false or misleading. In every instance, except in the case of in-person solicitation for pecuniary gain, the Supreme Court has rejected attempts to restrict truthful, non-deceptive attorney advertising. See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)(upholding ban on lawyer's in-person solicitation for pecuniary gain because of inherent likelihood of abuse, intimidation or overreaching). During the past two decades, the Supreme Court has expanded the rights of lawyers to advertise, and consumers to receive, information about legal services. In theses cases, the Court has emphasized the significant individual and societal interests served by the free flow of commercial speech in general, and lawyer advertising in particular. The Bates Court noted that "commercial speech serves to inform the public of the availability, nature and prices of products and services," thus "assuring informed and reliable decision." Bates, 433 U.S. at 364. Attorney advertising, the Bates Court further found, "encourages persons who traditionally go unrepresented to obtain counsel and seek access to the courts." Id. at 376-77 (recognizing that restriction on advertising "likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable"). The Zauderer Court also recognized the substantial benefits that accrue from lawyer advertising, noting that "insofar as

appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the system, it was undoubtedly more valuable than many other forms of advertising." Zauderer, 471 U.S. at 646.

B. Article I, Section 8 of the Texas Constitution Provides an Independent and Broader Protection of Lawyer Advertising

It is important to note that, notwithstanding the broad protections of free speech rights under the First Amendment, such protections are even stronger under the Texas Constitution. The Texas Supreme Court has determined on several occasions that the Texas Constitution affords protection beyond that provided by the United States Constitution. See, e.g., O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 402 (Tex. 1988); LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986). One commentator has characterized Texas' free speech right as being broader than its federal equivalent, stating:

> Various states, like Texas, have broader free speech and assembly protection, which are often positively phrased as affirmative grants of rights rather than the simple restriction of government power observed in the First Amendment to the Federal Constitution. These more expansive guarantees . . . offer a significant distinction upon which courts rely to construe their state constitutions.

O'Quinn, 763 S.W.2d at 402 (quoting J. Harrington, The Texas Bill of Rights 40 (1987)).

More recently, the Texas Supreme Court, in Davenport v. Garcia, 834 S.W.2d 4, 8 (Tex. 1992), reaffirmed its position that the Texas Constitution affords protection beyond that provided by the U.S. Constitution by noting that "it is quite obvious that the Texas Constitution's affirmative grant of free speech is more broadly worded than the First Amendment's." In Davenport, this Court held: "Today, we adopt a test recognizing that Article I, Section 8 of the Texas Constitution provides greater rights of free expression than its federal equivalent." Id. at 10. The Court also held that the "prior restraint of expression is

presumptively unconstitutional" and that "it [prior restraint] will withstand scrutiny . . . only in the most extraordinary circumstances." Id. (quoting O'Quinn, 763 S.W.2d at 402).

The Court in Davenport also noted that "continued inclusion of an expansive freedom of expression clause [in Article I, Section 8] and rejection of more narrow protection, indicates a desire in Texas to ensure broad liberty of speech." Davenport, 834 S.W.2d at 8. The Court further reaffirmed its prior pronouncement that "our constitution has independent vitality, and this Court has the power and duty to protect the additional state guaranteed rights of all Texans." Id. at 11 (citing LeCroy, 713 S.W.2d at 339).

The authority outlined above illustrates that the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution afford protection to truthful, non-deceptive lawyer advertising.

C. Restrictions on Commercial Speech Must Be Narrowly Tailored and Further a Substantial Governmental Interest

The Supreme Court set forth the current standard governing regulation of commercial speech in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

The Court recently explained in Board of Trustees of S.U.N.Y. v. Fox, 491 U.S. 469 (1989), that this test requires that a state proposing to restrict commercial speech show that it

has "carefully calculated" the "cost" of the proposed restriction to the First Amendment interests of both the speaker and the public. Fox, 492 U.S. at 480. This consitutional standard protects two fundamental interests: (1) an attorney's right to communicate information about legal services; and, (2) the public's right to receive such information. Zauderer, 471 U.S. at 651; Peel, 110 S.Ct. at 2293 (information about certification and specialties was entitled to constitutional protection because it facilitates the consumer's access to legal services and thus better serves the administration of justice).

The Supreme Court's decisions make it clear that the government has the burden of justifying its restrictions on commercial speech. See Zauderer, 471 U.S. at 641 ("Our decisions impose on the state the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest"); City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505, 1510 (1993) (reaffirming that the state has the burden of justifying restrictions on protected commercial speech). Therefore, in order for the Board's proposed restrictions on lawyer advertising to survive the required constitutional scrutiny, the Board must demonstrate: (1) a substantial governmental interest to justify its restrictions; (2) the existing standard has been inadequate to protect the governmental interest; and (3) the proposed restrictions are narrowly tailored to advance the substantial government interest.

In light of the holding in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), for any prohibition of public media advertising to survive constitutional scrutiny, the state must provide factual evidence that such advertising has the same potential for inherent abuse as in-person solicitation. The State cannot show such potential for abuse in justification of its proposed restrictions on lawyer advertising. Unlike in-person solicitation, the electronic and public media

do not pose inherent dangers of abuse. Shapero offers a common-sense approach that can be applied analogously to all lawyer advertising:

> [A] truthful and nondeceptive letter, no matter how big its type and how much it speculates can never shout at the recipient" or "grasp him by the lapels," as can a lawyer engaging in face to face solicitation. The letter simply presents no comparable risk of overreaching.

Shapero, 486 U.S. at 477. Shapero teaches that "the mode of communication makes all the difference" in what constitutes a permissible restriction." Id. at 473. With public media advertising (i) there is no personal coercive force of a trained advocate; (ii) the listener or viewer can put the advertisement aside by turning off the radio or television, changing the channel, or throwing away an unwanted letter; and, (iii) the advertising is public and, thus, easily available to the Board for scrutiny and disciplinary action, if warranted. Accordingly, advertising in the public media and written solicitations must be afforded the full First Amendment protection available to all commercial speech.

II. THE BOARD'S PROPOSED RULES ARE NEITHER NARROWLY TAILORED NOR DO THEY FURTHER A SUBSTANTIAL GOVERNMENTAL INTEREST

A. Each of the Board's Asserted Governmental Interests have been Rejected by the Supreme Court.

In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Arizona Bar urged six justifications for its complete ban on lawyer advertising, arguing that lawyer advertising: (i) is inherently misleading; (ii) would have an adverse effect on professionalism; (iii) would lead to an increase in litigation and overburden already crowded courts; (iv) would increase the cost of legal services; (v) would reduce the quality of legal services; and (vi) cannot be easily enforced due to large number of lawyers and the lack of sophistication of the typical client. The Bates Court rejected each of these arguments. It held that lawyer advertising was not inherently

misleading and found no economic or professional justification for the total ban on attorney advertising.

Opponents of lawyer advertising often assert that such advertising is undignified and, therefore, reduces public confidence in the legal process. Even if preserving dignity were a substantial governmental interest justifying some regulation, no data exist to support this conclusion. Zauderer distinguished between dignity in the courtroom and dignity in the First Amendment area:

> Although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights . . . [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

Id. at 648.

Those seeking to regulate attorney advertising often contend that advertising encourages litigation. The Bates Court also rejected this rationale:

> But advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.

Id. Furthermore, no data exist demonstrating that cases brought by lawyers who advertise are less meritorious than those brought by attorneys who do not advertise. See McChesney & Muris, The Effect of Advertising on the Quality of Legal Services, 65 A.B.A. J. 1503, 1506 (1979)(study concluding that not only is quality not compromised by advertising but also "quality may even increase").

Bates also rejected the rationale that advertising has an adverse effect on the quality of service. As the Court recognized, "restraints on advertising, however, are an ineffective way of deterring shoddy work." Bates, 433 U.S. at 377. Therefore, based on the decisions in Bates and Zauderer, the interests the Board may assert are insufficient to justify the abridgement of First Amendment rights that would result if the Court adopted the Board's proposed restrictions on lawyer advertising and written solicitation.

It is interesting to note that this Court has previously considered and recognized the value of the electronic media. The Court has adopted the local rules for Harris County and Dallas County regarding the broadcast of court proceedings. As stated in the Local Rules Governing the Recording and Broadcasting of Court Proceedings in the Civil District Courts of Harris County (the "Harris County Rules"):

> The policy of these rules is to allow electronic media coverage of public civil court proceedings to *facilitate the free flow of information to the public concerning the judicial system and to foster better understanding about the administration of justice.*

Harris County, (Tex.) Civ. Dist. R. 1 (Rules Governing the Recording and Broadcasting of Court Proceedings) (emphasis added). These rules were adopted by order of the Texas Supreme Court on September 17, 1992. By allowing television cameras into the courtroom, this Court rejected the very argument that the medium of electronic communications is inherently misleading.

