IN THE SUPREME COURT
STATE OF GEORGIA

IN RE: MOTION TO AMEND 2023-1

DOCKET NO. S24U0172

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I. INTRODUCTION

On May 2, 2023, the State Bar of Georgia submitted an *Amended Motion to Amend the Rules and Regulations of the State Bar of Georgia.* The proposed changes clarify and revise restrictions on lawyer communications with prospective clients. The State Bar carefully vetted and selected its proposed amendments so that each proposed amendment (i) used language previously held to comport with constitutional limitations and (ii) was narrowly tailored to achieve the significant and legitimate goals of the State Bar.

On September 25, 2023, this Court ordered the State Bar to submit a brief analyzing the federal and state constitutional implications of the proposed amendments to Rules 7.1-7.5 of the Georgia Rules of Professional Conduct, which pertain to attorney advertising. As such, this brief is limited to an analysis of those proposed amendments and rules that potentially implicate constitutional issues.

II. SUMMARY OF PROPOSED AMENDMENTS

A. Rule 7.1: Communications Concerning a Lawyer's Services

The first proposed change to Rule 7.1 is to move the former Comment 1, which defines a false or misleading communication, to the main text of the Rule. Additionally, some of the explanatory language from the text of the Rule is moved to the comments. The Bar proposes the following amendments to this Rule and its comments:

i. There are minor changes to Comment 1, to clarify that all statements about a lawyer's services must be truthful.

ii. Comment 2 states that misleading truthful statements are prohibited by Rule 7.1. The comment is amended to state that a truthful statement is misleading if "a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation." A truthful statement is also misleading if presented in a way that "creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action, when, in fact, no action is required."

iii. Comment 3 is amended to state that truthful statements regarding a lawyer's achievements may be misleading if "presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." Comment 3 is also amended to state that an unsubstantiated claim about a law firm's services or fees, or an unsubstantiated

comparison of a law firm's services or fees with those of other law firms, can be misleading if "presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated." There is an additional proposed amendment to this comment stating that the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or be otherwise misleading.

iv. The new proposed Comment 4 notes that Rule 8.4 bars conduct involving dishonesty, fraud, deceit, or misrepresentation. The same rule bars a lawyer from stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

v. The new proposed Comment 5 concerns firm names, letterheads, and professional designations. These topics were previously covered in Rule 7.5. The proposed amendment also allows a firm to be identified by a trade name, distinctive website address, social media username, or comparable professional designation that is not misleading. A law firm

name or designation is misleading if it "implies a connection with a government agency, with a deceased lawyer who was not a member of the firm, with a lawyer not associated with the firm or a predecessor firm, or with a non-lawyer or with a public or charitable legal services organization. The proposed Comment 5 also states that if a firm uses a trade name involving a geographic designation such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be necessary.

B. Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules

i. The proposed amendment to 7.2(c) allows a lawyer to communicate the fact that the lawyer does or does not practice in particular fields of law, or that the lawyer is a specialist in a particular field of law by experience, specialized training, or education, or if the lawyer is certified by a recognized and bona fide professional entity. Any communication regarding specialty or certification cannot be false or misleading.

ii. Proposed subsection b 5 allows lawyers to pay others for generating client leads, as long as the lead generator does not

recommend the lawyer, does not give the impression that it is making the referral without payment from the lawyer, or that it has analyzed a person's legal problems when determining which lawyer should receive the referral.

iii. Proposed subsections b 6 and 7 discuss legal service plans and lawyer referral services. Lawyers may pay the usual charges associated with these plans and services. Lawyers must act reasonably to assure that the activities with the plan or service are compatible with a lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communications must be in conformity with these Rules. As such, advertising may not be false or misleading, as would be the case if it misled the public to think it was a lawyer referral service sponsored by a state agency or bar association.

iv. Proposed subsection b 6 discusses reciprocal referral agreements between lawyers, which are permitted if they are not exclusive and the client is informed of the existence and nature of the agreement. Proposed comment 8 states that such agreements may not interfere with a lawyer's professional judgment. Comment 8 further states that the agreements should not be of indefinite duration and should

be reviewed periodically to determine whether they comply with the Rules.

v. Proposed Comment 11 requires that any communication about a lawyer or a law firm's services must include the name and contact information for the law firm. The contact information includes a website address, a telephone number, an email address, or a physical office location.

