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# What Went Wrong on the World Wide Web: The Crossroads of Emerging Internet Technologies and Attorney Advertising in Louisiana

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# What Went Wrong on the World Wide Web: The Crossroads of Emerging Internet Technologies and Attorney Advertising in Louisiana

“If commercial advertisers are First Amendment step-children, lawyers come closer to abandoned orphans.”<sup>1</sup>

## INTRODUCTION

Since the late 1970s, courtrooms have served as a battlefield for a war waged over self-regulated attorney advertising.<sup>2</sup> On the front line are attorney advertisers and public interest organizations, shouting battle cries for unhindered promotion of legal services and armed with dated, yet durable, First Amendment claims.<sup>3</sup> Defending their posts are state bar associations, bearing little more than the regulatory tradition of a dignified profession so vital to its future.<sup>4</sup> As with many wars, technological development brings both opportunities and challenges, which if not properly harnessed can result in either chaos or unwarranted suppression.<sup>5</sup>

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1. Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 2 (2002).

2. See *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (upholding a 30-day ban on mailed solicitations to accident victims); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (holding that truthful and nondeceptive mail targeted to individuals with specific needs could not be prohibited); *In re R.M.J.*, 455 U.S. 191 (1982) (holding that states may not impose absolute prohibitions on potentially misleading information if such information may also be presented in a way that is not deceptive); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (holding that in-person solicitation for pecuniary gain is subject to regulation); *In re Primus*, 436 U.S. 412 (1978) (holding that solicitation for social cause and no pecuniary gain is permissible); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that commercial speech is entitled to First Amendment protection).

3. See, e.g., Brian Wolfman, *Proposed Rules on Lawyer Advertising in Louisiana Are Unconstitutional*, PUB. CITIZEN (June 6, 2007), <http://www.citizen.org/pressroom/release.cfm?ID=2452> (arguing that the “[p]roposed Louisiana rules on lawyer advertising and solicitation are unconstitutional restrictions on free speech under the First Amendment and would harm many consumers of legal services”).

4. See *Went for It*, 515 U.S. at 639 (discussing the Court’s interest in “protecting the reputation and dignity of the legal profession”); *Bates*, 433 U.S. at 368 (recognizing and “commend[ing] the spirit of public service with which the profession of law is practiced and to which it is dedicated”).

5. See generally MARTIN L. VAN CREVELD, *TECHNOLOGY AND WAR: FROM 2000 B.C. TO THE PRESENT* (1991) (considering the influence of technology over the past 4,000 years on military organization, weaponry, logistics, intelligence, communications, transportation, and command).

The technological newcomer in this war is the Internet. Emerging technologies presented by this medium have forever changed the face of advertising.<sup>6</sup> The distinct nature of these advertising means evades traditional classification and leaves many states scrambling to address attorney use. Often times, as illustrated by Louisiana's failed attempt to regulate attorney Internet advertising, this haste results in the adoption of short-sighted rules that fail to recognize their own catalyst.<sup>7</sup> Louisiana's recent mishandling of this regulation sheds light upon the necessity for states to assert a substantial interest in such regulation and to narrowly tailor regulatory language.<sup>8</sup> As a result, Louisiana's treatment will likely be viewed as a quintessential misstep in the realm of attorney Internet advertising regulation as states across the nation begin to address this emerging issue.<sup>9</sup>

This Comment argues that overly broad regulations that subject all attorney Internet advertisements to the exacting content requirements governing traditional media, such as the regulations in Louisiana and Florida, create constitutional and practical shortcomings.<sup>10</sup> Rather than categorically regulating attorney Internet advertising, states should draft rules considerate of both consumer and commercial speech protection, which specifically address the functionality underlying the most prevalent forms of Internet advertising, such as pay-per-click advertising.<sup>11</sup>

As state bar associations jostle to regulate a forthcoming generation of technically erudite attorneys, the need to address attorney advertising on the Internet in a clear and sufficient manner has never been more urgent. The onset of Internet technologies presents a single, yet crucial, battle in the larger scope of

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6. See DAVID W. SCHUMANN & ESTHER THORSON, INTERNET ADVERTISING: THEORY AND RESEARCH 3 (2007) ("We know now that the way people consume, interact, share, view, and communicate with information, entertainment, and each other has changed forever." (quoting Christopher M. Schroeder, *The Media World Will Never, Ever, Be the Same*, MEDIAPOST (Sept. 22, 2005, 6:00 AM), [http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art\\_aid=34325](http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=34325)) (internal quotation marks omitted)).

7. See discussion *infra* Part III.B.1.c.

8. Email from Scott G. Wolfe, Jr. to the Bureau of Nat'l Affairs (2009), available at <http://www.abanet.org/cpr/la-ad.pdf> ("[This] decision [in *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539 (E.D. La. 2009)] underlines that the state has a burden to justify regulations, and narrowly tailor them . . . and in the case of the Internet, they must specifically consider that medium in formulating a justification and in properly tailoring the rule.").

9. *Id.* (characterizing the ruling in *Public Citizen* as "quite consequential for attorneys in other states who want to challenge their state's restriction on Internet advertising").

10. See discussion *infra* Part IV.

11. See discussion *infra* Part V.

competing perspectives—one that is likely determinative of a regulatory stronghold for decades to come. Part I of this Comment provides a brief history of attorney advertising regulation spanning back to the late 1970s. Part II explores emerging advertising technologies on the Internet, focusing on their functionality and inherent distinction from traditional advertising media. Part III examines current regulatory schemes as they apply to these prevailing technologies, and Part IV sheds light on their constitutional and practical shortcomings. Finally, Part V draws inferences from the shortcomings in these rules and proposes necessary action.

### I. A BRIEF HISTORY OF ATTORNEY ADVERTISING REGULATION

The United States Supreme Court first recognized the protection of commercial speech under the First Amendment in 1976<sup>12</sup> and in doing so sparked a flurry of activity relating to its application to attorney advertising. The Court specifically applied First Amendment protection to attorney advertising a year later in *Bates v. State Bar of Arizona*,<sup>13</sup> in which the Court ruled that states could regulate false, deceptive, or misleading lawyer advertisements, but that these advertisements “may not be subject to blanket suppression,” as this would inhibit the free flow of information.<sup>14</sup> In *Bates*, the Supreme Court of Arizona imposed disciplinary sanctions on two attorneys who violated a rule prohibiting attorney advertising.<sup>15</sup> The Arizona State Bar justified this rule by purporting that legal advertisements adversely affect professionalism, are inherently misleading, increase litigation and the cost of legal services, encourage shoddy work, and are difficult to monitor for abuse.<sup>16</sup> The United States Supreme Court concluded that truthful advertisements, such as those put forth by the appellants, are worthy of First Amendment protection,<sup>17</sup> but

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12. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

13. 433 U.S. 350 (1977). The *Bates* Court was concerned that lawyer advertising might not provide consumers with all relevant information needed to make an informed decision about counsel but noted that the prohibition of advertising “serves only to restrict the information that flows to consumers.” *Id.* at 374.

14. *Id.* at 383.

15. *Id.* at 359.

16. *Id.* at 368–79.

17. *Id.* at 386.

clearly held that false, deceptive, or misleading advertisements are within the scope of state regulation.<sup>18</sup>

Although the United States Supreme Court was hesitant to apply a categorical ban on lawyer communications, it did so in *Ohralik v. Ohio State Bar Ass'n*<sup>19</sup> with respect to in-person solicitation.<sup>20</sup> The Court in *Ohralik*, decided one year after *Bates*, distinguished in-person solicitation from speech traditionally protected by the First Amendment, stating that in-person solicitation “does not stand on par” with truthful advertising.<sup>21</sup>

Two years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>22</sup> the Court developed a test to determine whether states may regulate commercial speech.<sup>23</sup> First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.<sup>24</sup> Both the United States Supreme Court and lower courts have subsequently used this test to assess whether commercial speech is protected specifically in the context of attorney advertising.<sup>25</sup>

The United States Supreme Court addressed attorney advertising most recently in the 1995 case *Florida Bar v. Went for It, Inc.*,<sup>26</sup> in which state regulation of attorney advertising was

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18. *Id.* at 383.

19. 436 U.S. 447 (1978).

20. Solicitation differs from advertising in that it refers to a lawyer’s direct communication with a prospective client. *See* MODEL RULES OF PROF’L CONDUCT R. 7.3 (2010). In Louisiana, solicitation is governed by Louisiana Rules of Professional Conduct Rule 7.4, “Direct Contact with Prospective Clients,” which prohibits lawyers from

solicit[ing] professional employment from a prospective client with whom the lawyer has no family or prior lawyer–client relationship, in person, by person to person verbal telephone contact, through others acting at the lawyer’s request or on the lawyer’s behalf or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.

LA. RULES OF PROF’L CONDUCT R. 7.4 (2010).

21. *Ohralik*, 436 U.S. at 455. “The 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.” *Id.* at 454.

22. 447 U.S. 557 (1980).

23. *Id.* at 566.

24. *Fla. Bar v. Went for It, Inc.* 515 U.S. 618, 623 (1995) (citing *Cent. Hudson*, 447 U.S. at 564–65).

25. *See, e.g., Went for It*, 515 U.S. at 623; *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 552–53 (E.D. La. 2009).

26. 515 U.S. 618.

upheld.<sup>27</sup> There, the Court found that a Florida rule requiring a 30-day waiting period for targeted, direct-mail solicitation of personal injury and wrongful death clients met the test set forth in *Central Hudson*.<sup>28</sup> The Court reiterated that if commercial speech is either inherently misleading or has been proven to be misleading, the state may “freely regulate” it.<sup>29</sup> Today, the landmark *Bates* decision and the *Central Hudson* test remain highly applicable in the realm of attorney advertising regulation as it relates to commercial speech.

## II. TRADITIONAL AND EMERGING FORMS OF ADVERTISING

Since the United States Supreme Court’s application of commercial speech protection to attorney advertising in the late 1970s, lawyers have utilized virtually every thinkable advertising medium to provide information about their legal services and to attract clients. For over three decades, an array of advertising options has allowed attorneys to construct advertisements within the confines of regulations enacted by state bar associations. Though abundant, many of these traditional advertising options have remained considerably unchanged, allowing states to keep pace with lawyer use through rule enactment. The onset of the Internet, however, presents advertising options distinct from those in traditional media.

### *A. Traditional Forms of Advertising*

Television, billboards, bus stops, direct mail, and phonebooks all contain attorney advertisements that many potential clients view on a daily basis. Many of these advertisements exhibit qualities that state bar associations have deemed sufficiently similar to justify their regulation by general rules. A common characteristic of many of these traditional advertisements is their “linear flow”—the content of billboards is seldom updated daily, and the message conveyed in direct mail remains unmodified once printed, resulting in little interaction between advertiser and consumer.<sup>30</sup> Another

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27. *Id.* at 644–45.

28. *Id.*

29. *Id.* at 623–24 (quoting *Cent. Hudson*, 447 U.S. at 563–64); see also *In re R.M.J.*, 455 U.S. 191, 202 (1982) (noting that a state is entitled to prohibit advertising if it can show that it is “inherently likely to deceive” or has produced a “record indicat[ing] that a particular form or method of advertising has in fact been deceptive”).

