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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

Andrew Schlossberg,	:	
	:	Docket No. 14-cv-3772 MJP
Plaintiff,	:	
	:	
v.	:	
Glenn Howard, in his individual capacity,	:	
	:	
Defendant.	:	
	:	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This motion for summary judgment presents the sole question of whether a state bar association may force an attorney to state online that the blog expressing his views about the criminal justice system is an advertisement. Andrew Schlossberg runs a solo practice in which he specializes in criminal defense. In an effort to combat what he sees as unjustified public hostility towards the rights of criminal defendants, he began writing online articles in which he tried to inform the public about the current state of the criminal justice system through the use of actual cases. The Washington State Bar Association warned Schlossberg in a letter that, because all of his own cases that he mentions are cases he has won, he must post a disclaimer on every one of his blog posts stating that they are advertisements. Schlossberg brought this suit seeking declaratory relief stating that he need not post this disclaimer as it is a violation of his First Amendment right to freedom of speech. He brings this suit against Glenn Howard in his official capacity as Chief Disciplinary Counsel for the WSBA. Both parties have filed motions for summary judgment.

Schlossberg is entitled to win on his motion because his speech is not commercial, and since this triggers strict scrutiny which the proposed disclaimer cannot survive, requiring the disclaimer would be a violation of his First Amendment right to free speech. Furthermore, even if some of the speech is found to be commercial, the disclaimer is not directly and narrowly drawn to prevent the public from being misled, and thus it cannot be upheld. Because the disclaimer would violate Schlossberg's right to free speech whether or not some of the speech is deemed commercial, he is entitled to judgment as a matter of law.

STATEMENT OF FACTS

Andrew Schlossberg is an attorney and owns a solo practice in Seattle, Washington. (Pl.'s Dep. 2:19-3:7 attached as Ex. A.) He practices various areas of law, but the majority of his work is in criminal and family law. (Pl.'s Dep. 3:9-13.) He operates a website for his practice, on which he posts contact information, a summary of his practice, a professional biography, and a blog – "Developments in Seattle Criminal Law." (Law Office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com.) His blog consists of twenty-one articles, (Andrew Schlossberg, *Developments in Seattle Criminal Law*, Law Office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com/developmentsblog), that are all entirely true, (Def.'s Dep. 5:22-23 attached as Ex. B).

One of the purposes of the blog is to combat stereotypes about criminal defendants and advocate for criminal justice reform. (Pl.'s Dep. 5:19-6:1.) For instance, one article discusses the 2009 ruling by the 9th Circuit Court of Appeals that the California prison system was so overcrowded that it violated the Eighth Amendment. (Andrew Schlossberg, "California May Have to Cut Prison Population By 40 Percent," *Developments in Seattle Criminal Law*, Law Office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com/developmentsblog.) Another focuses on the Justice Department's 2011 efforts to combat prosecutorial misconduct. (Andrew Schlossberg, "Justice Dept. to Punish Prosecutors," *Developments in Seattle Criminal Law*, Law Office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com/developmentsblog.) He does have another motive as well, because the blog lends to his credibility as an attorney. (Pl.'s Dep. 6:12-18.) Though many of the articles reference cases which Mr. Schlossberg has won, each article ends emphasizing the point that it is important for the public to have an open mind towards defendants and maintain a critical eye on the justice system, and it is this message

that nearly the entirety of the article is about. (Andrew Schlossberg, *Developments in Seattle Criminal Law*, Law Office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com/developmentsblog.)

In the summer of 2014, Schlossberg received a letter from the Washington State Bar Association ordering him to place a disclaimer on his blog. (WSBA Letter attached as Ex. C.) The Office of Disciplinary Counsel for the ESBA, headed by Glenn Howard, received a complaint from one of Schlossberg's former clients claiming that Schlossberg did not adequately represent him. (Def.'s Dep. 3:20-24.) Although the complaint had been found to be meritless, the WSBA switched targets and began focusing on Schlossberg's website. (Def.'s Dep. 4:6-15.) The WSBA put out a report in which they concluded that attorney advertising may mislead potential clients. (*Ensuring Accurate Attorney Advertising*, 2012 Wash. St. B. Ass'n Task Rep. 2-3 attached as Ex. D.) Because Schlossberg posted about his successes in court, the WSBA decided that the articles could possibly mislead potential clients into thinking that he has never lost a case. (Def.'s Dep. 5:1-5). Rule 7.1 of the Rules of Professional Conduct prohibits misleading advertising. (Def.'s Dep. 5:9-10.)

The letter that Schlossberg received included the demand that he post an unprecedented disclaimer that has never before been required for any other similar blog, or else face disciplinary action. (WSBA Letter 1.) WSBA disciplinary action ranges from an admonition all the way to disbarment. (Def.'s Dep. 3:16-17.) The disclaimer that the WSBA would have Schlossberg place on his site has to include "ADVERTISMENT" in all capital letters, state that **future results were not guaranteed** in boldfaced font "the same size as the largest font in the post," and must scroll with the page such that it is "visible at all times." (WSBA Letter 1.)

Upon receiving the letter, Schlossberg became worried that posting the disclaimer would misrepresent his intentions and cheapen the political message which he sought to convey to his audience. (Pl.'s Dep. 9:16-20.) Though there is evidence that attorney blogs may lead to client referrals, (Allison Shields, *Blogging & Social Media*, 2014 A.B.A. TECHREPORT 2 attached as Ex. E), he felt that his speech was nonetheless not an advertisement and that labeling it as such would ignore the blog's broader purpose, (Pl.'s Dep. 10:9-15). He contacted a lawyer, and having decided to not post the disclaimer, filed this law suit. (Pl.'s Dep. 9:1-4.)

Schlossberg now moves for summary judgment on the grounds that the articles are not commercial speech and thus he cannot be forced to post the disclaimer, and if they are commercial speech, they still merit full First Amendment protection.

ARGUMENT

Schlossberg is entitled to summary judgment because his speech is not commercial, and even if it is commercial, the proposed disclaimer fails the intermediate scrutiny under which it must be analyzed. Federal summary judgment motions prevail if: (1) "there is no genuine issue as to any material fact" and (2) "the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(a)). On a motion for summary judgment, the evidence must be taken "in the light most favorable to the nonmoving party." *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015).

There is agreement as to the material facts of this case, and thus Schlossberg's success relies on him showing that he is entitled to judgment as a matter of law. Two issues must be examined to show that Schlossberg is entitled to win. First, his speech is not commercial and thus strict scrutiny applies, and it has been conceded that the proposed disclaimer cannot survive this analysis. (Order 1/19/16.) Second, even if the speech is commercial, the regulation cannot

survive the intermediate scrutiny under which it must be analyzed because it neither directly nor narrowly serves the asserted government interest.

I. SCHLOSSBERG IS ENTITLED TO WIN AS A MATTER OF LAW BECAUSE HIS SPEECH IS NONCOMMERCIAL, AND IS THUS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

Schlossberg's speech is noncommercial because it is far more than a mere proposal for a commercial transaction and lacks the characteristics of commercial speech, and is thus entitled to full First Amendment protection. Speech is noncommercial if it both (1) does more than merely propose a commercial transaction, and (2) lacks at least one of the *Bolger* factors. *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 957-58 (9th Cir. 2012) (citing *Bolger v. Youngs Drug Prod.'s*, 463 U.S. 60 (1983)). However, if commercial speech is "intrinsically intertwined" with noncommercial protected speech, then it ceases to be commercial and is entitled to full First Amendment protection. A restriction on noncommercial speech that is content-based is analyzed under strict scrutiny. *Dex Media*, 693 F.3d at 957. "A regulation is content-based if [it] . . . singles out particular content for different treatment." *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009).

Since the disclaimer would apply only to a particular subset of attorney speech as defined by its content– discussions of an attorney's results – the regulation is content-based and must be analyzed under strict scrutiny if Schlossberg's speech is determined to be noncommercial. It has been stipulated that the regulation will not survive strict scrutiny, (Order 1/19/16), and thus if his speech is noncommercial, Schlossberg is entitled to win as a matter of law. His speech is noncommercial because (1) it does far more than propose a commercial transaction, (2) it is not in the form of an advertisement for a specific product, and (3) even if there is some commercial speech, it is inextricably intertwined with protected speech and thus ceases to be commercial.

A. The Speech Does Not Merely Propose a Commercial Transaction Because It Never Offers the Sale of Services for a Price.

Schlossberg's blog is not core commercial speech because it contains commentary on the state of criminal law. If speech does more than merely "propose a commercial transaction," then it is not within the "core notion of commercial speech." *Bolger*, 463 U.S. at 66 (internal quotation marks omitted) (quoting *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)); *see also City of Cincinnati v. Discovery Network*, 507 U.S. 410, 423 (1993) (holding that editorial content, such as general information about real estate markets and interests rates, is not core commercial speech).

Given that the blog is far more than a proposal for a commercial transaction, it is not core commercial speech. For instance, one entry discusses the 2009 decision by the Ninth Circuit Court of Appeals that the California prison system violated the Eighth Amendment because of overcrowding. (Andrew Schlossberg, "California May Have to Cut Prison Population By 40 Percent," *Developments in Seattle Criminal Law*, Law Office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com/developmentsblog.) Another concerns prosecutorial misconduct and a watchdog group created in 2011 by the Justice Department. (Andrew Schlossberg, "Justice Dept. to Punish Prosecutors," *Developments in Seattle Criminal Law*, Law Office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com/developmentsblog.) Furthermore, the blog never even proposes a commercial transaction. (Andrew Schlossber, *Developments in Seattle Criminal Law*, Law office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com/developmentsblog.) Accordingly, the blog is clearly not core commercial speech and must be analyzed under the *Bolger* factors.

B. Schlossberg's Speech Is Not Commercial Speech Because It Is Not an Advertisement and Is Not for a Specific Product.

The blog posts are not commercial speech because they do not act as advertisements for a specific product but instead serve to inform the public about important issues in criminal law. When not in the core of commercial speech, speech is still commercial if it has the characteristics of commercial speech. *Dex Media*, 696 F.3d at 958 (citing *Bolger*, 463 E.S. at 66-67). There is strong support that speech is commercial only when a combination of all three factors is present: the speech must be (1) an advertisement (2) for a specific product, and (3) there must be an underlying economic motive. *Bolger*, 463 U.S. at 66-67. Where speech involves an underlying economic motive, but does not satisfy the other two factors, it is not commercial. *Dex Media*, 696 F.3d at 959.

This analysis involves a common sense understanding of what is an advertisement for a specific product. *See Bolger*, 463 U.S. at 67-68 (holding that pamphlets promoting drug store products and prophylactics by a contraceptive manufacturer were commercial speech); *Charles v. City of Los Angeles*, 697 F.3d 1146, 1151 (9th Cir. 2012) (explaining that it is undisputed that a billboard with no more than a logo of a television show and a picture of the hosts is an advertisement for a specific product); *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (holding that a doctor's advertisement offering medical services satisfies the *Bolger* factors); *Ass'n of Nat'l Advertisers v. Lungren*, 44 F.3d 726, 728 (9th Cir. 1994) (holding that a statute "regulat[ing] representations concerning a specific consumer good which take the form of advertisements or product labels" clearly involved commercial speech under the *Bolger* test) (quoting *Ass'n of Nat'l Advertisers v. Lungren*, 809 F. Supp. 747, 754 (N.D. Cal. 1992)).

When lacking the other two factors, speech is not commercial even when the *primary* motivation is economic. *Dex Media*, 696 F.3d at 960 (holding that a yellow pages directory is

informational and not commercial speech despite the fact that the publisher has a commercial motive).

The blog posts are meant to inform the general public about issues in criminal law, and are not advertisements for a particular product. The blog posts here are materially different than the speech in *Bolger*, *Charles*, *Joseph*, and *Lungren*. All four of those cases involved advertisements because they all involved what was clearly an attempt to sell a particular product or service in the overall form of "I offer X product/service which you should consume." Although there is data to suggest that attorneys may gain clients through their blogs, (Allison Shields, *Blogging & Social Media*, 2014 A.B.A. TECHREPORT 2), this benefit is not what is the defining feature of speech that satisfies the *Bolger* test. Rather than functioning as an advertisement, what is required is that the speech actually *be* an advertisement, and Schlossberg's blog entries never have the overall form of "I offer X product/service which you should consume." (Andrew Schlossber, *Developments in Seattle Criminal Law*, Law office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com/developmentsblog.) Indeed, Schlossberg's speech is much more like the noncommercial speech in *Dex Media*.

