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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW SCHLOSSBERG,	:	
	:	**Docket No. 14-cv-3772 MJP**
Plaintiff	:	
	:	
v.	:	
	:	
GLENN HOWARD, in his individual capacity,	:	
	:	
Defendant.	:	
	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT GLENN HOWARD'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

CASES

INTRODUCTION

Andrew Schlossberg is an attorney, but he is also a business owner. As an attorney, he diligently represents vulnerable defendants in a criminal justice system where the odds are against them. But as a business owner advertising his services, Mr. Schlossberg risks misleading the same vulnerable people he works to protect in the courtroom. On the website for his legal practice, Mr. Schlossberg has a page called "Developments in Seattle Criminal Law." It looks like a blog but primarily consists of descriptions of his past legal successes. Glenn Howard, the Chief Disciplinary Counsel of the Washington State Bar Association, saw Mr. Schlossberg's blog and, based on his knowledge of how consumers react to attorney advertising, realized how easily potential clients would be misled by a list of courtroom victories in the form of a blog. Pursuant to the Bar Association's rules, Mr. Howard told Mr. Schlossberg he should add a disclaimer to the blog so that readers would know it was an advertisement and not a guarantee of Mr. Schlossberg's future success. Instead of posting the disclaimer, Mr. Schlossberg filed a lawsuit against Mr. Howard.

Speech is commercial when it advertises a product or service for the financial benefit of the speaker. A regulation of commercial speech is constitutional when it directly and reasonably advances a substantial government interest. Mr. Schlossberg's blog is commercial speech because he uses it to appeal to potential clients of his legal practice. The disclaimer is a constitutionally permitted regulation because it is a reasonable way for the Bar Association to prevent potential clients from being misled by Mr. Schlossberg's blog. Summary judgment should be granted for Mr. Howard because, as a matter of law, Mr. Schlossberg's blog is commercial speech and the proposed disclaimer is constitutionally permitted.

STATEMENT OF MATERIAL FACTS

For nearly a decade, Glenn Howard has worked for the Washington State Bar Association (the "Bar Association") fighting to protect the public from unethical behavior by Washington lawyers and prevent erosion of the public's trust in the judicial system. (Deposition of Glenn Howard, dated May 15, 2015 ("Howard Dep."), attached as Exhibit A, 2:26-3:4, 6:4-9). He has been with the Bar Association's Office of Disciplinary Counsel ("ODC") since 2007 and has served as its Chief Disciplinary Counsel since 2012. (Howard Dep. 2:19-25).

One of the Bar Association's chief concerns is misleading lawyer advertising. (Howard Dep. 6:4-9). Mr. Howard is particularly concerned because most lawyer advertisements are directed at a low-income audience that has little contact with lawyers. (2012 Washington State Bar Association Task Report: Ensuring Accurate Attorney Advertising ("WSBA Report"), attached as Exhibit B, 2). Advertisements that describe lawyers' results are particularly likely to mislead the public. (WSBA Report 3). More than 40% of people in a focus group thought that such ads promised future success. (WSBA Report 3).

Andrew Schlossberg, a criminal defense attorney with a solo practice, first came to Mr. Howard's attention after a former client filed a complaint stating that Mr. Schlossberg's ineffective representation had landed him in jail. (Howard Dep. 3:18-4:2). In investigating Mr. Schlossberg, the ODC determined that part of his website violates the Bar Association's prohibition of misleading advertising by attorneys. (Howard Dep. 4:16-5:10).

Like other attorney websites, Mr. Schlossberg's website is designed to advertise his services; it describes his education and areas of specialty, states his "genuine desire to help those who find themselves in difficult circumstances," and has a link to contact him for a free consultation. (www.lawofficeofandrewschlossberg.com (last visited January 27, 2016), attached

as Exhibit C). In order to further market his legal services, Mr. Schlossberg has a page on his website called "Developments in Seattle Criminal Law." (Deposition of Andrew Schlossberg, dated April 22, 2015 (Schlossberg Dep.), attached as Exhibit D, 6:19-21). Many attorneys use blogs as a means of attracting clients, and solo practitioners, like Mr. Schlossberg, report the most success in attracting clients from blogs. (Allison Shields, *2014 Legal Technology Survey Report: Blogging & Social Media*, attached as Exhibit F, at 2). Mr. Schlossberg's blog includes a series of entries boasting of his legal successes, along with a "Contact" link at the top and his phone and fax numbers at the bottom. (www.lawofficeofandrewschlossberg.com/developmentsblog (last visited January 27, 2016) ("Blog"), attached as Exhibit E). Some of the entries also include brief commentary on broader criminal justice issues, which Mr. Schlossberg includes to communicate his "identity" to potential clients.[1] (Schlossberg Dep. 5:17-6:18).