30. Alexa Bezjian-Avery et al., *New Media Interactive Advertising vs. Traditional Media*, J. ADVERTISING RES., July/Aug. 1998, at 23, 24, available at

shared characteristic of these advertisements is their “passive exposure” to consumers.<sup>31</sup> They are seldom directed to a particular individual, and they generally appear without any act of volition by the viewer. Over the course of three decades, the qualities of these media have remained relatively unchanged, allowing state bar associations to carefully draft rules governing their content, which provide lawyers with sufficient guidance when advertising through such media.

Advancements in advertising technology, however, have presented media that evade traditional classification. Although some commentators argue that Internet advertising is sufficiently similar to traditional advertising to warrant comparable regulation,<sup>32</sup> others claim that the global reach of the Internet calls for a different approach.<sup>33</sup>

### *B. Emerging Forms of Advertising: The Internet*

In *Reno v. ACLU*,<sup>34</sup> the United States Supreme Court considered the protection of speech on the Internet, drawing a distinction between Internet speech and traditional broadcast media. Describing the Internet as a “unique and wholly new medium of worldwide communication,”<sup>35</sup> the Court noted that the “vast democratic forums of the Internet [have not been] subject to the type of government supervision and regulation that has attended the broadcast industry.”<sup>36</sup> The Court also described the Internet as “not as ‘invasive’ as radio or television” because “communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden.”<sup>37</sup>

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<http://marketing.wharton.upenn.edu/ideas/pdf/lacobucci/Internet/jar1998-alexa.pdf>.

31. *Id.*

32. See generally Jordan Rappaport, Comment, *Attorney Advertising on the Internet*, U. MIAMI SCH. L. (1996), <http://www.law.miami.edu/~froomkin/seminar/papers/rappaport.htm>.

33. See Christopher Hurd, *Untangling the Wicked Web: The Marketing of Legal Services on the Internet and the Model Rules*, 17 GEO. J. LEGAL ETHICS 827, 837 (2004).

34. 521 U.S. 844 (1997).

35. *Id.* at 850 (quoting *Reno v. ACLU*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

36. *Id.* at 868–69.

37. *Id.* at 869 (quoting *Reno*, 929 F. Supp. at 844). *But see* Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd., 642 F. Supp. 2d 539, 558–59 (E.D. La. 2009) (discussing how some Internet advertisements, such as pop-up advertisements, do not fall within the *Reno* Court’s description of the Internet as not invasive).

The Internet presents diverse and previously unthinkable means by which advertisers can convey their message to consumers.<sup>38</sup> These means serve to, among other things, level the playing field for lawyers who use it as an advertising medium, because decreased marketing costs allow sole practitioners and smaller firms to advertise directly beside larger competitors.<sup>39</sup> The benefits of decreased cost, immediate publication, and customization available on the Internet allow lawyers to reach beyond the confines of traditional media and advertise in unique ways.<sup>40</sup> The Internet, although seemingly a single advertising alternative, actually serves as a realm consisting of several different media, many of which contain unique and distinctive components.<sup>41</sup> As such, Internet advertising differs significantly from advertising in traditional media.<sup>42</sup>

*1. The Pay-Per-Click Advertising Model as Illustrated by Google AdWords*

The most pervasive form of Internet advertising is the “pay-per-click” (PPC) advertising model.<sup>43</sup> Under this model, an advertiser places a small advertisement on a search engine or other

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See also SCHUMANN & THORSON, *supra* note 6, at 17–18 (comparing “intrusiveness” of traditional advertising to Internet advertising).

38. The discussion herein will focus on the function of Internet advertisements to entice Internet users to “click through” the advertisement to the advertiser’s website, thereby redirecting the user to such website.

39. See CHRISTOPHER B. SCHULTZ, ANALYSIS OF IMPACT OF LOUISIANA LAWYER ADVERTISING RULES ON PAY PER CLICK & INTERNET MARKETING 2 (2009), available at <http://www.jdsupra.com/post/fileServer.aspx?fName=06518883-3c34-4da1-a198-867c9ba0910f.doc> (“Marketing budgets can start small (as little as \$10/month) and grow as a business grows. . . . A small business advertisement can appear right next to a[n] established, larger competitor.”).

40. See Daniel Becker, *Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, 70 *FORDHAM L. REV.* 2409, 2409 (2002); Kristine M. Moriarty, *Law Practice and the Internet: The Ethical Implications That Arise from Multijurisdictional Online Legal Service*, 39 *IDAHO L. REV.* 431, 431 (2003); Margaret Hensler Nicholls, *A Quagmire of Internet Ethics Law and the ABA Guidelines for Legal Website Providers*, 18 *GEO. J. LEGAL ETHICS* 1021, 1022 (2005).

41. See SCHUMANN & THORSON, *supra* note 6, at 15–17.

42. *Pub. Citizen*, 642 F. Supp. 2d at 559.

43. See BORIS MORDKOVICH & EUGENE MORDKOVICH, PAY-PER-CLICK SEARCH ENGINE MARKETING HANDBOOK: LOW COST STRATEGIES FOR ATTRACTING NEW CUSTOMERS USING GOOGLE, MSN, YAHOO! & OTHER SEARCH ENGINES 3 (2005) (“The growth of the online advertising industry makes pay-per-click advertising the most popular and lucrative means of online advertising today.”).

website and pays the amount agreed upon or bid for only when an Internet user clicks the advertisement and is redirected to the “landing” page.<sup>44</sup> PPC advertisements provide a large source of revenue to many search engines such as Yahoo, MSN, Bing, and Google.<sup>45</sup> Because nearly 99% of all Internet users utilize search engines,<sup>46</sup> regulatory focus should be given to the advertising methods employed thereon.

An understanding of the PPC advertising model is best obtained through analysis of what was once referred to as possibly “the most successful business idea in history”: Google AdWords.<sup>47</sup> This revolutionary advertising model analyzes every Google search to determine which advertisements will be listed as a “sponsored link” on a result page.<sup>48</sup> Essentially, Google combines an advertiser’s bid for an advertisement and a metric termed “quality score” to ensure that the advertisements appearing on a results page are “true, high-caliber matches for what users are querying.”<sup>49</sup> This metric incorporates factors such as the relevancy of an advertisement to the search term, the quality of the landing page that the advertisement is linked to, and the percentage of times an advertisement is actually clicked.<sup>50</sup> Google also imposes penalties for low quality advertisements to protect users from exposure to irrelevant or annoying advertisements.<sup>51</sup> Simply put, attorneys can create an advertisement and select which search terms will trigger its viewing, and Google takes regulatory measures to ensure that each potential client views advertisements relevant to his search. As illustrated by AdWords, PPC advertising provides high-quality, relevant advertisements, the likes of which are incomparable to any other existing form of advertising.

The components of an AdWords advertisement include a title, two sets of advertising text, a display URL,<sup>52</sup> and a landing URL,

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44. *Id.* at 6.

45. Ninety-seven percent of Google’s general revenue is drawn from advertising revenue, which amounted to over \$21 billion in 2008. See *2010 Financial Tables*, GOOGLE INVESTOR REL., [http://investor.google.com/fin\\_data.html](http://investor.google.com/fin_data.html) (last visited Dec. 19, 2010).

46. *iProspect Search Engine User Attitudes*, IPROSPECT, at 6 (2004), <http://www.iprospect.com/premiumPDFs/iProspectSurveyComplete.pdf> (“It should be of very little surprise that 98.8% of Internet users report using search engines.”).

47. Steven Levy, *The Secrets of Googlenomics*, WIRED, June 2009, at 110.

48. *Id.*

49. *Id.* at 114.

50. *Id.*

51. *Id.*

52. A URL is a “Uniform Resource Locator,” commonly referred to as an Internet address or web address. *Gregerson v. Vilana Fin., Inc.*, No. 06-1164, 2007 WL 2509718, at \*6 (D. Minn. Aug. 31, 2007).

all of which are subject to strict limitations of 25 or 30 characters.<sup>53</sup>

In order to submit a PPC advertisement to Google, an advertiser must complete several steps. First, he must choose certain keywords that will trigger the advertisement's appearance when those keywords are utilized in a search term.<sup>54</sup> Next, the advertiser writes an "ad copy," which is a character-limited area for the marketing message.<sup>55</sup> Several variations of advertisements are often submitted with a corresponding ad copy, each designed to be triggered by different keywords.<sup>56</sup> Then, the advertiser enters the display and landing URLs. Finally, he sets an advertising budget starting at, for instance, 10 cents per click and a budget of 25 dollars per month.<sup>57</sup>

After an advertiser submits a PPC advertisement, he can perform optimization measures by adjusting the ad copies, keywords, and budget to ensure that each advertisement is displayed appropriately and that he receives sufficient value from an advertisement.<sup>58</sup> This optimization requires frequent changing of the advertisement content to maximize its effectiveness.

Although the Internet serves as little more than a revolving door for many advertising technologies, Google is accessed daily by more than 60% of Internet users.<sup>59</sup> Google's freely accessible browsers, applications, and email services ensure that it will remain a market participant for the measurable future.<sup>60</sup> In fact, the large number of advertisements sold by Google further solidifies its dominant market share because each advertisement sold "generates torrents of data about users' tastes and habits . . . in order to predict future consumer behavior, find ways to improve its products, and sell more ads."<sup>61</sup>

The progression of Google's advertising techniques affirms the notion that these technologies will continue to advance. Since the company's first advertisement sale in 2000, which took the form of a simple block of text relevant to the search query,<sup>62</sup> to a decade

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53. SCHULTZ, *supra* note 39, at 2.

54. *Id.* at 2.

55. *Id.* at 3.

56. *Id.*

57. *Id.*

58. *Id.*

59. Levy, *supra* note 47, at 110.

60. *Id.* Hal Varian, UC Berkeley Haas School of Business and School of Information professor and Google's chief economist, justifies Google's array of free services by arguing that anything that increases Internet use ultimately enriches Google.

61. *Id.*

62. *Id.* at 110-14.

later, where a human salesman has been replaced by algorithmic technology, Google AdWords has become “the world’s biggest, fastest auction, a never-ending, automated, self-service version of Tokyo’s boisterous Tsukiji fish market.”<sup>63</sup>

## 2. Social Networking

In addition to Google AdWords, many other Internet advertisements entice users to “click through” them, thereby redirecting the user to a website.<sup>64</sup> Among these is another Internet advertising option available to lawyers called social networking. Social networks are Internet platforms that enable users to create profiles and connect with other individuals through shared hobbies, business affiliations, and other interests.<sup>65</sup> Social networking is not only a growing trend for connectivity with family and friends but has also become a valuable tool for many in the legal profession.<sup>66</sup> The trend in lawyer social networking is growing at an enormous rate, as 43% of lawyers were members of a social network in 2009, up from 15% in 2008.<sup>67</sup>

Some of the most popular social networks include Facebook,<sup>68</sup> MySpace,<sup>69</sup> Twitter,<sup>70</sup> LinkedIn,<sup>71</sup> and Avvo.<sup>72</sup> These networks all

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63. *Id.* at 110.