Like the yellow pages directory in *Dex Media*, Schlossberg's blog is informative, not commercial – it shares his views on the criminal justice system. (Pl.'s Dep. 5:19-6:11.) Though the speech is partially motivated by his desire to show potential clients his proficiency as a litigator, (Pl.'s Dep. 6:12-15), just as in *Dex Media*, this motivation alone, lacking the other two *Bolger* factors, is insufficient to make the speech commercial. In fact, the motivation of economic gain was likely more important in *Dex Media* than it is here as it is a publishers business to publish, while it is a lawyers business to litigate and not to publish. Therefore, since

the directory in *Dex Media* was not commercial speech, neither is Schlossberg's blog, and it is entitled to full First Amendment protection, which means he is entitled to win as a matter of law.

C. Even if the Blog Contains Commercial Speech, This Speech Is Inextricably Intertwined with Noncommercial Speech and Thus Ceases to Be Commercial.

The blog posts are fully protected speech even if some portion of the posts is determined to be commercial because these commercial elements are inseparable from the noncommercial elements. When commercial speech is "inextricably intertwined with otherwise fully protected speech, . . . [it] sheds its commercial character and becomes fully protected speech." *Dex Media*, 696 F.3d at 958 (internal quotation marks omitted) (citing *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988)). So long as the addition of protected speech is not being used as a pretext – simply meant to give the commercial speech full First Amendment protection – but is in fact inseparable from the noncommercial speech, the commercial and noncommercial speech is inextricably intertwined. *See, e.g., Bd. Of Tr.'s of State Univ. of New York v. Fox*, 492 U.S. 469, 479 (1989) (holding that "Tupperware parties" do not become fully protected speech merely because some aspects of home economics are included in the presentation); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) (holding that while day labors may implicitly "communicate a political message" while seeking work, their primary purpose is to advertise their services and thus the two kinds of speech are not inextricably intertwined).

Where there is a meaningful connection between the commercial and noncommercial speech, the two types of speech *are* inextricably intertwined. In *Gaudiya Vaishnava Soc'y v. City and County of San Francisco*, the various plaintiffs were nonprofit organizations engaged in advocacy projects. 952 F.2d 1059, 1060 (9th Cir. 1990). As part of this advocacy, the plaintiffs set up tables throughout the city in order to disseminate their message while at the same time selling various merchandise (e.g. t-shirts and bumper stickers bearing their message). *Gaudiya*,

952 F.2d at 1060. The court held that because the sale of merchandise served the groups advocacy goals by disseminating their messages, while also providing a source of funding for their advocacy, the commercial and noncommercial speech was inextricably intertwined. *Id.* at 1064-65.

On the other hand, where the primary purpose of the speech is commercial, noncommercial protected elements cannot simply be tacked on in order to give the commercial speech full First Amendment protection. In *Hunt v. City of Los Angeles*, one of the plaintiffs had a stand on the boardwalk at which he sold homemade incense and various incense holders. 638 F.3d 703, 708 (9th Cir. 2011). The incense holders displayed various meaningful symbols, such as a yin-yang, and the plaintiff had a sign and flyers that explained the "religious and/or mythological significance of . . . these symbols." *Id*. The court held that since the primary purpose of the speech was to promote the sale of the goods plaintiff was offering, and there was nothing stopping him from separating this commercial speech from the protected speech, the two kinds of speech were not inextricably intertwined. *Id*. at 716.

Like *Gaudiya* and unlike *Hunt*, Schlossberg's political speech is inextricably intertwined with any commercial speech. In both *Gaudiya* and here, any commercial aspect of the speech is intimately related to the underlying advocacy. In *Gaudiya*, the commercial speech was always tied to the underlying message and mission of the plaintiffs because the merchandise bore the plaintiffs' messages and the profits made were used to support their advocacy efforts. Here, any commercial speech contained in the blogs is always tied to Schlossberg's underlying mission to educate the public about the criminal justice system. (Pl.'s Dep. 6:3-11.) Instead of profits, though, Schlossberg gains credibility, which may gain him clients. (Pl.'s Dep. 6:12-21.) Though he of course gains financially from additional clients, these clients also represent an opportunity

for Schlossberg to advocate for the very thing he is so concerned with in his blog – the rights of criminal defendants. The commercial speech, then, serves to support Schlossberg's advocacy efforts in the same way a nonprofit uses commercial speech to fund its advocacy. Thus, just like in *Gaudiya*, any commercial speech on Schlossberg's blog is inextricably intertwined with his core political message and mission, and thus ceases to be commercial.

Unlike in *Hunt*, however, the claim that Schlossberg's commercial speech is inextricably intertwined with his protected speech is in no way pretextual. In *Hunt*, the primary purpose of the sales stand was to sell. The plaintiff engaged in a business, and in support of that business, included some information about the significance of meaningful symbols he was trying to sell. Here, on the other hand, the primary purpose of the speech is to share Schlossberg's views on the criminal justice system. (Pl.'s Dep. 5:19-22.) Of course there is an underlying economic motivation playing a part, (Pl.'s Dep. At 6:12-18), but this motivation is not the sole primary purpose as it was in *Hunt*. Because Schlossberg has a primary motive of informing the public about the criminal justice system, his claim of commercial speech being inextricably intertwined with noncommercial speech survives the pretext analysis.

Though it is conceivable that Schlossberg could separate his commercial from his political speech, this is not in fact the test. Though true that "no law of man or of nature makes it impossible" for Schlosberg to share his views on the criminal justice system through cases other than his own, or speak about the results of his case without discussing his views on criminal justice, the court's actual test is not nearly as strict. *Fox*, 492 U.S. at 474. There was nothing about the speech in *Gaudiya* that made it impossible for the groups to sell shirts not bearing or related to their messages or advocate their messages without selling merchandise, and the court still held that their speech was inextricably intertwined. *Gaudiya*, 952 F.2d at 1064-65.

Schlossberg's alleged commercial speech is just like *Gaudiya* in that, though it is conceptually separable from his noncommercial speech, both types of speech serve the same underlying noneconomic motive and are made stronger by their inclusion together. The plaintiffs in *Gaudiya* got to sell unique merchandise because it bore the plaintiffs' messages, and the messages got greater distribution through the merchandise. Here, Schlossberg gains credibility through sharing his views on the criminal justice system, and his blog gains credibility and because the blog makes clear that he is a successful attorney. (Pl.'s Dep. 6:12-18.) Indeed, it makes since that when speaking about the cases he has handled he is inevitably speaking about the issues he holds dear. Since he feels very strongly about the rights of criminal defendants, and he actually represents criminal defendants, speaking about the cases he has handled will always at least implicitly involve the sharing of his views. Thus, any aspects of his blog that are commercial are inextricably intertwined with his noncommercial speech and is entitled to full First Amendment protection.

This analysis does not change because the blog is attached to his firm's website. Any commercial speech in his blog is inextricably intertwined with noncommercial speech, and thus the blog as a whole ceases to be commercial. In just the same way, this noncommercial blog is inextricably intertwined with the website as a whole. The website lends credibility and provides viewership for the blog, and the blog lends credibility to the site, resulting in more opportunities to defend the rights of criminal defendants. In just the same way that both aspects of the blog serve the same mission and are mutually reinforcing, the blog and website serve the same mission and reinforce one another. Thus, any commercial speech on the blog is inextricably intertwined with noncommercial speech, warranting full First Amendment protection. Because

full First Amendment protection triggers strict scrutiny, and the regulation cannot survive strict scrutiny, Schlossberg is entitled to win as a matter of law.

II. EVEN ASSUMING THAT THE SPEECH IS COMMERCIAL, THE BAR'S REGULATION CANNOT SURVIVE INTERMEDIATE SCRUTINY BECAUSE IT DOES NOT DIRECTLY SERVE THE ASSERTED INTEREST AND IS NOT NARROWLY TAILORED.

If the court finds that Schlossberg's speech is commercial, he is still entitled to win as a matter of law because the regulation fails under the four-part *Central Hudson* analysis. First, commercial speech receives some constitutional protection so long as it is not misleading or deceptive, nor involves illegal activity. *Bolger*, 463 U.S. at 68. If the speech in question satisfies this prong, its regulation violates the First Amendment if (1) the interest asserted is not substantial, (2) the regulation does not directly relate to the asserted substantial interest, OR (3) the regulation is not narrowly drawn. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). A regulation will not survive this intermediate scrutiny if any of these three elements is not satisfied.

It is undisputed that protecting the public from being misled by attorney advertising is a substantial government interest. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) ("The interest of the States in regulating lawyers is especially great.") (internal quotation mark omitted) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)). Even conceding that this interest is substantial, the regulation fails for not being direct or narrowly drawn. First, the blog deserves First Amendment protection because it is not misleading, deceptive, or about illegal activity. Second, the disclaimer does not have a direct relation to the asserted interest because it is underinclusive, and in any case, the Bar has failed to meet its burden showing directness. Finally, the regulation is not narrowly drawn because it would apply to a substantial amount of fully protected speech.

A. Schlossberg's Speech Is Constitutionally Protected Because It Is Neither Deceptive nor Misleading.

Given that the blog is entirely truthful and accurate, it merits First Amendment protection. Commercial speech that is not misleading or deceptive, nor related to illegal activity, is entitled to First Amendment protection. *Cent. Hudson*, 447 U.S. at 563-64. Speech is not misleading or deceptive so long as it is entirely truthful. *See, e.g., Zauderer v. Office of Discipplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 639-40 (1985) (holding that advertisements for a contraceptive device that were "entirely accurate" warranted First Amendment protection), *see also Joseph*, 353 F.3d at 1108 (holding that where "board certified" is given a statutory meaning, its use by a doctor that does not meet the statutory requirement is misleading). Even when the speech presents an "incomplete version of the relevant facts," so long as the speech is truthful, it merits constitutional protection. *Cent. Hudson*, 447 U.S. at 562 (citing *Bates*, 433 U.S. at 374).

Schlossberg's speech is entirely truthful and concerns a lawful activity, and is thus constitutionally protected. The blog is in no way related to illegal activity, but focuses instead on legal commentary and discussion of cases Schlossberg has handled. (Andrew Schlossber, *Developments in Seattle Criminal Law*, Law office of Andrew Schlossberg, http://www.lawofficeofandrewschlossberg.com/developmentsblog.) There is also no allegation that the blogs are anything but truthful given that even Howard concedes that none of the blog entries are untrue, including the results of the cases Schlossberg has handled. (Def.'s Dep. 5:22-6:3.) Given the truthfulness of pieces on his web site, Schlossberg's speech is protected by the First Amendment.

Even though the blog posts only discuss cases that Schlossberg has won, this is not misleading as understood under the *Central Hudson* analysis because even an incomplete

disclosure of truthful facts is entitled to protection. 447 U.S. at 562. In *Bates*, the court found that even though attorney advertising could not include enough information to "provide a complete foundation on which to select an attorney," so long as the information was truthful it was valuable and thus warranted protection. 433 U.S. at 374.

Schlossberg's blog posts are entirely truthful, so like in *Bates*, they are not misleading for the purposes of First Amendment protection. Just like in *Bates*, the blog posts may not provide a complete foundation on which to understand Schlossberg as an attorney given that they do not discuss cases which he has lost. (Pl.'s Dep. 7:17-19.) Although there is data to suggest that the public may be misled when attorneys advertise using their results, (*Ensuring Accurate Attorney Advertising*, 2012 Wash. St. B. Ass'n Task Rep. 2-3), given that everything Schlossberg has posted is completely truthful, (Def.'s Dep. 5:22-6:3.), it is not misleading under the *Central Hudson* analysis. Therefore, like in *Bates*, even if the blog may not include some relevant facts, it does not lose First Amendment protection and the Bar must justify its disclaimer under intermediate scrutiny.

