In the

SUPREME COURT OF VIRGINIA

On Appeal from the
Circuit Court of the City of Richmond

Horace Frazier Hunter	)	
Appellant,	)	
	)	
v.	)	Record No. 121472
	)	
Virginia State Bar, Ex Rel	)	
Third District Committee	)	
Appellees.	)	

BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF APPEALLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

United States Code:

Rules of the Virginia Supreme Court

Other:

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in federal and state courts around the country, including this Court.

SUMMARY OF FACTS

Amicus Curiae adopts the Statement of the Case as provided by the Brief of Appellant.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN HOLDING THAT RULE 1.6(a) VIOLATES THE FIRST AMENDMENT BY PROHIBITING ATTORNEYS FROM DISCUSSING PUBLIC INFORMATION REGARDING THEIR CLIENTS

Rule 1.6(a) of Virginia's Rules of Professional Conduct cannot, consistent with the First Amendment, be interpreted to bar attorneys from discussing or disseminating non-confidential, non-privileged public information regarding past clients. When, as here, information regarding a client is revealed in the course of an open trial, that information becomes a matter of public knowledge. As such, an attorney who subsequently relays that same

information to another party, with or without the express permission of his client, does not commit a "disclosure" in violation of Rule 1.6(a).

In *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054 (1991), the Supreme Court of the United States stated unequivocally that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." Even when noting exceptions to this rule, the Court has kept a concern for attorneys' free speech rights at the fore. *See, e.g.*, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995) (Attorney speech "on public issues and matters of legal representation" will be accorded "the strongest protection our Constitution has to offer."). In particular, the Court has shown itself hostile to broad speech restrictions of the sort imposed upon attorneys by the Bar's interpretation of Rule 1.6(a). *See In re Primus*, 436 U.S. 412, 432 (1978) (overturning the public reprimand of an attorney, and noting that "broad prophylactic rules in the area of free expression are suspect . . . precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (internal citations omitted).

A. Rule 1.6(a) prohibits the "disclosure" of privileged or confidential client information and is therefore inapplicable to an attorney who merely comments on matters of public knowledge

The stated purpose of Rule 1.6(a) is to "facilitate[] the full development of facts essential to proper representation of the client," while "encourag[ing] people to seek early legal assistance." Va. Sup. Ct. R. pt. 6, § II, 1.6, n.2. In pursuit of these goals, Rule 1.6(a) reflects the common law decree that a "client's confidences must be protected from disclosure." *Id.* The position taken by the Bar, however, goes much further, reading into Rule 1.6(a) a prohibition against discussion by an attorney of public information that is neither confidential nor privileged. This expansive interpretation of impermissible "disclosures" serves neither aim of the Rule. Such a prohibition plainly does nothing to facilitate a full development of facts prior to trial, since the client's trial is the very means by which the information at issue has become generally known among the public. Nor would the Bar's reading of Rule 1.6(a) encourage people to seek early legal assistance. Clients seeking legal representation will assume, as always, that information conveyed in open court will become part of the public record and thus may be generally known.

The text of the Rule itself supports the claim that 1.6(a) was neither drafted nor intended to have the effect that the Bar claims it should. 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." (emphasis added). The words "disclose" and "reveal" are used interchangeably, but the plain meaning of these words clearly limit their application to matters involving secret or confidential information. The only case in Virginia to have addressed the meaning of disclosure within Rule 1.6(a), *Turner v. Commonwealth*, 58 Va. App. 567 (2011) (overturned on other grounds), concerned a defense attorney who testified against a former client based entirely upon information that came out at a previous trial. The court held that "once the information became generally known at a public hearing, [the attorney] violated no rule of professional conduct when he testified regarding information previously publicly relayed and generally known." *Id.* at 590. *Turner* thus stands for the proposition that, in Virginia, when information about a client is disclosed in open court, that information becomes general public knowledge and any citizen, including the client's own attorney, may speak freely about that information.

This interpretation of the boundaries of "disclosure" is supported in an analogous statute, The Privacy Act of 1974, 5 U.S.C. § 552a(b). The Privacy Act governs the disclosure of private records and includes a provision closely resembling Rule 1.6(a) that reads "No agency shall disclose any record . . . to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). Although, like Rule 1.6(a), the Act itself does not explicitly define "disclosure," it has the advantage of decades of precedent addressing the issue. In an unpublished per curiam opinion, the Fourth Circuit held in *Lee v. Dearment*, that records that became public as a result of an open trial could not be "disclosed" as such. 966 F.2d 1442 (4th Cir. 1992). This interpretation, consistent with *Turner*, dominates in several other jurisdictions as well. *See, e.g.*, *Hollis v. U.S. Dept. of Army*, 856 F.2d 1541, 1545 (D.C. Cir. 1988) ("When a release consists merely of information to which the general public already has access . . . the Privacy Act is not violated."); *Fed. Deposit Ins. Corp. v. Dye*, 642 F.2d 833, 836 (5th Cir. 1981) ("The release of public information to the same 'public' is not a disclosure."); *King v. Califano*, 471 F. Supp. 180, 181 (D.D.C. 1979) ("It has been recognized that, although the Privacy Act does not define disclosure, the term denotes the imparting of

information which in itself has meaning and which was previously unknown to the person to whom it is imparted. . . . Since the record establishes that the information at issue here was publicly known prior to [publication,] there has been no wrongful disclosure in violation of the Privacy Act.").

The factual statements contained in Hunter's blog entries pertaining to past cases clearly constitute dissemination–not disclosure–of public information. Penalizing Hunter for discussing non-confidential, non-privileged information that was revealed in the course of an open trial is inconsistent with the express purpose of Rule 1.6(a). Furthermore, absent a showing that such a restriction is narrowly tailored to serve an important governmental interest, the Bar's application of Rule 1.6(a) to Hunter's blog is impermissible under the First Amendment.

B. This court should endorse a bright-line rule that preserves the First Amendment rights of attorneys while protecting client confidentiality

Unless this Court establishes a clear line between permissible dissemination and improper disclosure of publicly known information regarding clients, legal discourse, training, and commentary will inevitably be chilled. Indeed, the actions of the Bar in this case have already raised serious questions and concerns within the legal community. *See, e.g.*, Catherine Ho, *Virginia*

State Bar's Crackdown on Lawyer's Blog Raises Questions, Washington Post, Oct. 9, 2011 ("Hunter's case has some lawyers—for whom blogging has become commonplace—as well as free speech and social media law experts questioning whether the bar is overreaching in its regulation of online speech in the social media age."); American Bar Association, Apr. 25, 2012, *Ethical Considerations in the Wake of* Hunter v. Virginia State Bar, http://apps.americanbar.org/cle/programs/t12lbc1.html.

Clear guidelines are particularly important in the context of continuing legal education, both in traditional settings and online, where attorney-authored blogs and social media are increasingly popular sources of legal analysis and interaction among professional peers. These avenues for discourse and development are curtailed when attorneys are prevented from commenting on the public facts of their prior cases. *Cf.* Va. Sup. Ct. R. pt. 6, § II, 1.6, n.5a ("An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development."). Furthermore, such a rule allows the general public and legal community alike to hear directly from those most informed and best situated to offer commentary and analysis regarding a particular case. The alternative is the Bar's proposed interpretation of Rule

1.6(a), where *everyone except* the attorney involved is permitted to discuss the public facts of a given case.

A final argument in favor of a rule permitting discussion of public information by attorneys is suggested by the comments to Rule 1.6(a). As to the Rule's policy underpinnings, it is noted that a central purpose of the confidentiality and privilege protections are to promote "the lawyer's function . . . to advise clients so that they avoid any violation of the law in the proper exercise of their rights." Va. Sup. Ct. R. pt. 6, § II, 1.6, n.1. The promise that protected communications will not be divulged by the attorney encourages clients "to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Id.* at n.2b. This is powerful and persuasive reasoning, but it simply does not apply where the information at issue was already "disclosed" in open court and available to all as a matter of public record. It is difficult to see how the possibility that an attorney might discuss the public facts of a resolved case is at all likely to discourage clients from speaking frankly with their lawyers. Instead, a bright-line rule allowing attorneys to freely discuss non-confidential, non-privileged public information demonstrates the transparency and integrity of Virginia's legal system and encourages clients to take advantage of expert legal guidance. Similarly, by

promoting the discussion of legal cases in social media and on the Internet, such a rule may draw attention to the role of a lawyer as a legal adviser, aiding clients in avoiding violations of law.

A bright-line rule permitting attorneys to discuss freely the public facts of cases involving past clients is the only interpretation of Rule 1.6(a) consistent with both the policy goals underlying that regulation and the constitutional requirement that whenever standards of professional conduct threaten to infringe upon protected speech, "precision of regulation must be the touchstone." *See In re Primus*, 436 U.S. at 432.

II. THE SPEECH EXPRESSED ON MR. HUNTER'S BLOG IS POLITICAL, NOT COMMERICAL

Mr. Hunter's blog posts are political speech entitled to heightened First Amendment protection. The content of Mr. Hunter's blog includes discussion and critical analysis of the criminal justice system along with other matters of public concern. The fact that this content was authored by an attorney involved in some of the matters discussed does not render the posts commercial speech. Rather, Mr. Hunter's blog presents a type of courtroom journalism analogous to materials afforded the fair report privilege. Accordingly, the Bar's application of Rules 7.1(a)(4) and 7.2(a)(3) in this case is an unconstitutional infringement of Mr. Hunter's First Amendment rights.

A. Mr. Hunter's blog posts do not meet the Supreme Court's definition of commercial speech

Decades of United States Supreme Court jurisprudence support the position that Mr. Hunter's blog is not commercial speech. Classic commercial speech is generally defined as a communication "which does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 776 (1976). Even if one could reasonably infer that some of the posts on Mr. Hunter's blog were intended to promote his legal practice and attract new clients, the blog is clearly concerned with much more than advertising and commercial gain. Mr. Hunter regularly addresses matters of great public importance concerning the operation of courts and the criminal justice system. Examples include a post profiling former U.S. Attorney General Alberto Gonzales, a discussion of Fourth Amendment rights, and commentary on various state and federal court proceedings. Each of these posts are pure political speech addressing issues of public importance. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (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.").

Nevertheless, the Bar insists that posts describing cases in which Mr. Hunter acted as counsel are nothing more than advertisements for his law

practice. Even if this were so, the Supreme Court has held that advertisements may also constitute protected political speech. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court determined that an editorial advertisement soliciting money for the civil rights movement did not lose its protected First Amendment status simply because it was a paid advertisement. The ad could not be considered purely "commercial" since, in addition to seeking financial support, it also "communicated information, expressed opinion, recited grievances, [and] protested claimed abuses . . . on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Id.* at 266.

Through his blog, Mr. Hunter speaks out on numerous matters of public concern. His opinions, analysis, and commentary are no less deserving of First Amendment protection than the editorial advertisement at issue in *Sullivan*. Without question, his speech must receive a higher level of protection than the mere advertising of services for hire. In short, Mr. Hunter's posts constitute classic political speech and are entitled to full First Amendment protection.

B. The existence of some financial interest on the part of a speaker does not render otherwise political speech commercial

The presence of an underlying profit motive does not transform political speech into commercial speech. *See Riley v. Nat'l Fed'n of the Blind of N.C.,*

Inc., 487 U.S. 781, 795 (1988). *Cf. Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010) (Speech concerning the political process is considered political speech even when the speaker is a corporation earning money as a result of its expression.). Mr. Hunter's speech is not rendered "commercial" merely because he may have had some pecuniary motivation behind certain posts appearing on his blog. Attorneys often write and speak on issues pertinent to their areas of practice in order to raise their professional profiles and attract new business opportunities. If, however, the hope of publicity and future gain was sufficient to identify "commercial" expression, public comments of any nature could be afforded lesser constitutional protection simply because the speech might be seen as potentially raising the attorney's profile or attracting new clients.

Mr. Hunter's blog serves multiple purposes. The blog undoubtedly functions as a marketing tool for Mr. Hunter's practice, but it does so only insofar as Mr. Hunter continues to provide his unique commentary and analysis addressing important issues surrounding the criminal justice system. The mere fact that Mr. Hunter stands to gain some commercial benefit from his blog does not wipe away the overriding motivations behind the endeavor: raising awareness, discussing important issues, and providing a resource for individuals

navigating the criminal justice system. To classify this activity as commercial speech simply because it might raise Mr. Hunter's professional profile or attract new clients to his practice not only ignores the bounds of commercial speech established by the Supreme Court, but also deprives Mr. Hunter of the First Amendment protection his speech is entitled to.

C. The information presented on Mr. Hunter's blog is indistinguishable in form and function from content protected by the common law fair report privilege

The content of Mr. Hunter's blog posts is analogous to the type of reporting that is traditionally afforded the fair report privilege. The fair report privilege is a common law privilege, adopted by the vast majority of states, which shields reporters from liability for defamation stemming from the reporting of an official action or proceeding, or of an open public meeting. *See Salzano v. N. Jersey Media Grp., Inc.*, 201 N.J. 500, 513-14 (2010). The privilege originates from a belief that democracy depends on citizens being informed of the proceedings of government, and that "one who reports what happens in a public, official proceeding acts as an agent for persons who had a right to attend, and informs them of what they might have seen for themselves." *Id.* at 514.

The fair report privilege further illustrates the value of Mr. Hunter's blog posts, and the necessity to ensure they receive the heightened First Amendment protections to which they are entitled. Mr. Hunter is in a uniquely valuable position to offer observations and critique of the cases he reports on because he was an active participant and has an intimate familiarity with the facts and law at issue. Through his blog, Mr. Hunter acts as an agent in disseminating news to his readers about recent trials within the criminal justice system. His actions promote public faith in the courts and contributes to the principle of an open courtroom. Finally, his efforts further the public's right to know about important developments in the legal system on the state and national level.

The public policy rationale that courts have followed in fair report cases would be diminished significantly if this Court does not recognize the right of all individuals, including Mr. Hunter, to disseminate information about open court proceedings. Finding Mr. Hunter's blog posts to be commercial speech would have far-reaching implications that would undermine First Amendment jurisprudence in unintended ways.

III. IN THE ALTERNATIVE, MR. HUNTER'S BLOG IS A MIXTURE OF POLITICAL SPEECH AND COMMERCIAL SPEECH THAT SHOULD BE ANALYZED UNDER THE STANDARD FOR POLITICAL SPEECH

In the event this Court finds the blog contains elements of commercial speech, this Court should employ a heightened level of review because any commercial elements are inextricably intertwined with the political speech. Accordingly, regulation of the blog should be analyzed under the heightened level of scrutiny afforded to purely political speech.

A. Political speech that is "inextricably intertwined" with commercial speech is afforded a heightened level of review

It is almost always impossible to strictly classify speech as either commercial or non-commercial; speech often exhibits elements of both categories. However, the Supreme Court has established that when "the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. . . . Therefore, we must apply the 'test for fully protected expression.'" *Riley*, 487 U.S. at 796; s*ee also Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 83 (1983) (Stevens, J., concurring in judgment) ("Because it restricts speech by the appellee that has a significant noncommercial component, I have scrutinized this statute in the same manner as I would

scrutinize a prohibition on unsolicited mailings by an organization with absolutely no commercial interest in the subject."); *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781 (3d Cir. 1999). Only if the commercial and non-commercial elements of speech are not "inextricably intertwined" can a court apply a lower standard of review. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989).

The commercial and non-commercial elements of Mr. Hunter's blogs are "inextricably intertwined." Therefore the disclaimer requirements established by the Bar must be analyzed under the heightened level of scrutiny applied to political speech. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

In *Riley*, a group of charitable organizations and individuals sued the government officials charged with the enforcement of the North Carolina Charitable Solicitations Act. The Act established "reasonable fees" for professional fundraisers, created disclosure requirements for charities, and created licensure requirements for solicitation by professional fundraisers. *Riley*, 487 U.S. at 784-87. North Carolina argued that the requirement that fundraisers disclose certain information only regulated commercial speech and should be analyzed under the "more deferential commercial speech principles." *Id.* at 795. However, the Supreme Court held "we do not believe that the speech

retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* at 796. When determining "what level of scrutiny to apply to a compelled statement," the Supreme Court ruled that "the nature of the speech taken as a whole and the effect of the compelled statement thereon" is what matters. *Id. See also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984).

B. The commercial and non-commercial elements of Mr. Hunter's blog are "inextricably intertwined"

Mr. Hunter's blog contains a substantial amount of political speech that is "inextricably intertwined" with any commercial speech also found in the blog. Regulation of the blog posts should therefore be evaluated under the heightened level of scrutiny afforded purely political speech. Mr. Hunter's discussion of his cases does not detract from the political nature of these blog postings. For example, in the blog posting titled "RICO Charges Dismissed in Biker Case," Mr. Hunter discusses both his success in having RICO charges dropped against a member of the American Outlaw Association, and his criticisms of Department of Justice's approach to the investigation of the American Outlaw Association. *See* VSB Exhibit 3 at 000023.

Because Mr. Hunter is a criminal defense attorney, his discussion of cases and politics is more like *Riley* in that it is impossible for him – or a court – to separate the commercial speech from the non-commercial speech. He cannot make the same political statement that he desires to make, or engage in the same form of public discussion, if he were to remove all discussion of his past litigation activities. Discussion of his past litigation is "characteristically intertwined" with his political speech. Unlike the Tupperware parties in *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), where the Supreme Court found inserting home economics lessons into sales pitches did not convert commercial speech into protected educational speech, Mr. Hunter's blog is not, in essence, a proposal that readers engage in a commercial transaction with his law firm. Rather, the blog is a forum in which Mr. Hunter engages in discussions of important political concern. His hope that the blog raises his profile does not convert his political speech into commercial speech.

C. The restrictions on Mr. Hunter's blog fail under the heightened level of scrutiny required by *Riley*

Since commercial and political speech are "inextricably intertwined" in Mr. Hunter's blog, and regulations on political speech are evaluated under a heightened level of scrutiny, the Bar's disclaimer requirement should be analyzed under this stringent standard. The regulation fails this test because it

does not meet the requirement that it be "narrowly tailored to serve the State's compelling interests." *Riley*, 487 U.S. at 810.

Though the Bar may have a compelling interest in protecting against the deception of Mr. Hunter's potential clients, the regulation does not satisfy the requirement under *Riley* that the regulation be narrowly tailored to the state's asserted goal. There are narrower, less restrictive regulations that the Bar can implement to prevent public deception. For example, the text that Mr. Hunter offered to include alerting readers to the fact that the blog was not intended to be an advertisement of Mr. Hunter's services and that his posts "should not be construed to suggest a similar outcome in any other case," VSB Exhibit 6, is a much narrower approach that would still protect the public from possible fraud and deceit. Mr. Hunter's proposed disclaimer achieves the goal of alerting potential clients that the blog posts are not a suggestion or guaranty of future outcomes without requiring Mr. Hunter to adopt the Bar's rigid advertising disclaimer. Because "more benign and narrowly tailored options are available," the regulation does not pass constitutional muster under this heightened level of review. *See Riley*, 487 U.S. at 799-801; *Schaumburg*, 444 U.S. at 639; *Munson*, 467 U.S. at 966-67.

IV. IF MR. HUNTER'S BLOG IS DEEMED COMMERCIAL SPEECH, THE BAR'S RULES, AS APPLIED, DO NOT SATISFY THE *CENTRAL HUDSON* TEST

Even if this Court deems Mr. Hunter's blog posts to be commercial speech, the Bar's rules improperly infringe on the constitutional protection afforded such speech. The test for assessing restrictions on commercial speech is set forth in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The first step in the *Central Hudson* analysis is to determine if the commercial speech at issue implicates the First Amendment at all; commercial speech that proposes an unlawful activity, or is fraudulent or misleading, does not find any protection under the First Amendment. *Id*. at 564.

There have been no claims that the blog posts are fraudulent or propose an illegal transaction. Rather, the Bar argues that, without the disclaimer required under its rules, Mr. Hunter's posts concerning some of his successful case results are inherently misleading because "they would lead a reasonable person to form an unjustified expectation that the lawyer can obtain the same result for that person as the lawyer obtained in previous matters without reference to the specific facts and legal circumstances of each client's case." *See In re Horace Frazier Hunter*, CL12-335-7, Brief of Appellee at 23. In support of its claim, the Bar cites *In re Burton*, 442 B.R. 421, 451 (2009), in

which the court found a bankruptcy lawyer's use of "in the vast majority of cases" to be misleading. The Bar also cites *In re Coale*, 775 N.E. 2d. 1079 (Ind. 2002) in which it was found misleading when out-of-state lawyers solicited plane crash victims without explaining that the award they achieved in an out-of-state verdict could not necessarily be achieved in state.

The cases cited by the Bar are easily distinguishable from the present facts. Mr. Hunter's description of a selection of his cases is a far cry from the bold promises the attorney in *Burton* made to clients in her solicitations about saving their homes. Mr. Hunter is not making any promises in his blog, nor is he directly soliciting clients. The only comparable element in these cases is that both attorneys omit certain facts in their write-up of cases. The attorney in *Burton* did this to simplify her plea to future clients and focus on the virtual guarantee she was making. *Burton*, 442 B.R. at 452. By contrast, Mr. Hunter was making stylistic choices in the presentation of his blog by referring to cases that spoke to his larger themes. His posts provide the facts of a variety of criminal cases, none of which have been shown to be deceptive. It is highly unlikely that a reasonable person reading such a blog would believe that the articles represent all of Mr. Hunter's cases, that he has been successful in all his cases, and that this demonstrates that he will be successful in all future cases.

"The states may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." (*In Re R.M.J.*, 455 U.S. 191, 203; *see also Allen, Allen, Allen & Allen v. Williams*, 254 F. Supp. 2d 614, 628 (E.D. Va. 2003).

When commercial speech is neither misleading nor fraudulent, nor proposes an illegal transaction, a regulation of such speech is only constitutional if (1) a "substantial" government interest is at stake, (2) the regulation "directly advances" the government interest, and (3) the regulation is "not more extensive than necessary" to serve that interest. *Central Hudson*, 447 U.S. at 564.

The state has a legitimate and compelling interest in preventing those aspects of solicitation that involve "fraud, undue influence, intimidation overreaching, and other forms of vexatious conduct." *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 462. Yet the Bar has yet to demonstrate any aspect of the statements in Mr. Hunter's blog that creates a state interest sufficiently substantial to justify a categorical ban on their use, nor does the Bar establish that the proposed regulation is properly tailored to the interest served. The Bar cannot show that its mandatory disclaimer directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve

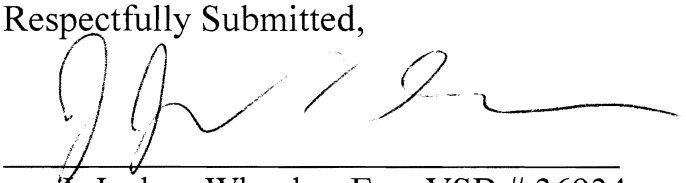
that interest. Mr. Hunter's blog is fundamentally different from the type of aggressive in-person solicitation exhibited by attorneys that courts have prohibited. His blog involves truthful descriptions of cases that speak to a view of the criminal justice system that he has developed through his expertise. To limit this speech would not only expand the commercial speech doctrine in a dangerous new direction, it would also diminish well-established First Amendment protection for truthful speech on matters of public concern.

Additionally, to the extent there is a substantial state interest in limiting this kind of truthful speech, the Bar's regulations are not narrowly tailored to promote that interest. The Bar proposes a one-size-fits-all solution: an inalterable disclaimer proclaiming any speech appearing alongside it to be nothing more than attorney advertising. Rather than allowing for flexibility in determining the best way to address the possibility that such speech could be misleading, the Bar has imposed an overly broad requirement on all such communications. The Bar's prescription is too strong and overbearing for the perceived ills it wishes to cure. The solution proposed by Mr. Hunter—a disclaimer explaining the nature of the blog in his own words—is a more narrowly-tailored and appropriate means by which to promote the state's interest in protecting the public from potentially deceptive communications.

CONCLUSION

For the foregoing reason, *amicus curiae* respectfully requests that this Court affirm the decision of the court below as it applies to Rule 1.6(a), but reverse the decision as it applies to Rules 7.1 and 7.2.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned herby certifies that the requisite number of copies of the foregoing Brief of *Amicus Curiae* was mailed, this 10th day of October 2012, postage prepaid, to the following.

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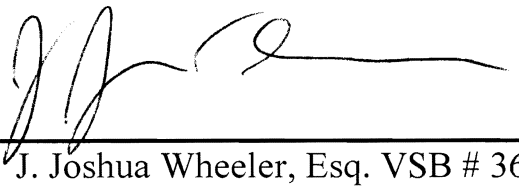
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of stated in the Rules of the Supreme Court of Virginia and is submitted in Word 2003 Times Roman 14-Point type with footnotes in 12-Point type. This Brief contains 5,029 words, excluding the parts of the brief exempted by the Rules of the Supreme Court of Virginia.

Respectfully submitted,



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