

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA**

WILLIAM H. HARRELL, JR.;  
HARRELL & HARRELL, P.A.;  
and PUBLIC CITIZEN, INC.,

Plaintiffs,

v.

THE FLORIDA BAR; JOHN F. HARKNESS, JR., in his official capacity as Executive Director of The Florida Bar; KENNETH L. MARVIN, in his official capacity as Director of Lawyer Regulation of the Legal Division of The Florida Bar; MARY ELLEN BATEMAN, in her official capacity as Director of Ethics and Advertising of the Legal Division of The Florida Bar; ELIZABETH TARBERT, in her official capacity as Chief Ethics Counsel of the Legal Division of The Florida Bar; JAMES N. WATSON, JR., in his official capacity as Chief Disciplinary Counsel, Tallahassee Branch, of the Legal Division of The Florida Bar; SUSAN V. BLOEMENDAAL, in her official capacity as Chief Disciplinary Counsel, Tampa Branch, of the Legal Division of The Florida Bar; JAN K. WICHROWSKI, in her official capacity as Chief Disciplinary Counsel, Orlando

Civil Action No. \_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

Branch, of the Legal Division of  
The Florida Bar; ADRIA E.  
QUINTELA, in her official  
capacity as Chief Disciplinary  
Counsel, Fort Lauderdale Branch,  
of the Legal Division of The  
Florida Bar; and ARLENE K.  
SANKEL, in her official capacity  
as Chief Disciplinary Counsel,  
Miami Branch, of the Legal  
Division of The Florida Bar,

Defendants.

### **INTRODUCTION**

1. This is a suit under 42 U.S.C. § 1983 against The Florida Bar (“Bar”) and Bar officials responsible for enforcing the attorney advertising provisions of the Florida Rules of Professional Conduct. Plaintiffs challenge provisions of the rules that prohibit common and innocuous advertising techniques that have no potential to deceive consumers. These provisions generally prohibit techniques that are widespread in other industries, but that the Bar characterizes as either irrelevant to the decision whether to retain a lawyer or factually unverifiable, and therefore unfit for consumption by Florida consumers. The state’s restrictions on these commonplace advertising techniques—without which it would be nearly impossible to produce an interesting or effective advertisement—are vague, arbitrary, and

contrary to U.S. Supreme Court precedent holding that attorney advertising is a form of protected speech that the state can restrict only in furtherance of an important government interest. Plaintiffs seek a declaration that the portions of the rules restricting these techniques violate the First and Fourteenth Amendments to the U.S. Constitution, and an injunction against enforcement of these rules.

### **JURISDICTION**

2. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

### **PARTIES**

3. Plaintiff William H. Harrell, Jr. ("Harrell") is a resident of Jacksonville, Florida. He was admitted to The Florida Bar in 1974 and since then has actively practiced law in the state. Harrell is a trial lawyer with substantial jury trial experience and is rated "AV" by Martindale-Hubbell. Harrell is the majority shareholder and managing partner of the firm Harrell & Harrell, P.A.

4. Plaintiff Harrell & Harrell, P.A. is a law firm in Jacksonville, Florida. The firm employs sixteen attorneys licensed in Florida and is one of the larger personal-injury law firms representing plaintiffs in the state. Harrell & Harrell advertises its services to the public through broadcast

media, print advertisements, and other forms of public media. The firm also operates a website from within Florida, available at both <http://www.harrellandharrell.com/> and <http://www.251-1111.com/>.

5. Plaintiff Public Citizen, Inc. is a nonprofit public interest organization with approximately 90,000 members nationwide, including nearly 5000 in Florida. Public Citizen Litigation Group (PCLG) is a division of Public Citizen that conducts litigation in state and federal courts. Since its founding in 1972, PCLG has litigated for the public interest in cases concerning consumer rights, health and safety regulation, access to the civil justice system, freedom of speech, and other topics.

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

7. Defendant John F. Harkness, Jr., is Executive Director of The Florida Bar.

8. Defendant Kenneth L. Marvin is Director of Lawyer Regulation of the Legal Division of The Florida Bar.

9. Defendant Mary Ellen Bateman is Director of Ethics and Advertising of the Legal Division of The Florida Bar.
10. Defendant Elizabeth Tarbert is Chief Ethics Counsel of the Legal Division of The Florida Bar.
11. Defendant James N. Watson, Jr. is Chief Disciplinary Counsel of the Tallahassee Branch of the Legal Division of The Florida Bar.
12. Defendant Susan V. Bloemendaal is Chief Disciplinary Counsel of the Tampa Branch of the Legal Division of The Florida Bar.
13. Defendant Jan K. Wichrowski is Chief Disciplinary Counsel of the Orlando Branch of the Legal Division of The Florida Bar.
14. Defendant Adria E. Quintela is Chief Disciplinary Counsel of the Fort Lauderdale Branch of the Legal Division of The Florida Bar.
15. Defendant Arlene K. Sankel is Chief Disciplinary Counsel of the Miami Branch of the Legal Division of The Florida Bar.
16. Defendant state officials are jointly responsible for the investigation, prosecution, and discipline of attorneys throughout the state.

## FACTUAL ALLEGATIONS

### **A. The Rules Governing Lawyer Advertising in Florida**

17. Members of The Florida Bar are required to comply with restrictions on the content of attorney advertising set forth in the Florida Rules of Professional Conduct. Violations of the rules are grounds for discipline, including public reprimand, suspension, or disbarment. Rules Regulating the Fla. Bar §§ 3-4.2, 3-5.1.

18. Some of the advertising rules are designed to serve the state's legitimate interest in protecting consumers from false or misleading advertising. Other rules, however, prohibit harmless advertising techniques that are prevalent in the media and that consumers are accustomed to viewing. As to this second category of rules, the Bar has taken the position that any statement that is not both objectively relevant to the selection of a lawyer and factually verifiable is categorically prohibited by the rules.

Among other things, the rules contain the following restrictions.

- a) The rules require that lawyer advertisements "provide only useful, factual information presented in a nonsensational manner" and include no "slogans or jingles." Florida Rule of Professional Conduct § 4-7.1, cmt.

- b) The rules provide that a lawyer advertisement is “misleading”—and therefore prohibited—when it states that a lawyer possesses a qualification that is common to most or all other lawyers in Florida, such as the statement that a lawyer is a member of The Florida Bar. *Id.* § 4-7.2, cmt.
- c) The rules prohibit advertisements that “describ[e] or characteriz[e] the quality of the lawyer’s services.” *Id.* § 4-7.2(c)(2). The Florida Supreme Court has interpreted this rule to prohibit statements about a lawyer’s “character and personality traits,” *The Florida Bar v. Pape*, 918 So. 2d 240, 244 (Fla. 2005).
- d) The rules prohibit advertisements that are “unsubstantiated in fact,” *id.* § 4-7.2(c)(1)(D), including statements that “compare[] the lawyer’s services with other lawyers’ services,” *id.* § 4-7.2(c)(1)(I), or “promise results,” § 4-7.2(c)(1)(G). A comment to the rules states that these rules prohibit not only false statements, but also inherently subjective statements and statements of opinion, such as the statement that a lawyer is

“one of the best,” or “one of the most experienced” in a field of law. *Id.* § 4-7.2, cmt.

- e) The rules prohibit “visual and verbal descriptions” that are “manipulative, or likely to confuse the viewer.” *Id.* §§ 4-7.2(c)(3), 4-7.5. A comment to the rules explains that “manipulative” advertisements include advertisements that “create suspense, or contain exaggerations or appeals to the emotions, [or] call for legal services.” *Id.* § 4-7.2, cmt. As an example, the comment states that “a drawing of a fist, to suggest the lawyer’s ability to achieve results” is prohibited. *Id.*
- The rules also contain a list of content that is acceptable, including:

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

*Id.* § 4-7.2(b)(1)(L).



- f) The rules prohibit television and radio advertisements that contain “any background sound other than instrumental music.” A comment provides, as examples, that “the sound of sirens or car crashes and the use of jingles” are prohibited. *Id.* § 4-7.5(b)(1)(C).

19. The Florida Bar strictly applies and enforces these rules, regularly prohibiting, for example, advertisements containing harmless background noises, such as the sounds of traffic or children laughing, innocuous props and scenes, and subjective statements of the sort that routinely appear in other forms of advertisements.

20. In addition to the restrictions on the content of lawyer advertisements, the rules include procedural requirements that impose a prior restraint on television and radio advertisements. The rules require that these advertisements be submitted to the Bar for approval at least fifteen days before they are aired and prohibit submitting lawyers from running the advertisements before obtaining Bar approval. *Id.* § 4-7.7(a)(1).

21. None of these rules are adequately supported by studies, factual findings, or other evidence demonstrating that they directly advance a legitimate state interest.

22. The rules are too vague to provide guidance about what kinds of advertisements are prohibited and invite arbitrary and discriminatory enforcement in violation of the First Amendment to the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

**B. The Rules' Application to Plaintiffs William H. Harrell, Jr. and Harrell & Harrell, P.A.**

23. On May 10, 2002, plaintiff Harrell submitted for review by The Florida Bar a transcript of a proposed television advertisement for plaintiff Harrell & Harrell, P.A. that included the statement "Don't settle for anything less."

24. In a letter dated May 17, 2002, staff counsel for the Bar advised Harrell that the phrase did not comply with Rule 4-7.2(b)(1)(B) because it could "create unjustified expectations about results the lawyer can achieve." However, the Bar also stated that it was approving use of the phrase "Don't settle for less than you deserve" ("the phrase") as an alternative to the proposed language.

25. Based on the May 17, 2002, letter, Harrell changed his advertisements from the phrase "Don't settle for anything less" to "Don't settle for less than you deserve." Since then, Harrell has consistently used