B. The Disclaimer Does Not Directly Advance the Government Interest Because It is Underinclusive and the Bar Has Failed to Meet Its Burden Showing that the Disclaimer Will Further the Asserted Interest.

The proposed disclaimer does not directly relate to the asserted interest because it would not apply so long as Schlossberg moved his blog off of his firm's website, and because the Bar has failed to meet its burden showing that the regulation will actually prevent the harm the Bar seeks to prevent. A regulation on commercial speech must directly advance the government interest in order to be upheld. *Cent. Hudson*, 447 U.S. at 564. In order to directly advance the interest, the regulation must not be so underinclusive as to make the regulation essentially ineffective at alleviating the harm complained of. *Discovery Network*, 507 U.S. at 425-26. The

party seeking to uphold the regulation has the burden of showing through concrete facts that the regulation "will in fact alleviate [the harm] to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (citing *Zauderer*, 471 U.S. at 648-49).

Where a regulation is so limited in its application that it is unlikely to serve the desired end the regulation fails to be direct. In *Discovery Network*, the city prohibited dispensing commercial handbills on 62 freestanding newsracks on public property throughout the city. 507 U.S. at 413. However, the regulation did not apply to noncommercial handbills, and thus left between 1,500 and 2,000 similar newsracks undisturbed. *Id*. at 417. Because these newsracks were no less an eyesore than the 62 prohibited newsracks, the court held that the regulation failed for underinclusiveness. *Id*. at 422-26.

Like in *Discovery Network*, the regulation being applied to Schlossberg does not apply to a substantial amount of attorney advertising because Schlossberg is free to keep the blog as is so long as it is not a part of his firm's website. In both cases, a substantial amount of speech implicated by the asserted interest is beyond the scope of the regulation. In *Discovery Network*, there were a significant number of newsracks that, despite being as much an eyesore as the newsracks at issue were not being restricted in the same way. Here, the regulation leaves a significant number of attorney advertisements discussing the attorneys results unregulated because the disclaimer does not apply so long as the blog is not a part of the attorneys' firm's website. (Def.'s Dep. 9:4-6.) Suppose that Schlossberg did choose to move his blog off of his firm's website, this would not change the fact that potential clients could be misled by his reporting only cases he has won. Such a blog implicates the same interest to the same degree, yet remains totally unrestricted. Since underinclusivness meant that the regulation in *Discovery*

Network was not direct, the regulation here is also not direct and fails the *Central Hudson* analysis.

The regulation also fails because the bar has failed to meet its burden establishing that the proposed disclaimer will have a material effect on the asserted harm. In order to prove directness, the party seeking to uphold a restriction on commercial speech must move beyond "speculation or conjecture," and concretely "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 770-71 (holding that a regulation banning solicitation by certified public accountants could not be upheld because the government had not provided any studies showing that the asserted harm existed and that the ban would alleviate the harm).

Having failed to put in any evidence showing that the disclaimer will actually prevent potential clients from overestimating an attorney's success rate, the Bar has failed to meet its burden showing that the regulation directly relates to the asserted interest. Though the Bar has provided a study indicating that attorney advertisements that discuss results may mislead the general public, (*Ensuring Accurate Attorney Advertising*, 2012 Wash. St. B. Ass'n Task Rep. 2-3), they have failed to provide any evidence at all that the disclaimer will actually prevent this misapprehension. Such a failure to present evidence is no surprise given that Howard admits that such a disclaimer has never been used before on a blog. (Def.'s Dep. 8:12-15.) Given the Bar has failed to meet its burden, and that the regulation is substantially underinclusive, the disclaimer is not direct and thus Schlossberg deserves to win as a matter of law.

C. The Disclaimer Is Substantially Excessive Compared to the Government's Interest Because It Would Apply to a Significant Portion of Core Protected Speech.

The proposed disclaimer is not narrow enough to survive intermediate scrutiny because it applies to a significant portion of fully protected speech. Restrictions on commercial speech must be "narrowly drawn." *Cent. Hudson*, 447 U.S. at 565 (quoting *In re Primus*, 436 U.S. 412, 438 (1978)). In order to be narrowly drawn, there must be a reasonable fit between the government's interest and the means chosen to further that interest, and the regulation cannot be "substantially excessive" such that there exists a "far less restrictive and more precise means." *Fox*, 492 U.S. at 479 (internal quotation marks omitted) (quoting *Shapero v. Ky. Bar. Ass'n*, 486 U.S. 466, 476 (1988)).