64. See Nicholas Kushmerick, *Learning to Remove Internet Advertisements*, PROC. 3D ANN. CONF. ON AUTONOMOUS AGENTS 175, 175 (1999) (“If judged to be interesting or relevant, users can click on these so-called ‘banner advertisements,’ jumping to the advertiser’s own site.”).

65. Social networking allows members to “use their online profiles to become part of an online community of people with common interests.” *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007).

66. On July 30, 2009, the ABA featured a session on “Social Networks, Blawgs, and Podcasts: Business Development Tools for the Internet Age” to teach lawyers what social networks are, why they should become skilled in them, and how to effectively use them. See *Ethical Implications of Web 2.0 Technology, Green Marketing, Rainmaking in a Recession Among Law Practice Topics to be Explored at ABA Annual Meeting in Chicago*, A.B.A. (July 20, 2009), [http://www.abanet.org/abanet/media/release/news\\_release.cfm?releaseid=715](http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=715); see also Leora Maccabee, *Legal Marketing Ethics in a Web 2.0 World*, LAWYERIST (July 17, 2009), <http://lawyerist.com/legal-marketing-ethics-web-2-0>.

67. See Reginald Davis, *Getting Personal: Social Networks Appeal, but Not to the Firm*, A.B.A. J., Aug. 2009, at 30, available at [http://www.abajournal.com/magazine/getting\\_personal/](http://www.abajournal.com/magazine/getting_personal/).

68. Facebook enables its users to present themselves in an online profile, accumulate “friends” who can post comments on each others’ pages, and view each others’ profiles. Facebook members can also join virtual groups based on common interests; see what classes they have in common; and learn each others’ hobbies, interests, musical tastes, and romantic relationship status through the profiles. Nicole B. Ellison, *The Benefits of Facebook “Friends”: Social Capital and College Students’ Use of Online Social Network Sites*, J. COMPUTER-

involve dozens of means by which lawyers can interact and advertise, including direct messaging, broadcast messaging to both specified groups and all network users, bulletin board postings, commentary, and interactive applications developed by third parties such as games.<sup>73</sup>

In addition to these advertising methods, PPC advertising plays a large role in social networking, as it generally serves as the main source of revenue for these networks.<sup>74</sup> Social networking sites allow lawyers to quickly and easily create image and text-based advertisements that redirect users to a law firm website or a page contained within that social network.<sup>75</sup> Many of these advertisements utilize PPC advertising technology similar to that used by Google AdWords and provide optimization measures to track who is clicking an advertisement and to maximize its

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MEDIATED COMM. (July 2007), <http://jcmc.indiana.edu/vol12/issue4/ellison.html>; see FACEBOOK, <http://www.facebook.com> (last visited Dec. 19, 2010).

69. Myspace is a social network that allows users to connect through online profiles and express themselves through pictures, videos, music, and web postings. See MYSFACE, <http://www.myspace.com> (last visited Dec. 19, 2010).

70. Twitter is a free social networking and micro-blogging service that enables its users to send and read messages known as “tweets.” Tweets are text-based posts of up to 140 characters displayed on the author’s profile page and delivered to the author’s subscribers, who are known as “followers.” Senders can restrict delivery to those in their circle of friends or, by default, allow open access. Users can send and receive tweets via the Twitter website, Short Message Service (SMS), or external applications. See TWITTER, <http://twitter.com> (last visited Dec. 19, 2010). See generally Akshay Java et al., *Why We Twitter: Understanding Microblogging Usage and Communities*, PROC. JOINT 9TH WEBKDD & 1ST SNA-KDD WORKSHOP (2007), available at [http://ebiquity.umbc.edu/\\_file\\_directory\\_/papers/369.pdf](http://ebiquity.umbc.edu/_file_directory_/papers/369.pdf).

71. LinkedIn is a business-oriented social networking site mainly used for professional networking. The purpose of the site is to allow registered users to maintain a list of contact details of people they know and trust in business. The people in the list are called “connections.” Users can invite anyone (whether a site user or not) to become a connection. See LINKEDIN, <http://www.linkedin.com> (last visited Dec. 19, 2010).

72. Avvo is a free website that helps consumers handle their legal matters through lawyer rating and profiles, client reviews, lawyer disciplinary histories, and peer endorsements. See AVVO, <http://www.avvo.com> (last visited Dec. 19, 2010).

73. See *supra* notes 68–72.

74. See Eric Eldon, *Is the Big Facebook Advertising Experiment Working?*, VENTURE BEAT (Mar. 31, 2009), <http://venturebeat.com/2009/03/31/is-the-big-facebook-advertising-experiment-working/> (discussing Facebook and Myspace profiting from advertising).

75. For a detailed description of Facebook’s social network advertising, see *Guide to Facebook Ads*, FACEBOOK, <http://www.facebook.com/adsmarketing> (last visited Dec. 19, 2010).

effectiveness.<sup>76</sup> As with AdWords, these advertisements contain limitations on character and text space.<sup>77</sup> The ease of use and inexpensive nature of both connecting through social networks and advertising thereon, coupled with the ability to target specific consumer groups, provides lawyers the ability to efficiently market their services to, in the case of Facebook, over 500,000,000 active users.<sup>78</sup>

### 3. *Lawyer and Law Firm Websites*

PPC advertising and social networking allow lawyers to market their services in an arguably more efficient and effective manner than any other media. The links contained in those advertisements often redirect users to a law firm website, which generally provides a more comprehensive source of information regarding legal services. PPC advertisements, then, serve merely to entice visitation of a law firm website where the bulk of information about legal services is actually contained. Additionally, while Internet advertisements entice users to visit law firm websites indirectly by clicking the advertisements, users also encounter these websites voluntarily by either searching for a specific lawyer or law firm or by entering a law firm's web address. Thus, Internet users encounter law firm websites both voluntarily and indirectly by clicking advertisements.

Although not as novel as PPC advertising, websites still exhibit characteristics distinguishable from traditional advertisements. Absent the transitory nature of traditional advertisements conveyed via television, radio, and billboards, websites can offer more voluminous and detailed information than virtually any other medium.<sup>79</sup> Websites therefore allow for more deliberation during information intake than do traditional media or PPC advertisements.<sup>80</sup> Additionally, volition is present in the website context more so than with traditional media, as consumers often voluntarily enter a web address or conduct a specific search before

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76. *Id.*

77. *Id.* A Facebook advertisement title can have up to 25 characters, and the advertising body can have up to 135 characters.

78. *Id.*

79. See generally Maria Sicilia et al., *Effects of Interactivity in a Website: The Moderating Effect of Need for Cognition*, J. ADVERTISING, Fall 2005, at 31 (discussing interactivity of websites as allowing for greater information intake and personal control over information exchange).

80. *Id.* at 31–32.

viewing a website.<sup>81</sup> Conversely, advertisements in traditional media often appear without action by the consumer.<sup>82</sup>

An exploration of emerging forms of advertising available on the Internet illustrates their inherent distinction from traditional advertising and complex functionality. Although some of these media have been around for decades, many are far more recent developments that will continue to evolve at the pace of technology. Accordingly, the distinct complexity and evolutionary nature of these advertising technologies underlies the impracticality of categorical subjection of all Internet advertisements to traditional advertising rules.<sup>83</sup>

### III. REGULATION OF EMERGING ADVERTISING TECHNOLOGIES

Exploring the intricacies of emerging Internet advertising technologies raises the issue of how regulatory schemes treat their use by lawyers. Analysis of the undertakings of the American Bar Association (ABA) and state bar associations reveals that categorical application of the rules governing traditional forms of advertising to all Internet advertisements through broad, all-encompassing regulatory language results in discord.

#### A. Sparse Guidance from the ABA

The ABA has been a source of guidance for ethical standards in the legal profession for over a century, dating back to the 1908 Canons of Professional Ethics.<sup>84</sup> The Model Rules of Professional Conduct (the “Model Rules”),<sup>85</sup> adopted by the ABA House of Delegates in 1983, replaced the preceding Model Code of Professional Responsibility<sup>86</sup> and currently serve as a model for the ethical rules governing attorneys in most states.<sup>87</sup>

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81. *Id.*

82. *Id.*

83. See discussion *infra* Part IV.

84. ABA CANONS OF PROF'L ETHICS (1908), available at [http://www.abanet.org/cpr/mrpc/Canons\\_Ethics.pdf](http://www.abanet.org/cpr/mrpc/Canons_Ethics.pdf).

85. MODEL RULES OF PROF'L CONDUCT (2010).

86. MODEL CODE OF PROF'L RESPONSIBILITY (1980), available at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>.

87. As of November 3, 2010, 45 states and the District of Columbia had adopted the revised rules. Of the remaining five states, Texas and West Virginia had circulated proposed rules. Georgia and Hawaii had not yet issued a report. California employs its own rules. *Status of State Review of Professional Conduct Rules*, A.B.A., [http://www.abanet.org/cpr/pic/ethics\\_2000\\_status\\_chart.pdf](http://www.abanet.org/cpr/pic/ethics_2000_status_chart.pdf) (last updated Nov. 3, 2010) (illustrating the status of state review of the Model Rules).

### 1. Ethics 2000

The past few decades were marked by rapid expansion of Internet technologies, and initial attempts by the ABA to account for this change were unsuccessful.<sup>88</sup> The Model Rules largely fail to address Internet advertising sufficiently for uniform state adoption.<sup>89</sup> The ABA recognized this void in Internet advertising guidance and created the Ethics 2000 Commission in 1997 to review the Model Rules.<sup>90</sup> Although Ethics 2000 “made some Internet related changes to [Model] Rules 7.1, 7.2, and 7.3, these changes were limited.”<sup>91</sup>

The changes to Rule 7.1, which prohibits false or misleading communications about legal services, expanded the rule’s commentary to describe how truthful statements can be misleading if they omit facts necessary to make the law firm’s communication considered as a whole not materially misleading.<sup>92</sup> The language of the rule states that it should be applied to “all communications,” apparently covering the Internet,<sup>93</sup> but the change included no Internet or computer-based communication references. The changes to Rule 7.2 amended permissible advertising avenues to include “electronic communication.”<sup>94</sup> Comment 3 of this rule was amended to state that “electronic media, such as the Internet, can be an important source of information about legal services.”<sup>95</sup> Rule 7.3 was amended to restrict solicitation by “real-time electronic contact” or “electronic communication” unless warranted by certain circumstances.<sup>96</sup> Through Ethics 2000, the ABA attempted to address advertising rules in light of emerging technologies, but as commentators point out, identifying the technological

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88. Hurlid, *supra* note 33, at 827 (“The [Model Rules] have not kept pace with issues created by the Internet explosion and Internet-based lawyer advertising.”).

89. *Id.*

90. Charlotte Stretch, *Overview of Ethics 2000 Commission and Report*, A.B.A., at 1, [http://www.abanet.org/cpr/e2k/e2k-ov\\_mar02.doc](http://www.abanet.org/cpr/e2k/e2k-ov_mar02.doc) (last visited Dec. 27, 2010).

91. Hurlid, *supra* note 33, at 827.

92. See MODEL RULES OF PROF’L CONDUCT R. 7.1 (2010).

93. See *id.* cmt. 1, which states that the rule “governs all communications about a lawyer’s services, including advertising permitted by [Model] Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful.”