While a few of the entries do not mention specific cases of Mr. Schlossberg's, the overwhelming majority do—and Mr. Schlossberg only discusses cases in which he was successful. (Blog; Schlossberg Dep. 7:3-14). Two-thirds of the content of the blog (analyzed line by line) is about Mr. Schlossberg's courtroom victories. (Blog). In writing about his cases, Mr. Schlossberg discusses his specific legal arguments, motions, and appeals. (Blog). He always writes about himself in the third person, often referring to himself with a phrase like "Andrew Schlossberg of the Law Office of Andrew Schlossberg." (Blog).

At all times while viewing the blog, the viewer can see the Contact link at the top of the page and Mr. Schlossberg's contact information at the bottom. (Blog). The website's title "Law Office of Andrew Schlossberg" is also always visible, and this title is in a much larger font than "Developments in Seattle Criminal Law." (Blog).

[1] "People want to know who you are and what you stand for." (Schlossberg Dep. 5:17-6:18).

After thoroughly investigating Mr. Schlossberg's website, the ODC determined that the blog violates the Bar Association's Rule 7.1 of the Bar Associations Rules of Professional Conduct, which prohibits misleading attorney advertising. (Howard Dep. 4:16-5:10). Comment 3 of Rule 7.1 explains that "[a]n advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients 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 matters." (Letter from Howard to Schlossberg, dated July 15, 2014 ("WSBA Letter"), attached as Exhibit G, 1).

Mr. Howard and the ODC were concerned about Mr. Schlossberg's website in light of the troublesome findings of the WSBA Report on attorney advertising, so Mr. Howard decided something needed to be done. (Howard Dep. 6:17-24, 7:12-19). Rather than ordering Mr. Schlossberg to remove "Developments in Seattle Criminal Law" from his website or change its content, Mr. Howard proposed that Mr. Schlossberg add a disclaimer to the blog. (WSBA Letter 1). The disclaimer was to state (1) in capital letters that "Developments in Seattle Criminal Law" is an advertisement and, (2) in boldfaced type as large as the largest font used in the blog, that it is not a guarantee of future results. (WSBA Letter 2). In the past the Bar Association has required similar disclaimers for print and television advertisements. (Howard Dep. 8:11-15).

On July 15, 2014, Mr. Howard sent a letter to Mr. Schlossberg explaining the violation and proposing the disclaimer as a solution, pursuant to Comment 3 of Rule 7.1 (WSBA Letter 1). Mr. Howard thought adding the short disclaimer would be a simple way to resolve the problem, amenable both to Mr. Schlossberg and the ODC (WSBA Letter 1).

Rather than accepting Mr. Howard's proposed resolution, or even responding to his letter, Mr. Schlossberg consulted a lawyer and filed this lawsuit. (Schlossberg Dep. 8:23-9:1).

STANDARD OF REVIEW

Summary judgment must be granted when there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Material facts are those facts that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only material facts as to which there is a genuine dispute must be viewed in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

ARGUMENT

Mr. Howard is entitled to summary judgment because, as a matter of law, Mr. Schlossberg's blog is commercial speech and the disclaimer that Mr. Howard proposed is constitutional. Speech is commercial if its main purpose is to sell something. *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). A regulation of commercial speech is constitutional when it directly and reasonably advances a substantial government interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Mr. Schlossberg's blog is commercial speech because he uses it to appeal to potential clients of his legal practice. The disclaimer is a constitutionally permitted regulation because it is a reasonable way for the Bar Association to prevent potential clients from being misled by Mr. Schlossberg's blog.

I. MR. SCHLOSSBERG'S BLOG IS COMMERCIAL SPEECH BECAUSE IT IS DESIGNED TO ADVERTISE HIS LEGAL SERVICES TO POTENTIAL CLIENTS AND BECAUSE ITS NONCOMMERCIAL CONTENT COULD EASILY BE REMOVED.

Mr. Schlossberg's blog is commercial speech because it is an advertisement intended to market his legal services and the limited noncommercial content it contains could easily be removed and published separately. Speech is commercial if it "does no more than propose a

commercial transaction," or, in closer cases where the speech contains both commercial and noncommercial content, if the publication as a whole exhibits the following characteristics—an advertising format, a reference to a specific product, and an economic motive. *Bolger*, 463 U.S. at 66-67. If speech is deemed commercial under either of these criteria, it is not entitled to full First Amendment protection unless it has noncommercial contents that are inextricably intertwined with its commercial contents. *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012).

Mr. Schlossberg's blog is more than a bare proposal for a commercial transaction because it contains both commercial and noncommercial content. Nonetheless, as a whole, it is commercial speech because it advertises his legal services to potential clients who he hopes will pay him to represent them. The blog is not entitled to more protection than commercial speech is typically afforded because there is no objective reason why its commercial and noncommercial content have to be combined.

A. Mr. Schlossberg's blog is commercial speech because it is an advertisement for his business that references his legal services and is intended to make him more appealing to potential clients.

Mr. Schlossberg's blog exhibits all three of the *Bolger* factors: (1) it is an advertisement; (2) it refers to a specific product; and (3) it has an underlying economic motive. None of these factors alone is sufficient to characterize a mixed publication as commercial, but the presence of all three strongly indicates that a publication is commercial. *Bolger*, 463 U.S. at 66-67; *Dex Media*, 696 F.3d at 960. It is also possible for speech to be commercial even if one of the factors is absent. *Bolger*, 463 U.S. at 67 n.14. Since Schlossberg's blog is an advertisement for his business that repeatedly refers to his legal services, and he admits that one of its purposes is to attract business, the blog is commercial speech.

1. Mr. Schlossberg's blog is an advertisement because it has the features and purpose of an advertisement.

Mr. Schlossberg's blog is an advertisement because it is part of the website for his legal practice, enables readers to contact him for consultations, contains far more discussion of his successful cases than of broader policy issues, and clearly links its limited public policy commentary with its commercial content. The mere presence of identifying and contact information can be sufficient to make a publication an advertisement. *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F. 3d 1099, 1103, 1106 (9th Cir. 2004) (deeming a doctor's letterhead a form of advertising). *See also Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 99-100 (1990) (treating an attorney's letterhead as commercial speech). Moreover, a publication that contains both commercial and noncommercial elements is an advertisement if there is a clear link between its commercial and noncommercial content. *Dex Media*, 696 F.3d at 959. If the overall impression of a publication is that its purpose is to encourage the viewer to make a purchase, it is properly considered an advertisement even when the explicit commercial content is relatively minimal. *See Bolger*, 463 U.S. at 62 n.4, 66.

A mixed publication is an advertisement when there is a straightforward, direct connection between the commercial and noncommercial content. *See Bolger*, 463 U.S. at 62 n.4, 66; *Dex Media*, 696 F.3d at 959. In *Bolger*, a condom manufacturer distributed pamphlets about condom usage and sexually transmitted diseases. 463 U.S. at 62 n.4. In spite of the fact that the pamphlets mostly consisted of general health information and some only mentioned the company name and its products once, the Supreme Court considered the pamphlets as a whole to be advertisements because the informational content was clearly linked to the company's commercial intent. *Id*. *Cf. Dex Media*, 696 F.3d at 959 (holding that the yellow pages as a whole

was not an advertisement because there was no link between its advertising content and its noncommercial community information and phone listings).

Mr. Schlossberg's blog is an advertisement because it is part of the website for his legal practice and enables readers to contact him for consultations. While reading the blog, the name of his practice, "Law Office of Andrew Schlossberg," is always visible at the top of the page, along with a link that viewers can click to contact Mr. Schlossberg directly for a free consultation. (Blog). At the bottom of the page, Mr. Schlossberg's telephone and fax numbers are also always visible. (Blog). If an attorney's or doctor's letterhead is advertising, as in *Peel* and *Pain Management*, then a blog located on a commercial website like Mr. Schlossberg's is an advertisement too. Given the ease with which one can contact Mr. Schlossberg directly while viewing his blog, it is arguably an even clearer example of an advertisement than letterhead.