C. Rule 7.3: Solicitation of Clients

The proposed Rule 7.3 (a) defines solicitation. Rule 7.3 (b) bars solicitation when a significant motivation for doing so is pecuniary gain by "live, person-to-person contact". Such solicitation was already previously barred by ethical rules. The proposed amendments clarify the scope of the prohibition. Proposed comment 2 defines "live, person-to-person contact" as "in-person, face-to-face, live telephone, and other real-time visual or auditory person-to-person communications where the person is subject to direct personal encounter without time for reflection." The proposed comment states that such contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. There is an exception to this prohibition when the target is a lawyer, a person who routinely uses the offered legal services for business purposes, or a

person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm.

However, no solicitation is permitted if the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer. The lawyer is also barred from solicitation that involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence, or when the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer. Proposed comment #6 states, in part, that live, person-to-person contact of people "who may be especially vulnerable to coercion or duress[,]" such as the elderly, the disabled, or those whose first language is not English, is "ordinarily not appropriate[.]"

Lawyers are also barred from solicitation through written communication to a person or a person's family member regarding a personal injury or wrongful death action within 30 days of the accident or disaster giving rise to the action. A proposed comment clarifies that otherwise permissible communications can be mailed, emailed, or transmitted by other electronic means. Proposed comment #1 clarifies that a communication is not a solicitation if it is directed to the general public, such as a billboard or a commercial, if it is in response to a request for information, or if it is automatically generated in response to electronic searches.

D. Rule 7.4: Communication of Fields of Practice and Rule 7.5: Names and Letterheads- These Rules have been incorporated in Rules 7.1-7.3.

III. CONSTITUTIONAL ANALYSIS

A. Standard for U.S. and Georgia Constitutions

As stated above, the Court asked for legal analysis explaining "whether and how the proposed amendments are consistent" with the free speech provisions in the Georgia and U.S. Constitution. As discussed below, it is far from clear that there is, or ought to be, any difference between the two standards.

In the seminal *Paramount Pictures* case, discussed at length below, the Georgia Supreme Court rejected the idea that the Georgia Constitution provided greater protection that the U.S. Constitution and held that "[i]n the absence of controlling state precedent this court has applied analogous First Amendment standards when construing the state constitution." *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 255, 297 S.E.2d 250, 253 (1982). The Georgia Supreme Court has "looked to federal cases interpreting the First Amendment for guidance in applying Georgia's free speech guarantee[]" as far back as 1932. *Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 728, 715 S.E.2d 148, 150 (2011).

Georgia appellate courts have occasionally held that the Georgia Constitution, in limited circumstances, "provides even broader protection of speech

that the first amendment" of the U.S. Constitution. *See Statesboro Pub. Co. v. City of Sylvania*, 271 Ga. 92, 95, 516 S.E.2d 296, 299 (1999). The deviation from the decades-long precedent appears to have emanated from dictum in a 1990 Georgia Supreme Court case. In that case, the Georgia Supreme Court stated in a single sentence without analysis or citation of authority that the Georgia Constitution provided "even broader" protection than the U.S. Constitution. *State v. Miller*, 260 Ga. 669, 671, 398 S.E.2d 547, 550 (1990).

This "broader protection" was applied in a 1999 case, in which the Georgia Supreme Court held that content-neutral restrictions were consistent with the U.S. Constitution if they were "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information[,][1]" but to comply with the Georgia Constitution, the regulations must also be "the least restrictive means" of achieving the goals of the regulation. *Coffey v. Fayette Cnty.*, 279 Ga. 111, 112, 610 S.E.2d 41, 42 (2005).

However, the Georgia Supreme Court later cast significant doubt as to whether there is any legal or historical support for the idea that Georgia's Constitution provides greater protection than the U.S. Constitution for *any* type of speech. In the *Grady* case, the Court stated that the "rationale for our deviation from the governing First Amendment standard in this one area of free speech law

[1] *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989).

is elusive." *Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 728, 715 S.E.2d 148, 150 (2011). The *Grady* Court further noted that the statement in *Miller* regarding the broader protection "was not supported by any citation of authority or any discussion of the text, history, or case law regarding the protection of free speech provided in the 1983 or previous Georgia Constitutions. It was [also] inconsistent with precedent like *Carr* and *Paramount Pictures*." *Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 729, 715 S.E.2d 148, 150 (2011). As stated above, the statement was clearly dictum, since the Court resolved the *Miller* case under the under the First Amendment test set out in *United States v. O'Brien*, which was decided in the U.S. Supreme Court. *Miller*, 260 Ga. at 671–672. In discussing a later case that also sought to apply a heightened standard, the Court noted that:

> "[O]ther than citing the *Miller* dictum, which as discussed above was supported by no authority or reasoning, and the *Clark* dissent, which is not precedent even for the application of the First Amendment, the *Statesboro* majority cited no authority and offered no analysis of constitutional text, history, or precedent to support the proposition that the Georgia free speech guarantee is broader than its federal counterpart. Nor did the majority acknowledge or try to distinguish contrary Georgia precedent such as *Carr*, *Paramount Pictures*, and *Chamblee Visuals*. Moreover, less than two months after Statesboro, the Court unanimously held yet again that "Georgia's constitutional free speech provision does not confer any greater free speech right than that protected by the First Amendment." *Cahill v. Cobb Place Assocs.*, 271 Ga. 322, 323, 519 S.E.2d 449 (1999)…[O]ur cases saying that Georgia's constitutional protection of free speech is broader than that provided by the First Amendment offer none of the

> legal reasoning one would normally expect for such an important constitutional point."[2]

Ultimately, the *Grady* Court determined the issues before it without having to resolve the question of whether the Georgia Constitution provides any broader protection to free speech than the U.S. Constitution does. The Bar's position is that the protection afforded by both Constitutions should be considered coterminous, particularly in the absence of any legal or historic reason to treat them otherwise. If a restriction on speech is consistent with the U.S. Constitution, it is consistent with the restrictions with the Georgia Constitution.

Absent any textual or historical basis to construe Georgia's free speech protection more broadly than its federal counterpart, important prudential considerations favor construing those protections as coextensive. For example, doing so would reduce the burden on the courts, as challenges to similar or identical lawyer advertising rules and other bar rules have been long resolved under the federal constitutional standard. Those federal standards have not generated any oppressive or onerous constraints that have impaired the practice of law or the public's access to counsel.

Declaring broader state constitutional constraints on bar rules would generate litigation of multiple issues long resolved under the federal constitution. Further, making Georgia an outlier risks adverse consequences. With the

[2] *Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 730, 715 S.E.2d 148, 151 (2011).

expansion of reciprocity rules and the nationalization of many areas of litigation, more and more lawyers are admitted in multiple states. That makes a uniform application of the bedrock principals underlying lawyer advertising restrictions important. Imagine a Georgia lawyer somehow freed from lawyer solicitation restrictions utilizing reciprocity for admission into a state that follows the federal constitutional model and thus imposes restrictions enforceable under the law of the other state but not under Georgia law. Advertising or solicitations allowable under Georgia law could result in sanctions by the bar of the other state. Both lawyers and advertisements cross state lines, warranting a uniformity of restrictions absent a sound textual or historical basis requiring a fractured approach.