Narrowness is achieved when the regulation is generally limited in such a way as to serve the government interest without overburdening other speech. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the government asserted the substantial interest of preventing Puerto Ricans from becoming excessive gamblers in order to protect the "health, safety and welfare of the Puerto Rico citizens." 478 U.S. 328, 341 (1986). This was achieved by restricting advertisements for casino gambling *within* Puerto Rico while allowing for media advertising *outside* Puerto Rico. *Id*. at 332. The court held that this statute was narrowly drawn because it specifically limited itself to the sort of speech it felt was harmful to Puerto Rico citizens, while allowing those advertisements that the locals would not have access to. *Id.* at 343.

Unlike in *Posadas*, the Bar's disclaimer as applied to Schlossberg is not narrowly drawn because it would apply even to his posts that are purely informative and have nothing to do with the asserted government interest. In *Posadas*, the government was worried about the effects of casino advertising on locals, and so it restricted the advertising available to locals while allowing advertising that did not implicate this interest. However, here the government is worried about

the effects of attorneys advertising their results, but the disclaimer applies not only to the posts that discuss Schlossberg's results, but also to all of his posts about general matters of criminal law that never mention any case he has handled. (WSBA Letter 1.) This case is unlike *Posadas*, and because the disclaimer does not narrowly target the speech the Bar is concerned with, and in fact burdens clearly protected speech, the regulation is not narrowly tailored. .

The disclaimer fails the fourth prong of the *Central Hudson* analysis despite the fact that instead of being a ban on speech, it merely requires additional information to be added to the blog. In order to prevent consumers from being either confused or deceived, "warning[s] or disclaimer[s] might be appropriately required." *Zauderer*, 471 U.S. at 651 (internal quotation marks omitted). In *Zauderer*, the court upheld a regulation which required that an attorney advertising contingency-fee rates must disclose whether these include court costs, or whether the client will be liable for such costs even if they lose the case. 471 U.S. at 633. It did so because the disclaimer merely added "purely factual and uncontroversial information." *Id.* at 651.

The disclaimer required here, however, is different than that in *Zauderer* because instead of requiring uncontroversial additional information, the Bar's disclaimer actually requires Schlossberg to brand his blog in a way that is both controversial, and in some applications, untrue. In *Zauderer*, the additional information was uncontroversial because it simply clarified the difference between a "cost" and a "fee," a difference that could confuse consumers. On the other, here the disclaimer does not clarify the language but actually labels the blog as an ADVERTISMENT. (WSBA Letter 1.) This is far from uncontroversial, indeed, Schlossberg contests this characterization as it would misrepresent his intentions and color the readers impression of the information in a way that cheapens the message. (Pl.'s Dep. 9:7-10:3.) Also unlike *Zauderer*, the disclaimer is untruthful when applied to the blog posts that don't concern

cases Schlossberg has handled because even if the court finds that some of the posts contain advertisements, the general interest posts clearly do not and thus forcing a disclaimer that labels them as advertisements is untrue. Thus, unlike in *Zauderer*, the regulation is not narrowly drawn because even though the disclaimer is not a ban on speech, it still fails for being controversial and, at times, untrue. Having failed the fourth prong of the *Central Hudson* analysis, the regulation as applied to Schlossberg cannot survive the intermediate scrutiny under which it must be analyzed. Schlossberg is thus entitled to win as a matter of law.

CONCLUSION

Schlossberg's speech is noncommercial and thus warrants full First Amendment protection. Even if the court finds the speech is commercial, the proposed disclaimer would still violate his right to freedom of speech. Because of this violation, he is entitled to a declaratory judgment as a matter of law stating that requiring the proposed disclaimer on his blog would violate his First Amendment right, and thus his summary judgment motion should be granted.

SIGNATURE BLOCK

DATED: February 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Summary Judgment of Plaintiff, Andrew Schlossberg, was served this day via email, to counsel for Defendant at the following address:

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