Moreover, the blog is as an advertisement because there is a clear link between Mr. Schlossberg's descriptions of his past legal victories and the limited policy commentary he includes. Like the pamphlets in *Bolger*, where the information about condom usage and sexually transmitted diseases was clearly linked to the condom manufacturer's references to its products, Mr. Schlossberg's brief discussions of broader criminal justice issues are almost always directly connected to his descriptions of his successes in the courtroom. In *Bolger*, the pamphlets consisted predominantly of informational content, but the Supreme Court nonetheless treated them as advertisements. Here, where more than three-quarters of the blog entries discuss Mr. Schlossberg's legal victories and two-thirds of the space is occupied by these boastful descriptions, the case for it being an advertisement is even more straightforward. While an attorney whose purpose was to discuss public policy issues might reasonably discuss his past cases, surely cases he lost would be as relevant as those he won. Since Mr. Schlossberg's blog

only discusses cases he won and these case descriptions take up so much of the blog's space, his intent to use the blog as an advertisement is apparent.

2. Mr. Schlossberg's blog refers to a specific product, namely his legal services.

Mr. Schlossberg's blog repeatedly mentions his legal services—the product that he is using his blog to market. There is ample precedent for considering professional services to be a product for the purposes of commercial speech analysis. *See, e.g., Pain Mgmt.,* 353 F. 3d at 1106 (treating medical services as a product). Mr. Schlossberg touts his legal services in most of the blog entries, discussing not only the facts of his past cases but his specific legal arguments, motions, and appeals. (Blog). Moreover, in all of these entries he writes about himself in the third person, often using a phrase like "Andrew Schlossberg of the Law Office of Andrew Schlossberg." (Blog). That he refers to himself in this way shows that his purpose is not to use his case descriptions as examples in discussions of public policy issues but rather to market his business and the legal services that are its product.

3. Mr. Schlossberg has an economic motive to publish his blog because he admits that one of its purposes is to market his legal practice.

Mr. Schlossberg's blog has an underlying economic motive because its purpose is to drum up business for his legal practice. Soliciting clients for professional services is an economic motive. *Pain Mgmt.*, 353 F. 3d at 1106. Mr. Schlossberg admits that one of the reasons he has a blog on his website is to market his legal services. (Schlossberg Dep. 6:19-21).

B. Mr. Schlossberg's blog is only entitled to the limited protection afforded to commercial speech because its discussions of broad policy issues are not inextricably intertwined with its commercial content.

Since Mr. Schlossberg's blog is commercial speech and the limited noncommercial content it contains could easily be separated from the commercial content, the blog is not entitled to the full protection afforded to noncommercial speech. Commercial speech generally receives

less protection from government regulation than noncommercial speech, but there is a "narrow exception" for commercial speech that has noncommercial elements that are inextricably intertwined with its commercial elements. *Dex Media*, 696 F.3d at 958. Speech that would otherwise be treated as commercial (either because it proposes a commercial transaction or passes the *Bolger* test) is only entitled to full First Amendment protection if it has commercial and noncommercial elements that, by some "law of man or of nature," cannot possibly be separated. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989). The mere fact that commercial speech includes a discussion of an important public issue is not sufficient to entitle it to full protection. *Bolger*, 463 U.S. at 67-68. For good reason, linking a product to a public issue or debate only affords commercial speech the full protection given to noncommercial speech if the discussion of the public issue cannot be separated from the commercial aspects of the speech; otherwise, businesses could evade regulation merely by incorporating matters of public concern into their advertisements. *Id.* at 68.

When people engaged in commercial speech include philosophical or other noncommercial musings in their sales pitches to increase their appeal to potential customers, that does not make the commercial and noncommercial parts of their speech inextricably intertwined. *Hunt v. City of Los Angeles*, 638 F.3d 703, 708, 716 (9th Cir. 2011). In *Hunt*, the plaintiffs were boardwalk vendors who also spoke about healing and spirituality. 638 F.3d at 708. While selling their incense, shea butter, and oil burners, the plaintiffs communicated their views about the healing powers and spiritual significance of their products and explained the meaning of various religious symbols. *Id.* They used their discussions of spirituality to establish credibility with their potential customers; the spirituality was part of their brand.[2] *Id.* Even though the plaintiffs were

[2] "According to Hunt, his area is 'the Garden of Eve and [I] really just make it look nice and smell good, as if I was in heaven.'" *Hunt*, 638 F.3d at 708.

expressing their religious and philosophical views, the court held that their activities could be regulated as commercial speech because there was "no meaningful nexus between the products sold (the commercial speech) and the information provided (the noncommercial speech)." *Id.* at 716. The plaintiffs could have easily sold their wares without referencing their spiritual views or communicated their spiritual views without selling anything. *Id. See also Fox*, 492 U.S. at 474 (holding that selling housewares and teaching about home economics were not inextricably intertwined); *United States v. Schiff*, 379 F.3d 621, 629 (9th Cir. 2004) (holding that the plaintiff's stories about his personal history with the IRS and his theories about the federal income tax system were not inextricably intertwined with his efforts to sell his books and other media about tax avoidance).

Mr. Schlossberg's descriptions of his past cases, which he incudes in his blog in order to market his legal services, are not inextricably intertwined with his discussions of the criminal justice system. Like the plaintiffs in *Hunt*, Mr. Schlossberg's commercial and noncommercial speech could easily be separated. Mr. Schlossberg could easily have a blog on a separate website discussing his views on broader criminal justice issues without touting his legal services and past successes, and he could easily have a section on his website about previous cases of his without discussing policy issues. The plaintiffs in *Hunt* undoubtedly thought of their incense and shea butter as inherently spiritual. Similarly, Schlossberg may view criminal defense work as inherently political. In neither case, though, is there anything—aside from the advertisers' subjective views—that requires the expression of their beliefs to be included in their sales pitches. Moreover, both Schlossberg and the *Hunt* plaintiffs use their noncommercial speech as part of their larger effort to establish their brands. The *Hunt* plaintiffs want potential customers to view them as spiritual people selling products that will improve their lives. Similarly, Mr.

Schlossberg wants potential clients to see him as a passionate advocate, committed to fighting against a broken, oppressive criminal justice system. Both Mr. Schlossberg and the vendors in *Hunt* could remove the noncommercial speech from their advertisements; however, they chose not to because they believed including it made what they were selling more attractive to potential customers.

II. SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THE DISCLAIMER IS A CONSTITUTIONALLY PERMITTED REGULATION OF MR. SCHLOSSBERG'S COMMERCIAL SPEECH.

The disclaimer is a constitutional regulation of Mr. Schlossberg's blog because it directly advances the Bar Association's substantial interest in protecting the public from potentially misleading attorney advertising. A government restriction on commercial speech that concerns lawful activity and is not inherently misleading is permitted if (1) the asserted government interest is substantial; (2) the regulation directly advances the asserted government interest; and (3) the regulation is not more extensive than necessary. *Cent. Hudson*, 447 U.S. at 566. When the Supreme Court held that commercial speech is entitled to First Amendment protection, the Court emphasized that this protection is limited, particularly insofar as the speech has the potential to deceive the public. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* 425 U.S. 748, 771 (1976). States can completely prohibit commercial speech that is false or inherently misleading. *See, e.g.*, *In re R.M.J.*, 455 U.S. 191, 203 (1982). While outright bans on speech that is only potentially misleading might not always be appropriate, where past experience indicates a particular type of advertising is subject to abuse, states may impose restrictions such as disclaimers or explanations. *Id.* The Supreme Court has long recognized that the unique nature of professional services makes advertisements for such services particularly likely to mislead the public even when the advertisements do not explicitly say anything that is false. *See, e.g.*, *Id.* at

202; *Va. State Bd. of Pharmacy*, 252 U.S. at 773 n.25. States can, therefore, regulate attorney advertising even when it is not inherently misleading. *In re R.M.J.*, 495 U.S. at 202.