In any event, as discussed below, the tests applied by the U.S. Supreme Court and the Georgia Supreme Court are similar. As such, they will be analyzed in this brief together. The novel "least restrictive means" factor in a few Georgia cases appears mostly, although not exclusively, in cases involving regulations on personal, political, or expressive speech, rather than regulations of commercial speech. *See Statesboro Pub. Co. v. City of Sylvania,* 271 Ga. 92, 95, 516 S.E.2d 296, 299 (1999)("**Because the ordinance challenged in this case regulates political, religious, and personal speech**, we interpret our state constitution to require the city to narrowly draw its regulations to suppress no more speech than is necessary to achieve the city's goals.")(emphasis added) Indeed, in 2012, the

Georgia Supreme Court declined to apply the heightened standard to a case involving incidental restrictions on commercial speech, which is at issue here. *Great Am. Dream, Inc. v. DeKalb Cnty.*, 290 Ga. 749, 752, 727 S.E.2d 667, 670 (2012).

IV. U.S. AND GEORGIA CONSTITUTIONS

The First Amendment of the United States Constitution, as applied to the States through the Fourteenth Amendment, "protects commercial speech from unwarranted governmental regulation." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561, 100 S. Ct. 2343, 2349, 65 L. Ed. 2d 341 (1980). Attorney advertising is commercial speech and is therefore "accorded a measure of First Amendment protection." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S. Ct. 2371, 2375, 132 L. Ed. 2d 541 (1995).

The constitutional protections afforded to commercial speech are not as robust as those afformed to political or personal speech. The U.S. Supreme Court has recognized "the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech…[T]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interest served by its regulation" *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562, 100 S. Ct. 2343,

2349, 65 L. Ed. 2d 341 (1980). To require the same protection for commercial speech as is provided for non-commercial speech "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S. Ct. 1912, 1918, 56 L. Ed. 2d 444 (1978). Put another way, commercial speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Id.* When dealing with restrictions on commercial speech, the U.S. Supreme Court stated that it allowed "modes of regulation" that "might be impermissible in the realm of noncommercial expression[.]" *Friedman v. Rogers*, 440 U.S. 1, 10, 99 S. Ct. 887, 894, 59 L. Ed. 2d 100 (1979).

Article 1, Section 1, Paragraph 5 of the Georgia Constitution states that "[n]o law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." However, "free speech protection only goes so far; protected expression may sometimes be restricted in limited ways when justified by sufficient government interests, without violating the Constitution." *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 297 Ga. 513, 520, 773 S.E.2d 728, 735–36 (2015).

A. The Proposed Amendments Are Content-Neutral

When determining whether a regulation of speech is content neutral under the Georgia Constitution "**[t]he government's purpose is the controlling consideration.** A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 297 Ga. 513, 521, 773 S.E.2d 728, 736 (2015)(emphasis added). In other words, the Court must evaluate "whether the government has adopted a regulation of speech because of disagreement with the message it conveys[]" or whether the regulation is designed to combat the "undesirable secondary effects" of certain speech. *Goldrush II v. City of Marietta*, 267 Ga. 683, 690, 482 S.E.2d 347, 355 (1997). As discussed below, the Bar does not adopt ethical rules to regulate speech that it disagrees with; rather, it adopts the rules to further well-recognized state interests and protect against undesirable secondary effects. As such, the Rules at issue are content-neutral.

Similarly, the principal inquiry in determining whether a regulation is content-neutral pursuant to the U.S. Constitution is the intent of the government agency in adopting it. The U.S. Supreme Court held that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock*

Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (1989). Regardless of whether a regulation is content-based or content-neutral, Federal courts apply intermediate scrutiny when evaluating restrictions on commercial speech. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S. Ct. 2371, 2376, 132 L. Ed. 2d 541 (1995); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554, 121 S. Ct. 2404, 2421, 150 L. Ed. 2d 532 (2001)(The *Central Hudson* test for commercial speech regulations is "substantially similar" to content-neutral time, place, and manner restrictions.) Even cases which discuss a heightened standard tend to apply the intermediate scrutiny framework. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S. Ct. 2653, 2657, 180 L. Ed. 2d 544 (2011), in which the Court referred to "heightened scrutiny" but still applied the *Central Hudson* test.

B. The Tests Applying Intermediate Scrutiny

The Bar Rules are subject to intermediate scrutiny. The intermediate scrutiny tests used for the U.S. Constitution and the Georgia Constitution are similar. The tests are summarized below:

U.S. Constitution- *Central Hudson*[3]	**Georgia Constitution- *Paramount Pictures*[4]**
Is the expression protected by the First	

[3] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341 (1980)
[4] *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 256, 297 S.E.2d 250, 254 (1982)

Amendment?	
Does the state assert a substantial interest to be achieved by the restriction on commercial speech?	Does the regulation further an important government interest?
Does the regulation directly advance the state's interest?	Is the government interest unrelated to the suppression of speech?
Is the regulation narrowly drawn?	Is the incidental restriction of speech no greater than is essential to the furtherance of the state interest?

C. The Rules Satisfy Both Tests

1. Certain Commercial Speech is Not Subject to Constitutional Protection

The first part of the *Central Hudson* test is determining whether the speech in question is subject to any constitutional protection. If commercial speech concerns illegal activity, or is false or misleading, then it is not subject to First Amendment protection and the government can freely regulate it. *Fulton Cnty. v. Galberaith*, 282 Ga. 314, 318, 647 S.E.2d 24, 28 (2007); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S. Ct. 2371, 2376, 132 L. Ed. 2d 541 (1995). Misleading advertising "may be prohibited entirely. *In re R. M. J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 937, 71 L. Ed. 2d 64 (1982). Likewise, false and misleading commercial speech is not protected by the Georgia Constitution. *See Marks v.*

State, 280 Ga. 70, 75, 623 S.E.2d 504, 509 (2005)(Georgia citizen has no right under State or U.S. Constitution to engage in speech which is calculated to deceive or mislead people into thinking he is qualified to practice law).

As such, none of the Rules that prohibit false or misleading communications raise any constitutional concerns. Likewise, a statement or implication that a lawyer can obtain certain results by means that violate the Rules of Professional Conduct or other law has no Constitutional protection, as there is no protection for statements relating to illegal activity.

The current Rules bar certain statements that are truthful, but misleading. The proposed changes clarify the standard for determining whether a truthful statement is misleading. Specifically, the comments state that truthfully reporting previous achievements may be misleading if presented "so as to lead a reasonable person to from an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." The Rules also state that unsubstantiated claims and comparisons involving lawyers can be misleading if they are presented with such specificity as to lead a reasonable person to conclude that the comparison or claim can be substantiated.

The Rules suggest that a disclaimer or qualifying language may preclude a finding that a truthful statement is misleading. This is consistent with U.S.

Supreme Court precedent that states that disclaimers or explanation might be preferable to an outright ban on potentially misleading information. *In re R. M. J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 937, 71 L. Ed. 2d 64 (1982).

The proposed changes state that the standard for whether a statement is misleading is whether it creates a substantial likelihood that a reasonable person would be misled by it. This is a well-known standard that has been applied in numerous contexts, including trademark[5], insurance coverage[6], securities fraud[7], and false advertising[8] cases.

2. The Bar Asserts a Substantial and Important Interest, Which is Unrelated to the Suppression of Speech

States have a general interest in "protecting consumers and regulating commercial transactions[.]" *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S. Ct. 1912, 1920, 56 L. Ed. 2d 444 (1978). Further, the state bears "a special responsibility for maintaining standards among members of the licensed professions." *Id.* The regulation of the practice of law is a judicial function. The Georgia Constitution vests the judicial power of the state in the courts. *See* 1983 Ga. Const., Art. VI, Sec. I, Para. I. The Supreme Court of Georgia is "endowed with the inherent and exclusive authority to govern the practice of law in Georgia."

[5] *E. Georgia Motor Club v. AAA Fin. Co.*, 212 Ga. 408, 411, 93 S.E.2d 337, 339 (1956)
[6] *Kerr-McGee Corp. v. Georgia Cas. & Sur. Co.*, 256 Ga. App. 458, 459, 568 S.E.2d 484, 486 (2002)
[7] *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 135 S. Ct. 1318, 191 L. Ed. 2d 253 (2015)
[8] *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 252 (3d Cir. 2011).