94. See MODEL RULES OF PROF’L CONDUCT R. 7.2.

95. *Id.* cmt. 3.

96. See MODEL RULES OF PROF’L CONDUCT R. 7.3. The commentary to this rule also contained minor amendments to incorporate the “real-time electronic contact” language. *Id.* cmts. 1–3.

shortcomings of the advertising rules and adequately correcting them are distinct tasks.<sup>97</sup>

## 2. *Ethics 20/20*

The ABA's most recent acknowledgement of the technological impact on lawyer discipline was marked by its formation of the ABA Commission on Ethics 20/20 in 2009.<sup>98</sup> Ethics 20/20 will supplement the work of existing committees on client protection, ethics and professional responsibility, and professional discipline, thereby illustrating the ABA's intent to move forward in embracing these technologies and adapting current guidelines to account for their use by attorneys.<sup>99</sup> Ethics 20/20 is charged with a thorough review of the Model Rules in the context of advances in technology and global legal practice developments.<sup>100</sup> However, initial news releases by the ABA on Ethics 20/20 fail to mention any proposed action to specifically address attorney Internet advertising,<sup>101</sup> and pertinent modification to the Model Rules seems unlikely in the near future. As such, the ethical implications of lawyers' use of modern technology, though acknowledged by the ABA, are still admittedly absent from ABA ethics codes and regulatory structure.<sup>102</sup> Consequently, as the ABA has been slow to provide a workable model of Internet advertising regulation for state adoption, states are forced to deal internally with emerging advertising technologies.

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97. See Matthew Garner Mercer, *Lawyer Advertising on the Internet: Why the ABA's Proposed Revisions to the Advertising Rules Replace the Flat Tire with a Square Wheel*, 39 BRANDEIS L.J. 713, 727–28 (2001).

98. See ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers, A.B.A. (Aug. 4, 2009), [http://www.abanet.org/abanet/media/release/news\\_release.cfm?releaseid=730](http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=730) [hereinafter *Ethics Commission*].

99. *Id.*; see also *Message from Commission on Ethics 20/20 Co-Chairs Jamie S. Gorelick and Michael Traynor*, A.B.A., <http://www.abanet.org/ethics2020/chairs.html> (last visited Dec. 19, 2010).

100. See *Ethics Commission*, *supra* note 98.

101. *Id.*

102. *Id.* At the American Bar Association's announcement of the ABA Commission on Ethics 20/20, President Carolyn Lamm stated:

Technological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure. Technologies such as e-mail, the Internet and smart phones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded international business opportunities for our clients.

*Id.*

*B. State Regulation*

The ABA Model Rules and recent initiatives fall short of providing a model for states to incorporate rules pertinent to Internet advertising, and, as a result, states have been forced to develop their own Internet advertising rules. Since the turn of the century, states have scrambled to keep their advertising regulations on pace with Internet advances.<sup>103</sup> Often times this urge to control the conduct of attorneys on the Internet has led to the adoption of short-sighted rules that fail to recognize their catalyst—the evolution of Internet technologies. Indeed, states have often subjected these advertisements to rules developed in different times, for different media.

Although inadequate Model Rule guidance unquestionably presents problems of disunity,<sup>104</sup> an arguably beneficial byproduct is state innovation in the area of advertising regulation—a matter particularly advantageous in the evolutionary realm of the Internet. Thus, states should continue to lead the charge in developing rules to account for attorney advertising on the Internet, but in doing so should acknowledge the distinct functionality of Internet advertisements.

An analysis of two very similar rules governing Internet advertising in Louisiana and Florida illustrates how states have overlooked the distinct nature of Internet advertisements and disregarded the interplay between these advertisements and law firm websites. Rule 7.6 of the Louisiana Rules of Professional Conduct<sup>105</sup> (the “Louisiana Rules”) and Rule 4-7.6 of the Rules Regulating the Florida Bar<sup>106</sup> (the “Florida Rules”) were crafted specifically for computer-accessed communications, and both generated lively debate within their respective legal communities.<sup>107</sup>

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103. See Nia Marie Monroe, *The Need for Uniformity: Fifty Separate Voices Lead to Disunion in Attorney Internet Advertising*, 18 GEO. J. LEGAL ETHICS 1005, 1010 (2005).

104. *Id.* at 1015.

105. LA. RULES OF PROF'L CONDUCT R. 7.6 (2010).

106. RULES REGULATING THE FLA. BAR R. 4-7.6 (2010).

107. See PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR—RULE 4-7.6, COMPUTER ACCESSED COMMUNICATIONS, APPENDIX E (2008), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/2071FA6597020408852574DC005246EC/\\$FILE/Appendix%20E%20-%20Selected%20Materials%20Regarding%20Various%20Proposed%20Amendments.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/2071FA6597020408852574DC005246EC/$FILE/Appendix%20E%20-%20Selected%20Materials%20Regarding%20Various%20Proposed%20Amendments.pdf?OpenElement) (containing selected articles, commentary, and email submissions regarding proposed changes to the Florida Rules).

*1. Louisiana's Approach to Internet Advertising Regulation:  
Rule 7.6 "Computer-Accessed Communications"*

*a. The Source of Louisiana Rule 7.6*

In 2006, following changes made to the Florida Rules regarding lawyer advertising, the Louisiana Legislature adopted a concurrent resolution stating that "the manner in which some members of the Louisiana State Bar Association (LSBA) are advertising their services in this state has become undignified and poses a threat to the way attorneys are perceived."<sup>108</sup> In response, the Louisiana Supreme Court formed the Committee to Study Lawyer Advertising (the "Supreme Court Committee"),<sup>109</sup> which reviewed a copy of a Florida survey that illustrated public perception of attorney advertising.<sup>110</sup> The LSBA Rules of Professional Conduct Committee (the "LSBA Committee") also met several times<sup>111</sup> to assemble proposed amendments to Part 7 of the Louisiana Rules.<sup>112</sup> Upon completion of the LSBA Committee's proposal, the Supreme Court Committee met and voted to endorse the LSBA Committee's proposed amendments.<sup>113</sup> The Louisiana House of Delegates then voted to accept the LSBA

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108. S. Con. Res. 113, 2006 Leg., Reg. Sess. (La. 2006), available at <http://www.lsba.org/2007InsideLSBA/documents/ethics/2006LegisConcurrentResolution.pdf>. The resolution noted consideration of Senate Bill No. 617, which would have established a committee "to address ethical concerns posed by lawyer advertising and to present a more positive message to the citizens of this state." *Id.*

109. The committee was chaired by Justice Catherine D. Kimball and consisted of Rick Stanley, Chair of the LSBA's Rules of Professional Conduct Committee; Senator Rob Marionneaux, the sponsor of the joint resolution; and several attorneys.

110. See Minutes of the Comm. to Study Lawyer Adver., Sept. 15, 2006, at 3, available at <http://docs.justia.com/cases/federal/district-courts/louisiana/laedce/2:2008cv04451/128148/42/40.html>.

111. The LSBA Committee met four times between September 21, 2006 and October 6, 2006.

112. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539 (E.D. La. 2009).

113. See Minutes of the Comm. to Study Lawyer Adver., Oct. 23, 2006, available at <http://docs.justia.com/cases/federal/district-courts/louisiana/laedce/2:2008cv04451/128148/42/41.html>. In order to gauge public opinion on the proposal, the LSBA Committee held several public hearings on the proposed amendments in November 2006. *History of LSBA Proposal for the New Rules*, LA. ST. BAR ASS'N, <http://www.lsba.org/2007MemberServices/LawyerAdHistory.asp> (last visited Dec. 20, 2010) (hearing transcripts for Nov. 2 (Baton Rouge, LA), Nov. 8 (Lafayette, LA), Nov. 9 (New Orleans, LA), and Nov. 16 (Shreveport, LA)).

Committee's proposal<sup>114</sup> and recommended that the Louisiana Supreme Court incorporate the proposed rules.<sup>115</sup> The Louisiana Supreme Court adopted the rules on July 3, 2008, to become effective December 1, 2008.<sup>116</sup>

The proposed rules contained Louisiana Rule 7.6, entitled "Computer-Accessed Communications," is nearly identical to Florida Rule 4-7.6, likewise titled "Computer-Accessed Communications."

*b. The Context and Scope of Louisiana Rule 7.6*

Louisiana Rule 7.6<sup>117</sup> is located in the section of the Louisiana Rules entitled "Information About Legal Services."<sup>118</sup> The rule

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114. The Louisiana House of Delegates voted to accept the proposed amendments on June 7, 2007.

115. *Pub. Citizen*, 642 F. Supp. 2d at 540.

116. *Id.*

117. LA. RULES OF PROF'L CONDUCT R. 7.6 (2010) ("Computer Accessed Communications"):

(a) Definition. For purposes of these Rules, "computer-accessed communications" are defined as information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere.

(b) Internet Presence. All World Wide Web sites and home pages accessed via the Internet that are controlled, sponsored, or authorized by a lawyer or law firm and that contain information concerning the lawyer's or law firm's services:

(1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law;

(2) shall disclose one or more bona fide office location(s) of the lawyer or law firm or, in the absence of a bona fide office, the city or town of the lawyer's primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2; and

(3) are considered to be information provided upon request and, therefore, are otherwise governed by the requirements of Rule 7.9.

(c) Electronic Mail Communications. A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless:

(1) the requirements of subdivisions (b)(1), (b)(2)(A), (b)(2)(B)(i), (b)(2)(C), (b)(2)(D), (b)(2)(E) and (b)(2)(F) of Rule 7.4 are met;

(2) the communication discloses one or more bona fide office location(s) of the lawyer or lawyers who will actually perform the services advertised or, in the absence of a bona fide office, the city or

defines computer-accessed communications<sup>119</sup> and sets parameters for the applicability of other rules contained in the same section to such communications, with specific regard to law firm websites<sup>120</sup> and email communications.<sup>121</sup>

Subdivision (a) defines computer-accessed communications, broadly encompassing any information regarding legal services disseminated via computer.<sup>122</sup> It explicitly includes homepages, websites, unsolicited email, and information appearing on search engines but does not limit its application to these specific communications.<sup>123</sup> The seemingly limitless scope of this definition includes information about legal services found “elsewhere” on the Internet.<sup>124</sup>

Subdivision (b), entitled “Internet Presence,” governs homepages and websites that are controlled, sponsored, or authorized by a lawyer or law firm and that contain legal service information.<sup>125</sup> It requires jurisdiction and office location disclosure and classifies law firm websites as “information provided upon request,” subjecting them to the requirements of Rule 7.9.<sup>126</sup> Rule 7.9 in turn subjects law firm websites to Rule 7.2,<sup>127</sup> Louisiana’s general attorney advertising rule but further allows “factually verifiable statements concerning past results” that are not “false, misleading or deceptive.”<sup>128</sup> Thus, law firm homepages and websites are governed by all substantive advertising rules under Rule 7.2, with an additional jurisdiction disclosure requirement and the expanded permissibility of non-deceptive testimonials.

town of the lawyer’s primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2; and

(3) the subject line of the communication states “LEGAL ADVERTISEMENT.”

*Id.*

118. LA. RULES OF PROF’L CONDUCT R. 7.

119. *Id.* R. 7.6(a).

120. *Id.* R. 7.6(b).

121. *Id.* R. 7.6(c).

122. *Id.* R. 7.6(a).

123. *Id.*

124. *Id.*

125. *Id.* R. 7.6(b).

126. *Id.*; see *id.* R. 7.9 (“Information About a Lawyer’s Services Provided upon Request”).

127. Louisiana Rule 7.2, “Communications Concerning a Lawyer’s Services,” describes required, permissible, and prohibited content of lawyer advertisements and contains disclosure requirements. *Id.* R. 7.2; see *infra* note 132.

128. LA. RULES OF PROF’L CONDUCT R. 7.9(b)(3).

Before its suspended enforcement resulting from the decision in *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*,<sup>129</sup> subdivision (d) effectively acted as a catch-all provision for advertisements other than those contained on law firm websites or transmitted via email.<sup>130</sup> Rule 7.6(d) applied to “[a]ll [other] computer-accessed communications concerning a lawyer’s or law firm’s services,”<sup>131</sup> and subjected all such communications to the requirements of Rule 7.2—the rule developed for traditional advertisements.<sup>132</sup> Louisiana Rule 7.6(d) stated:

(d) Advertisements. All computer-accessed communications concerning a lawyer’s or law firm’s services, other than those subject to subdivisions (b) [websites] and (c) [email] of this Rule, are subject to the requirements of Rule 7.2<sup>133</sup> when a significant motive for the law firm’s doing so is the law firm’s pecuniary gain.<sup>134</sup>

*c. The Change from Public Citizen: Suspending the Rule 7.6(d) Catch-All Provision*

In the fall of 2008, the plaintiffs in *Public Citizen* filed suit in the United States District Court for the Eastern District of Louisiana and sought preliminary injunction against the enforcement of the

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129. 642 F. Supp. 2d 539 (E.D. La. 2009).

130. Pursuant to the decision in *Public Citizen*, the Louisiana Supreme Court issued an order suspending the enforcement of subdivision (d) on September 22, 2009. Supreme Court of La., Order (Sept. 22, 2009), available at [http://www.lsba.org/2007MemberServices/Advert0609/ROPC\\_ARTICLEXVI\\_REVISEDSEPT222009.pdf](http://www.lsba.org/2007MemberServices/Advert0609/ROPC_ARTICLEXVI_REVISEDSEPT222009.pdf).

131. LA. RULES OF PROF’L CONDUCT R. 7.6(d). Subdivisions (b) and (c) of Rule 7.6 relate to lawyer or law firm websites and unsolicited emails, respectively. Thus, Rule 7.6(d) governs all computer-based communications concerning legal services not falling within those categories.

132. Disclosure and disclaimer requirements of Louisiana Rule 7.2, to which Louisiana Rule 7.6(d) subjected Internet advertisements, include Louisiana Rule 7.2(a)(1) (requiring the inclusion of the name of at least one lawyer responsible for the content of the advertisement); Louisiana Rule 7.2(a)(2) (requiring disclosure of the location of practice); Louisiana Rule 7.2(c)(1)(H) (requiring disclosure of payment for paid testimonials or endorsements); Louisiana Rule 7.2(c)(1)(I) (requiring disclaimer of portrayal of a client by a non-client or of depiction of any events or pictures that are not actual or authentic); Louisiana Rule 7.2(c)(6) (requiring disclosure of any costs in addition to advertised fee); Louisiana Rule 7.2(c)(9) (requiring disclosure in every language that is used in the advertisement); and Louisiana Rule 7.2(c)(10) (requiring disclosures be in a print size at least as large as the largest print size used in the advertisement). *Id.* R. 7.2.

133. *Id.*

134. *Id.* R. 7.6(d).

Louisiana proposed rules set to be effective December 1, 2008.<sup>135</sup> In response, the Louisiana Supreme Court postponed the effective date of the proposed rules on three separate occasions.<sup>136</sup> During this postponement, the LSBA conducted a survey on the perception of lawyers and lawyer advertising, reviewed the proposed rules in light of constitutional challenges, and submitted final recommendations to the Louisiana Supreme Court.<sup>137</sup>

Among the several challenges to the proposed rules brought by the plaintiffs in *Public Citizen* was a challenge to Rule 7.6(d), the catch-all provision.<sup>138</sup> Specifically, the plaintiffs contested the application of the disclosure requirements of Rule 7.2<sup>139</sup> to Internet advertisements as mandated by Rule 7.6(d).<sup>140</sup> They focused their argument on the incompatibility of these requirements to PPC advertisements,<sup>141</sup> asserting that Louisiana failed to produce evidence that the catch-all Rule 7.6(d) directly advanced the state's interest and that the rule was not narrowly tailored, and was therefore unconstitutional.<sup>142</sup> The court agreed, striking down Rule 7.6(d) because it was "not shown that [Louisiana] studied online advertising techniques or methods and then attempted to formulate a Rule that directly advanced the State's interests and was narrowly tailored with respect to Internet advertising."<sup>143</sup> "Instead," the court continued, "[Louisiana], through its high court, simply applied the same Rules as those developed for television, radio, and print ads to Internet advertising."<sup>144</sup>

Thus, in implementing the catch-all Internet rule, Louisiana did not adequately consider the inherently different nature of Internet advertising techniques as compared to traditional advertising in light of applicable constitutional standards. Although the court clearly held Rule 7.6(d) unconstitutional because it neither "directly and materially advance[d] the State's interest [n]or [was it] narrowly tailored,"<sup>145</sup> the court nevertheless left the door open for further implementation of Internet advertising regulation in the decision's final footnote:

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135. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 544 (E.D. La. 2009).

136. *Id.*

137. *Id.* at 544–45.

138. *Id.* at 546.

139. See *supra* note 132 (listing disclosure and disclaimer requirements of Louisiana Rule 7.2).

140. *Pub. Citizen*, 642 F. Supp. 2d at 558.

141. See discussion *supra* Part II.B.1.

142. *Pub. Citizen*, 642 F. Supp. 2d at 558–59.

143. *Id.* at 559.

144. *Id.*

145. *Id.* at 559–60.

The Court expresses no opinion regarding the First Amendment integrity of the proposed Internet Rules. If the Louisiana Supreme Court wishes to pursue an appropriate administrative process regarding regulation of Internet advertising and then return to an examination of law firm advertising on the Internet, the high court has the authority to do so, consistent with this Court's opinion.<sup>146</sup>

The court noted that "Internet advertising differs significantly from advertising in traditional media,"<sup>147</sup> concluding that "the Internet presents unique issues related to advertising, which the State failed to consider in formulating [Rule 7.6(d)]."<sup>148</sup> Thus, the notable change in Louisiana Rule 7.6 after the *Public Citizen* decision was the suspended enforcement of the catch-all Rule 7.6(d).<sup>149</sup> All other portions of the rule remain in effect.

## 2. Florida's Approach to Internet Advertising Regulation: Rule 4-7.6 "Computer-Accessed Communications"

The similarities between Louisiana Rule 7.6 and Florida Rule 4-7.6 present many of the same challenges regarding regulation of attorney Internet advertising. A comparative analysis of the two rules and their treatment of Internet advertising sheds light on problems with catch-all subjection of Internet advertisements to traditional advertising rules as well as problems arising from the absence of a catch-all provision,<sup>150</sup> and it reveals possible solutions for states attempting to incorporate Internet advertising regulations.<sup>151</sup>

### a. Florida Rule 4-7.6

The Florida Supreme Court adopted Florida Rule 4-7.6<sup>152</sup> in 1999 to address computer-accessed communications.<sup>153</sup> In doing

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146. *Id.* at 560 n.16.

147. *Id.* at 559.

148. *Id.*

149. See *supra* note 130 (regarding the Louisiana Supreme Court order suspending enforcement of Louisiana Rule 7.6(d)).

150. See discussion *infra* Part IV.

151. See discussion *infra* Part V.

152. RULES REGULATING THE FLA. BAR R. 4-7.6 (2010). The comment reads as follows:

Advances in telecommunications and computer technology allow lawyers to communicate with other lawyers, clients, prospective clients, and others in increasingly quicker and more efficient ways. Regardless of the particular technology used, however, a lawyer's communications

so, Florida became one of the first states to adopt a rule specifically addressing regulation of computer-accessed communications and the Internet.<sup>154</sup>

Although there is not a notable contextual difference between Florida Rule 4-7.6 and Louisiana Rule 7.6, there is a substantive difference between their classifications of law firm websites as “information provided upon request.”<sup>155</sup> Louisiana has a rule specifically addressing information provided upon request, which subjects such information to the general rules governing advertising.<sup>156</sup> Florida, alternatively, does not subject information upon request to its advertising rules.<sup>157</sup> Thus, in Louisiana, law

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with prospective clients for the purpose of obtaining professional employment must meet standards designed to protect the public from false, deceptive, misleading, or confusing messages about lawyers or the legal system and to encourage the free flow of useful legal-related information to the public.

The specific regulations that govern computer-accessed communications differ according to the particular variety of communication employed. For example, a lawyer’s Internet web site is accessed by the viewer upon the viewer’s initiative and, accordingly, the standards governing such communications correspond to the rules applicable to information provided to a prospective client at the prospective client’s request.

In contrast, unsolicited electronic mail messages from lawyers to prospective clients are functionally comparable to direct mail communications and thus are governed by similar rules. Additionally, communications advertising or promoting a lawyer’s services that are posted on search engine screens or elsewhere by the lawyer, or at the lawyer’s behest, with the hope that they will be seen by prospective clients are simply a form of lawyer advertising and are treated as such by the rules.

This rule is not triggered merely because someone other than the lawyer gratuitously links to, or comments on, a lawyer’s Internet web site.

*Id.* cmt.

153. See Amendments to Rules Regulating the Fla. Bar—Advertising Rules, 762 So. 2d 392 (Fla. 1999).

154. Prior to the adoption of Florida Rule 4-7.6, the Florida Rules subjected websites to the general advertising rules.

155. Both rules treat websites as “information provided upon request.” The Louisiana Rules subject “information provided upon request” to Louisiana Rule 7.2, which governs all advertisements. LA. RULES OF PROF’L CONDUCT R. 7.9 (2010). However, the Florida Rules do not subject “information provided upon request” to its advertising rules. RULES REGULATING THE FLA. BAR R. 4-7.1(f) (“Subchapter 4-7 shall not apply to communications between a lawyer and a prospective client if made at the request of that prospective client.”).

156. LA. RULES OF PROF’L CONDUCT R. 7.9.

157. In 2006, the Florida Supreme Court adopted the recommendations of the Advertising Task Force 2004 and deleted Florida Rule 4-7.9 regarding information at the request of a prospective client. In doing so, the court also adopted Florida Rule 4-7.1(f), which provides that information provided upon

firm websites are subject to the general requirements of all advertisements under Louisiana Rule 7.2, but in Florida, such websites are subject to no regulation under Florida subchapter 4-7, except for a general prohibition against dishonesty.<sup>158</sup>

Another important difference is that although Louisiana's Rule 7.6(d) catch-all provision was suspended,<sup>159</sup> Florida's Rule 4-7.6(d) catch-all provision remains in effect.<sup>160</sup> Thus, unlike in Louisiana, all Internet advertisements in Florida, other than law firm websites and email communications, are subject to the general rules governing traditional advertisements under Florida Rule 4-7.2.

*b. Amendments, Proposed and Failed*

On February 26, 2008, the Florida Bar submitted to the Florida Supreme Court a petition to amend the Florida Rules, specifically addressing Rule 4-7.6, entitled "Computer-Accessed Communications."<sup>161</sup> The proposed amendments,<sup>162</sup> which were

request is not subject to the lawyer advertising rules. Florida Rule 4-7.1(g), also adopted at this time, provides that all lawyer communications remain subject to the general prohibition against conduct involving dishonesty, deceit, or misrepresentation.

158. RULES REGULATING THE FLA. BAR R. 4-7.1(g) (providing that all lawyer communications remain subject to the general prohibition against conduct involving dishonesty, deceit, or misrepresentation).

159. *See supra* note 130 (regarding the Louisiana Supreme Court order suspending enforcement of Louisiana Rule 7.6(d)).

160. Florida Rule 4-7.6(d) states: "(d) Advertisements. All computer-accessed communications concerning a lawyer's or law firm's services, other than those subject to subdivisions (b) [websites] and (c) [email] of this rule, are subject to the requirements of rule 4-7.2." RULES REGULATING THE FLA. BAR R. 4-7.6(d).

161. *See* PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR—RULE 4-7.6, COMPUTER ACCESSED COMMUNICATIONS (2008) [hereinafter FINAL PETITION], available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F989C9A575EA581285257460006E8B82/\\$FILE/Final%20Petition%20-%20Amendments%20to%20RRTFB%204-7.6.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F989C9A575EA581285257460006E8B82/$FILE/Final%20Petition%20-%20Amendments%20to%20RRTFB%204-7.6.pdf?OpenElement). Florida Bar President Kelly Overstreet Johnson appointed the Advertising Task Force 2004 (the "Task Force") on February 9, 2004, the findings of which were previously provided to the Florida Supreme Court in a petition filed in the case *In re Amendments to the Rules Regulating the Florida Bar—Advertising*, 971 So. 2d 763 (Fla. 2007). The court declined to adopt changes to Rule 4-7.6 at that time, pending a study of regulation of websites by the Special Committee on Website Advertising Rules (the "Special Committee"), stating that "it is not efficient or sound for the Court to address the regulation of Internet advertising at this time, while the special committee is studying these very issues." *Id.* at 764. As a result, the proposed amendments contained in the February 2008 petition include changes to Rule 4-7.6 that had been previously developed by the Task Force, as well as changes regarding regulation of websites found under Rule 4-7.6(b) that were

considered by the Florida Supreme Court in *In re Amendments to the Rules Regulating the Florida Bar—Rule 4-7.6, Computer Accessed Communications*,<sup>163</sup> “address[ed] changes in terminology and technology, [took] into account the methods the public uses to access computer advertising, recognize[d] the vast flow of information through the Internet, and [sought] to provide a new approach to regulating computer-accessed attorney advertisements.”<sup>164</sup>

The proposed changes to subdivision (b), governing law firm websites, separated websites into two categories, homepages and the remainder of the website, and applied different rules to each classification.<sup>165</sup> Under the proposed changes, law firm homepages and websites would be subject to all substantive attorney advertising rules except the filing requirement.<sup>166</sup> However, the remainder of a website beyond the homepage would be exempt from the prohibition against statements characterizing the quality of legal services, the prohibition against providing information on past results, and the prohibition against testimonials if appropriate disclaimers were present.<sup>167</sup>

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developed by the Special Committee and the Florida Bar. See PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR—RULE 4-7.6, COMPUTER ACCESSED COMMUNICATIONS, APPENDIX D (2008), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/6205C095321111B7852574630055CFF7/\\$FILE/Appendix%20D%20-%20Final%20Report.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/6205C095321111B7852574630055CFF7/$FILE/Appendix%20D%20-%20Final%20Report.pdf?OpenElement).

162. See PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR—RULE 4-7.6, COMPUTER ACCESSED COMMUNICATIONS, APPENDIX B (2008), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/AF807F9E111A96468525746300557797/\\$FILE/Appendix%20B%20-%20Full%20Text%20of%20Proposed%20Rule%20Changes.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/AF807F9E111A96468525746300557797/$FILE/Appendix%20B%20-%20Full%20Text%20of%20Proposed%20Rule%20Changes.pdf?OpenElement); see also PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR—RULE 4-7.6, COMPUTER ACCESSED COMMUNICATIONS, APPENDIX C (2008) [hereinafter APPENDIX C], available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F14041D875FD58E985257463005590EA/\\$FILE/Appendix%20C%20-%202%20Column%20Format.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F14041D875FD58E985257463005590EA/$FILE/Appendix%20C%20-%202%20Column%20Format.pdf?OpenElement).

163. 24 So. 3d 172 (Fla. 2009). The proposed amendments contained changes to all subdivisions of Florida Rule 7.6. With regard to subdivision (d), the catch-all provision covering all Internet advertisements other than law firm websites and emails, the changes would have restricted the subdivision’s applicability to unsolicited computer-accessed communications and modified language for clarity. See APPENDIX C, *supra* note 162, at 5; see also FINAL PETITION, *supra* note 161, at 9.

164. *In re Amendments*, 24 So. 3d at 172.

165. See APPENDIX C, *supra* note 162, at 1–4; see also FINAL PETITION, *supra* note 161, at 2–8.

166. Lawyer advertisements must be filed for review under Florida Rule 4-7.7.

167. See APPENDIX C, *supra* note 162, at 1–4.

These amendments to subdivision (b) attempted to strike a middle ground between subjecting law firm websites to all substantive advertising rules and leaving them virtually unregulated as information upon request. However, they did not substantively address the overly broad catch-all provision, nor did they account for the fact that law firm websites are often visited as a result of clicking an advertisement that falls under the catch-all provision. The Florida Supreme Court struck down the proposed amendments because they did not address material beyond the homepage sufficiently for it to be categorized as information upon request.<sup>168</sup> In other words, the court wanted more safeguards to ensure that material found on a law firm website, i.e., beyond the homepage, would not be misleading. The court added that certain steps could be taken to make information beyond a homepage constitute information upon request, such as the completion of an online request form and the acceptance of a disclaimer—an Internet measure comparable to that of requesting physical information such as a brochure.<sup>169</sup> Thus, the Florida Supreme Court found that the proposed increase in website regulation was not adequate to protect consumers, and in doing so sent the Florida Bar back to the drawing board.

#### IV. PROBLEMS ARISING FROM BOTH THE PRESENCE AND ABSENCE OF A CATCH-ALL PROVISION THAT SUBJECTS INTERNET ADVERTISEMENTS TO THE RULES GOVERNING TRADITIONAL ADVERTISEMENTS

Former Louisiana Rule 7.6(d) and current Florida Rule 4-7.6(d) attempt to categorically regulate Internet advertisements in one fell swoop by employing a catch-all provision that subjects those advertisements to the rules governing traditional forms of advertising.<sup>170</sup> Adopting rules that fail to account for the presence of various advertising media within the Internet and that subject such media to the content requirements governing traditional media raises constitutional and practical problems. These problems suggest that states like Louisiana and Florida should eliminate such an overly broad catch-all provision. However, eliminating the catch-all provision raises more issues with regard to how potential clients encounter law firm websites through advertising, which

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168. *In re Amendments*, 24 So. 3d at 173.

169. *Id.* at 173–74.

170. RULES REGULATING THE FLA. BAR R. 4-7.6(d) (2010); LA. RULES OF PROF'L CONDUCT R. 7.6(d) (2010); *supra* Part III.B.1.b; *supra* note 160.

should be considered when generating a solution for the absence of a catch-all provisions.

*A. Cut the Catch-All: Problems Arising from the Presence of the Catch-All Provision*

The catch-all Internet provisions employed by Louisiana and Florida subject all computer-based communications regarding legal services, other than those contained on law firm websites or transmitted via email, to the content requirements of traditional advertisements. Their overly broad and insufficient language creates constitutional concerns and practical inconsistencies that support the proposition that these states should cut the catch-all provision.

*1. Constitutional Considerations Presented by the Catch-All Provision*

The court in *Public Citizen* recognized the constitutional deficiencies arising from Louisiana's application of the principles underlying Rule 7.2 to Internet communications through all-encompassing language.<sup>171</sup> There, the court applied the *Central Hudson* test, which held that states could regulate attorney advertisements (1) if the government asserted a substantial interest in such regulation, (2) if the government demonstrated that the restriction on commercial speech directly and materially advanced that interest, and (3) if the regulation was narrowly drawn.<sup>172</sup> As the court in *Public Citizen* pointed out, Louisiana neither studied online advertising technology nor formulated a rule "that directly advanced the State's interest and was narrowly tailored with respect to Internet advertising."<sup>173</sup> Accordingly, the broad language of the catch-all provision failed to meet applicable constitutional standards set forth by *Central Hudson* and was properly held unconstitutional in Louisiana.<sup>174</sup>

*2. Practical Considerations Presented by the Catch-All Provision*

Not only was the language of Louisiana's catch-all provision unconstitutional, but its application of the content requirements of

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171. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 558 (E.D. La. 2009).

172. *Id.* (citing *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995)).

173. *Id.*

174. *Id.* at 559.

Rule 7.2<sup>175</sup> to all Internet advertisements proved incompatible with the functionality of these advertisements. Although the court in *Public Citizen* did not provide an in-depth analysis for any practical inconsistencies arising from the catch-all provision,<sup>176</sup> the plaintiffs correctly argued that Rule 7.6(d) was incompatible with one of the most prevalent forms of Internet advertising: PPC advertising.<sup>177</sup>

Problems arise specifically from the character limitations imposed by and essential to PPC advertising campaigns and other Internet advertisements, which, in the case of AdWords, are 25 to 35 characters per line.<sup>178</sup> For instance, the name and office location disclosure requirement<sup>179</sup> is inherently at odds with PPC advertising. Because AdWords limits the number of characters for each advertisement, the inclusion of a lawyer's name and office location would likely leave little space for any substantive advertising. Likewise, the requirement that paid testimonials or endorsements disclose the fact of payment<sup>180</sup> presents the same problem. Furthermore, when such a disclaimer or disclosure is required, Louisiana Rule 7.2(c)(10) requires that it be in "a print size at least as large as the largest print size used in the advertisements."<sup>181</sup> Because PPC advertisements contain title lines that are usually of a larger font than the subsequent text,<sup>182</sup> the application of this rule severely limits lawyers' use of the medium. Thus, the disclosure requirements to which these advertisements are subject under catch-all regulation effectively prohibit lawyers from substantively advertising through a PPC medium.

Additionally, the requirement of Rule 7.7 that advertisements be submitted for review is at odds with the inherently changing nature of PPC advertising content.<sup>183</sup> With respect to AdWords, several variations of PPC advertisements are produced by Google to determine which advertisement is the most effective.<sup>184</sup> The continual refining of the language of each advertisement is essential to the advertisement's effectiveness.<sup>185</sup> Thus, submitting for review every advertisement variation, along with its

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175. See *supra* note 132 (listing disclosure and disclaimer requirements of Louisiana Rule 7.2).

176. *Pub. Citizen*, 642 F. Supp. 2d at 559.

177. *Id.*

178. See discussion *supra* Part II.B.1.

179. LA. RULES OF PROF'L CONDUCT R. 7.2(a)(1)–(2) (2010).

180. *Id.* R. 7.2(c)(1)(H).

181. *Id.* R. 7.2(c)(10).

182. See discussion *supra* Part II.B.1.

183. See LA. RULES OF PROF'L CONDUCT R. 7.7.

184. See discussion *supra* Part II.B.1.

185. See discussion *supra* Part II.B.1.

corresponding filing fee,<sup>186</sup> is overly burdensome and negates the beneficial nature of advertising through the self-serving medium.<sup>187</sup> Ultimately, the cost-effective nature of AdWords is counteracted by the imposition of this filing fee for every advertisement.<sup>188</sup> This impracticality was recognized by the court in *Public Citizen* in its decision to hold Rule 7.7 unconstitutional as it pertains to the filing requirement.<sup>189</sup>

Perhaps more importantly, even though Louisiana did not adequately consider current Internet advertising options, Louisiana should be mindful that these advertisements will continue to evolve at the pace of technology. Using technology to improve quality and reduce the cost of providing legal services ensures that Internet advertising will continue to evolve as a “powerful tool in law” for the future of the profession.<sup>190</sup> Lawyers’ use of social network-based technologies is increasing, and this trend is driven primarily by cost savings and value enhancement.<sup>191</sup> These drivers will continue to propel the evolution of this technology through the development of new applications, ensuring that unique and adaptive forms of technology will continue to be adopted by legal practitioners.<sup>192</sup> Although consideration should be given to the forms of Internet advertising that exist today, technological advancement will continue to expand the regulatory gap where catch-all regulation has proved inadequate on constitutional and

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186. Louisiana Rule 7.7 sets out the filing requirements for attorney advertisements. See *Lawyer Advertising*, LA. ST. BAR ASS’N, <http://www.lsba.org/2007MemberServices/lawyeradvertising.asp> (last visited Dec. 20, 2010) (providing detailed information regarding the \$175 filing fee).

187. SCHULTZ, *supra* note 39, at 3.

188. *Id.*

189. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 559 (E.D. La. 2009).

190. See Paul Lippe, *The Role of Social Networking in Law*, AM. LAW. (July 30, 2009), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202432624155&slreturn=1&hblogin=1> (“[S]ocial networking will prove to be a powerful tool in law, because its structure reflects the distributed nature of the legal profession, so it has the potential to help improve quality and reduce costs at a time when these are more of a clients’ priorities than ever before.”).

191. See Paul Lippe, *Welcome to the Future: Oh So Social?*, AMLAW DAILY (July 28, 2009, 5:45 AM), <http://amlawdaily.typepad.com/amlawdaily/2009/07/future.html> (“[T]he financial pressure on the legal industry will accelerate adoption of these tools if they can help clients save money or lawyers generate revenue . . .”).

192. See Om Malik, *Moore’s Law Reconsidered*, CNRMONEY (Apr. 3, 2007), [http://money.cnn.com/magazines/business2/business2\\_archive/2007/03/01/8401037/index.htm](http://money.cnn.com/magazines/business2/business2_archive/2007/03/01/8401037/index.htm) (describing the collaboration of current technology applications and mobile communication devices such as the iPhone as an example of a today’s continuation of Moore’s Law regarding evolution of computing power).

practical grounds. Thus, catch-all regulation of Internet advertisements and their subjection to the rules governing traditional advertisements will become more difficult as technology advances and should accordingly be abandoned.

Louisiana's attempt to enact a rule that categorically governs all Internet media and subjects such media to a rule developed for traditional advertising results in deficiencies that were simply overlooked. Louisiana Rule 7.6 addresses websites and emails with adequate specificity for lawyers to understand prohibited conduct. However, for all other Internet media, Rule 7.6(d) provides little guidance for lawyers to advertise their services. As evidenced by the *Public Citizen* holding, application of traditional advertising regulations to all emerging Internet technologies will not only fail in light of constitutional scrutiny but will inhibit the free flow of information necessary for the legal profession to adequately serve a client base that is increasingly knowledgeable of, if not dependent on, the Internet.<sup>193</sup> States should, therefore, follow Louisiana's lead by abandoning catch-all regulation that fails to consider the inherent distinctions that set Internet advertisements apart from their traditional counterparts.

*B. The Effect of Cutting the Catch-All: Problems Arising from the Absence of the Catch-All Provision with Respect to Differing Treatment of Websites as "Information upon Request"*

The exemption of emerging forms of Internet advertising from overly broad catch-all regulation is necessary on constitutional and practical grounds. However, Louisiana's failed attempt to regulate attorney Internet advertising leaves many Internet media largely unregulated. Thus, the problem that Louisiana faces has shifted—insufficient language contained in Rule 7.6(d)'s catch-all provision has been replaced by a lack of governing language post-*Public Citizen*, leaving consumers vulnerable to unregulated and potentially misleading advertisements.

Without application of substantive advertising rules to Internet advertisements, these advertisements would likely be subject only to the general prohibitions contained in many state rules against

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193. See Lucy Schlauch Leonard, Comment, *The High-Tech Legal Practice: Attorney-Client Communications and the Internet*, 69 U. COLO. L. REV. 851, 852 (1998) (“[A]s clients and the marketplace demand greater efficiency from attorneys, those attorneys who fail to use the technology available to them will find themselves less valuable to their clients.”).

false and misleading statements.<sup>194</sup> These general prohibitions likely do not provide adequate safeguards for consumers because, as seen in traditional advertising regulation, even truthful statements can be misleading when not accompanied by certain disclosures—especially in technological contexts that provide limited advertising space.

Because legal PPC advertisements redirect potential clients to law firm websites, deregulating these advertisements may increase the visitation of law firm websites that results from clicking a potentially misleading advertisement. With emerging forms less regulated, that which often prompts law firm website visitation—an Internet advertisement—may be more misleading because of the exemption of otherwise necessary information from disclosure. From this perspective, one might accept the view that websites, when their visitation is the result of an unregulated advertisement, are a continuance of that advertisement. The question, then, is: at what point does information cease to be an advertisement, which is subject to all substantive advertising rules, and become information upon request, which is subject to such rules depending on a state's definition?

The answer to this question depends on which definition of information upon request is employed—Louisiana's or Florida's. Louisiana subjects information upon request to its advertising rules,<sup>195</sup> while Florida does not.<sup>196</sup> As a result, Louisiana's treatment of websites as information upon request demands a higher standard than does Florida's treatment. Therefore, cutting the catch-all provision would have a potentially more detrimental impact in states like Florida because, under the Florida Rules, an unregulated, potentially misleading advertisement that redirects a potential client to a law firm website would at no point in that process be subject to Florida's substantive advertising rules.

One seemingly appropriate solution for states like Florida would be to simply increase website regulation. This view would hold that Internet advertisement regulation is unnecessary because increased website regulation would cure misleading notions created by those advertisements. Subjecting websites to all

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194. *See, e.g.*, RULES REGULATING THE FLA. BAR R. 4-7.1(g) (2010) (providing that all lawyer communications remain subject to the general prohibition against conduct involving dishonesty, deceit, or misrepresentation).

195. LA. RULES OF PROF'L CONDUCT R. 7.9(a) (2010) ("Information provided about a lawyer's or law firm's services upon request shall comply with the requirements of Rule 7.2 unless otherwise provided in this Rule 7.9.").

196. RULES REGULATING THE FLA. BAR R. 4-7.1(f) ("Subchapter 4-7 shall not apply to communications between a lawyer and a prospective client made at the request of that prospective client.").

substantive advertising rules and additionally requiring disclosures and disclaimers not otherwise contained in the Internet advertisement that prompted visitation would seem to accomplish this. Thus, decreased regulation of Internet advertisements arguably calls for a corresponding increase in website regulation, which would serve to counteract any misleading notions created by deregulating Internet advertisements.

The Florida Bar submitted a proposal that sought to increase the regulation of homepages to the Florida Supreme Court in a petition to amend the Florida Rules in 2008.<sup>197</sup> The petition, which was struck down by the court, contained an amendment that would subject law firm homepages to all substantive attorney advertising rules except the filing requirement.<sup>198</sup> The amendment would then have the remainder of the website, i.e., everything beyond the homepage, treated as information upon request.<sup>199</sup>

This proposed amendment was struck down because the suggested measures were not sufficient to make material behind the homepage fall under the definition of information upon request.<sup>200</sup> As the court noted, however, information beyond a homepage could constitute information upon request if regulations required additional safeguards, such as the completion of a request form and the acceptance of a disclaimer.<sup>201</sup> In other words, material beyond a homepage could be classified as information upon request, and thus exempt from the general advertising rules, if an Internet user were required to provide his information when requesting to view such material. Because the amendments were struck down, the Florida Rules do not apply general advertising rules to homepages and websites under their classification as information upon request.

This regulatory focus on website regulation as a counteractive measure is further supported by the idea that law firm homepages often serve as a “home base” to which potential clients are redirected after clicking an advertisement. Consequently, the homepage may be the more appropriate place for disclaimers and disclosures, rather than the advertisement itself, because it is where the bulk of information regarding a lawyer’s services can be found.

Nevertheless, homepages and websites are frequently encountered voluntarily through specific searches for lawyers or law

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197. See FINAL PETITION, *supra* note 161.

198. *Id.*

199. *Id.*

200. *In re Amendments to the Rules Regulating the Fla. Bar—Rule 4-7.6, Computer Accessed Commc’ns*, 24 So. 3d 172, 173 (2009).

201. *Id.* at 173–74.

firms or by entering a particular web address. Thus, increasing homepage or website regulation might cure any misleading notions created by unregulated advertisements but would subject them to unnecessary regulation for those seeking to voluntarily encounter the site. Increasing such regulation would thereby inhibit the free flow of information desired by potential clients when choosing legal services. This unnecessary regulation would then be at odds with the requirement that regulations be narrowly tailored.<sup>202</sup> Thus, other measures should be considered that serve to both protect consumers and allow for the free flow of information on the Internet.

#### V. A SOLUTION AT THE CROSSROADS OF INTERNET ADVERTISING AND LAW FIRM WEBSITES: THE CLICKWRAP SOLUTION

Any solution that attempts to address attorney advertising on the Internet must consider the interplay between emerging forms of Internet advertising, such as PPC advertisements, and law firm websites. Links contained in PPC advertisements redirect potential clients to a law firm website.<sup>203</sup> Thus, the content of an advertisement can heavily influence whether that advertisement is clicked and, in turn, whether a law firm website is viewed. Accordingly, states should consider regulation of such advertising and of law firm websites as related concerns.

If states assert a substantial interest in regulating Internet advertisements, such regulation should directly advance that interest by curing misleading notions arising from those advertisements, but it should also be narrowly tailored to avoid the practical problems arising from catch-all language as seen in the Louisiana and Florida rules. An appropriate regulatory measure that would fulfill these criteria is one that allows the viewer of an Internet advertisement to assent to being redirected to a law firm website after clicking that advertisement but before proceeding to the website. In other words, effective regulation would require disclosures and disclaimers neither in the advertisement itself nor on the website, but at the crossroads of the two.

The clickwrap agreement would make this possible. A clickwrap agreement is an Internet agreement that requires its user to consent to terms or conditions by clicking a dialog box on the screen in order to proceed.<sup>204</sup> These agreements are mostly found

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202. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564–65 (1980).

203. *See* Kushmerick, *supra* note 64.

204. *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (quoting *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 22 (2d Cir. 2002));

on the Internet, as part of the installation process of software packages, or in other circumstances where agreement is sought using electronic media.<sup>205</sup> In order to assess a clickwrap agreement's potential worth in the attorney Internet advertisement process as a mechanism to further regulatory objectives, one can consider the process by which a potential client encounters a common attorney Internet advertisement. An Internet user who searches for "Injury Attorney" on Google views several search results, including a number of "sponsored links," which are attorney PPC advertisements. These advertisements lure the user to click them, thereby redirecting the user to a law firm website. Catch-all regulation inhibits a lawyer-advertiser from displaying a substantive, meaningful advertisement by the character limits imposed by, though necessary to, PPC advertisements because information disclosure is required in the advertisement itself.<sup>206</sup> Without catch-all regulation, though, the advertisement may contain misleading information prohibited in traditional advertisements, so the source of the user's visit to the law firm website could be tainted.<sup>207</sup> However, with the clickwrap solution in effect, a user who clicks one of these advertisements would quickly view a dialog box, which contains any necessary disclosures not contained in the advertisement before proceeding to the law firm website. Thus, the clickwrap solution would protect consumers from misleading advertisements while allowing lawyers to freely advertise their services through Internet media such as PPC advertisements.

Clickwrap agreements are foreign neither to courtrooms nor legal commentary. Courts have addressed clickwrap agreements in the context of enforceability.<sup>208</sup> Commentators have suggested that

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*see also* James J. Tracey, Legal Update, *Browsewrap Agreements*: Register.com, Inc. v. Verio, Inc., 11 B.U. J. SCI. & TECH. L. 164, 165 (2005) (distinguishing clickwrap agreements from "browsewrap agreements," which allow the user to view the terms of the agreement but do not require the user to take any affirmative action before the website performs its end of the contract).

205. *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585, 593-94 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002).

206. *See* discussion *supra* Part IV.A.2.

207. *See* discussion *supra* Part IV.A.2.

208. *See ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (finding acceptance of an offer and the terms contained within the shrinkwrap license by clicking through the dialog box); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (finding certain aspects of a clickwrap agreement "unconscionable, and therefore unenforceable"); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007) (upholding forum-selection clause); *i.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 336 (D. Mass. 2002)

clickwrap agreements should be utilized by law firms as a disclaimer to address confidentiality concerns when potential clients visit a law firm website.<sup>209</sup> Furthermore, such agreements have been promoted as a useful tool to define the scope of representation and prevent unintended attorney–client relationships for attorneys operating a web-based virtual law office.<sup>210</sup> As attorneys transition to virtual law office practice, clickwrap agreements are likely to become the standard for online legal contracting between attorney and client.<sup>211</sup> Thus, the use of clickwrap agreements to provide advertising disclosure would be a logical extension of its growing functionality in the legal profession.

The clickwrap solution would serve to alleviate both the problems arising from the presence of a catch-all provision as well as problems arising from its absence due to limited definitions of information upon request, such as that found in Florida.<sup>212</sup> The use of a clickwrap agreement in conjunction with otherwise unregulated advertisements would serve to cure any misleading notions before a user is redirected from an unregulated advertisement to a law firm website. Thus, it would fulfill the purpose of a catch-all provision, while correcting practical inconsistencies. These practical problems would be alleviated because, with the clickwrap solution in place of a catch-all provision, the advertisement itself would not be subject to the content requirements of traditional advertisements. Rather, the means by which websites are accessed through advertisements would be regulated. Consequently, the character limitations

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(upholding a clickwrap agreement as contract formation); *In re RealNetworks, Inc. Privacy Litig.*, No. 00-C-1366, 2000 WL 631341 (N.D. Ill. May 8, 2000) (upholding an arbitration clause).

209. David Hricik, Mercer Univ. Sch. of Law, *Whoops! I Did It Again! What Britney Spears Can Teach Us About the Ethical Issues Arising from the Intentional Transmission of Confidences from Prospective Clients to Firms*, HRICIK.COM (May 2004), <http://www.hricik.com/eethics/3.1.html>.

210. STEPHANIE L. KIMBRO, PRACTICING LAW ONLINE: CREATING A WEB-BASED VIRTUAL LAW OFFICE 13 (rev. ed. 2009), available at <http://www.vlotech.com/ebooks/PracticingLawOnline.pdf>. A virtual law office (VLO) is a professional law practice that exists online through a secure portal and is accessible to the client and the attorney anywhere the parties may access the Internet. A VLO provides attorneys and clients with the ability to securely discuss matters online, download and upload documents for review, and handle other business transactions in a secure digital environment. *Id.* at 4.

211. *Id.* at 14. The ABA Committee on Cyberspace Law provides sources to assist attorneys in researching and drafting VLO online agreements. See *Business Law Section: Committee on Cyberspace Law*, A.B.A., <http://www.abanet.org/dch/committee.cfm?com=CL320000> (last modified Dec. 6, 2010).

212. See discussion *supra* Part IV.

imposed by PPC advertisements would no longer inhibit lawyers from benefiting from the efficient and cost effective manner of such advertisements because any disclosure requirements not contained in the advertisements could be fulfilled by way of the clickwrap. Although this solution would require an intermediate step that Internet users could simply bypass by clicking “continue” or “agree,” disclosure by clickwrap is arguably more effective than traditional disclosure in the advertisement itself, as it provides disclosure in an independent setting that draws focus to its content.

Furthermore, a clickwrap solution is more appropriate than increasing website regulation because the latter inhibits voluntary website visitation by failing to distinguish voluntary visitors from those redirected by advertising. If disclosures not contained in advertisements were required to be displayed on the homepage, a voluntary website visitor would be presented with unnecessary information disclosure. Alternatively, utilizing clickwrap agreements in conjunction with Internet advertisements would allow users to bypass such agreements when searching for a specific lawyer or law firm or entering a law firm’s web address. As such, the clickwrap solution would allow homepages and websites in states like Florida to remain categorized as information upon request, while alleviating otherwise tainted website visitation. Thus, the free flow of information on the Internet could then be preserved for those who are searching for specific lawyers or law firms.

Accordingly, rather than catch-all regulation of the content and medium of attorney Internet advertisements, subsection of otherwise non-conforming advertisements to the requirement of a clickwrap agreement before website visitation is a proper solution. Redrafting the language of Louisiana Rule 7.6(d) would appropriately incorporate this measure:

(d) All computer-accessed communications concerning a lawyer’s or law firm’s services, other than those subject to subdivisions (b) and (c) of this Rule, the purpose of which is to redirect a user to an Internet Presence as described in subdivision (b),<sup>213</sup> shall first redirect the user to a page on which assent can be given to, and which contains, all statements, disclosures, and disclaimers as required by Rule 7.2 not otherwise contained in such communication.

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213. An Internet Presence is broadly defined as “[a]ll World Wide Web sites and home pages accessed via the Internet that are controlled, sponsored, or authorized by a lawyer or law firm and that contain information concerning the lawyer’s or law firm’s services.” LA. RULES OF PROF’L CONDUCT R. 7.6(b) (2010).

The scope of this language would encompass any Internet advertisement that redirects a user who clicks it to a website sponsored, authorized, or controlled by a lawyer or law firm.<sup>214</sup> This includes all PPC advertisements, such as those found on search engines, social networking sites, and banner-type advertisements. As most Internet advertisements entice users to “click through” them and redirect users to a website, the clickwrap solution would bring regulation up to speed with current lawyer use of advertising technology.

The clickwrap solution, although broad in application, is sufficiently narrower in both a constitutional and technical sense than former Louisiana Rule 7.6(d), which was overly broad in both language and principle. Rather than subjecting Internet advertisements to traditional *content* regulation, as Louisiana’s catch-all provision attempted, states should incorporate a *means* regulation that is considerate of the practical problems arising from both the existence of the catch-all provision and its absence. The language of the failed Louisiana catch-all provision sought to regulate the content of Internet advertisements and would have required inclusion of disclosures and disclaimers in the advertisement itself. Alternatively, by providing lawyer-advertisers the option to display necessary disclosure either in the advertisement itself *or* by way of a clickwrap agreement, the clickwrap solution alleviates the constitutional and practical shortfalls of the former rule.

The Florida Supreme Court noted that the purpose of Rule 4-7.6 is to “protect consumers from misleading information, provide consumers with accurate and helpful information in the selection of a lawyer, and respect lawyers’ abilities to provide information about themselves to the public.”<sup>215</sup> The clickwrap solution, as it modifies former Louisiana Rule 7.6(d), fulfills each of these purposes in a manner mindful of consumer protection, commercial speech implications, and current advertising technologies.

#### CONCLUSION

Emerging Internet advertising technologies have complicated an ongoing war between state bar associations attempting to regulate legal advertisements and lawyers seeking to market their services. As illustrated by Louisiana’s failed attempt to regulate attorney Internet advertising, inequities resulting from states’

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214. *Id.*

215. *In re Amendments to the Rules Regulating the Fla. Bar—Rule 4-7.6, Computer Accessed Commc’ns*, 24 So. 3d 172, 173 (Fla. 2009).

failure to recognize the dynamic nature of these technologies have manifested themselves through careless rule adoption, thereby empowering lawyers and public interest organizations with valid claims to attack unwarranted regulation.

Categorical regulation of Internet advertisements and their subjection to traditional advertising rules fails to acknowledge the distinction between traditional and emerging forms of advertising, such as pay-per-click advertisements. Requiring traditional disclosure in Internet advertisements severely limits lawyers' use of such media due to the strict character limitations contained therein. Thus, application of traditional rules to these technologies fails to consider their functionality and results in constitutional and practical discord. If states assert a substantial interest in regulating attorney Internet advertisements, they should recognize the constitutional and practical problems arising from overly broad catch-all provisions and should accordingly abandon uncompromising application of old rules to new technologies.

Instead, as lawyers and clients continue to embrace such technological advancements, states should likewise embrace such technologies in the development of regulatory schemes by incorporating tools such as the clickwrap agreement to accomplish their regulatory end. The use of clickwrap agreements for information disclosure at the junction of Internet advertisements and law firm websites would allow lawyers to freely advertise their services while protecting consumers from misleading notions arising from otherwise unregulated advertisements.

An enduring war waged over World Wide Web advertising regulation is fundamental to ensuring that the voice of both perspectives is properly heard. However, if states continue to disregard the underlying functionality and beneficial nature of Internet advertising technologies, they will only stifle the free flow of information presented thereby and replenish the arsenal of lawyers' claims against them. As a result, states will then be forced to reflect on that which Louisiana regrettably contemplates—what went wrong on the World Wide Web.

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