While there is nothing in Mr. Schlossberg's blog that is false or inherently misleading, it is still subject to government regulation because it is commercial speech that has the potential to mislead people. The disclaimer is a constitutionally permitted regulation of Mr. Schlossberg's commercial speech. The Bar Association has a substantial interest in protecting vulnerable, unsuspecting potential clients from potentially misleading attorney advertising. The disclaimer directly advances this interest by targeting the misleading aspects of the blog and correcting the likely misperceptions. The disclaimer is not a more extensive measure than is necessary because it is a reasonable means of addressing the Bar Association's concerns and merely gives consumers additional information about what they are viewing.

A. The Bar Association has a substantial interest in protecting the public from the effects of potentially misleading attorney advertising.

Mr. Howard and the Washington State Bar Association have a substantial interest in protecting members of the public from attorney advertising that might lead people to form unjustified expectations of positive legal outcomes. A government regulation of commercial speech is permitted when the government asserts a substantial interest, the proposed regulation directly advances that interest, and the proposed regulation is not more extensive than necessary. *Cent. Hudson*, 447 U.S. at 566. Governments have a particular interest in regulating advertising by professionals because it is especially susceptible to abuse, in part because of the public's relative lack of knowledge. *In re R.M.J.*, 455 U.S. at 202. This interest is even more pronounced with respect to attorney advertising because of lawyers' essential role in the state's administering of justice. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978). When attorneys and other professionals make assertions about their special abilities or knowledge in specific practice areas,

states have an interest in ensuring that the information is accurate and not confusing. *See Peel*, 496 U.S. at 110; *Pain Mgmt.*, 353 F.3d at 1108.

Advertisements that describe attorneys' past results, like Mr. Schlossberg's blog, are particularly likely to mislead the public. More than 40% of people in a focus group thought that such advertisements promised future success. (WSBA Report 3). Mr. Schlossberg's blog is even more problematic than a typical advertisement because it is disguised as a discussion of public policy. Viewers might forget that they are looking at an advertisement and, thus, be less skeptical than they might otherwise be when viewing an advertisement. Meanwhile, as they read about one after another of Mr. Schlossberg's legal victories, they will get the impression that he never loses a case. Given the public's relative lack of knowledge about the legal profession and the absence of the kind of standardization of legal services that might make it easier for the public to compare attorneys, Mr. Howard is right to be concerned about members of the public being misled by Mr. Schlossberg's blog. The government interest is especially strong here because attorney advertising tends to be directed at a low-income audience. Moreover, people looking for a criminal defense attorney tend to be in desperate situations and might be more susceptible to potentially misleading advertising. The government is charged with administering justice and, thus, has a substantial interest in ensuring that defendants make informed choices based on clear information when they choose who will represent them in court.

B. The disclaimer directly advances the state's interest in protecting the public because it directly addresses the Bar Association's concerns about Mr. Schlossberg's blog.

The disclaimer Mr. Howard proposed directly advances the state's interest in protecting the public from potentially misleading attorney advertising because it directly addresses the concern that readers of Schlossberg's blog will be misled into thinking that he never, or rarely,

loses a case. A government regulation of commercial speech is permitted when the government asserts a substantial interest, the proposed regulation directly advances that interest, and it is not more extensive than necessary. *Cent. Hudson*, 447 U.S. at 566. A proposed regulation directly advances the government's interest when it will alleviate the harms it seeks to remedy "to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). While empirical data is helpful, tangentially related studies and anecdotal evidence can be sufficient to establish that a restriction on speech directly advances the government's interest. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). Tenuous connections between the government's interest and the proposed restriction will not suffice, but common-sense reasoning can establish that a sufficiently direct relationship exists between a regulation and the government's interest. *Id.*; *Cent. Hudson*, 447 U.S. at 569.