Wallace v. State Bar of Georgia, 268 Ga. 166, 167, 486 S.E.2d 165, 166 (1997). The State Bar of Georgia is an administrative arm of the Georgia Supreme Court; it is "authorized to maintain and enforce standards of conduct to be observed by members of the State Bar and those authorized to practice law in Georgia." *Scanlon v. State Bar of Georgia*, 264 Ga. 251, 252, 443 S.E.2d 830, 831 (1994). The Bar retains authority to regulate attorney speech and communication even if it is not untruthful or misleading. *In re R. M. J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 937, 71 L. Ed. 2d 64 (1982).

The U.S. Supreme Court has recognized that state bar associations have a substantial interest in "curbing activities that negatively affect the administration of justice." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S. Ct. 2371, 2376, 132 L. Ed. 2d 541 (1995). This interest includes "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers[]" and "preserving the integrity of the legal profession" and promoting the ethical conduct of professionals who practice within their boundaries. *Id.* Georgia Courts have held that the State Bar has a substantial interest "promoting the independent judgment of lawyers, prohibiting the practice of law by a layman, and protecting consumers from overreaching by those to be compensated[.]" *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1338 (11th Cir. 1998)(internal citations omitted). The state also has an interest in "reducing the

likelihood of overreaching and the exertion of undue influence on lay persons[.]" *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 461, 98 S. Ct. 1912, 1921, 56 L. Ed. 2d 444 (1978).

Importantly, these state interests are unrelated to the suppression of speech, as is required under the Federal *Central Hudson* test. *See also, United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

3. The Rules Directly and Materially Advance the Interests

As discussed above, the Rules regulate or prohibit the following communication, even if it is ostensibly not untruthful or misleading:

i. Solicitation by "live, person-to-person contact" when a significant motivation for doing so is pecuniary gain.

ii. Solicitation relating to wrongful death or personal injury through written communication to a person or a person's family member within 30 days of the accident or disaster giving rise to the action.

iii. Solicitation through coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence, or when the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

This conduct is already prohibited by the current ethics rules. The proposed changes simply update the terminology of the rules to account for updated technologies and media.

These regulations directly and materially advance the legitimate state interests cited above. In satisfying this prong, the Bar may rely on "studies and anecdotes pertaining to different locales altogether…[and]history, consensus, and simple common sense[.]" *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628, 115 S. Ct. 2371, 2378, 132 L. Ed. 2d 541 (1995). The Bar need not present "empirical data ... accompanied by a surfeit of background information[.]" *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1340 (11th Cir. 1998). The Bar need not prove any actual harm suffered by any target of a solicitation, since "[r]ules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464, 98 S. Ct. 1912, 1923, 56 L. Ed. 2d 444 (1978).

In a 1998 case involving similar restrictions on solicitation, the State Bar, relayed "the public's complaints about in-person, telephonic and direct mail solicitation." *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1341 (11th Cir. 1998). The Bar also submitted the results of a consumer survey showing that "the more intrusive the advertising method, the more negative the public's view of lawyers." *Id.* The "highest percentage of respondents" agreed with the statement that

"lawyers track down injured people and try to talk them into taking legal action." *Id.* The Court held that the Bar could reasonably infer form the survey results that "the majority of legal service consumers view in-person solicitation—whether through lawyers or their agents—as unduly intrusive, destructive to the court system and deserving of regulation." *Id.*

Finally, there is significant historical support for bans of in-person solicitation. The U.S. Supreme Court held in 1978 that "[t]he solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. It has been proscribed by the [Ohio] organized Bar for many years." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454, 98 S. Ct. 1912, 1917, 56 L. Ed. 2d 444 (1978).