As a practical matter, the Board cannot demonstrate a substantial interest to justify the type of restriction on attorneys' rights of free speech that will result from the adoption of the proposed rules. The overwhelming evidence that has been accumulating since the landmark decision in Bates indicates that lawyer advertising has been effective; has tended to reduce the

costs of legal services; has enhanced the accessibility of lawyers, especially for people who previously had been reluctant to seek legal representation; and has expanded the effectiveness of legal representation by increasing the public's awareness of legal rights. See Calvani, Langenfeld & Shufford, Attorney Advertising and Competition at the Bar, 41 Vand. L. Rev. 761, 776 (1988); McChesney, Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers, 131 U. Pa. L. Rev. 45, 79 (1985); Hazard, Pearce & Stempel, Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services, 58 N.Y.U. L. Rev. 1084, 1099 (1983). Consumers receive the same benefits from lawyer advertising as from advertising for other products and services. These benefits include information concerning the availability, nature, and price of the service, all of which allows for informed decision-making. McChesney, *supra,* at 50.

An American Bar Association feasibility study on advertising found that advertising had the potential to improve public attitudes toward attorneys, and could increase the likelihoood of a consumer contacting an attorney. Similarly, in an experiment conducted by the ABA Commission on Advertising, a 30 second television commercial advertising legal services was shown in a central Illinois market. The ABA report on that experiment, entitled Legal Advertising: The Illinois Experiment, found that legal advertising was met with strong public acceptance (less than one out of ten respondents had anything negative to say about the concept) and that public attitude can be positively affected when specific ideas are communicated.

There is no evidence that lawyer advertising in Texas presents a problem that cannot be solved through existing rules. The Board can provide no facts to explain why the current absolute prohibition on false or misleading advertising is inadequate. There have not been many instances of lawyers' abuse of the public through advertising or written solicitations. Indeed,

the Board has not often been inclined to institute disciplinary actions against attorneys' alleged fraudulent advertisements. In fact, a substantial number of the approximately 25 pending disciplinary actions in Texas regarding attorneys' communications involve improper third party solicitation of clients, and very few actions involve attorneys' false or misleading advertisements or written communications.

These state statistics are consistent with the national experience. The latest statistics from the American Bar Association Center for Professional Discipline, which maintains a record of lawyers disciplined throughout the United States, indicate that, from 1977 through 1988, only 50 lawyers were disciplined for advertising violations in all 50 states. See American Bar Association, Analysis of National Discipline Data Bank from the Center for Professional Discipline. The advertising lawyers disciplined represent only 0.16% of the total of 31,533 lawyers disciplined for a variety of violations during this time period.

In short, from both a legal and practical standpoint, the Board cannot demonstrate the required substantial governmental interest. Not only have the Board's asserted interests already been rejected by the Supreme Court in previous cases, but also the empirical information belies the necessity for the proposed amendments.

B. The Board's Proposed Rules Restricting Constitutionally Protected Commercial Speech Are Not Narrowly Tailored.

Finally, the Board has failed to meet the requirement of Fox that the state demonstrate a "reasonable fit" between its stated ends and the means chosen to accomplish those ends. Central Hudson requires that, even if the government interest is substantial, the regulation may not be more "extensive than necessary to serve that interest." Central Hudson, 447 U.S. at 566. The Board's proposed rules prohibiting production techniques and format ideas in public

media advertising and written solicitations, as well as the overly burdensome filing and disclosure requirements, are far more extensive than necessary to achieve any conceivable goal of the State Bar.

In fact, the techniques and formats that the Board seeks to prohibit are the kinds of effective methods of attracting the attention of viewers and listeners, which advance the interests lauded in Bates, RMJ, Zauderer, and Shapero, by ensuring the flow of valuable commercial information to the public. The proposed rules would drastically reduce the effectiveness of public media advertisements, and substantially reduce, if not eliminate, the dissemination of protected commercial speech.

C. Partial Analysis of the Proposed Rules

Texans Against Censorship contends that the entire scheme presented by the proposed amendments is unconstitutional. The heavy disclosure, recordkeeping, and financial burdens imposed by these rules will chill the advertising of truthful, non-deceptive information. As the U.S. Supreme Court recognized:

> Unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.

Zauderer, 471 U.S. at 651. This chilling effect would infringe upon lawyers' free speech rights as well as result in harm to the public due to the restriction on the dissemination of valuable information about legal services. See Linmark Assoc., Inc. v. Township of Wilingboro, 431 U.S. 85, 96 (1977) (stating that a restriction on speech impermissibly "prevented [people] from obtaining certain information"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (commercial speech is intensely concerned with the instrumental interest of hearers in receiving information that enhances the capacity for informed choice).

Putting aside the blanket unconstitutionality of the proposed rules, many of the rules are, standing alone, patently unconstitutional. While a detailed review of each rule would be prohibitively time-consuming in this context, a short discussion of a few of the most offensive aspects of the rules may assist the Court's analysis.

Several of the rules rely on undefined, subjective, and, therefore, ambiguous terms. For example, Proposed Rules 7.02(a)(3) and 7.04(n) prohibit statements in advertisements that cannot be "factually substantiated." Proposed Rule 7.04(q) prohibits statements that are not "readily subject to verification." Do these rules forbid advertisements stating that a particular attorney is dependable, hardworking, a tough negotiator, loyal or smart? Such terms surely are impossible to substantiate or verify to everyone's satisfaction.

In the same vein, Proposed Rules 7.04(g) and 7.04(o) forbid advertisements that "appeal[] primarily to the emotions." To what emotions do these rules apply? Would an advertisement intended to address a person's real and justifiable fear of being unable to pay medical bills constitute a violation? By the same token, would an advertisement intended to address a corporate officer's real and justifiable fear of being subjected to a frivolous lawsuit likewise constitute a violation? As these examples demonstrate, these terms are too ambiguous to be enforceable, especially since all effective advertising -- even truthful, non-deceptive advertising -- relies on an appeal to emotions.

The prohibition against "appeals to emotions" is even more objectionable as it appears in Proposed Rule 7.04(o), which states:

> No motto, slogan or jingle that . . . appeals primarily to the emotions may be used in any advertisement in the public media.

The use of a motto, slogan or jingle is not false or misleading. Indeed, it is entitled to the same communicative respect as illustrations -- which the Supreme Court found expressly protected by the First Amendment in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). Free speech rights include the right to reach the attention of a potential listener. Heffron v. International Society for Krishna Consiousness, 451 U.S. 640, 655 (1987).

Proposed Rule 7.04(h) appears calculated solely to increase the burden on advertising attorneys. That proposed rule prohibits the use of actors and narrators to portray lawyers in advertisements. Because there is nothing inherently misleading about the use of professional actors or narrators, there can be no justification for this rule. Moreover, there are a myriad of less restrictive means of preventing any confusion that might result from the use of an actor.

Proposed Rule 7.05(a), restricting the use of targeted direct mail solicitation, is remarkably similar to the barratry rules recently struck down by the U.S. Court of Appeals for the Eleventh Circuit and the United States District Court for the Southern District of Texas. See McHenry v. The Florida Bar, 1994 WL 177979 (11th Cir. May 10, 1994) (invalidating Florida Bar rules requiring 30 day waiting period to contact prospective clients in personal injury cases); Moore v. Morales, 843 F.Supp. 1124 (S.D. Tex. 1994) (invalidating similar Texas statute). In many ways, the invalidated barratry rules were more narrowly tailored than the Proposed Rule: the barratry rules would permit contact after 30 days, whereas the Proposed Rule is a permanent prohibition; the barratry rules were restricted to certain types of cases and potential clients, whereas the Proposed Rule is not limited in that way.

Proposed Rule 7.04(j) requires that lawyers who advertise specific fees for a specific service honor that fee for at least 90 days, or in some cases, for at least one year. This rule is undeniably content-based and, therefore, cannot be upheld as a reasonable time, place and

manner restriction. While any type of speech may be constitutionally curtailed via reasonable time, place and manner restrictions, such restrictions must be content-neutral. City of Cincinnati, 113 S.Ct at 1516 (1993) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)); see also Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (stating that "above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content. This is never permitted").

The scope of these Proposed Rules is far reaching. The proposed rules cover attorney newsletters--publications which are entitled to full First Amendment protection. Under these new regulations, newsletters will have to be submitted to the newly created Lawyer Advertisement and Solicitation Review Committee "either before or concurrently with the mailing." Proposed Rule 7.07(b). The submission must be accompanied by a fee, a copy of the newsletter, and "a representative sampling of the envelopes" transmitting the newsletter. This applies to newsletters unless they are sent only to existing or former clients, other lawyers or professionals, or members of nonprofit organizations that meet certain conditions. Finally, the research materials and notes and drafts supporting the newsletter must be promptly submitted to the Committee if requested "to substantiate statements and representations made or implied." Proposed Rule 7.07(e). In some circumstances, newsletters might be construed as "written solicitation communications," an undefined term used in the proposed rules, thereby subjecting newsletters to a multitude of regulations.

Although the United States Supreme Court has indicated that commercial speech receives lesser constitutional protection than other types of speech, newsletters do not fall within that category and are entitled to the highest level of First Amendment protection. Under the strict

scrutiny test, laws regulating the content of speech will be upheld only when they are justified by compelling governmental interests and are narrowly tailored to achieve those interests. The Board cannot meet such stringent requirements. The Board has failed to demonstrate that such proposed restrictions as those regarding newsletters are narrowly tailored to further a compelling governmental interest.

As even this abbreviated analysis demonstrates, the proposed rules are unconstitutional. As restrictions on commercial speech they fail because they are not narrowly tailored to advance a substantial governmental interest. Furthermore, to the extent that the proposed rules seek to regulate pure speech (e.g., newsletters), they are indefensible infringements on the rights guaranteed in the First Amendment and Article I, section 8 of the Texas Constitution.

III. THE COURT SHOULD EXERCISE ITS INHERENT POWER TO REGULATE AND CONTROL THE PRACTICE OF LAW BY REJECTING THE PROPOSED RULES

It is well settled that the Texas Supreme Court has the inherent power to regulate and control the practice of law. This inherent power is given to the Court by the present Texas Constitution of 1876. Daves v. State Bar of Texas, 691 S.W.2d 784, 789 (Tex.App.--Amarillo 1985, writ ref'd n.r.e.)(citing Scott v. State, 86 Tex. 321, 24 S.W. 789, 790 (1894)). The State Bar of Texas is governed by the State Bar Act and administratively controlled by the Supreme Court. Even though the State Bar Act is utilized as an aid in the Court's exercise of its inherent power to regulate and control the practice of law, the provisions of the Act do not, by virtue of the Court's inherent power under the Constitution, detract from or limit the Court's primary responsibility to regulate and control the legal profession by its own orders. Daves, 691 S.W.2d at 789 (citing State Bar of Texas v. Heard, 603 S.W.2d 829, 831 (Tex. 1980)). This Court, therefore, has the authority to refuse to promulgate the proposed rules.

Section 81.024 of the Government Code, makes clear that the Supreme Court must substantively consider the proposed rules. In particular, section 81.024(b) provides that the "supreme court *may*, . . . pursuant to resolution of the board of directors of the state bar, . . . prepare, propose, and adopt rules or amendments to rules for the operation, maintenance and conduct of the state bar and the discipline of its members." Tex. Gov't Code § 81.024(b) (emphasis added). By including the word "may," the legislature must have considered the possibility that the Supreme Court might choose not to prepare, propose and adopt rules proposed by the Board. This analysis of the statutory language is bolstered by a consideration of section 81.024(c), which states: "When the *supreme court* has prepared and proposed rules or amendments to rules under this section, the court shall mail a copy of each proposed rule or amendment in ballot form to each registered member of the state bar for a vote." Tex. Gov't Code § 81.024(c) (emphasis added).

When read together, these statutory provisions clarify that the Supreme Court is the real author of all Bar rules. Obviously, the legislature would not expect the Court to give its imprimatur to proposed rules that the Court itself did not consider constitutional and capable of lawful enforcement. Accordingly, before exercising its discretion to promulgate rules, the Court should carefully scrutinize the rules submitted by the Board.

CONCLUSION

It is evident that the Board's proposed excessive restrictions on public media advertising and written solicitation of legal services, if adopted, would severely restrict the dissemination to the public of reliable and valuable commercial information regarding the availabiltity and cost of legal services, in violation of the First Amendment to the U.S. Constitution and Article I, Section 8 of the Texas Constitution. The Board therefore is asking this Court to promulgate

rules that are unconstitutional and which this Court (or another court) will be forced to strike down. The credibility, dignity and image of the Board, this Court and Texas's lawyers will not be enhanced by such an expensive, yet futile, exercise. The proper -- and only logical -- alternative is for this Court to reject the proposed rules thereby choosing constitutional self-regulation over mere self-regulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Texans Against Censorship was served on The Executive Director of the State Bar of Texas, Ms. Karen Johnson, 1414 Colorado St., Austin, Texas, 78701 by overnight courier, on this the 1ST day of June, 1994.

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