Empirical studies, including informal surveys commissioned by the government, can establish that a proposed government regulation of commercial speech directly advances a substantial government interest and materially alleviates a real harm. *Went For It, Inc.*, 515 U.S. at 628. In *Went For It*, the Florida Bar commissioned a study of the effects of lawyer advertising on public opinion. *Id.* at 620. The study found that the public viewed direct-mail solicitations by attorneys in the immediate wake of accidents as an invasion of privacy and that those types of advertisements damaged the reputation of the legal profession. *Id.* at 626. As a result of the study, the Florida Bar passed rules that prohibited lawyers from contacting accident victims to solicit business within thirty days of an accident. *Id.* at 620-21. The Supreme Court held that these rules directly advanced the state's substantial interests in protecting the privacy of accident victims and preserving the integrity of the legal profession because they eliminated the source of the harm. *Id.* at 624. *See also Borgner v. Brooks*, 284 F.3d 1204, 1213 (11th Cir. 2002)

(accepting survey data as proof that consumers could be harmed by dentists' potentially misleading statements about their certifications and holding that a disclaimer would directly advance the state's interest in protecting consumers from that harm), *cert. denied*, 537 U.S. 1080 (2002).

Even in the absence of empirical evidence, a restriction on speech can be shown to directly advance the government's interest merely based on common sense. *Cent. Hudson*, 447 U.S. at 569. In *Central Hudson*, the Supreme Court held that a ban on utility company advertisements promoting electricity usage directly advanced the government's interest in reducing energy consumption even though there was no evidence in the record that the advertisements actually affected energy consumption. *Id.* at 558, 569. The Court reasoned that the mere fact that the plaintiff utility company was challenging the regulation demonstrated an "immediate connection" between advertising and electricity usage. *Id.* at 569. *Cf. Edenfield*, 507 U.S. at 771 (holding that Florida's ban on direct solicitation of prospective clients by accountants did not directly advance the state's interests in preventing fraud because the state presented neither studies nor anecdotal evidence demonstrating a link between solicitation and fraud and there was no common-sense reason to presume such a link).

The disclaimer proposed by the Bar Association directly advances a substantial government interest because it directly addresses real problems whose existence is established empirically. As in *Went For It* and *Borgner*, Mr. Howard's reasons for concern and his proposed solution are based on data from a study. The study establishes that a substantial portion of people who view Mr. Schlossberg's blog are likely to be deceived by it and to interpret it as a guarantee of future success. In *Went For It*, the Supreme Court approved a complete ban on attorney advertising targeted at people who had recently been in accidents because it directly advanced

the state's interest in protecting accident victims' privacy and preventing damage to the reputation of the legal profession. Here, where the harm is in how viewers will interpret Mr. Schlossberg's advertisement, the disclaimer, like the disclaimer in *Borgner*, will directly address each of the potential sources of deception. The disclaimer addresses Mr. Schlossberg's discussion of his past legal successes by informing readers that the blog is not a guarantee of future success. It addresses the blog format, which might make viewers forget they are viewing an advertisement and, thus, make them even less skeptical than they would be if viewing a more traditional advertisement, by reminding them that they are viewing an advertisement. After viewing the disclaimer, potential clients will know not to interpret Mr. Schlossberg's descriptions of his past cases as an assurance that he will attain similar outcomes in their cases, and they will be reminded that what they are reading is intended, at least in part, to market Mr. Schlossberg's services.

Even if the Bar Association had no survey data to support Mr. Howard's concerns about Mr. Schlossberg's blog, a court might reasonably conclude that the disclaimer directly advanced the state's interests. As in *Central Hudson*, where common sense was sufficient to support the state's claim that utility company advertising would lead to increased energy consumption, a clear and direct connection can easily be inferred between a blog like Mr. Schlossberg's and criminal defendants' getting a false sense of the likelihood of success in their own legal cases. In *Edenfield*, in contrast, any connection between accountants' soliciting business and fraud would have been tenuous and speculative at best.

C. The disclaimer is not a more extensive regulation than is necessary because it is a reasonable means of achieving the Bar Association's goal and provides the public with truthful information.

The disclaimer is not a more extensive restriction on Mr. Schlossberg's speech than is necessary because it is a reasonable means of preventing consumers from being misled and merely adds additional truthful information to the content that Mr. Schlossberg wants to communicate. A government regulation of commercial speech is permitted when the government asserts a substantial interest, the proposed regulation directly advances that interest, and it is not more extensive than necessary. *Cent. Hudson*, 447 U.S. at 566. For a restriction on commercial speech to be constitutional, it need not be the least restrictive measure possible; nor must it be the absolute best means of achieving the government's goal. *Fox*, 494 U.S. at 480. Rather, there must be a reasonable fit between the government's ends and the means chosen. *Id.* While outright bans on commercial speech can be overly burdensome, mandatory disclosures and disclaimers are a less restrictive way to protect consumers while also preserving the rights of professionals to advertise their services. *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). Commercial speech is afforded First Amendment protection primarily because courts have concluded that consumers benefit from such speech; therefore, the desire of those who engage in commercial speech to withhold truthful information from the public does not warrant much deference. *Id.*

When attorney advertising is literally truthful but nonetheless likely to mislead, states may require disclosures or disclaimers in order to provide consumers with more complete information. *Id.* In *Zauderer*, an attorney advertising his contingency-fee services said that clients would not owe any legal fees unless their claims were successful. *Id.* at 631. The attorney was disciplined by the state of Ohio for violating its rule that required attorneys advertising

contingency-fee services to disclose that losing clients would still be liable for costs. *Id.* at 633. While the advertisement did not contain any untruthful statements, the Supreme Court nonetheless upheld Ohio's rule because lay people would be unlikely to understand the technical difference between "fees" and "costs" and would, thus, be easily deceived into thinking that if their claims were unsuccessful they would owe no money at all. *Id.* at 652. Since they only convey truthful information, mandated disclaimers and disclosures are a reasonable, minimally restrictive way to prevent consumers from being deceived. *Id.* at 651. *See also Peel*, 496 U.S. at 110 (suggesting that, rather than barring attorneys from advertising certain certifications, the state could have required disclaimers that gave more information about the certifying organizations); *W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1096 (9th Cir. 2001) (holding that, while an outright ban on pharmacists' advertising compounded drugs was too restrictive, a disclaimer would be acceptable); *Borgner*, 284 F.3d at 1214-15 (approving a disclaimer in dentists' ads indicating that a certifying organization was not recognized by the state Dental Board).

Since Mr. Schlossberg's blog is likely to mislead consumers, the disclaimer Mr. Howard proposed, which directly and narrowly addresses the potential sources of confusion, is an appropriate and not overly restrictive requirement. As with the attorney advertisements in *Zauderer*, there is no suggestion that Mr. Schlossberg's blog contains any untrue statements. Nonetheless, both the *Zauderer* advertisements and Mr. Schlossberg's blog are likely to mislead consumers due to consumers' vulnerability and lack of familiarity with the legal profession. Just as a disclaimer was appropriate in *Zauderer* to provide consumers with more complete information about their financial obligations, the Bar Association's proposed disclaimer is

appropriate because it will give consumers a more realistic sense of the likelihood of success in their criminal cases should Mr. Schlossberg represent them.

It is easy to imagine other more onerous regulations that the Bar Association might have imposed. Mr. Howard could have ordered Mr. Schlossberg to remove the blog from his law office's website or told him that if he wanted to discuss past cases he had to include cases that he lost in addition to those he won. Instead, Mr. Howard chose merely to require that Mr. Schlossberg add accurate, descriptive information alongside his blog. While there are various possibilities for how the disclaimer might have been worded and formatted, the disclaimer need not be perfect in order to be permissible. Rather, it simply must be a reasonable means of preventing consumers from being misled. The Bar Association has required similar disclaimers on television and radio advertisements in the past. (Howard Dep. 8:11-15). A disclaimer is even more needed here, where the blog format might lead consumers to lose sight of the fact that they are looking at an advertisement.

CONCLUSION

Summary judgment should be granted for Mr. Howard because, as a matter of law, Mr. Schlossberg's blog is commercial speech and the disclaimer that Mr. Howard proposed on behalf of the Bar Association is a constitutionally permitted regulation of commercial speech. Mr. Schlossberg's blog is commercial speech because he uses it to advertise his legal services and its discussions of broader policy issues could easily be removed. The disclaimer is an acceptable regulation because it directly and reasonably advances the state's substantial interest in preventing criminal defendants from being misled by attorney's advertisements. There is no dispute as to any of the material facts of the case, and both of these issues are rightfully decided as matters of law.

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Respectfully submitted,

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ATTORNEYS FOR DEFENDANT GLENN HOWARD

CERTIFICATE OF SERVICE

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

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Dated: February 20, 2016