Regarding the 30-day ban on written solicitation to people with wrongful death or personal injury claims, there is significant literature supporting that the restrictions materially further legitimate state interests. In a U.S. Supreme Court case involving similar restrictions, the Florida State bar "submitted a 106–page summary of its 2–year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the

immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626, 115 S. Ct. 2371, 2377, 132 L. Ed. 2d 541 (1995). Further survey results included the fact that "fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy;" 45% believed that direct-mail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24% reported that it "made you angry." Ibid. Significantly, 27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail. *Id.*

4. The Rules are Narrowly Tailored and Do Not Restrict More Speech Than Necessary to Further State Interests

The final prong of the State and Federal tests relates to the fit of the regulation to the state interest sought to be furthered. As discussed above, there are Georgia appellate court decisions indicating that certain speech regulations must use the least restrictive means to further the state interest. Indeed, even some federal court cases use language that could be construed in a similar way. However, the U.S. Supreme Court has held that, for this prong of the test, "the differences between commercial speech and noncommercial speech are manifest." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632, 115 S. Ct. 2371, 2380, 132 L. Ed.

2d 541 (1995). The Court has made clear that the standard for commercial speech restrictions is lower: "What our decisions require 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 [;] **that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective**. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 3034–35, 106 L. Ed. 2d 388 (1989)(emphasis added).

Since there is no basis to determine that Georgia Constitutional free speech protections are any broader than the U.S. Constitution (*See Grady*, *supra*), the Court should use federal precedent to analyze this prong.

The scope of the Rules is narrow. Attorneys are still permitted to advertise their services in nearly countless ways. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 633-34, 115 S. Ct. 2371, 2380-81, 132 L. Ed. 2d 541 (1995). Attorneys may send out non-targeted letters to the general population. Attorneys may advertise on television, radio, billboards, and the internet. Attorney advertisements are extremely common on Georgia's airways; a survey done by an advocacy group

found that $391.2 million was spent on more than 3.8 million legal services ads in Georgia between 2017 and 2021.[9] It is impossible to believe that advertising restrictions might prevent an injured party from becoming aware that there are Georgia lawyers who might be able to assist her in asserting a claim. The types of solicitation that are barred are those that harm citizens and lower the public's opinion of Georgia lawyers.

Direct, live, person-to-person contact has the potential for abuse not found in other communications, such as advertisements directed at the general public. Indeed, as the U.S. Supreme Court held, "there is a difference of constitutional dimension between rules prohibiting appeals to the public at large[] and rules prohibiting direct, personalized communication in a coercive setting." *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 296, 127 S. Ct. 2489, 2493, 168 L. Ed. 2d 166 (2007).

This is because "[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457, 98 S. Ct. 1912, 1919, 56 L. Ed. 2d 444 (1978). Further, "[t]he aim and effect of in-person solicitation may be to provide a one-sided presentation and

[9] https://www.atra.org/2022/02/22/study-trial-lawyers-spent-more-than-263-million-on-georgia-tv-ads-over-past-5-years/

to encourage speedy and perhaps uninformed decision making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual…In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' actually may disserve the individual and societal interest…in facilitating 'informed and reliable decision making.'" *Id.*

The 30-day ban on written communications to those with personal injury or wrongful death claims is likewise narrowly drawn. A 30-day limit for similar solicitations has previously been upheld by the U.S. Supreme Court, which held that the ban reasonably fit the goals of protecting victim privacy and improving the public's perception of attorneys. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 633, 115 S. Ct. 2371, 2380, 132 L. Ed. 2d 541 (1995). The Court found that a general prohibition on such communications was appropriate, given the difficulty on crafting a narrow ban on grounds such as severity of injury. *Id.*

5. The Rules Satisfy The Least Restrictive Means Test

Even if the Court were to apply the heightened standard cited, the Rules would still satisfy this prong. There is no practical way to draw the rules any narrower to achieve the legitimate goals of protecting the privacy and peace of victims and maintaining or improving the public's perception of attorneys.

Attorneys have countless alternate avenues to make the public aware of their services; there is no harm done to the profession or to the public by these rules.

V. CONCLUSION

The Rules are necessary to further important state interests. They are consistent with the Georgia and U.S. Constitutions. The proposed amendments clarify and modernize the Rules. The Bar respectfully requests that the Court grant its motion to amend the Rules.

Respectfully submitted, this 4th day of December, 20233.

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