MEMORANDUM OF LAW

FIRST AMENDMENT ISSUES RAISED

BY COMPLAINT RE: HORACE FRAZIER HUNTER

VSB DOCKET No. 11-032-084907

I. Introduction

The Constitution of the United States prohibits the Virginia State Bar from presuming to regulate the blogs of Horace Hunter that are at issue in this matter. The First Amendment imposes what is effectively a jurisdictional bar, preventing the Commonwealth of Virginia or any of its agencies from exercising the power of the state to censor or impose disclaimer obligations on these blogs, which constitute core political speech.

II. The Horace Hunter Blogs Constitute Core Political Speech

This dispute invites discussion of first principles. The actual *content* of the speech in contest here, ranging from articles criticizing Attorney General Alberto Gonzalez for the firing of eight United States Attorneys, to descriptions of the content and operation of state and federal laws, such as the elements of a criminal prosecution under the federal Racketeering Influenced and Corrupt Organizations Practices Act, to descriptions, sometimes with editorial commentary, of the outcomes of judicial proceedings in state and federal courts, clearly falls within the core definition of political speech protected by the First Amendment. "There is no question that speech critical of the exercise of the State's power lies at the very center of the First

Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1020, 1035 (1991).

The Commonwealth of Virginia would be absolutely prohibited from punishing any Virginia citizen or company for posting any of the information contained in Horace Hunter's blogs on the Internet, period. It would simply be unthinkable, for example, that the Commonwealth could restrict or impose disclaimer requirements on *The Richmond Times Dispatch* for articles describing the outcomes of criminal trials in Virginia. "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 575 (1980). "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile v. State Bar of Nevada*, 501 U.S. at 1035. Indeed, this First Amendment bar against censorship of description of Virginia's actions in matters related to the justice system extends even to proceedings that the state deems confidential. *Landmark Communications, Inc., v. Virginia*, 435 U.S. 829, 838-39 (1990).

III. For Virginia to Impose a Disclaimer Requirement Requiring Horace Hunter to Profess a Belief he Does not Believe is an Exercise in Forced Speech that Violates the First Amendment.

"Forced speech", in which an individual is forced by the state to profess a belief he or she does not entertain, is prohibited by the First Amendment. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977), *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner*

Broadcasting Systems, Inc., v. FCC, 512 U.S. 622, 641 (1994).

The Commonwealth of Virginia is attempting, through the Virginia State Bar, to force Horace Hunter to profess that his blogs are not an exercise of his First Amendment right to express his views on matters of public concern, but instead are commercial advertisements soliciting legal business. Horace Hunter does not intend for his blogs to be received or understood as advertisements, nor does he believe that they are advertisements. The Commonwealth thus imposes its forced disclaimer requirement at its peril. If the Commonwealth's view of the blogs as advertisements is incorrect, it has placed itself in violation of the Constitution. Horace Hunter has offered the ameliorative step of a disclaimer reciting that his blogs are *not* intended to be understood as advertisements. One might think this would take all the oxygen out of the Commonwealth's fears, however paternalistic they might be, and everyone could go home.

If the Commonwealth persists in its determination to force Horace Hunter to declare that his speech is something he does not intend or believe it to be, however, then this dispute is distilled to a relatively simple question: Is speech that is *manifestly* core political speech in its *actual content* transformed into "commercial speech" merely because the speaker is engaged in the commercial marketplace, as a participant in a "regulated industry," the practice of law.

IV. Horace Hunter's Status as a Licensed Attorney Drawing Paying Clients from the General Public Does not Transform His Blogs into Advertisements.

A. Status as a Commercial Enterprise or Actor Does Not Standing Alone Diminish First Amendment Protection

If Horace Hunter, ordinary citizen, would have an unassailable constitutional right to publish every single sentence of his blogs without restriction or regulation by the state, is there

something in his status as a licensed member of the Virginia State Bar that eliminates that right?

One possibility might be that Horace Hunter, because he conducts a for-profit "commercial enterprise" as a practicing lawyer who represents clients for fees, receives diminished First Amendment protection because of the corporate or commercial characteristics of his activities in the legal economic marketplace. This possibility, however, has been considered and rejected by the Supreme Court, on repeated occasions.

