Supreme Court Advisory Committee on the Rules of Professional Conduct: Lawyer Advertising (Background)

4/21/08 - Bob Burton introduced the topic of lawyer advertising at a meeting of the Supreme Court Advisory Committee on the Rules of Professional Conduct. Nate Alder (president-elect of the Bar) and John Baldwin talked about a recent ABA conference breakout session on lawyer advertising. A subcommittee was formed to study the issue further (Bob Burton, Stuart Schultz, Paul easy, and Leslie Van Frank).

5/12/08 - The advertising subcommittee made a written preliminary recommendation. Is this issue of sufficient concern to Bar members? We recommend a survey.

5/19/08 - Advisory Committee meeting: Issue tabled until there is a clear indication from Bar leadership that Bar leadership wants to aggressively pursue enforcement. Bob Burton and Stuart Schultz will work with Bar leadership in their individual capacities to develop possible survey questions.

_____ Survey _____

8/6/09 - Nate Alder and Bob Burton presented at a Supreme Court conference.

8/12/09 - Chief Justice Durham sent Bob Burton a letter asking the Advisory Committee to undertake a review of lawyer advertising rules and to recommend any amendments it finds advisable. Court expressed particular concern about lawyer advertising that unfairly maligns the court system as a whole.

9/28/09 - Advisory Committee meeting: Survey indicated that lawyer advertising was second most important issue to lawyers for

OPC to focus on. Advertising subcommittee was reactivated and asked to focus on 4 things. (See meeting minutes)

1/11/10 - Advisory Committee meeting: Other than the survey, Bar Commission hasn't done any research or analysis of the issue. Subcommittee's review and analysis are reflected in draft letter to Chief Justice Durham dated 1/11/10. **Subcommittee feels that current advertising rule is adequate enough** for OPC to pursue misleading ads. Fairly extensive task force work needs to be done by the Bar to show a "substantial interest" in regulating this type of commercial speech. Constitutional foundation is critical to withstand constitutional challenges. Utah needs to tread carefully and deliberately before making changes to the rules.

January ____, 2009

Hon. Christine M. Durham
Chief Justice
Utah Supreme Court
P. O. Box 140210
Salt Lake City, UT 84114-0210

Dear Chief Justice Durham:

In February of 2008, following its decision in *Bowen v. Utah State Bar*, the Supreme Court asked the Advisory Committee on the Rules of Professional Conduct to examine the Rules of Lawyer Discipline and Disability and to make a recommendation as to whether the rules should be amended to provide for a right of appeal from disciplinary orders made by the Ethics and Discipline Committee based upon informal complaints of unprofessional conduct.

Following receipt of this assignment, the full committee engaged in general discussion, and I appointed a subcommittee consisting of Gary Sackett, Kent Roche, Steve Johnson, and Judge Stephen Roth to study the issues and present recommendations to the full committee. The subcommittee presented its preliminary recommendations to the full committee, and there was general agreement that there should be a right to judicial review of disciplinary orders issued by the Ethics and Discipline Committee. However, the full committee sought guidance from the Supreme Court as to whether the judicial review should take place in the Supreme Court or in the district courts. In response to the committee's inquiry, the Supreme Court advised that it would like the following elements included in the rule amendments developed by the committee: judicial review should be to the Supreme Court; the procedures of the Ethics and Discipline Committee with regard to creating a record should be enhanced; the Supreme Court's review should be on the record; and the decision of the Ethics and Discipline Committee and/or the chair should be presumed valid, with the burden on the respondent to demonstrate error.

With the instructions from the Supreme Court in hand, the subcommittee and full committee continued their work, including meeting with Art Berger and Terrie McIntosh, chair and co-chair, respectively, of the Ethics and Discipline Committee, to get their input on the changes to Rule 14-510 of the Rules of Lawyer Discipline and Disability proposed by the

advisory committee. Also, Billy Walker, who is a member of the advisory committee, explained to the full committee in detail the process currently in place for informal disciplinary proceedings before the screening panels and the exceptions hearing process to the chair of the Ethics and Discipline Committee.

Attached are the modifications to Rule 14-510 recommended by the advisory committee. Besides providing a right of appeal from an informal disciplinary proceeding, the proposed rule amendments are intended to improve the quality of the hearing record, to specify the rights of the complainant and the respondent at the proceedings before the screening panel, and to detail more fully the procedures on exceptions and on judicial appeal. The most controversial issues considered by the committee were whether the committee chair, as part of the exceptions procedure, should be able to issue a final determination of discipline that is more severe than the original recommendation of the screening panel, and whether OPC should be provided an appeal right from an exception hearing. The committee ultimately decided that the committee chair should not be able to impose more severe discipline than that imposed by the screening panel. However, the committee ended up in a tie vote as to whether OPC should be given an appeal right from an exception hearing, and it submits that issue as an open one to the Supreme Court.

I am happy to meet with the Court to review the proposed amendments and to answer any questions you may have.

Sincerely,

Attachment

Rule 14-510. Prosecution and appeals.

(a) Informal complaint of unprofessional conduct.

(a)(1) Filing. A disciplinary proceeding may be initiated against any member of the Bar by any person, OPC counsel or the Committee, by filing with the Bar, in writing, an informal complaint in ordinary, plain and concise language setting forth the acts or omissions claimed to constitute unprofessional conduct. Upon filing, an informal complaint shall be processed in accordance with this article.

(a)(2) Form of informal complaint. The informal complaint need not be in any particular form or style and may be by letter or other informal writing, although a form may be provided by the OPC to standardize the informal complaint format. It is unnecessary that the informal complaint recite disciplinary rules, ethical canons or a prayer requesting specific disciplinary action. The informal complaint shall be signed by the complainant and shall set forth the complainant's address, and may list the names and addresses of other witnesses. The informal complaint shall be notarized and contain a verification attesting to the accuracy of the information contained in the complaint. In accordance with Rule 14-504(b), complaints filed by OPC are not required to contain a verification. The substance of the informal complaint shall prevail over the form.

(a)(3) Initial investigation. Upon the filing of an informal complaint, OPC counsel shall conduct a preliminary investigation to ascertain whether the informal complaint is sufficiently clear as to its allegations. If it is not, OPC counsel shall seek additional facts from the complainant; additional facts shall also be submitted in writing and signed by the complainant.

(a)(4) Notice of informal complaint. Upon completion of the preliminary investigation, OPC counsel shall determine whether the informal complaint can be resolved in the public interest, the respondent's interest and the complainant's interest. OPC counsel and/or the screening panel may use their efforts to resolve the informal complaint. If the informal complaint cannot be so resolved or if it sets forth facts which, by their very nature, should be brought before the screening panel, or if good cause otherwise exists to bring the matter before the screening panel, OPC counsel shall cause to be served a NOIC by regular mail upon the respondent at the address reflected in the records of the Bar. The NOIC shall have attached a true copy of the signed informal complaint against the respondent and shall identify with particularity the possible violation(s) of the Rules of Professional Conduct raised by the informal complaint as preliminarily determined by OPC counsel.

(a)(5) Answer to informal complaint. Within 20 days after service of the NOIC on the respondent, the respondent shall file with OPC counsel a written and signed answer setting forth in full an explanation of the facts surrounding the informal complaint, together with all defenses and responses to the claims of possible misconduct. For good cause shown, OPC counsel may extend the time for the filing of an answer by the respondent not to exceed an additional 30 days. Upon the answer having been filed or if the respondent fails to respond, OPC counsel shall refer the case to a screening panel for investigation, consideration and determination. OPC counsel shall forward a copy of the answer to the complainant.

(a)(6) Dismissal of informal complaint. An informal complaint which, upon consideration of all factors, is determined by OPC counsel to be frivolous, unintelligible, barred by the statute of limitations, more adequately addressed in another forum, unsupported by fact or which does not raise probable cause of any unprofessional conduct, or which OPC declines to prosecute may be dismissed by OPC counsel without hearing by a screening panel. OPC counsel shall notify the complainant of such dismissal stating the reasons therefor. The complainant may appeal a dismissal by OPC counsel to the Committee chair within 15 days after notification of the dismissal is mailed. Upon appeal, the Committee chair shall conduct a de novo review of the file, either affirm the dismissal or require OPC counsel to prepare a NOIC, and set the matter for hearing by a screening panel. In the event of the chair's recusal, the chair shall appoint the vice chair or one of the screening panel chairs to review and determine the appeal.

(b) Proceedings before Committee and screening panels.

(b)(1) Review and investigation. A screening panel shall review all informal complaints referred to it by OPC counsel, including all the facts developed by the informal complaint, answer, investigation and hearing, and the recommendations of OPC counsel.

(b)(2) Respondent's appearance. Before any action is taken ~~which~~ that may result in the recommendation of an admonition or public reprimand or the filing of a formal complaint, the screening panel shall, upon at least ~~14 days~~ 21 days' notice, afford the respondent an opportunity to appear before the screening panel. Respondent and ~~testify under oath, together with~~ any witnesses called by the respondent may testify, and respondent may ~~to~~ present ~~an~~ oral argument with respect to the informal complaint. ~~All testimony shall be recorded and preserved so long as proceedings are pending, and in any event, not less than six months following the hearing. A written brief may also be submitted.~~ Respondent may also submit a written brief to the screening panel ~~by~~ at least 10 days prior to the ~~respondent. The brief~~ hearing, which shall not exceed ~~five~~ 10 pages in length unless permission for enlargement is extended by the chair or the chair's delegate for good cause shown. A copy of the brief shall be forwarded by OPC counsel to the complainant.

(b)(3) Complainant's appearance. A complainant shall have the right to appear before the screening panel personally and ~~testify under oath~~, together with any witnesses called by the complainant, ~~with respect to the~~

~~informal complaint or in opposition to the matters presented by the respondent. The complainant may be represented by counsel or some other representative~~ may testify.

(b)(4) Right to hear evidence; cross-examination. The complainant and the respondent shall ~~each~~ have the right to be present during the presentation of the evidence unless excluded by the screening panel chair for good cause shown. Respondent may be represented by counsel, and complainant may be represented by counsel or some other representative. Either complainant or respondent may seek responses from the other party at the hearing by posing questions or areas of inquiry to be asked by the panel chair. Direct cross-examination will ordinarily not be permitted except, on request, the panel chair deems that it would materially assist the panel in its deliberations.

(b)(5) Hearing Record. The proceedings of any hearing before a screening panel under this subsection (b) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings. Pursuant to its function as secretary to the Committee under Rule 14-503(h)(1), OPC shall be responsible for the assembly of the complete record of the proceedings, to be delivered to the chair of the Committee upon the rendering of the panel's recommendation to the Committee chair. The record of the proceedings before the panel shall be preserved for not less than one year following delivery of the panel's recommendation to the chair of the Committee and for such additional period as any further proceedings on the matter are pending or might be instituted under this section.

(b)(~~5~~6) Screening panel determination. Upon review of all the facts developed by the informal complaint, answer, investigation and hearing, the screening panel~~, in behalf of the Committee,~~ shall make one of the following determinations:

(b)(~~5~~6)(A) ~~that the informal complaint does not raise facts in which there is probable cause to believe~~ The preponderance of evidence presented does not establish that the respondent was engaged in unprofessional conduct, in which case~~,~~ the informal complaint shall be dismissed. OPC counsel shall promptly give notice of such dismissal by regular mail to the complainant and the respondent~~; or~~. A

~~(b)(5)(B) that a~~ letter of caution may also be issued with the dismissal. The letter shall be signed by OPC counsel or the screening panel chair and shall serve as a guide for the future conduct of the respondent. ~~Thereupon, the informal complaint shall be dismissed, with the complainant and the respondent being notified of the dismissal.~~ The complainant shall also be confidentially notified of the caution; ~~or~~

~~(b)(5)(C) that a dismissal may be conditioned upon the performance by the respondent of specified conduct which the Committee determines to be warranted by the facts and the Rules of Professional Conduct; or~~

(b)(~~5~~6)(~~D~~B) ~~that t~~The informal complaint shall be referred to the Diversion Committee to be processed in accordance with the provisions of Rule 14-533;

(b)(6)(C) The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent be admonished;

(b)(6)(D) The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent ~~be admonished. Such~~ receive a public reprimand; or

(b)(6)(E) A formal complaint shall be filed against the respondent pursuant to Rule 14-511.

(b)(7) Recommendation of admonition or public reprimand. A screening panel recommendation that the respondent should be disciplined under subsection (b)(6)(C) or (b)(6)(D) shall be in writing and shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished or publicly reprimanded. ~~A copy of such screening panel recommendation shall be served upon the respondent prior to delivery of the recommendation to the Committee chair. The Committee chair shall enter an order admonishing the respondent if no exception has been filed within ten days of notice of the recommendation being provided to the respondent; or~~

~~(b)(5)(E) that the informal complaint be referred to the Committee chair with an accompanying screening panel recommendation that the respondent receive a public reprimand. Such screening panel recommendation shall be in writing and shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should receive a public reprimand.~~ A copy of such screening panel recommendation shall be delivered to the Committee chair and a copy served upon the respondent. ~~prior to the delivery of the recommendation to the Committee chair. The Committee chair shall enter an order publicly reprimanding the respondent if no exception has been filed within ten days of notice of the recommendation being provided to the respondent; or~~

~~(b)(5)(F) that a formal complaint be filed against the respondent.~~

(b)(~~6~~8) Determination of appropriate sanction. In determining an appropriate sanction and only after having found unethical conduct, the screening panel may consider any admonitions or greater discipline imposed upon the respondent within the five years immediately preceding the alleged offense.

(b)(~~7~~9) Continuance of disciplinary proceedings. A disciplinary proceeding may be held in abeyance by the Committee prior to the filing of a formal complaint when the allegations or the informal complaint contain matters of substantial similarity to the material allegations of pending criminal or civil litigation in which the respondent is involved.

(c) Exceptions to admonitions and public reprimands. Within ~~ten~~ 30 days after ~~notice~~ service of the recommendation of an admonition or public reprimand ~~to the Committee chair~~ on respondent, ~~the~~ respondent may file with the Committee chair ~~an exception~~ exceptions to the recommendation and may ~~also, if desired,~~ request a hearing. The exceptions shall include a memorandum, not to exceed 20 pages, stating the grounds for review, the relief requested and the bases in law or in fact for the exceptions.

(d) Procedure on exceptions.

(d)(1) Hearing not requested. If no hearing is requested, the Committee chair will review the record compiled before the screening panel.

(d)(2) Hearing requested. If a request for a hearing is made, the Committee chair~~,~~ or a screening panel chair designated by the Committee chair~~,~~ shall ~~proceed to~~ serve as the Exceptions Officer and hear the matter in an expeditious manner, with OPC counsel and the respondent having the opportunity to be present. ~~The complainant's testimony may be read into the record~~ and give an oral presentation. The complainant need not appear personally. ~~unless called by the respondent.~~ However, upon motion to the Exceptions Officer and for good cause shown, respondent may seek to augment the record before the screening panel or the original brief on exceptions, including:

(d)(2)(A) A request to call complainant as an adverse witness for purposes of cross-examination. ~~The respondent~~ if complainant was not subject to direct cross-examination before the screening panel, and

(d)(2)(B) A request for time to obtain a transcript of the screening panel proceedings to support respondent's exceptions, the cost of such transcript to be borne by respondent. If a transcript is requested, OPC will provide the Committee chair with the transcript as transcribed by a court reporting service, together with an affidavit establishing the chain of custody of the record.

(d)(3) Burdon of proof. A respondent who files exceptions under this section (d) shall have the burden ~~of proof~~ of showing that the recommendation of the screening panel is ~~unreasonable,~~ unsupported by substantial evidence~~,~~ or is arbitrary, capricious, legally insufficient or ~~and~~ otherwise clearly erroneous.

(d)(4) OPC response. The Exceptions Officer may request a written response from OPC to exceptions filed by respondent.

(d)(5) Record on exceptions. The proceedings of any hearing on exceptions under this subsection (d) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings.

(e) Final Committee disposition. Either upon the completion of the exceptions procedure under subsection (d) or if no exceptions have been filed by respondent under subsection (c), the Committee chair shall issue a final, written determination that either sustains, dismisses, or modifies the disciplinary recommendation of the screening panel. A modification of the screening panel's recommendation of discipline may not:

(e)(1) Be more severe than the original recommendation of the screening panel; nor

(e)(2) Require OPC to file a formal complaint under Rule 14-511.

(f) Appeal of a final Committee determination of admonition or public reprimand.

(f)(1) Within 30 days after service by OPC of a final, written determination of an admonition or a public reprimand in a matter for which exceptions have been filed by respondent under subsection (c), respondent may file a request for review with the Supreme Court seeking reversal or modification of the final determination by the Committee.

(f)(2) A request for review under this subsection (f) will be subject to the procedures set forth in Title III of the Utah Rules of Appellate Procedure.

(f)(3) A party requesting a transcription of the record below shall bear the costs. OPC will provide the Court with the transcript as transcribed by a court reporting service, together with an affidavit establishing the chain of custody of the record.

(f)(4) The Supreme Court shall conduct a review of the matter on the record.

(f)(5) Respondent shall have the burden of demonstrating that the Committee action was:

(f)(5)(A) Based on a determination of fact that is not supported by substantial evidence when viewed in light of the whole record before the Court;

(f)(5)(B) An abuse of discretion;

(f)(5)(C) Arbitrary or capricious; or

(f)(5)(D) Contrary to Articles 5 and 6 of Chapter 14 of the Rules of Professional Practice of the Supreme Court.

(g) General procedures.

(g)(1) Testimony. All testimony given before a screening panel or the Exceptions Officer shall be under oath.

(g)(2) Service. To the extent applicable, service or filing of documents under this Rule is to be made in accordance with Utah Rules of Civil Procedure 5(b)(1), 5(d) and 6(a).

(g)(3) Form of Documents. Documents submitted under this Rule shall conform to the requirements of Rules 27(a) and 27(b) of the Utah Rules of Appellate Procedure, except it is not required to bind documents along the left margin.

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(a) Informal complaint of unprofessional conduct.

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(a)(2) Form of informal complaint. The informal complaint need not be in any particular form or style and may be by letter or other informal writing, although a form may be provided by the OPC to standardize the informal complaint format. It is unnecessary that the informal complaint recite disciplinary rules, ethical canons or a prayer requesting specific disciplinary action. The informal complaint shall be signed by the complainant and shall set forth the complainant's address, and may list the names and addresses of other witnesses. The informal complaint shall be notarized and contain a verification attesting to the accuracy of the information contained in the complaint. In accordance with Rule 14-504(b), complaints filed by OPC are not required to contain a verification. The substance of the informal complaint shall prevail over the form.

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(a)(5) Answer to informal complaint. Within 20 days after service of the NOIC on the respondent, the respondent shall file with OPC counsel a written and signed answer setting forth in full an explanation of the facts surrounding the informal complaint, together with all defenses and responses to the claims of possible misconduct. For good cause shown, OPC counsel may extend the time for the filing of an answer by the respondent not to exceed an additional 30 days. Upon the answer having been filed or if the respondent fails to respond, OPC counsel shall refer the case to a screening panel for investigation, consideration and determination. OPC counsel shall forward a copy of the answer to the complainant.

(a)(6) Dismissal of informal complaint. An informal complaint which, upon consideration of all factors, is determined by OPC counsel to be frivolous, unintelligible, barred by the statute of limitations, more adequately addressed in another forum, unsupported by fact or which does not raise probable cause of any unprofessional conduct, or which OPC declines to prosecute may be dismissed by OPC counsel without hearing by a screening panel. OPC counsel shall notify the complainant of such dismissal stating the reasons therefor. The complainant may appeal a dismissal by OPC counsel to the Committee chair within 15 days after notification of the dismissal is mailed. Upon appeal, the Committee chair shall conduct a de novo review of the file, either affirm the dismissal or require OPC counsel to prepare a NOIC, and set the matter for hearing by a screening panel. In the event of the chair's recusal, the chair shall appoint the vice chair or one of the screening panel chairs to review and determine the appeal.

(b) Proceedings before Committee and screening panels.

(b)(1) Review and investigation. A screening panel shall review all informal complaints referred to it by OPC counsel, including all the facts developed by the informal complaint, answer, investigation and hearing, and the recommendations of OPC counsel.

(b)(2) Respondent's appearance. Before any action is taken that may result in the recommendation of an admonition or public reprimand or the filing of a formal complaint, the screening panel shall, upon at least 21 days' notice, afford the respondent an opportunity to appear before the screening panel. Respondent and any witnesses called by the respondent may testify, and respondent may present oral argument with respect to the informal complaint. Respondent may also submit a written brief to the screening panel at least 10 days prior to the hearing, which shall not exceed 10 pages in length unless permission for enlargement is extended by the chair or the chair's delegate for good cause shown. A copy of the brief shall be forwarded by OPC counsel to the complainant.

(b)(3) Complainant's appearance. A complainant shall have the right to appear before the screening panel personally and, together with any witnesses called by the complainant, may testify.

(b)(4) Right to hear evidence; cross-examination. The complainant and the respondent shall have the right to be present during the presentation of the evidence unless excluded by the screening panel chair for good cause

shown. Respondent may be represented by counsel, and complainant may be represented by counsel or some other representative. Either complainant or respondent may seek responses from the other party at the hearing by posing questions or areas of inquiry to be asked by the panel chair. Direct cross-examination will ordinarily not be permitted except, on request, the panel chair deems that it would materially assist the panel in its deliberations.

(b)(5) Hearing Record. The proceedings of any hearing before a screening panel under this subsection (b) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings. Pursuant to its function as secretary to the Committee under Rule 14-503(h)(1), OPC shall be responsible for the assembly of the complete record of the proceedings, to be delivered to the chair of the Committee upon the rendering of the panel's recommendation to the Committee chair. The record of the proceedings before the panel shall be preserved for not less than one year following delivery of the panel's recommendation to the chair of the Committee and for such additional period as any further proceedings on the matter are pending or might be instituted under this section.

(b)(6) Screening panel determination. Upon review of all the facts developed by the informal complaint, answer, investigation and hearing, the screening panel shall make one of the following determinations:

(b)(6)(A) The preponderance of evidence presented does not establish that the respondent was engaged in unprofessional conduct, in which case the informal complaint shall be dismissed. OPC counsel shall promptly give notice of such dismissal by regular mail to the complainant and the respondent. A letter of caution may also be issued with the dismissal. The letter shall be signed by OPC counsel or the screening panel chair and shall serve as a guide for the future conduct of the respondent. The complainant shall also be confidentially notified of the caution;

(b)(6)(B) The informal complaint shall be referred to the Diversion Committee to be processed in accordance with the provisions of Rule 14-533;

(b)(6)(C) The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent be admonished;

(b)(6)(D) The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent receive a public reprimand; or

(b)(6)(E) A formal complaint shall be filed against the respondent pursuant to Rule 14-511.

(b)(7) Recommendation of admonition or public reprimand. A screening panel recommendation that the respondent should be disciplined under subsection (b)(6)(C) or (b)(6)(D) shall be in writing and shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished or publicly reprimanded. A copy of such screening panel recommendation shall be delivered to the Committee chair and a copy served upon the respondent.

(b)(8) Determination of appropriate sanction. In determining an appropriate sanction and only after having found unethical conduct, the screening panel may consider any admonitions or greater discipline imposed upon the respondent within the five years immediately preceding the alleged offense.

(b)(9) Continuance of disciplinary proceedings. A disciplinary proceeding may be held in abeyance by the Committee prior to the filing of a formal complaint when the allegations or the informal complaint contain matters of substantial similarity to the material allegations of pending criminal or civil litigation in which the respondent is involved.

(c) Exceptions to admonitions and public reprimands. Within 30 days after service of the recommendation of an admonition or public reprimand on respondent, respondent may file with the Committee chair exceptions to the recommendation and may request a hearing. The exceptions shall include a memorandum, not to exceed 20 pages, stating the grounds for review, the relief requested and the bases in law or in fact for the exceptions.

(d) Procedure on exceptions.

(d)(1) Hearing not requested. If no hearing is requested, the Committee chair will review the record compiled before the screening panel.

(d)(2) Hearing requested. If a request for a hearing is made, the Committee chair or a screening panel chair designated by the Committee chair shall serve as the Exceptions Officer and hear the matter in an expeditious manner, with OPC counsel and the respondent having the opportunity to be present and give an oral presentation. The complainant need not appear personally. However, upon motion to the Exceptions Officer and for good cause shown, respondent may seek to augment the record before the screening panel or the original brief on exceptions, including:

(d)(2)(A) A request to call complainant as an adverse witness for purposes of cross-examination if complainant was not subject to direct cross-examination before the screening panel, and

(d)(2)(B) A request for time to obtain a transcript of the screening panel proceedings to support respondent's exceptions, the cost of such transcript to be borne by respondent. If a transcript is requested, OPC will provide the Committee chair with the transcript as transcribed by a court reporting service, together with an affidavit establishing the chain of custody of the record.

(d)(3) Burdon of proof. A respondent who files exceptions under this section (d) shall have the burden of showing that the recommendation of the screening panel is unsupported by substantial evidence or is arbitrary, capricious, legally insufficient or otherwise clearly erroneous.(d)(4) OPC response. The Exceptions Officer may request a written response from OPC to exceptions filed by respondent.

(d)(5) Record on exceptions. The proceedings of any hearing on exceptions under this subsection (d) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings.

(e) Final Committee disposition. Either upon the completion of the exceptions procedure under subsection (d) or if no exceptions have been filed by respondent under subsection (c), the Committee chair shall issue a final, written determination that either sustains, dismisses, or modifies the disciplinary recommendation of the screening panel. A modification of the screening panel's recommendation of discipline may not:(e)(1) Be more severe than the original recommendation of the screening panel; nor

(e)(2) Require OPC to file a formal complaint under Rule 14-511.

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(f)(5)(A) Based on a determination of fact that is not supported by substantial evidence when viewed in light of the whole record before the Court;

(f)(5)(B) An abuse of discretion;

(f)(5)(C) Arbitrary or capricious; or

(f)(5)(D) Contrary to Articles 5 and 6 of Chapter 14 of the Rules of Professional Practice of the Supreme Court.

(g) General procedures.

(g)(1) Testimony. All testimony given before a screening panel or the Exceptions Officer shall be under oath.

(g)(2) Service. To the extent applicable, service or filing of documents under this Rule is to be made in accordance with Utah Rules of Civil Procedure 5(b)(1), 5(d) and 6(a).

(g)(3) Form of Documents. Documents submitted under this Rule shall conform to the requirements of Rules 27(a) and 27(b) of the Utah Rules of Appellate Procedure, except it is not required to bind documents along the left margin.

January 11, 2010

The Honorable Christine M. Durham
Utah Supreme Court
P.O. Box 140210
Salt Lake City, UT 84114-0210

Re: Lawyer Advertising

Dear Justice Durham:

As per the request of the Court, the Advisory Committee on the Rules of Professional Conduct has examined the issue of lawyer advertising.

Background

The Committee has reviewed the Utah rules, the ABA model rules, rules of other jurisdictions, and a recent opinion from the Utah State Bar's Ethics Advisory Opinion Committee. Members of the Committee have also talked to various representatives from the Utah State Bar. The Committee has also examined various court cases across the country challenging ethical rules regulating advertising.

As you know, the Utah rules are modeled quite closely after the ABA model rules. Most states have attorney advertising rules similar to the ABA model rules and similar to Utah's rules. However, there are some notable departures. California, Texas, Louisiana, and Florida have very detailed rules regulating attorney advertising. Texas, Louisiana, and Florida all have rules requiring the pre-screening of certain kinds of advertising.

Legal challenges that have been asserted to advertising rules have primarily addressed First Amendment and prior restraint issues. It appears that those jurisdictions with the most detailed and restrictive rules have confronted the most legal challenges.

A newly decided and instructive case is Public Citizen Inc. v. Louisiana Disciplinary Board, et al, 642 F. Supp. 2d 539 (E.D.La. 2009). In this case, the constitutionality of the Louisiana advertising rules was addressed. The court provides a good explanation of the process followed by the Bar and the Louisiana Supreme Court in preparing and investigating the rules, including surveys that were taken to determine the level of both public and lawyer attitudes about advertising. Not all the parts of the

advertising rules were questioned by the plaintiffs. Interestingly, part of the rule requiring pre-screening of advertisements was only attacked as it applied to internet advertisements, which the court did find was unconstitutional, in part, because no survey had addressed attitudes towards internet advertising. The court applied two analytical approaches to the constitutional issue:

First, under the United States Supreme Court cases on commercial speech/advertising the court found there is no constitutional protection for untruthful advertising and advertising related to unlawful activities. Therefore, to the extent the rules address regulation of that type of speech, there is no constitutional protection.

Second, the court noted that if the advertising is not misleading, or is only potentially misleading, the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 563-64 (1980) held that "states may regulate if they articulate a substantial interest in doing so, if the regulation is narrowly drawn, and if the challenged interference with speech is in proportion of the interest served." Public Citizen, Inc., 642 F.Supp. 2d at 552.

The Louisiana District Court upheld the constitutionality of some parts of the advertising rule under consideration based on both the first and the second analytical approaches and struck down some parts of the rule under the second analytical approach. A copy of the opinion is enclosed.

The Utah State Bar Ethics Advisory Opinion Committee recently examined the issue of attorney advertising in Opinion No. 09-01. In summary, this opinion suggests that each advertisement should be evaluated on its own merits to determine whether or not it is misleading. The opinion cites commentators that argue against "attempts to impose more burdensome and categorical prohibitions," because they "are likely to lead to little but constitutional litigation." A copy of that opinion is enclosed.

Recommendations

Based upon the review and analysis conducted by the Supreme Court's Advisory Committee on the Rules of Professional Conduct, the Committee recommends, with the exception of Rule 8.2, that the Utah Rules of Professional Conduct not be amended at this time. This is not to say that some amendments may not be helpful, but the Committee is concerned that if any amendments are made, they should be very carefully crafted

because of First Amendment and free speech issues. Also, and more importantly, it is the Committee's view that some fairly extensive task force work would need to be done by the Bar to show a substantial need and state interest in further regulating attorney advertising so that a sufficient foundation for the new rules or amendments would be in place. As we have studied the issue, we have concluded that such a foundation is critical to help insure that new and more restrictive rules or amendments regarding attorney advertising would withstand constitutional challenges. At this point, although the Bar did send out a general survey about the Office of Professional Conduct, it is the opinion of the Committee that the issue of lawyer advertising has not been studied in sufficient depth to create the kind of necessary constitutional foundation.

The Committee further feels that some of the cautionary language contained in Advisory Opinion No. 09-01 needs to be carefully considered. Because of First Amendment issues, the Committee concluded that Utah needs to tread carefully and deliberately before making changes to the rules. In this regard, it may be wise for the Committee to monitor jurisdictions such as Louisiana, Texas, California, and Florida to gauge what kind of litigation may take place in those jurisdictions challenging their existing rules before we embark on major revisions to the Utah rules.

As the Committee has reflected upon the issue of lawyer advertising, the Committee concluded that part of the problem with misleading advertisements in Utah is that very rarely does anyone file a complaint with the Office of Professional Conduct. It would seem to the Committee that the Office of Professional Conduct could initiate complaints on its own and that members of the Bar and public who are concerned with inappropriate advertisements could also file complaints. The fact that not many of these kinds of complaints are filed in Utah suggests to the Committee either that the advertising problem in Utah may not be as egregious as the problem seems to be in other more populous and more litigious jurisdictions, or that enforcement of the existing rules in Utah may be too lax.

Rule 8.2

As stated earlier, although the Committee is not recommending amendments to Rule 7.1 through 7.6, the Committee does recommend a minor amendment to Rule 8.2. The Committee recommends that Rule 8.2 be amended as follows:

> (a) A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the *judicial system*, qualifications or integrity of a judge, adjudicatory officer, or a candidate for election or appointment to a judicial office.

The Committee recommends a similar revision to comment 3 of Rule 8.3 so that the new comment would read as follows:

> [3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges, ~~and~~ courts, *and the judicial system whenever they are* unjustly criticized.

The Committee believes that the minor proposed amendment to Rule 8.2 would satisfy one of the concerns set forth in your letter of August 12, 2009 wherein you state: "The Court is particularly concerned about lawyer advertising that unfairly maligns the court systems as a whole."

Thank you for giving the Committee the opportunity to examine the lawyer advertising rules for the State of Utah. Please let me know if the Court has any questions or would like the Committee to take a look at any other aspect of this matter at the present time.

Yours truly,

Robert A. Burton

RAB/ls
Enclosures

Service: Get by LEXSEE®
Citation: 642 F. Supp. 2d 539

*642 F. Supp. 2d 539, *; 2009 U.S. Dist. LEXIS 67244, **

View Available Briefs and Other Documents Related to this Case

PUBLIC CITIZEN, INC., ET AL. VERSUS LOUISIANA ATTORNEY DISCIPLINARY BOARD, ET AL.

CIVIL ACTION NO. 08-4451 SECTION "F"

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

642 F. Supp. 2d 539; 2009 U.S. Dist. LEXIS 67244

August 3, 2009, Decided
August 3, 2009, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, a public citizens organization and two lawyers and their firms, challenged La. St. Bar. art. XVI, R. 7.2(c)(1)(D), (E), (I), (J), (10), 7.5(b)(2)(C), 7.6(d), 7.7, of the Louisiana Rules of Professional Conduct, which were to be effective October 1, 2009. Defendants, who included the Louisiana Attorney Disciplinary Board, moved to dismiss and sought summary judgment. Plaintiffs also sought summary judgment.

OVERVIEW: The Louisiana State Bar Association had presented Findings and Recommendations which were impressive and survey results were also submitted. Rule 7.2(c)(1)(E)'s prohibition of communications promising results regulated only inherently misleading speech. Rule 7.2(c)(1)(J) survived as portraying of a judge or jury in an ad was inherently misleading. Rule 7.2(c)(1)(L) survived as supported by survey evidence and it could not be more narrowly tailored. Rule 7.2(c)(1)(D) was supported by survey results that targeted the public's perception of testimonials. Rule 7.2(c)(1)(I) did not violate the First Amendment, nor did Rule 7.2(c)(10)'s written disclaimer requirements, since disclaimers had a beneficial purpose. But, the Findings did not support additional disclosures for a spokesperson under Rule 7.5(b)(2)(C); it did not directly and materially advance a state interest. Rule 7.6(d) was incompatible with "pay-per-click" online advertising and there was no evidence it advanced a state interest and was not narrowly tailored. Internet advertising differed significantly from advertising in traditional media and presented unique issues, which was not considered in formulating Rule 7.7.

OUTCOME: Defendants' motion to dismiss was denied. Defendants' summary judgment motions were granted as to Rules 7.2(c)(1)(D), (E), (I), (J), (L), and (10), and denied in all other respects. Plaintiffs' motions were granted as to Rule 7.5(b)(2)(C), 7.6(d), and 7.7 (as it pertained to filing requirements for Internet advertising), but were denied in all other respects.

CORE TERMS: advertising, advertisement, misleading, disclaimer, summary judgment, spokesperson, portrayal, ads, law firm, commercial speech, disclosure, deceptive, spoken, inherently, substantial interest, truthful, unsolicited, materially, consumer, scenes, testimonial, disclosure requirements, profession, motto, narrowly drawn, narrowly tailored, hypothetical, deception, print, trade name

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

HN1 Fed. R. Civ. P. 12(b)(1), (h)(3), govern dismissals for lack of subject matter jurisdiction. A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case. In determining whether jurisdiction exists, the court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Questions > General Overview

HN2 Federal courts have jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C.S. § 1331. Whether a claim "arises under" federal law is determined by examining the allegations of what must be a well-pleaded complaint. And the federal question must appear on the face of

the complaint. More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
HN3 A motion to dismiss under Fed. R. Civ. P. 12(b)(1) requires that the court only examine whether it has jurisdiction to hear the case; it does not call for intrusion into the merits of the claim. Jurisdiction, therefore, is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. Dismissal for lack of subject-matter jurisdiction is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of the United States Supreme Court, or otherwise completely devoid of merit as not to involve a federal controversy. More Like This Headnote

Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Legal Entitlement
HN4 Fed. R. Civ. P. 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. A genuine issue of fact exists only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Absence of Essential Element of Claim
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Standards > Appropriateness
HN5 The mere argued existence of a factual dispute does not defeat an otherwise properly supported motion for summary judgment. Therefore, if the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. Hearsay evidence and unsworn documents do not qualify as competent opposing evidence. Finally, in evaluating the summary judgment motion, the court must read the facts in the light most favorable to the non-moving party. More Like This Headnote

Civil Procedure > Justiciability > Case or Controversy Requirements > General Overview
Civil Procedure > Justiciability > Standing > Burdens of Proof
Constitutional Law > The Judiciary > Case or Controversy > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation
HN6 U.S. Const. art. III restricts federal judicial power to cases and controversies. The court must determine whether the conflicting contentions of the parties present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. The plaintiffs bear the burden of establishing standing and ripeness under U.S. Const. art. III. More Like This Headnote

Civil Procedure > Justiciability > Standing > Injury in Fact
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements
Governments > Legislation > General Overview
HN7 To establish standing, plaintiffs must answer to three factors: (1) an injury in fact which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection -- an injury that is fairly traceable to the challenged conduct; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Plaintiffs must show standing, even in a facial challenge to a statute because a litigant only has standing to vindicate his own constitutional rights. In a suit challenging the legality of government action or inaction, if the plaintiff is himself an object of the action, there is ordinarily little question that the action has caused him injury, and that a judgment preventing the action will redress it. More Like This Headnote

Civil Procedure > Justiciability > Standing > Injury in Fact
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Standing
HN8 The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury for purposes of standing. One who is challenging a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement; one does not have to await the consummation of threatened injury to obtain preventive relief. In the freedom of speech context, a harm of self-censorship can be realized even without an actual prosecution. Chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement. A credible threat of present or future prosecution is an injury sufficient to confer standing, even if there is no history of past enforcement. The Fifth Circuit takes a generous view on this point. The phrase "credible threat of prosecution" is quite forgiving. When dealing with statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary

evidence. More Like This Headnote

Civil Procedure > Justiciability > Standing > Injury in Fact
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > General Overview
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Standing
HN9 Courts are probably entitled to assume that law enforcement agencies will not disregard a recent expression of the legislature's will for purposes of standing and First Amendment challenges. More Like This Headnote

Legal Ethics > Legal Services Marketing > Advertising
HN10 See La. St. Bar. art. XVI, R. 7.7(h).

Civil Procedure > Justiciability > Standing > Third Party Standing
Constitutional Law > The Judiciary > Case or Controversy > Standing > Third Party Standing
HN11 Associations have standing to bring suit on behalf of their members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
HN12 The First Amendment not only guarantees a right to speak, but also protects the right to receive information and ideas. If there is a right to advertise, there is a reciprocal right to receive the advertising. More Like This Headnote

Civil Procedure > Justiciability > Ripeness > Imminence
Civil Procedure > Justiciability > Ripeness > Tests
Civil Procedure > Justiciability > Standing > Injury in Fact
Constitutional Law > The Judiciary > Case or Controversy > Ripeness
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements
HN13 A court should dismiss a case for lack of ripeness when the case is abstract or hypothetical. The two key considerations for a ripeness determination are the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. A case is generally ripe if any remaining questions are purely legal ones. Ripeness and standing share a kinship, particularly in the shared requirement that the injury be imminent rather than conjectural or hypothetical. More Like This Headnote

Civil Procedure > Justiciability > Ripeness > Tests
Constitutional Law > The Judiciary > Case or Controversy > Ripeness
HN14 Requiring a regulated party to proceed without knowing whether a statute is valid due to dismissal for lack of ripeness would impose a palpable and considerable hardship. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
HN15 Commercial speech is protected by the First Amendment. Some regulation of commercial speech is clearly permissible, but a state may not do so by keeping the public in ignorance of truthful information. Commercial speech is afforded a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment protections, allowing modes of regulation that might be impermissible in the realm of noncommercial expression. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Legal Ethics > Legal Services Marketing > Advertising
HN16 Advertising by attorneys may not be subjected to blanket suppression, but advertising by attorneys may still be regulated in some ways. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Misleading Speech
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
HN17 For commercial speech to come within the First Amendment's protections, it at least must concern lawful activity and not be misleading. The United States Supreme Court has focused and made essential the integrity of the information. Because disclosure of truthful relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information, only false, deceptive, or misleading commercial speech may be banned. Therefore, truthful advertising related to lawful activities is entitled to the protections of the First Amendment, but misleading advertising may be prohibited entirely. However, 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. If a form of advertising is not

misleading, or is only potentially misleading, states may regulate if they articulate a substantial interest in doing so, if the regulation is narrowly drawn, and if the challenged interference with speech is in proportion to the interest served. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Misleading Speech
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Evidence > Procedural Considerations > Burdens of Proof > Allocation

HN18 If regulated advertising is not misleading, or is only potentially misleading, a court addressing a First Amendment challenge must apply the Central Hudson test to determine if the restrictions are narrowly tailored to further a substantial government interest, making regulation still permissible. In making these determinations, it is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. 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. The Fifth Circuit has held that evidence used to justify the state's regulation need not exist pre-enactment. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Misleading Speech
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

HN19 If a state can show that certain advertising is inherently likely to deceive or has produced a record indicating that a particular form or method of advertising has in fact been deceptive, it is entitled to prohibit that advertising. Commercial speech is misleading when it is inherently likely to deceive the public and if it is devoid of intrinsic meaning. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Misleading Speech
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Legal Ethics > Legal Services Marketing > Advertising

HN20 La. St. Bar. art. XVI, R. 7.2(c)(1)(E)'s prohibition of communications that promise results regulates only speech that is inherently misleading. Therefore, this type of advertising may be freely regulated. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Misleading Speech
Legal Ethics > Legal Services Marketing > Advertising

HN21 A portrayal of a judge or jury in an ad for legal services is inherently misleading. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Misleading Speech
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

HN22 Absent material that is inherently misleading, a state may regulate commercial speech if it satisfies the three-prong Central Hudson test: (1) the state must assert a substantial interest in support of the regulation; (2) the state must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation must be narrowly drawn. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Legal Ethics > Legal Services Marketing > Advertising

HN23 The United States Supreme Court has given consistent recognition to the states' important interests in maintaining standards of ethical conduct in the licensed professions. It has also expressed some reservation whether a state's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. But, the Court has recognized that the states have a compelling interest in the practice of professions within their boundaries, and the interest of the states in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice, and have historically been officers of the courts. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Legal Ethics > Legal Services Marketing > Advertising

HN24 The state may not by scatter-shot condemn lawyer advertising, but does indeed have a substantial interest in addressing the ethical standards of the profession, as well as in preventing public confusion or deception. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

HN25 The state, in regulating commercial speech, must demonstrate that the challenged regulation advances a governmental interest in a direct and material way. That burden cannot be satisfied by mere speculation or conjecture; rather, the state must show that the harms are real and the restriction will in fact alleviate them

to a material degree. The United States Supreme Court has required evidentiary support in the forms of empirical data or anecdotes to support the state's regulation. Empirical data need not be accompanied by a surfeit of background information, and the regulation can be justified by reference to studies and anecdotes pertaining to different locales altogether, or can be based solely on history, consensus, and simple common sense. In short, the state must demonstrate some basis for its regulation with evidentiary support. To be "narrowly drawn" in the commercial speech context, the regulation need not be the least restrictive means of advancing the state's interest. Instead, there must be a reasonable fit between the state's interest and the means chosen to accomplish those ends. They should be no more extensive than reasonably necessary to further substantial interests, and in proportion to the interest served. More Like This Headnote

Legal Ethics > Legal Services Marketing > Advertising

HN26 The Louisiana Rules of Professional Conduct governing the use of events, scenes, or pictures that are not authentic, portrayals of a client by a non-client, and use of a non-lawyer spokesperson, condone each of these advertising techniques as long as they include a disclaimer as provided by La. St. Bar. art. XVI, R. 7.2 (c)(10). The disclaimer provision requires that written disclaimers be in a print size at least as large as the largest print size used in the advertisement, spoken disclosures be spoken at the same or slower rate of speed as the other spoken content of the advertisement, and all disclosures used in advertisements that are televised or displayed electronically shall be both spoken aloud and written legibly. Additionally, when a spokesperson is used, a spoken and written disclosure must identify the spokesperson as such, that the spokesperson is not a lawyer, and that the spokesperson is being paid to be a spokesperson, if paid. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

HN27 The United States Supreme Court advises that there are material differences between disclosure requirements and outright prohibitions on commercial speech. Warnings or disclaimers as safeguards might be appropriately required in order to dissipate the possibility of consumer confusion or deception. At the same time, the Supreme Court also admitted that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling the protected commercial speech. An advertiser's rights are adequately protected as long as the disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

HN28 Requiring a disclaimer as to commercial speech is unconstitutionally restrictive when the detail required in the disclaimer effectively rules out the desired advertising on a business card or letterhead, or in a yellow page listing. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

Legal Ethics > Legal Services Marketing > Advertising

HN29 La. St. Bar. art. XVI, R. 7.5(b)(2)(C) does not directly and materially advance the state's interests, and, therefore, violates the First Amendment. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

Legal Ethics > Legal Services Marketing > Advertising

HN30 La. St. Bar. art. XVI, R. 7.2(c)(1)(J)'s regulation of portrayals of a judge or jury in an advertisement directly and materially advances the state's interests for purposes of a First Amendment challenge. The Rule on the portrayal of judges and juries directly and materially advances the state's interest in maintaining the standards of the legal profession, as well as protecting against the deception of the public. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

Legal Ethics > Legal Services Marketing > Advertising

HN31 La. St. Bar. art. XVI, R. 7.2(c)(1)(L) materially advances the state's interest in preventing deception of the public, and is narrowly tailored to achieve those ends. This regulation, aimed at prohibiting lawyers from using mottos or slogans that imply to the public that they can achieve results when future results can never be predicted, directly and materially advances the state's interests. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

HN32 While the least restrictive means need not be utilized to regulate commercial speech, the state must ensure that the restricted speech is proportional to the state's interest. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising

HN33 Internet advertising differs significantly from advertising in traditional media. The Internet presents unique

issues related to advertising and regulation of commercial speech. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Legal Ethics > Legal Services Marketing > Advertising
HN34 La. St. Bar. art. XVI, R. 7.6(d) is unconstitutional. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Advertising
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Legal Ethics > Legal Services Marketing > Advertising
HN35 La. St. Bar. art. XVI, R. 7.7 as it applies to the filing requirements for Internet advertising is unconstitutional. More Like This Headnote

Available Briefs and Other Documents Related to this Case:

U.S. District Court Motion(s)
U.S. District Court Pleading(s)

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For Scott G. Wolfe, Jr. (08-4994), Wolfe Law Group, LLC (08-4994), Consol Plaintiffs: Scott G. Wolfe, Jr., LEAD ATTORNEY, The Wolfe Law Offices, LLC, New Orleans, LA; Ernest Enrique Svenson, Svenson Law Firm, New Orleans, LA.

For Louisiana Attorney Disciplinary Board, Billy R. Pesnell, in his official capacity as Chair of the Louisiana Attorney Disciplinary Board, Charles B Plattsmier, in his official capacity as Chief Disciplinary Counsel for the Louisiana Attorney Disciplinary Board's Office of Disciplinary Counsel, Defendants: Phillip A. Wittmann, LEAD ATTORNEY, [**2] Kathryn Marie Knight, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Jessica Davidson Miller, John H. Belsner, PRO HAC VICE, O'Melveny & Myers, LLP (Washington), Washington, DC.

For Louisiana Attorney Disciplinary Board (08-4994), Billy R. Pesnell, in his official capacity as Chief Disciplinary Counsel for the Louisiana Attorney Disciplinary Board (08-4994), Charles B Plattsmier, in his official capacity as Chief Disciplinary Counsel (08-4994), Consol Defendants: Phillip A. Wittmann, LEAD ATTORNEY, Kathryn Marie Knight, Matthew S. Almon, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA.

JUDGES: MARTIN L. C. FELDMAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: MARTIN L. C. FELDMAN

OPINION

[*544] ORDER AND REASONS

The pending motions orbit one central question: Can Louisiana's proposed Rules regarding lawyer advertising withstand Constitutional scrutiny?

Before the Court are the defendants' Motion to Dismiss and Motion for Summary Judgment; the Motion of Public Citizen, Inc., et al. for Summary Judgment; and the Motion of Scott G. Wolfe, Jr. et al for Summary Judgment. The defendants' Motion to Dismiss is DENIED, and the motions [**3] for summary judgment are GRANTED IN PART and DENIED IN PART, subject to the reasons below. The parties shall submit a Judgment within ten days that is consistent with this Order and Reasons.

Background

The Louisiana legislature adopted a concurrent resolution in 2006, stating that "the manner in which some members of the Louisiana State Bar Association are advertising their services in this state has become undignified and poses a threat to the way lawyers are perceived." The resolution called on the Louisiana Supreme Court to establish a committee to study lawyer advertising and to recommend changes to Part 7 of the Louisiana Rules of Professional Conduct, which governs lawyer advertising, by March 1, 2007. The Louisiana Supreme Court created the Committee to Study Attorney Advertising, which obtained a copy of a Florida survey that gauged the public's views on attorney advertising.

The LSBA Rules of Professional Conduct Committee met four times between September 21, 2006 and October 6, 2006 to assemble a series of proposed amendments to lawyer advertising Rules. The Supreme Court Committee then met on October 23, 2006 to consider the proposed amendments and voted to endorse them. The [**4] LSBA Committee also held four public hearings on the proposed Rule changes between November 2, 2006 and November 16, 2006. After all that, the Louisiana House of Delegates voted on June 7, 2007 to accept the LSBA Committee's proposal and recommended that the Louisiana Supreme Court incorporate the proposed Rules into the Rules of Professional Conduct. On July 3, 2008, the Louisiana Supreme Court adopted the Rules, to become effective on December 1, 2008.

Plaintiffs filed suit and sought a preliminary injunction against enforcement of the Rules in Fall 2008. In response, the Louisiana Supreme Court postponed the effective date of the Rules until April 1, 2009. During that time, the LSBA commissioned a survey on the attitudes of consumers and lawyers toward lawyers and lawyer advertising in Louisiana. After the completion of the survey, on February 18, 2009, the Louisiana Supreme Court ordered that the effective date of the new Rules be deferred until October 1, 2009 "to allow the LSBA and the Court to further study certain Rules in light of the constitutional challenges that have been raised." On March 11, 2009, the Louisiana Supreme Court [*545] asked the LSBA Committee to review several of [**5] the challenged Rules.

The LSBA Committee reported back on April 15, 2009, and recommended that the high court modify the Rules prohibiting celebrity spokespeople, non-authentic scenes, and actors playing clients - so as to permit such commercials if accompanied by a special disclaimer or disclosure. On June 4, 2009, the Louisiana Supreme Court adopted the LSBA Committee's final recommendations as drafted and changed during the investigative process; October 1, 2009 is the effective date of the new Rules.

Public Citizen, Inc., Morris Bart, Morris Bart LLC, William N. Gee, III, and William N. Gee, III, Ltd. ("Public Citizen plaintiffs") challenge the following Rules:

Rule 7.2(c)(1)(D): prohibiting as false, misleading, or deceptive communications that "contain[] a reference or testimonial to past successes or results obtained, except as allowed in the Rule regulating information about a lawyer's services provided upon request."

Rule 7.2(c)(1)(E): prohibiting as false, misleading, or deceptive communications that "promise[] results."

Rule 7.2(c)(1)(I): prohibiting as false, misleading, or deceptive communications that "include[] a portrayal of a client by a non-client without disclaimer of [**6] such, as required by Rule 7.2(c)(10), or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer of such, as required by Rule 7.2(c)(10)."

Rule 7.2(c)(1)(J): prohibiting as false, misleading, or deceptive communications that "include[] the portrayal of a judge or a jury." [1]

FOOTNOTES

1 This Rule contains additional prohibitions that the plaintiffs do not challenge: "the portrayal of a lawyer by a non-lawyer, the portrayal of a law firm as a fictionalized entity, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise implies that lawyers are associated in a law firm if that is not the case."

Rule 7.2(c)(1)(L): prohibiting as false, misleading, or deceptive communications that "utilize[] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter."

Rule 7.2(c)(10): "Any words or statements required by these Rules to appear in an advertisement or unsolicited written communication must be clearly legible if written or intelligible if spoken aloud.

"All disclosures and disclaimers required by these Rules shall be clear and conspicuous. Written disclosures and disclaimers [**7] shall use a print size at least as large as the largest print size used in the advertisement or unsolicited written communication, and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and read the disclosure or disclaimer. Spoken disclosures and disclaimers shall be plainly audible and spoken at the same or slower rate of speed as the other spoken content of the advertisement. All disclosures and disclaimers used in advertisements that are televised or displayed electronically shall be both spoken aloud and written legibly."

Rule 7.5(b)(2)(C): allowing "a non-lawyer spokesperson speaking on behalf of the lawyer or law firm, as long as that spokesperson shall provide a spoken and written disclosure, as required by Rule 7.2(c)(10), identifying the spokesperson as a spokesperson, disclosing that the spokesperson is not a lawyer and disclosing that the spokesperson is being paid to be a spokesperson, if paid."

Scott G. Wolfe, Jr. and Wolfe Law Group, LLC ("Wolfe plaintiffs") challenge the following Rules, as they relate to Internet-based [*546] advertising and communications:

Rule 7.2(a): requiring that advertisements and unsolicited [**8] written communications contain the name of at least one lawyer responsible for their content and one or more bona fide office location(s), by city or town, of the lawyer or

lawyers who will actually perform the services advertised.

Rule 7.2(c)(10): specifying the disclosure requirements: all written disclosures shall be in a type as large as the largest print size used in the advertisement and all advertisements that are televised or displayed electronically shall be both spoken aloud and written legibly.

Rule 7.2(c)(11): "No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm."

Rule 7.6(a): defining "computer-accessed communications" as "information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere."

Rule 7.6(c)(3): requiring that unsolicited electronic mail **[**9]** communications state "LEGAL ADVERTISEMENT" in the subject line.

Rule 7.6(d): "**Advertisements.** All computer-access communications concerning a lawyer's or law firm's services, other than those subject to subdivisions (b) [2] and (c) [3] of this Rule, are subject to the requirements of Rule 7.2 [4] when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

FOOTNOTES

2 Rule 7.6(b) is titled "Internet Presence" and governs "[a]ll World Wide Web sites and home pages accessed via the Internet that are controlled, sponsored, or authorized by a lawyer or law firm and that contain information concerning the lawyer's or law firm's services."

3 Rule 7.6(c) is titled "Electronic Mail Communications," and applies to unsolicited electronic mail communications to a prospective client for the purpose of obtaining professional employment.

4 Rule 7.2 is titled "Communications Concerning A Lawyer's Services" and contains the requirements for what may or may not be contained in advertisements and unsolicited written communications, as well as disclosure requirements.

Rule 7.7: explaining the duties of the LSBA Committee and the evaluation process for lawyer advertising, including a fee for filing a proposed **[**10]** advertisement for evaluation.

Defendants move to dismiss plaintiffs' complaints; they also seek summary judgment. In their motion to dismiss, defendants assert this Court does not have subject matter jurisdiction to hear the claims because the case is not ripe for adjudication and plaintiffs do not have standing to sue.

Defendants vigorously contend: plaintiffs do not have standing to sue because they have no injury in fact or imminent risk of harm; they have failed to show how any concrete injury is causally connected to any of defendants' actions; and their claims are not redressable by a decision by this Court because they have not shown that their advertisements would comply with the other new lawyer advertising Rules. They add that Public Citizen lacks associational standing because it has failed to identify a willing speaker who would **[*547]** otherwise have standing and alleges only a generalized grievance.

Defendants add that plaintiffs have not submitted any advertisements to the LSBA for review, the LSBA has not found any of their advertisements to be non-compliant, and none of the defendants have threatened disciplinary action against any of the plaintiffs under the new Rules. They **[**11]** characterize plaintiffs' concerns as merely a subjective fear that their future advertisements will violate the Rules once they become effective October 1, 2009. Thus, they urge, this matter is not ripe for adjudication.

Finally, defendants argue that the Rules only prohibit content and methods that are inherently misleading, which they are constitutionally permitted to regulate. The also argue that, even if the Court finds the restricted advertising is not inherently misleading, the Central Hudson test validates the constitutional integrity of the Rules because: the State has a substantial interest in the Rules; the Rules directly and materially advance the State's substantial interest; and the Rules are in reasonable proportion to the interests served (they are as narrowly drawn as possible).

In the summary judgment motion against the Wolfe plaintiffs, defendants assert that the overbreadth doctrine does not apply to commercial speech, and, therefore, cannot be the basis of invalidating these Rules; prior review of lawyer advertisements is not a prior restraint on speech; and the Rules only apply to commercial speech.

The plaintiffs counter and stress that they do have standing to contest **[**12]** the Rules because, importantly, their injury is one of self-censorship, which is sufficient for standing in a First Amendment context. Further, plaintiffs argue that the defendants have not submitted sufficient evidence to show that the attorney advertising is misleading or deceptive. They contend for an actual deception threshold and, from that, conclude that the Rules fail the Central Hudson test.

The Wolfe plaintiffs argue that the Rules' Internet provisions violate Central Hudson because there is no evidence the provisions are necessary, they were not narrowly drawn, and they are unconstitutionally vague. More significantly, they point out that the studies the Committee looked at contained no questions about attorney advertising on the Internet, and the Committee had no other evidence that Internet advertising is misleading or otherwise requires regulation. They draw attention to the differences between Internet ads and other advertising media.

I. STANDARD

A. Motion to Dismiss

HN1 Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure govern dismissals for lack of subject matter jurisdiction. "A case is properly dismissed for lack of subject matter jurisdiction when the court **[**13]** lacks the statutory or constitutional power to adjudicate the case." Home Builders Ass'n of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998). In determining whether jurisdiction exists, the Court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the Court's resolution of disputed facts. Clark v. Tarrant County, 798 F.2d 736, 741 (5th Cir. 1986). HN2 Federal courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Whether a claim "arises under" federal law is determined by examining the allegations of what must be a well-pleaded complaint. See Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808, **[*548]** 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986). And the federal question must appear on the face of the complaint. See Tores v. Southern Peru Copper Corp., 113 F.3d 540, 542 (5th Cir. 1997) (citations omitted).

HN3 A motion to dismiss under Rule 12(b)(1) requires that the Court only examine whether it has jurisdiction to hear the case; it does not call for intrusion into the merits of the claim. Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946). **[**14]** "Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." Id. Dismissal for lack of subject-matter jurisdiction "is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy." Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (internal quotations omitted).

B. Summary Judgment

HN4 Rule 56 of the Federal Rules of Civil Procedure instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The Court emphasizes **[**15]** that HN5 the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. See Donaghey v. Ocean Drilling & Exploration Co., 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. Id. Hearsay evidence and unsworn documents do not qualify as competent opposing evidence. Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir. 1987). Finally, in evaluating the summary judgment motion, the court must read the facts in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255.

II. JUSTICIABILITY

HN6 Article III of the United States Constitution restricts federal judicial power to cases and controversies. **[**16]** This Court must determine "whether the conflicting contentions of the parties present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." Babbit v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). The plaintiffs bear the burden of establishing standing and ripeness under Article III. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006); Miss. State Democratic Party v. Barbour, 529 F.3d 538, 545 (5th Cir. 2008).

[*549] A. Standing of Lawyer/Law Firm Plaintiffs

HN7 To establish standing, plaintiffs must answer to three factors: (1) an injury in fact which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection - an injury that is fairly traceable to the challenged conduct; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Plaintiffs must show standing, even in a facial challenge to a statute because "a litigant only has standing to vindicate his own constitutional rights." Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); **[**17]** but see Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) ("[I]n the First Amendment context, litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from

constitutionally protected speech or expression."). In a suit challenging the legality of government action or inaction, if the plaintiff is himself an object of the action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." Lujan, 504 U.S. at 561-62.

1. Injury in Fact

HN8 "The loss of First Amendment freedoms," the Fifth Circuit instructs, "for even minimal periods of time, unquestionably constitutes irreparable injury." Croft v. Governor of Texas, 562 F.3d 735, 745 (5th Cir. 2009) (quoting Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). One who is challenging a statute "must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement[;] . . . one does not have to await the consummation [**18] of threatened injury to obtain preventive relief." Babbitt, 442 U.S. at 298. Plaintiffs draw attention to the need for self-censorship. In the freedom of speech context, a harm of "self-censorship . . . can be realized even without an actual prosecution." Am. Booksellers, 484 U.S. at 393. "Chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." Houston Chronicle Publ'g Co. v. City of League City, Texas, 488 F.3d 613, 618 (5th Cir. 2007). "A credible threat of present or future prosecution is an injury sufficient to confer standing, even if there is no history of past enforcement." Rangra v. Brown, 566 F.3d 515, 519 (5th Cir. 2009). Fifth Circuit literature on this point takes a generous view. The phrase "credible threat of prosecution is quite forgiving. When dealing with statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." Id.; see Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 818 (5th Cir. 1979) (holding that a justiciable controversy exists when "the plaintiff [**19] is seriously interested in disobeying, and the defendant seriously intent on enforcing, the challenged measure").

The lawyer and law firm plaintiffs meet the injury requirements in this case. Plaintiffs' affidavits state that they are currently running advertisements containing specific elements that violate the amended Rules, including non-authentic scenes, actors playing clients, and slogans that imply success or effectiveness. They have asserted that they will have to continue [*550] self-censoring their advertising if the Rules go into effect, and, but for the Rules, they would continue running ads containing elements prohibited by the Rules.

The defendants' submission that plaintiffs refer only to hypothetical and unspecified advertisements is contradictory to the record: the plaintiffs have noted specific advertising campaigns, slogans, and advertising techniques they currently use that would violate the Rules. This is in rather stark contrast to the recent Florida decision which defendants emphatically invoke, Harrell v. Florida Bar., Case No. 3:08-cv-15-J-34TEM (M.D. Fla. Mar. 31, 2009). In that case, the plaintiffs had not explained which ads would be effected by the challenged lawyer [**20] advertising Rules or how they would violate them. Id.

Additionally, the plaintiffs have established a "credible threat" of enforcement. As the Fifth Circuit noted in Krishna, HN9 "we are probably entitled to assume that law enforcement agencies will not disregard such a recent expression of the legislature's will." 601 F.2d at 821 ("[T]he probability of enforcement is not relevant to a court's jurisdiction over an anticipatory challenge."); Am. Booksellers, 484 U.S. at 393 ("We are not troubled by the pre-enforcement nature of this suit. The state has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."). The defendants' argument that the plaintiffs have not received a notice of non-compliance or applied for an advisory opinion from the LSBA Committee to determine the compliance of their ads misses the point; the Rules themselves note that HN10 "[a] finding by the Committee of either compliance or noncompliance shall not be binding in a disciplinary proceeding." Rule 7.7(h). As has been repeatedly reiterated, the plaintiffs need not await condemnation before presenting a challenge to what they assert are per se infirmities of the Rules.

2. [21] Causation**

The causation requirement for standing is also satisfied. The plaintiffs must show that their injuries are "fairly traceable" to the challenged conduct. Lujan, 504 U.S. at 560. They have done so. The defendants are responsible for attorney discipline in Louisiana. Although defendants correctly note they neither proposed nor approved the Rules, they would be the authorized ones to institute disciplinary proceedings about a violation of the Rules. Because plaintiffs' injuries implicate a credible fear of being charged with violating the Rules, they have established the requisite causal connection.

3. Redressability

It follows that a favorable ruling in this case would be likely to redress plaintiffs' claim of injuries. If this Court ruled in the plaintiffs' favor, the defendants would be prohibited from pursuing disciplinary proceedings against the plaintiffs for violating the Rules in their pursuit of clients by advertising. Plaintiffs are thus made to self-censor their advertisements because of the challenged Rules. Invalidating these Rules would remove the threat of accusations of violations of the challenged Rules and redress their injury. See Fed. Election Comm'n v. Akins, 524 U.S. 11, 25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998); [**22] Lujan, 504 U.S. at 561-62.

B. Associational Standing of Public Citizen

HN11 Associations have standing to bring suit on behalf of their members when: (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests [the association] seeks to protect are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." United Food and Commercial Workers Union Local 751 v. Brown [*551] Group, Inc., 517 U.S. 544, 553, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996).

Public Citizen fulfills each test. Public Citizen, it is undisputed, is a nonprofit public interest organization with 270 members in Louisiana, whose stated mission includes a claim to protect consumer rights and freedom of speech. The plaintiffs allege that the State's restrictions on lawyer advertising injure Public Citizen's Louisiana members, who are consumers of lawyer services, by preventing them from receiving information that they have an interest in receiving. The United States Supreme Court has recognized that HN12 the First Amendment not only guarantees a right to speak, but also protects the "right to receive information and ideas." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). [**23] In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court overturned regulations that restricted the right of pharmacists to advertise drugs; the challenge was undertaken by a consumer group representing their members' right to receive commercial drug advertisements. Id. at 754 n.10. The Court noted, "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these [plaintiffs]." Id. at 757; see also Am. Booksellers, 484 U.S. at 392 (holding that the plaintiff, an association, had standing in a First Amendment challenge to represent the rights of bookbuyers to receive information).

Similarly, Public Citizen comes to Court asserting the right of its members to receive lawyer advertising. For the same reasons discussed above, they will suffer an injury if these Rules unconstitutionally restrict the ability of lawyers to communicate and advertise their services to consumers. Therefore, Public Citizen's members would have standing to challenge the Rules. Further, the challenge is informed by Public Citizen's asserted goals of ensuring that its members are not restricted from receiving communications and [**24] truthful advertising regarding the availability of lawyer services. Finally, neither the claim nor the relief requested requires the participation of an individual member.

C. Ripeness

HN13 "A court should dismiss a case for lack of ripeness," we are reminded, "when the case is abstract or hypothetical." Miss. State Democratic Party, 529 F.3d at 545 (quoting Monk v. Huston, 340 F.3d 279, 282 (5th Cir. 2003)). The two key considerations for a ripeness determination are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Roark & Hardee LP v. City of Austin, 522 F.3d 533, 545 (5th Cir. 2008). "A case is generally ripe if any remaining questions are purely legal ones . . . ." Id. Ripeness and standing share a kinship, particularly in "the shared requirement that the injury be imminent rather than conjectural or hypothetical." