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Speaking Legally and Freely: Lawyers, Web Sites, and the First Amendment

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**SPEAKING LEGALLY AND FREELY:
LAWYERS, WEB SITES, AND THE FIRST AMENDMENT**

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I. INTRODUCTION

In 1973, the Internet had not been invented, web sites did not exist, and lawyer marketing was essentially unknown. Yet a 1973 letter from a South Carolina lawyer offering help to a sterilized woman would lead to a United States Supreme Court decision recognizing important First Amendment principles that today limit the power of states to regulate lawyer web sites.

*In re Primus*¹ concerned South Carolina's attempt to punish lawyer Edna

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1. 436 U.S. 412 (1978).

Smith Primus for advising Mary Etta Williams of her legal rights and the availability of legal assistance through the American Civil Liberties Union (ACLU).² Newspapers had been reporting at the time that South Carolina women had been sterilized “as a condition of the continued receipt of medical assistance under the Medicaid program.”³ Primus’s letter stated that “[t]he American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation.”⁴ “We will be coming to Aiken in the near future and would like to explain what is involved,” Primus wrote.⁵ The letter continued, “[I]f you are interested, let me know, and I’ll let you know when we will come down to talk to you about it.”⁶

At the time that Primus wrote this letter, South Carolina’s rules governing lawyers prohibited “knowingly assist[ing] a person or organization that recommends, furnishes, or pays for legal services [in order] to promote the use of [the lawyer’s] services or those of [the lawyer’s] partners or associates.”⁷ A panel of South Carolina’s lawyer disciplinary board concluded that Primus violated that rule by attempting to solicit a potential client for the ACLU, for which an associate of Primus was staff counsel.⁸ The panel also found Primus violated another rule—DR 2-104(A)(5)—because she encouraged the potential client to join in a prospective class action that was to be brought by the ACLU.⁹ Sanctioning Primus, the disciplinary board argued, served the state’s interests in “the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients.”¹⁰

South Carolina’s attempt to serve those interests by sanctioning Primus, the Supreme Court found, was unconstitutionally broad and violated Primus’s rights to freedom of speech and association.¹¹ Primus’s letter clearly communicated an offer to provide legal assistance, and in discussing her letter the United States Supreme Court acknowledged that a state could regulate lawyer solicitation activity “that ‘simply propose[s] a commercial transaction.’”¹² “In the context of political expression and association, however, a State must regulate with significantly greater precision,” the Court held.¹³ As a result, the Court rejected

2. *See id.* at 415–16, 421.

3. *Id.* at 415.

4. *Id.* at 416 n.6.

5. *Id.*

6. *Id.*

7. *Id.* at 418 n.10 (quoting S.C. DR 2-103(D)). For similar versions of Disciplinary Rule 2-103(D) and commentary on the multiple amendments to that rule, see ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D) (1979).

8. *Id.* at 420–21.

9. *Id.* at 421.

10. *Id.* at 432.

11. *See id.* at 433, 39.

12. *Id.* at 437 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

13. *Id.* at 437–38.

South Carolina's sanction of *Primus* for "her actions . . . undertaken to express personal political beliefs."¹⁴

The *Primus* decision, therefore, provides considerable protection for written communications advising members of the public of their legal rights. That is precisely the content of many legal service providers' web sites today. Consequently, this Article argues, states must not seek to regulate web sites broadly with the same onerous regulations that some states apply to traditional print and television advertising. Instead, lawyer web pages that do not consist of pure advertising content are entitled to full constitutional protection.

II. LAWYER WEB SITES ARE WIDESPREAD AND SIGNIFICANT

At first glance, the subject of lawyers' web sites might seem a fairly narrow topic, of interest only to law firm marketing staffs. But in fact law firms, like all industries and professions, are part of the Internet revolution. In 1994, only "five American law firms had web pages."¹⁵ "Today, almost all large law firms and many small firms and solo practitioners have web sites."¹⁶ As the president of The Florida Bar has noted, the Internet has dramatically changed the way lawyers communicate.¹⁷ Specifically, he wrote, "Florida has traveled from the isolated advertising lawyer of the mid-1970s to massive, sophisticated marketing which the Bar struggles to address, including the regulation of Web sites. Tension between legitimate commercial speech and the protection of the public intensifies as never before."¹⁸ No doubt the same could be said of the bars of South Carolina and every other state.

III. LAWYER WEB SITES ARE NOT NECESSARILY COMMERCIAL SPEECH

But lawyers' web sites are not merely "legitimate commercial speech," to use The Florida Bar president's words.¹⁹ Since the *Primus* decision, the United States Supreme Court has on many occasions reiterated that commercial speech means communication "proposing a commercial transaction."²⁰ Presumably, therefore, the legitimate commercial speech that the president of The Florida Bar had in mind was a web page on which a lawyer overtly urges potential clients to retain him and to pay a fee for his assistance with a particular legal

14. *Id.* at 421–22.

15. Jeffrey E. Kirkey, *Legal Ethics in Cyberspace: Keeping Lawyers and Their Computers out of Trouble*, 18 T.M. COOLEY L. REV. 37, 46–47 (2001).

16. J. T. Westemeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 269–70 (2004).

17. See Henry M. Coxe III, *Finding Time to Face the Issues*, 80 FLA. BAR J. 6, 6 (2006).

18. *Id.*

19. *Id.*

20. *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980)); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (quoting *Central Hudson*, 447 U.S. at 562); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989).

problem—speech genuinely proposing a commercial transaction. And no doubt some law firm web content fits within this definition. Web pages that overtly urge clients to pay particular lawyers for assistance with specific matters likely fit within the definition of commercial speech. Certainly regulators of lawyer speech have at times treated such web pages as simply a form of traditional lawyer advertising in another medium.²¹

But the fact that some speech on lawyer web sites is commercial does not mean all lawyer speech transmitted through that medium is commercial. Lawyers use the Internet to post scholarly articles,²² to discuss the status of pending cases,²³ to discuss developments in particular substantive areas of the law,²⁴ to report major court decisions,²⁵ and to speak on any number of subjects without ever proposing to provide a particular legal service to a particular client for a fee. Consequently, much of the speech on lawyer web sites falls outside of the Supreme Court’s basic definition of commercial speech.

The web site is the medium; it is not the message. To say that certain speech occurs in public parks does not tell us the level of First Amendment protection that applies. Some speech in public parks is commercial.²⁶ Some speech in public parks is not commercial.²⁷ Indeed, as the Supreme Court has recognized in a plurality opinion, “mere physical characteristics of the property [where speech occurs] cannot dictate forum analysis.”²⁸ Similarly, a report concerning recent Fourth Circuit decisions or alerting members of the public to their legal

21. See Iowa Supreme Court Attorney Disciplinary Bd. v. Bjorklund, 725 N.W.2d 1, 6 (Iowa 2006) (sanctioning a lawyer for claims on a web site that his firm’s ““scholarly achievements are unmatched by any other law firm,”” that the lawyer is ““the foremost authority on drunk driving defense,”” and that the firm’s ““zealous and aggressive legal representation has resulted in overwhelmingly favorable results for clients,”” because the statements violated an Iowa rule prohibiting public communications that “are false, deceptive, unfair or unverifiable. . . . [O]r which contain any statement or claim relating to the quality of the lawyer’s services” (quoting IOWA CODE OF PROF’L RESPONSIBILITY DR 2-101(A) (repealed 2005))); *In re Richmond’s Case*, 872 A.2d 1023, 1029 (N.H. 2005) (concluding a lawyer’s claim on his web site of “expertise in financing and raising capital” was a misrepresentation because the lawyer “did not have any special training or experience in securities law”); *Office of Disciplinary Counsel v. Furth*, 754 N.E.2d 219, 225, 231–32 (Ohio 2001) (holding attorney’s web site claim to be “[a] passionate and aggressive advocate” violated a rule prohibiting unverifiable self-laudatory statements).

22. See, e.g., Frederick Dorwart, Lawyers, Articles, <http://www.fdlaw.com/articles.cfm> (last visited June 17, 2007).

23. See, e.g., Public Citizen, Litigation Group, www.citizen.org/litigation (last visited June 17, 2007).

24. See, e.g., Partly Cloudy: Florida’s Sunshine and Public Records Laws, <http://floridasunshinelaw.blogspot.com/> (last visited June 17, 2007).