The Court has thus made it abundantly clear that when corporations enter the *political* arena, they receive the same levels of First Amendment protection as any individual citizen, though in the nature of things the underlying motivations of the corporation may be maximization of profit. The Court has thus held that a public utility operating in a highly regulated industry may not be forced against its well to carry a message it does not support. *Pacific Gas & Electric Company v. Public Utilities Commission*, 475 U.S. 1, 11 (1986). So too, although banking is a highly regulated industry, banks have a First Amendment right to participate in the political process. *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

B. **The *Citizens United* Decision Stands Squarely Against Virginia**

Most dramatically, the Supreme Court's landmark decision in *Citizens United v. Federal Election Commission*, 130 U.S. 876 (2010) held that neither a corporation's corporate structure as a creature of the state, nor its underlying profit motive, disqualified it from the full protection of the First Amendment for speech that was itself intrinsically political. *Citizens United* is directly germane to Horace Hunter's circumstances here, because the United States argued in the case that it could impose regulatory restrictions on *advertisements* for a movie critical of then

Senator Hillary Clinton because of the corporate identity of the organization paying for the ads. Yet the Supreme Court held that it was the content of the *speech* that mattered, not the identity or motivation of the speaker, in determining whether the speech enjoyed full First Amendment protection.

C. The Existence of a Profit Motive Does Not Diminish First Amendment Protection

Horace Hunter, like many of Virginia's lawyers, seeks to earn a living through his law practice. That motive does not morph his every word into advertising. The Supreme Court's position on this point could not be clearer. As the Court declared in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976), "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . . Speech likewise is protected even though it is carried in a form that is 'sold' for profit." *See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-85 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Smith v. California*, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

One of the most compelling examples is *New York Times Co. v. Sullivan*, in which the speech at issue was embedded in a *paid advertisement* run in the *New York Times*, soliciting contributions for the civil rights movement and the defense of Martin Luther King. Notwithstanding the fact that the speech was contained within an advertisement for which the *Times* was paid four thousand dollars, and that it was an open solicitation for money, the Supreme Court bestowed the highest levels of First Amendment protection to the *content* of the

expression contained within the vessel of the advertisement. *New York Times Co. v. Sullivan*, 376 U.S. at 266. In words that apply with perfect parallelism to the blogs authored by Horace Hunter, the Supreme Court declared:

> The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

Id., *citing N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

D. The Decision in *Sorrell v. IMS Health Inc.* Demonstrates the Unconstitutionality of Virginia's Actions

To put it bluntly, the Virginia State Bar simply has no authority to regulate the political content of Horace Hunter's speech, as it is not "commercial speech" at all, and is not magically transformed into commercial speech merely because Horace Hunter happens to be a member of a highly regulated profession that draws clients for pay from the general public. It is doubtful that criticism of the Attorney General of the United States, or descriptions of federal RICO laws, or recitations of the outcomes of cases, truly involve "commercial activity" in any normal usage of that term at all. But even if one were to grant to the Virginia State Bar the concession that the practice of law is an economic enterprise and thus lawyers are in that sense participants in the commercial marketplace, it does not follow that speech *about* the "commercial business of law" constitutes "commercial advertising soliciting legal business."

This critical distinction was central to the Supreme Court's recent decision in *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011). *Sorrell* involved speech that was, by comparison to the material in Horace Hunter's blogs, far more "commercial" in nature, and devoid of any content

that might plausibly be characterized as expressive advocacy on matters relating to politics or culture. Yet the Supreme Court treated the information at issue in *Sorrell* as deserving of the highest levels of First Amendment protection. *Sorrell* involved practices of "data mining" and "detailing," processes through which pharmaceutical manufacturers promote their drugs. Pharmacies receive what is called "prescriber-identifying information" when processing prescriptions. They in turn sell the information to "data miners". The data miners produce reports on prescriber behavior and lease their reports to pharmaceutical manufacturers. "Detailers" employed by pharmaceutical manufacturers then use the reports to refine their marketing tactics and increase sales to doctors.

The state of Vermont sought to limit this practice, through passage of its Prescription Confidentiality Law, known as "Act 80." Vt. Stat. Ann., Tit. 18, § 4631 (Supp.2010).The Vermont statute provided that absent the prescriber's consent, prescriber-identifying information could not be sold by pharmacies and similar entities, disclosed by those entities for marketing purposes, or used for marketing by pharmaceutical manufacturers. There were certain limited exceptions. For example, the law allowed dissemination for "health care research."

The Supreme Court, in an opinion written by Justice Kennedy, struck down the law, holding that it was a content-based and viewpoint based restriction on speech, thereby qualifying for heightened scrutiny. The principal line of battle in the Supreme Court was over the appropriate standard of view.

Vermont argued that Act 80 was not a regulation of speech, but a commercial restriction on trafficking in a "commodity". The Supreme Court roundly rejected the state's argument. The Court held that the law, on its face, enacted a content-based and speaker-based restriction on

speech. The law, the Court noted, prohibited the sale of information subject to exceptions that were based in large part on the content of a purchaser's speech. *Id.* at 2663. The law then prohibited the disclosure when pharmaceutical manufacturers used the information for marketing. The law thus targeted speech used for "marketing," with specific content, which was a content-based restriction. *Id.* at 2664. ("Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted."), *citing Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 429 (1993) (applying heightened scrutiny to "a categorical prohibition on the use of newsracks to disseminate commercial messages" . . . "[T]he very basis for the regulation is the difference in content between ordinary newspapers and commercial speech" in the form of "commercial handbills .... Thus, by any commonsense understanding of the term, the ban in this case is 'content based' "); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994) (explaining that strict scrutiny applies to regulations reflecting "aversion" to what "disfavored speakers" have to say).

The Court in *Sorrell* emphasized that heightened scrutiny may be triggered by laws that *burden* speech based on its content, even though the law may not effect an outright *ban* on the speech. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 131 S.Ct. at 2664, *citing See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115 (1991) (content-based financial burden); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (speaker-based financial burden).

The Court in *Sorrell* repudiated the Vermont's attempt to cast its law has simply their regulation of a commercial commodity, an argument that had been accepted by one of the lower

courts that had reviewed the law, treating it as nothing more than the regulation of a commodity, such as "beef jerky." *Sorrell v. IMS Health Inc*., 131 S.Ct. at 2666. The Court in *Sorrell* observed that the creation of information is protected by the First Amendment, even when that information is devoid of advocacy, and is simply a collection of "facts." As the Court in *Sorrell* explained: "This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* at 2667, *citing Bartnicki v. Vopper,* 532 U.S. 514, 527 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct"); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 481 (1995) ("information on beer labels" is speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 759, (1985) (plurality opinion) (credit report is "speech").

Vermont, the Court held, could not avoid subjecting its law to First Amendment scrutiny merely by characterizing the information it was regulating as merely factual. "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell v. IMS Health Inc*., 131 S.Ct. at 2666.

Vermont also tried to justify its law as a regulation of purely commercial speech, thereby qualifying for the "intermediate scrutiny" applied under the *Central Hudson* test. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). In *Central Hudson* the Public Service Commission of New York ordered electric utilities to cease all advertising that "promotes the use of electricity." The Supreme Court held the restriction unconstitutional, and in the process of doing so announced what is now a famous four-part test:

> At the outset, we must determine whether the expression is

> protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 563-64. The Supreme Court in *Sorrell* did what it has often done in cases in which elements of non-commercial speech and commercial speech appear intertwined—it ruled in the alternative that under *either* standard, the law must be struck down. Sorrell v. IMS Health Inc., 131 S.Ct. at 2667 ("As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.") *citing Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173, 184, (1999); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989).

To the extent that the Virginia State Bar is understood as taking the position that the political content that forms the *substance* of Horace Hunter's speech is not subject to the strict scrutiny standard normally applicable to regulation of such speech because it constitutes a mere "list" of "case results", the *Sorrell* decision stands as an unequivocal rejection of that position. If heightened scrutiny applied to Vermont's restriction of the listing of medical prescription data, then surely heightened scrutiny applies to the listing of judicial case results. Data services such as Westlaw or LEXIS contain lists of "case results." Those enterprises provide those lists to consumers to make money. Yet it is plain, after *Sorrell*, that it would violate the Constitution for a Virginia agency to presume to regulate the data contained on Westlaw or LEXIS as a "commodity," or as mere "commercial speech" qualifying only for the intermediate scrutiny standard of *Central Hudson* and its progeny. Horace Hunter does far more than simply "list" the

results of cases. His blogs elaborate upon and provide coloration and commentary on those results. But *even if* Horace Hunter's blog merely listed results of cases, some of which he was personally involved in as an advocate and some not, the learning of *Sorrell* is that his presentation is fully protected by the strict scrutiny standard of the First Amendment.

V. Horace Hunter's Blogs Are Not "Commercial Speech" Under Any Plausible Existing Interpretations of that Term

The Constitution does not permit the Virginia State Bar to classify Horace Hunter's speech as "commercial speech" by sheer fiat. Declaring it so does not make it so. The Virginia State Bar could not simply declare Horace Hunter's blog "obscene" and by attaching that label deny the speech all constitutional protection. Rather, the Bar would bear the burden of proving that the speech falls within the definitional confines of obscenity as set forth in Supreme Court decisions defining that doctrine. *See Miller v. California*, 413 U.S. 15 (1073). So too, for the Bar to treat Horace Hunter's blog as commercial speech, it must demonstrate that Horace Hunter's speech meets the constitutional definition of commercial speech.

There is little, if anything, in the actual content of Horace Hunter's speech that qualifies it as "commercial speech" within the meaning of that phrase as a First Amendment term of art. The classic definition of "commercial speech" limits it to "speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Horace Hunter's blog does not propose a commercial transaction at all. Certainly it cannot be said that it does *no more* than propose a commercial transaction.

Nor does Horace Hunter's speech substantially partake of any of the other indicia of "commercial speech" that some courts have used in aid of classification of speech as commercial

or noncommercial. *See, e,.g., U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia,* 898 F.2d 914, 933 (3d Cir.1990) (courts should consider "three factors to consider in deciding whether speech is commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech."), *citing Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 66-67 (1983). An affirmative answer to all three questions provides "strong support" for the conclusion that the speech is commercial." *U.S. Healthcare,* 898 F.2d at 933. This inquiry involves making a "'commonsense distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" *Orthopedic Bone Screw,* 193 F.3d at 792, *quoting Bolger,* 463 U.S. at 65, *quoting in turn, Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 455–56 (1978).

Horace Hunter's blogs are not in themselves advertisements, nor are they embedded in advertisements. They do not refer to a specific product or service, but describe legal issues, doctrines, and judicial decisions. Horace Hunter's motivation is surely mixed—as with virtually all public comment by members of the bar. His motivation is to comment on issues of public concern and of concern to the legal system. A byproduct of the visibility such commentary brings may be to attract more legal business. But if some underlying motive for pecuniary grain alone were all it took to transform speech from political to commercial, then large swatches of speech in the American marketplace of ideas would be disqualified from full First Amendment protection, merely because they also implicate the speaker's interest in profiting in the marketplace of commerce.

VI. Even if Non-commercial and Commercial Elements of Horace Hunter's Blogs Were Deemed to be Intertwined, First Amendment Doctrine Demands that Horace Hunter Receive the Benefit of the Higher Level of Scrutiny

The speech of Horace Hunter is not commercial speech for First Amendment purposes. Even if this claim is not accepted by the Virginia State Bar, surely the Bar must concede that at the very least, Horace Hunter's blogs are an admixture of commercial and noncommercial speech.

While it is hard to discern *anything* in Horace Hunter's blog that supplies elements of "commercial speech" in the sense that the Supreme Court has defined that term, to the extent that the Virginia State Bar imagines it can find some scintilla of commercial speech content in the blogs, at best that content is intertwined with political speech, which then requires that strict scrutiny, not intermediate scrutiny, be applied. *See Sorrell*, 131 S.Ct. at 2667, *quoting Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (discussing whether "pure speech and commercial speech" were inextricably intertwined, so that "the entirety must . . . be classified as noncommercial").

When commercial and noncommercial elements of a message are intertwined, the appropriate constitutional response is to ratchet up, not ratchet down, treating the entirety of the message as protected by the First Amendment's demanding strict scrutiny standard. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 796 (1988) (applying "exacting First Amendment scrutiny" to a state regulation of charitable solicitation materials). "Where the commercial and noncommercial elements of speech are 'inextricably intertwined,' the court must apply the "test for fully protected expression." *In re Orthopedic Bone Screw Prods. Liability Litigation.,* 193 F.3d 781, 793 (3d Cir.1999), *quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. at 796.

A casual tour of the web sites of Virginia law firms shows that scores of law firms in this

state include links to the blogs of their lawyers on their web pages, and these blogs do not contain disclaimers of the sort the State Bar seeks to impose on Horace Hunter. Nor could they, under our Constitution. Virginia lawyers, like all Virginia citizens, have the right to post blogs about matters related to the judicial system, matters related to cases, and matters related to cases those lawyers have litigated. There is nothing about the medium of an Internet blog that diminishes the First Amendment protection the speech would otherwise enjoy. Many Virginia lawyers write magazine articles, law review articles, and newsletters describing cases, including their own. Virginia lawyers often give talks for CLE credit or bar groups or the public or business groups that may include potential clients on cases or recent legal developments, *often on matters in which the lawyers have been involved as advocates.* Indeed, it is the very fact that the lawyer *has* been involved that may be deemed to qualify the lawyer as especially expert, at the least, especially interesting, to the audience. Why do lawyers in Virginia write and speak about the justice system, the law, cases, and their own participation in prior legal matters? To a large degree, the motivation is civic—lawyers are vital participants in our democracy and our system of justice and are motivated to enter the marketplace of ideas to engage in discussion about the world they know best. Yet part of the motivation may also be to "network" or "market' or "generate visibility" or "get their name out there." As the Supreme Court has made it abundantly clear, there is nothing wrong with this. And the mere fact that lawyers and law firms may gain some commercial advantage by engaging in robust participation in the marketplace of ideas, through newsletters, symposiums, or blogs, does not transform the protected political content of what they write or say into unprotected commercial advertising.

For example, returning to the *Sorrell*, litigation, it is worth noting that the lead law firm

in the litigation was Hunton & Williams, a prominent American law firm headquartered in Richmond. Following the success of Hunton lawyers in the Supreme Court, those lawyers conducted a seminar on the case and its ramifications, which was advertized through Hunton's normal marketing mechanisms. Surely it is not the position of the Virginia State Bar that it had the power to discipline the Hunton & Williams law firm because its lawyers conducted a seminar describing the outcome and ramifications of a case they had successfully litigated, even though some in the audience might have been current or prospective clients. Such a claim by the state would have no principled stopping point, short of sweeping within the jurisdiction of the state all speech by lawyers germane to their participation in the counsels of our democracy. By extension this logic would have empowered the Virginia State Bar, had it then been in existence, to impose on the great Virginia lawyer James Madison disclaimer requirements for his circulation of his essays in *The Federalist Papers*, which, by the way, a modern day Madison practicing law in Virginia might well circulate in the form of an Internet blog.

VII. The Virginia Bar's Attack on Horace Hunter's Blog Partakes of Paternalism of the Sort the Supreme Court has Consistently Repudiated.

A court reviewing any action by the Virginia State Bar imposing any disciplinary penalty on Horace Hunter for his refusal to place a disclaimer on his blogs would, for the reasons articulated above, apply strict scrutiny First Amendment review to the actions of the bar, and under that exacting standard, surely hold the actions of the Commonwealth unconstitutional.

As is often the case, however, a reviewing court might also rule in the alternative, as courts in such circumstances often do, and hold that even under the intermediate scrutiny test of *Central Hudson* and its progeny, the actions of the Virginia State Bar are unconstitutional.

The Bar's entire argument is grounded in the highly paternalistic judgment that consumers of Virginia services in Virginia will be mislead by Horace Hunter's blogs, thereby hiring him as a lawyer under the mistaken assumption that the outcomes in the matters Horace Hunter would handle for them would be the same as the outcomes described in his blogs. Surely any conceivable interest the Commonwealth might plausibly be able to assert in court to justify its claim would evaporate when a court considered the less restrictive alternative of the disclaimer Horace Hunter himself offered, one which would alert consumers that his blogs are not intended as advertising. Indeed, Horace Hunter's proffered disclaimer would speak the *truth*, whereas the disclaimer the Commonwealth seeks to impose invites Horace Hunter to speak a subjective *falsehood.*

Much of the content of the blogs has nothing to do with judicial outcomes. As applied to Horace Hunter's criticisms of government officials, or explanations of federal and state laws, the Bar's position is utterly incoherent, and on its face unconstitutionally overbroad.

Even as applied to his descriptions of legal cases, however, the Bar's logic is far from self-evident, and far from supported by the sort of empirical data courts require when the misleading character of the advertising at issue is not self-evident. Horace Hunter's blogs describe cases in which he was not even a lawyer participating in the matter. In cases in which he was participating, the blogs often go into detail, setting forth with factual specificity the full nature of the circumstances. In many of these entries, Horace Hunter's own opinions and editorial views add coloration and commentary. The notion that such speech is inherently misleading and thereby subject to the Bar's disclaimer requirements, in the absence of any empirical data to support the claim, goes beyond anything currently accepted in commercial

speech jurisprudence.

The Supreme Court has steadily advanced protection for advertising, repeatedly striking down regulations grounded in paternalistic motivations or speculative judgments by government regulators. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011); *Thompson v. Western States Medical Center*, 435 U.S. 357 (2002) (striking down restrictions on pharmaceutical advertising); *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 554-555 (2001) (striking down some and sustaining some restrictions on tobacco advertising); *Greater New Orleans Inc., v. United States,* 527 U.S. 173 (1999) (striking down casino gambling advertising limitations); *44 Liquormart, Inc., v. Rhode Island*, 517 U.S. 484 (1996) (striking down liquor advertizement restrictions); *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995) (striking down beer advertising regulations); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 512 U.S. 136, 147 (1994) (striking down restrictions on accountancy advertising); *Edenfield v. Fane,* 507 U.S. 761 (1993) (striking down commercial speech limitations on accountants); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down restrictions on newsracks for commercial flyers and publications); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91(1990) (regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading unconstitutional); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (striking down some and upholding some restrictions on lawyer advertising);*Bolger v. Youngs Drug Product Corp*., 463 U.S. 60 (1983) (statute banning

unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *In re R.M.J.*, 455 U.S. 191 (1982) (regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleadingly unconstitutional); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (striking down restrictions on advertising statements by public utilities); *In re Primus*, 436 U.S. 412 (1978) (striking down restrictions on solicitation of legal business on behalf of ACLU); *Bates v. State Bar of Ariz*., 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleadingly unconstitutional); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); (regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated racial status unconstitutional); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (striking down restrictions on pharmaceutical advertising); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (striking down restrictions on abortion advertising).

The Supreme Court's war on paternalism in the regulation of advertising has been consistent and unremitting. In *Thompson v. Western States Medical Center*,, for example, the Court reiterated a theme that has been prominent in the Court's decisional law for decades, observing that "'[t]here is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.'" 435 U.S. at 375, *quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748

770 (1976). *See also 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 503 (1996) ("[B]ans against truthful, nonmisleading commercial speech. . . usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good") (internal citation omitted); *Id.* at 508 ("Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends."); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 105 (1990) ("We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."), *citing*; *Bolger, et al. v. Youngs Drug Product Corp*., 463 U.S. 60, 74 (1983); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-792, and n. 31 (1978) (criticizing State's paternalistic interest in protecting the political process by restricting speech by corporations); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97(1977) (criticizing, in the commercial speech context, the State's paternalistic interest in maintaining the quality of neighborhoods by restricting speech to residents). As Justice Stevens stated in *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995):

> Any "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good.

Id. at 497 (Stevens, J., concurring). And in the words of Justice Thomas:

> In case after case following Virginia Bd. of Pharmacy, the Court,

and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate 'commercial' information; the near impossibility of severing 'commercial' speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 738 (1996) (Thomas, J., concurring). *See also Id*. at 495-96 ("a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it"); *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) ("But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790-91 (1988) ("The State's remaining justification–the paternalistic premise that charities' speech must be regulated for their own benefit–is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."), *citing Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987).

VIII. No Disclaimer May be Imposed on Horace Hunter's Blogs Unless the Commonwealth Demonstrates that the Content of the Blog is in Fact Misleading

The Supreme Court has repeatedly evidenced its gathering skepticism toward regulation grounded in nothing more than a governmental body's invocation of common sense, seasoned intuition, or regulatory experience. Instead, the Court has constantly insisted that regulations be firmly grounded in hard evidence and empirical data.

This is often encapsulated in contemporary cases by an emphasis by the Supreme Court on a requirement that the government regulation directly *and materially* advance the government interest. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) ("For that reason,

the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'") *quoting Edenfield v. Fane*, 507 U.S. 761, 771 (1993). More important than this linguistic nuance, the Supreme Court now repeatedly emphasizes that the government must have *real evidence* that the regulation it is defending is effective, refusing to accept mere "common sense" or legislative or administrative speculation or discretion as a sufficient basis for advertising restrictions. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth,"); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 512 U.S. 136, 147 (1994); (striking down a disclaimer requirement because the state failed "to back up its alleged concern that the [speech] would mislead rather than inform"); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); (rejecting the state's asserted harm because the state had presented no studies, nor anecdotal evidence to support its position); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) (rejecting a claim that certain speech was potentially misleading for lack of empirical evidence); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985) (striking down restrictions on attorney advertising where "[t]he State's arguments amount to little more than unsupported assertions"). As the Supreme Court explained in *Greater New Orleans Broadcasting Association, Inc. v. United States*: 527 U.S. 173 (1999): "The third part of the *Central Hudson* test asks whether the speech restriction directly and materially advances the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on

commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

So too, in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the Court applied the *Central Hudson* test to strike down certain regulations imposed by the state of Massachusetts against certain smokeless tobacco and cigar advertising. Troubled by the very broad sweep of the ban, the Court held that the government had failed to meet its burden of proving that the regulations were no broader than necessary to accomplish its objectives. A speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about lawful products, the Court concluded, and the state had failed to show that the regulations at issue are not more extensive than necessary. *Id*. at 554 ("'This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'") *quoting Greater New Orleans Broadcasting Association, Inc. v. United States*: 527 U.S. 173, 188 (1999); *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993).

In *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000), the United States Court of Appeals struck down a Florida prohibition on lawyer advertising containing "self-laudatory statements." The Florida rule provided that: "A lawyer shall not make statements that are merely self-laudatory or statements describing or characterizing the quality of the lawyer's services in advertisements and written communication." In *Mason* the court struck down the application of this standard to an advertisement in the Yellow Pages stating that a lawyer was "'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory." The Bar issued an opinion that the

advertisement violated the rule against self-laudatory statements, notifying Mason that his advertisement must include a full explanation as to the meaning of the Martindale-Hubbell AV rating and how the publication chooses the participating attorneys, including the fact that the Martindale-Hubbell AV ratings are based exclusively on opinions expressed by confidential sources and that the publication does not undertake to rate all Florida attorneys. The court held that this advertising could not be disciplined under the Florida standard on either the theory that it was misleading or potentially misleading, because the state had failed to support its claims with any evidence other than the claim that it was "common sense" that such advertising could mislead an unsophisticated public. In a critical passage in *Mason*, the court stated:

> Moreover, the Bar presented no studies, nor empirical evidence of any sort to suggest that Mason's statement would mislead the unsophisticated public. While empirical data supporting the existence of an identifiable harm is not a *sine qua non* for a finding of constitutionality, the Supreme Court has not accepted "common sense" alone to prove the existence of a concrete, non-speculative harm. . . . To the contrary, the law in this field has emphatically dictated that "rote invocation of the words 'potentially misleading,'" does not relieve the state's burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Id. at 959. Not only did the bar in *Mason* present no evidence of actual deception, it "presented no studies, nor empirical evidence of any sort to suggest that Mason's statement would mislead the unsophisticated public." *Mason*, 208 F.3d at 957. The court pointedly observed that "[w]hile empirical data supporting the existence of an identifiable harm is not a *sine qua non* for a finding of constitutionality, the Supreme Court has not accepted 'common sense' alone to prove the existence of a concrete, non-speculative harm." *Id*. at 957-58, *citing Ibanez*, 512 U.S. at 147 (striking down a disclaimer requirement because the state failed "to back up its alleged concern

that the [speech] would mislead rather than inform"); *Edenfield*, 507 U.S. at 770-71(rejecting the state's asserted harm because the state had presented no studies, nor anecdotal evidence to support its position); *Peel*, 496 U.S. at 108 (rejecting a claim that certain speech was potentially misleading for lack of empirical evidence); *Zauderer*, 471 U.S. at 648-49 (striking down restrictions on attorney advertising where "[t]he State's arguments amount to little more than unsupported assertions"). To the contrary, the *Mason* court observed, the law instead has "emphatically dictated that rote invocation of the words 'potentially misleading,' does not relieve the state's burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Mason*, 208 F.3d at 958 (internal citations omitted).

The court in *Mason* held that the bar was shouldered with the burden of proof, and that the burden simply could not be satisfied by "'mere speculation or conjecture.'" *Id*., *quoting Edenfield*, 507 U.S. at 770-71. The bar's burden was to produce "concrete evidence" that Mason's "spin" on his rating as "the Highest Rating" threatened to mislead the public. But all the bar had produced were inferences grounded in "mere speculation" and "unsupported conjecture." *Mason*, 208 F.3d at 958.

Tellingly, bar authorities in *Mason* sought to rescue the constitutionality of their regulation by arguing that the bar had not insisted upon an outright ban on speech, but would have permitted Mason to tout his rating if accompanied by a disclaimer. The court rejected this argument, however, on the supposition that given the complete lack of evidence supporting the bar's underlying claim that the public would indeed be mislead, even regulation limited to imposition of a disclaimer would violate the First Amendment. *Id.* ("But given the glaring omissions in the record of identifiable harm, we see little merit in this argument."). The

Supreme Court in *Ibanez*, the court in *Mason* noted, had similarly refused to accept even a disclaimer requirement when the record failed to provide empirical support for the claim of public harm. *See Ibanez*, 512 U.S. 146 ("Given the state of this record–the failure of the Board to point to any harm that is potentially real, not purely hypothetical–we are satisfied that the Board's action is unjustified. We express no opinion whether, in other situations or on a different record, the Board's insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion, rather than one imposing 'unduly burdensome disclosure requirements [that] offend the First Amendment.'"), quoting *Zauderer*, 471 U.S. at 651. The court in *Mason* thus held that "[e]ven partial restrictions on commercial speech must be supported by a showing of some identifiable harm." *Mason*, 208 F.3d at 958. The bar, the court held, was not relieved of its burden to identify a genuine threat of danger simply because it requires a disclaimer, rather than a complete ban. *Id.*

Once again, this strong emphasis on real proof in First Amendment cases echoes a broader theme of modern First Amendment law, in which the Supreme Court has insisted that actions of regulatory agencies impinging on freedom of speech be buttressed by solid evidence justifying the need for the abridgement. *See, e.g, Turner Broadcasting System, Inc., v. Federal Communications Commission*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."), *quo ting Quincy Cable TV, Inc., v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985).

IX. The Information Contained in the Blog Does Not Violate Rule 1.6 of the Rules of Professional Conduct.

The Bar, in its Bill of Particulars, misstates and completely mischaracterizes Rule 1.6 of the Rules of Professional Conduct. The Rule states in pertinent part that "A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client…" Rule 1.6(a) of the Rules of Professional conduct. The Comment section of Rule 1.6 describes exactly what type of information is considered a client confidence. In fact, Comment 3 describes the relationship between attorney-client privilege and client-lawyer confidentiality stating,

> "The principal of confidentiality is given effect in two related bodies of law, the attorney client privilege in the law of evidence and rules of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law."

Rule 1.6 Comment 3. Therefore, the attorney-client privilege and client-lawyer confidence relate to the same type of information with the only distinction being the context in which the information is sought to be disclosed. Attorney-client privilege relates to judicial proceedings and client-lawyer confidence relates to all other situations. The Bar's assertion that information could constitute a client-lawyer confidence without being considered protected by attorney-client privilege is simply

inaccurate. Further, the other comments under Rule 1.6 clearly indicated that the rule applies to communications betweens attorneys and their clients as well as other confidential information.

> "[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to **advise** clients so that they avoid any violations of the law in the proper exercise of their rights.
>
> [2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
>
> [2a] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based on experience, lawyers know that clients usually follow the **advice** given, and the law is upheld.
>
> [2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to **communicate** frankly and fully with the lawyer even as to embarrassing or legally damaging subject matter. Comments 1-2b of Rule 1.6.

None of these comments addresses the Bar's asserted need to protect information disclosed during the course of a public trial in a criminal case.

Moreover, the Court of Appeals of Virginia recently addressed this very issue in the case of Turner v. Commonwealth, Record No. 1809-10-1, July 26, 2011. In the Turner case, the defendant was on trial for aggravated malicious wounding and use of a firearm during the commission of a felony. During the preliminary hearing, Eric

Poindexter, a witness to the shooting, testified he witnessed the defendant shoot someone. At the trial of the case in the Circuit Court, Poindexter testified that he could no longer remember the incident. The attorney for the Commonwealth then sought to have the witness declared unavailable and sought to admit the transcript of his preliminary hearing testimony. The trial Court agreed that the witness was unavailable but did not allow the introduction of the preliminary hearing transcript on the grounds that the transcript had not been signed or certified. After a recess, the attorney for the Commonwealth called as a witness, Brian Keeley, the attorney who represented the defendant at the preliminary hearing, to testify as to what Poindexter testified at the preliminary hearing regarding the defendant and the shooting. The attorney for the defendant objected on several grounds including that, as defendant's former counsel, Keeley had "a duty or an obligation" to the defendant regarding "anything that may have transpired and he would not be permitted to do anything that would be detrimental to the defendant. The trial Court rejected that argument stating, "I agree he cannot divulge any information even though he no longer represents Mr. Turner based on attorney client privilege…..or divulge anything that's of confidence." Keeley then testified that Poindexter testified at the preliminary hearing the defendant shot the victim.

The Court of Appeals of Virginia affirmed the ruling of the trial Court and rejected the notion that the testimony of a witness at a preliminary hearing is somehow a client-lawyer confidence stating,

"In this case, we find that the circuit court did not abuse its discretion by

> permitting Keeley to testify regarding information that was not obtained confidentially from Turner. Neither Rule 1.6 nor Rule 1.9 prohibits a lawyer from testifying in court regarding what occurred at a former public court proceeding when such testimony does not does not involve communications solely between an attorney and his client and the testimony concerns information that is generally known. The Commonwealth only sought to elicit events and information conveyed by Poindexter at a prior public court proceeding, and did not seek to have any information disclosed that was privileged or **uniquely** related to Keeley's representation of Turner. Specifically, Keeley's testimony in this case did not involve any confidential information or secrets that he obtained 'in the course of the representation' or 'relating to the representation,' Rule 1.9, nor was it 'gained in the in the professional relationship' or if disclosed 'would be embarrassing or would be likely to be detrimental to the client,' Rule 1.6 Rather, Keeley's testimony was limited to events he witnessed while he was Turner's counsel that occurred at the preliminary hearing in the general district court, which was open to the public, and entailed the prior testimony of a sworn witness that was disclosed publicly to all those present at the preliminary hearing."

Turner v. Commonwealth, pages 20-21.

Similarly in the present case, all of the information that the Bar is alleging is confidential, embarrassing to the client, or detrimental to the client is information that is limited to what the Respondent witnessed while he was counsel that occurred at criminal trials or appellate hearings, which were open to the public, and entailed the events of those trials or decisions of appellate courts that were disclosed publicly to all those present at the trials or who read the public opinions delivered by the appellate courts.

Moreover, the conduct and events surrounding criminal trials are of the upmost public concern and the right to public trial insures the government is properly exercising its power take the liberty of its citizens. There is no question that speech critical of the exercise of the State's power lies at the very center of the First

Amendment. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1034 (1991). The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. Id, *quoting* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839-839 (1978). It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted. Id, *quoting* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980). Therefore, the conduct of criminal trials and appellate hearings can in no way be deemed a client-lawyer confidence.

Conclusion

For the reasons submitted above, Horace Hunter's blogs are protected speech under the First Amendment to the United States Constitution, and Virginia may not punish him for that expression, nor impose upon him a disclaimer requirement forcing him to recite and profess what he does not believe.

Respectfully submitted,

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