25. See, e.g., McGlinchey Stafford PLLC, *Client Alert: Supreme Court Decides the Cleveland Predatory Lending Ordinance Case*, Dec. 6, 2006, <http://gmba.net/ClientAlert120606.pdf> (last visited June 17, 2007).

26. See, e.g., *Infinity Outdoor, Inc. v. City of N.Y.*, 165 F. Supp. 2d 403, 405, 414–15 (E.D.N.Y. 2001) (applying commercial speech analysis to a zoning regulation of signs near highways and public parks).

27. See, e.g., *Barnett v. D’Artois*, 331 F. Supp. 1310, 1315 (W.D. La. 1971) (applying First Amendment protections for political speech in a public park).

28. *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (O’Connor, J., plurality opinion).

rights is not commercial speech merely because the report appears on a law firm's web site. The fact that a message is communicated via a web site does not determine that the speech is commercial; such a rule would understate the constitutional protection that is potentially applicable to such communication. Because lawyers use web sites to do much more than propose commercial transactions, lawyers' web sites are not merely—or even necessarily—commercial speech.²⁹ Consequently, the power states have to regulate commercial speech generally does not extend to the noncommercial content of lawyer web sites.

IV. THE DISTINCTION BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH

Labeling speech commercial or noncommercial is significant because, of course, the First Amendment grants noncommercial speech a much greater level of protection than commercial speech. The Supreme Court has given considerable deference to state efforts to regulate commercial speech, most notably in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.³⁰ And to be sure, *Central Hudson's* deferential standard has been applied to traditional lawyer advertising.³¹ But the *Central Hudson* standard does not apply to web sites that discuss legal, political, or social topics.

For example, in *CPC International, Inc. v. Skippy Inc.*,³² the Fourth Circuit applied “full First Amendment protection”³³ to speech on a cartoonist's web site

29. Some communication that does not merely propose a commercial transaction might be considered commercial if that speech is part of an advertisement that refers to a specific product or service and the speaker has an economic motivation for the speech. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 & n.13 (1983) (addressing whether pamphlets that a manufacturer of contraceptives produced that referred to the manufacturer's products either specifically or generically were commercial speech); see also *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 90, 94 n.2, 97 (2d Cir. 1998) (holding a brewery's proposed beer label depicting “a frog with the second of its four unwebbed ‘fingers’ extended in a manner evocative of a well known human gesture of insult” was commercial speech because this “depiction of an insolent frog” or “a frog behaving badly” was “a form of advertising, identifi[ed] a specific product, and serve[d] the economic interest of the speaker”). *Primus* precludes application of this broad definition of commercial speech to a lawyer's web page speech “undertaken to express personal political beliefs.” See 436 U.S. 412, 422 (1978); see also *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 226 (2003) (Stevens, J., dissenting) (noting “our Nation's deep commitment to ‘safeguarding academic freedom’ and to the ‘robust exchange of ideas’” (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967))). Consequently, any political, scholarly, or journalistic content of a lawyer's web site is protected from regulation as mere commercial speech.

30. 447 U.S. at 564–65 (1980) (describing how the government must assert substantial interest in support of its regulation, demonstrate that the restriction directly and materially advances that interest, and demonstrate that the regulation is narrowly drawn to service a First Amendment Challenge).

31. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629–31, 638 (1985) (indicating the Court would apply *Central Hudson* to newspaper advertisements stating that a lawyer would represent clients in certain matters for a fee).

32. 214 F.3d 456 (4th Cir. 2000).

33. *Id.* at 462.

that included criticism of a company with which the cartoonist had been in litigation.³⁴ “The web site served a primarily informational purpose, not a commercial one,” the Fourth Circuit found.³⁵ Similarly, in *Nissan Motor Co. v. Nissan Computer Corp.*,³⁶ the Ninth Circuit applied “full First Amendment protection”³⁷ to a web site containing links to sites that offered disparaging commentary concerning an auto maker.³⁸ And, in 2004, a California Court of Appeal found that the Planned Parenthood organizations’ web sites providing medical information were not commercial and were entitled to “full First Amendment protection,”³⁹ even though the sites included a telephone number that could be used by persons seeking an appointment for medical services.⁴⁰ Similarly, state regulation of lawyers’ web sites is not entitled to *Central Hudson*’s deferential treatment—at least to the extent that the web sites do more than merely offer a lawyer’s services for a fee.

V. PROBLEMS WITH TREATING LAWYER WEB SITES AS COMMERCIAL SPEECH

The difficulties of regulating lawyer web sites have been front and center in Florida. In January 2007, the Board of Governors of The Florida Bar considered tightening regulations concerning lawyer web sites.⁴¹ Under regulations in effect at that time, Florida lawyers’ web sites were subject to a generally applicable prohibition on “false, misleading, deceptive or unfair communication.”⁴² In addition, Florida lawyers were required to disclose on their web sites attorney admission information and office locations.⁴³ Without any specific evidence that such requirements had proven insufficient, the Board of Governors contemplated subjecting web sites to the more onerous requirements that apply to television and traditional print advertising.⁴⁴ Those forms of advertising must be submitted to bar officials for review “either prior to or concurrently with the lawyer’s first dissemination of the advertisement.”⁴⁵ In addition, television advertisements must not contain “any spokesperson’s voice or image that is recognizable to the public” or “any background sound other than instrumental music.”⁴⁶ And print and television ads must not contain testimonials,⁴⁷ “any reference to past success

34. *Id.* at 460–62.

35. *Id.* at 462.

36. 378 F.3d 1002 (9th Cir. 2004)

37. *Id.* at 1017 (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002)).

38. *Id.* at 1008, 1015.

39. *Bernardo v. Planned Parenthood Fed’n of Am.*, 9 Cal. Rptr. 3d 197, 215 (Ct. App. 2004).

40. *Id.* at 217.

41. See Gary Blankenship, *Board Takes New Tack on Lawyer Web Sites: Proposal Includes Some Lawyer Ad Rules Exemptions with Disclaimers*, FLA. BAR NEWS, Feb. 15, 2007, at 1.

42. See FLA. BAR R. 4-7.2(b)(1) (West 2006).

43. See *id.* 4-7.6(b)(1)–(2).

44. See Blankenship, *supra* note 41.

45. See FLA. BAR. R. 4-7.7(a).

46. See *id.* 4-7.5(b)(1)(B)–(C).

47. *Id.* 4-7.2(b)(1)(E).

or results obtained” by the lawyer,⁴⁸ and “statements describing or characterizing the quality of the lawyer’s services.”⁴⁹ The Florida Board of Governors also considered restricting access to law firm web sites so that one would have to establish a prior relationship with a firm and obtain a password as a prerequisite to access portions of the site.⁵⁰ Regulating law firm web sites in this manner—that is, by restricting access, requiring law firms to submit web site content for regulatory review, or prohibiting speech by lawyers concerning their prior cases—is remarkably bad public policy, is simply unworkable, and is unconstitutional.

VI. POLICY REASONS FOR REJECTING ONEROUS REGULATION OF LAWYER WEB SITES

Onerous regulation of web sites is bad policy because lawyers ought to be encouraged to use their web sites to discuss legal developments with other lawyers, clients, and the public. Such discussion advances legal scholarship and the development of our profession. To facilitate such communication, it is important that lawyers, law students, and law professors—in Florida and elsewhere—have easy access to one another’s writings. A rule requiring users to obtain passwords, sign in to a law firm’s web site, or take other additional steps to access legal content will deter communication. Computer users are understandably wary of sites that require user information as a precondition for access. Likewise, a requirement that lawyers submit web content for bar approval would take away one of the Internet’s key virtues—the ability to disseminate information quickly. If a lawyer must await regulatory approval before posting commentary on a United States Supreme Court decision, that lawyer’s analysis will be stale by the time the regulators approve the publication. The scholarship and qualifications of lawyers ought not be hidden behind such barriers.

VII. PRACTICAL PROBLEMS WITH HEAVY REGULATION OF LAWYER WEB SITES

Access limits would not only deter scholarship and commentary. Such rules also would be difficult to implement. Internet technology changes constantly. Consequently, it is unclear how access restrictions might impact search engine results. For example, suppose a law professor in South Carolina is studying law enforcement compliance with *Brady v. Maryland*.⁵¹ The professor might use a popular search engine, such as Google or Yahoo!, to identify web publications discussing *Brady*. Such a search would identify a wide range of results,

48. *Id.* 4-7.2(b)(1)(B).

49. *Id.* 4-7.2(b)(3).

50. See Blankenship, *supra* note 41.

51. 373 U.S. 83 (1963).

including a Federal Judicial Center article,⁵² a page from the Los Angeles District Attorney's web site,⁵³ and an article from a Texas-based law firm.⁵⁴ This sort of open communication ought to be encouraged. And yet under the access restrictions contemplated in Florida, if a criminal defense lawyer were to write an article about *Brady* and mention a case in which that lawyer participated, the lawyer would have been prohibited from posting the article on a publicly available portion of the lawyer's firm site.⁵⁵

Such regulation of lawyer web sites would raise a host of complex questions. If the lawyer gave a copy of the article to his law school, would the lawyer be subject to discipline if the school posted the article on its publicly accessible web site with a link to the lawyer's firm site? If the article is on an access-restricted portion of the firm's site, would search engines such as Google or Yahoo! be able to find his article? How would the access restrictions be applied to Florida lawyers whose firms operate in multiple states? Would such a lawyer be disciplined if his firm's out-of-state marketing staff posted his article on a public portion of his firm's site? Would the access rules apply to discussion groups edited by law professors who are active members of The Florida Bar? These complex questions would no doubt make enforcing access restrictions extremely difficult.

The volume of lawyer web sites also would present significant problems in states—such as Florida—that require lawyers to submit mass media print and television advertising for regulatory review.⁵⁶ Florida's pre-2007 rule governing computer-accessed communications by lawyers purported to regulate any “information regarding a lawyer's or law firm's services.”⁵⁷ That language could be read quite broadly as applying, for example, to any article in which a lawyer merely mentions a case in which the lawyer participated. If states were to apply existing review requirements developed for print and television advertisements to all such materials—including constantly changing Internet publications—regulators would be inundated with content. Surely those who regulate the legal profession can find better ways to spend their time than regulating—or defending the regulation of—legal commentary. States do not

52. *E.g.*, LAURAL L. HOOPER, JENNIFER E. MARSH & BRIAN YEH, FED. JUDICIAL CTR., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES 1 (2004), [http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/\\$file/BradyMat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/$file/BradyMat.pdf).

53. *E.g.*, Brady Protocol, Special Directive 02-08 (L.A. County Dist. Attorney's Office Dec. 7, 2002), <http://da.co.la.ca.us/sd02-08.htm>.

54. *E.g.*, Musick & Musick LLP, *Brady Materials and Impeachment Evidence*, <http://www.musicklawoffice.com/legal-articles/brady-materials.html> (last visited June 17, 2007).

55. *See* FLA. BAR R. 4-7.2(b)(1)(B) (West 2006) (prohibiting “any reference to past successes or results obtained”); Blankenship, *supra* note 41 (citing the view of The Florida Bar's president-elect that “attorneys should not be able to use testimonials, refer to past results, or characterize the quality of their legal services” on lawyer web sites “because similar things cannot be done on TV and other types of ads”).

56. *See* FLA. BAR R. 4-7.7(a).

57. *Id.* 4-7.6(a).

require lawyers to submit to regulators letters that are sent to individual potential clients, even though such letters undoubtedly mention lawyers' previous experience and past successes.⁵⁸ The case has not been made to treat web content differently than individual letters. If that case is made, states had better beef up their regulatory staffs considerably.

VIII. THE FIRST AMENDMENT PRECLUDES HEAVY REGULATION OF LAWYER WEB SITES

In addition to these practical problems, application of content-based rules to web site news articles or commentary would raise serious constitutional concerns. "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."⁵⁹ Accordingly, although courts have allowed regulation of genuine lawyer advertising,⁶⁰ courts have been much less tolerant of regulation of speech concerning newsworthy, academic, social, or political matters, even if that speech is communicated in a medium customarily occupied by advertising.⁶¹ To the extent that web site rules would apply to legal news or commentary simply because that material appears on a lawyer's web site, the rules will be ripe for a constitutional challenge—particularly rules that go beyond prohibitions on deceptive and misleading speech to prohibit speech that offends the dignity of the profession.⁶²

Constitutional concerns arise not only because of lawyers' free speech rights, but also because the First Amendment protects the public's right to receive information. Regulation of lawyers' web sites rests on the assumption that members of the public are too unsophisticated to recognize puffery. The

58. *See, e.g., id.* 4-7.9(b).

59. *NAACP v. Button*, 371 U.S. 415, 439 (1963).

60. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629–31, 655 (1985) (addressing newspaper advertisements stating that a lawyer would represent clients in certain matters for a fee and finding the rule prohibiting deceptive advertising by lawyers survived First Amendment challenge).

61. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995) ("There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) ("[A] piece of newsworthy information on the cover of a magazine, or a book review on the back of a book's dust jacket, is entitled to full constitutional protection") (Stevens, J., concurring); *In re Primus*, 436 U.S. 412, 432 (1979) (applying the "exacting scrutiny applicable to limitations on core First Amendment rights" to a state's attempt to punish a lawyer who sought to further political and ideological goals through associational activity, including litigation, and advised a lay person of legal rights and availability of legal assistance (quoting *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976))).

62. *See Boos v. Barry*, 485 U.S. 312, 322 (1988) (finding a statute aimed at protecting the dignity of foreign officials by banning on protests within 500 feet of foreign embassies violated the First Amendment); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841–42 (1978) ("Our prior cases have firmly established . . . that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.' The remaining interest sought to be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales." (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964))).

Supreme Court has repeatedly rejected such a “highly paternalistic approach” to advertising.⁶³ Interrupting the free flow of information from lawyers to their colleagues and the public is simply patronizing and gives too little value to the public’s interest in the free flow of information from lawyers to their potential clients.

Finally, access restrictions on web site content are simply unnecessary. One often-cited rationale for regulating lawyer advertising is that such speech might intrude upon the seclusion and solitude of persons in mourning or recovering from physical injury.⁶⁴ Concern over such intrusion is inapplicable in the context of web sites. By performing an Internet search and selecting a link to a law firm’s web site, the user has already implicitly requested information from the firm. As a member of the Board of Governors of The Florida Bar explained, “[p]eople search the Web for specific things. A consumer who searches the Web for an attorney . . . I believe by definition . . . is [requesting] information. . . .”⁶⁵ The rules governing Florida lawyers have for years recognized that information a potential client requests is not subject to the onerous regulation applicable to traditional print advertising.⁶⁶ Instead, Florida ethics rules merely require that such solicited communications be truthful and not misleading and, in some circumstances, include certain fee-related information.⁶⁷ Consequently, requiring the user to take additional steps would be redundant. The fact that individuals access web sites through searches or domain names prevents the problems of intrusiveness or overreaching that can arise if a lawyer uses the telephone or in-person visits to solicit potential clients.⁶⁸

For all of these reasons, legal services web sites ought not be subject to the painstaking regulation that some states apply to lawyer newspaper and television advertising. Whether regulators will act accordingly is, to some degree, an open question. The Florida Bar’s Board of Governors has tentatively placed some

63. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 771 (1976) (rejecting ban on pharmacy price advertising); *accord* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 70–72 (1983) (rejecting federal effort to ban potentially “offensive” and “intrusive” direct mail advertisements for contraceptives, and noting that “[r]ecipients of objectionable mailings . . . may ‘effectively avoid further bombardment of their sensibilities simply by averting their eyes’” (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 542 (1980))); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 96–97 (1977) (rejecting a ban on “for sale” signs on residential property enacted because of fear such signs would drive down property values).

64. *See, e.g., Went For It*, 515 U.S. at 625 (quoting The Florida Bar’s argument that “intrusion upon the special vulnerability and private grief of victims or their families” is “universally regarded as deplorable and beneath common decency.”).

65. *See* Blankenship, *supra* note 41 (quoting Florida Bar Board of Governors member Harold Melville).

66. *See* FLA. BAR R. 4-7.9(b) (West 2006).

67. *See id.* 4-7.9.

68. *Cf. Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 454–57 (1978) (distinguishing “solicitation of business by a lawyer through direct, in-person communication” from newspaper advertising and upholding regulation of the former but noting that First Amendment protection of the latter); *In re Primus*, 436 U.S. 412, 422 (1978) (distinguishing “in-person solicitation for pecuniary gain” from an attorney’s letter).

burdens on web sites, such as requiring disclaimers that indicate results in cases discussed on the sites might not be typical.⁶⁹ Application of this compelled speech provision to noncommercial speech would likely be unconstitutional.⁷⁰ But fortunately Florida has otherwise stopped short of applying the state's onerous rules for print and television advertising to web sites.

Likewise, New York regulators have tightened that state's regulation of speech concerning legal services. Amendments to New York's advertising rules took effect in early 2007, including a web site disclaimer requirement similar to Florida's.⁷¹ The amendments to New York's advertising rules are already being challenged by a personal injury law firm and by the legal services organization Public Citizen.⁷² Fortunately, New York regulators did not adopt some more intrusive regulations that the Federal Trade Commission had criticized as likely to frustrate consumer choice and to increase the costs of legal services.⁷³

IX. CONCLUSION

As the New York and Florida examples illustrate, state regulators are imposing new requirements on legal services web sites. *Primus* teaches that such speech is not necessarily commercial for purposes of the First Amendment. Scholarly articles, case comments, and legislative summaries on web sites ought not be treated the same as web pages overtly urging an injured person to retain the sponsoring law firm for a fee. Therefore, sweeping new rules regulating legal

69. Blankenship, *supra* note 41 (quoting the disclaimer The Florida Bar Board of Governor's adopted: "Not all results are provided, the results are not necessarily representative of results obtained by the lawyer, and a prospective client's individual facts and circumstances may differ from the matter in which the results are provided."); Board of Governors, Florida Bar, *The Proposed Attorney Web Site Advertising Rule*, FLA. BAR NEWS, Feb. 15, 2007, at 1.

70. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–16 (1990) (holding that states must not compel lawyer political speech through use of mandatory bar association dues to pay for ideological activities unrelated to the bar's purposes; a state might lawfully require its lawyers to pay for programs germane to regulating the legal profession or to improving legal services in the state, but must not compel bar members to fund unrelated political activities such as support for "a gun control or nuclear weapons freeze initiative"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (rejecting a Florida compelled speech statute); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) ("[T]he individual liberty interests guarded by the First Amendment, which may be impaired when personal or political speech is mandated by the state, are not ordinarily implicated by compelled commercial [speech].") (citations omitted)). See generally James B. Lake, Note, *Lawyers, Please Check Your First Amendment Rights at the Bar: The Problem of State-Mandated Bar Dues and Compelled Speech*, 50 WASH. & LEE L. REV. 1833 (1993) (discussing Supreme Court decisions regarding state bar associations and compelled speech).

71. See N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.6(E)(3) (2007).

72. See Complaint at 1, 12, *Alexander v. Cahill*, No. 5:07-cv-00117-FJS-GHL (N.D.N.Y. Feb. 1, 2007) (alleging, *inter alia*, that domain name regulation "affects even web pages that are totally unrelated to the lawyer's practice of law").

73. See Letter from Maureen K. Ohlhausen, Director, Office of Policy Planning, Lydia B. Parnes, Director, Bureau of Consumer Protection, Michael A. Salinger, Director, Bureau of Economics, Fed. Trade Comm'n, to Michael Colodner, Counsel, N.Y. Office of Court Adm. 1 (Sept. 14, 2006), available at <http://www.ftc.gov/os/2006/09/V060020-image.pdf>.

services web sites will likely violate the First Amendment, unduly burden non-commercial speech, and hamper legal scholarship. To avoid these adverse consequences, regulators of legal services ought to rely upon existing prohibitions on false, misleading, or deceptive communications and not subject web sites to requirements applicable to traditional advertising.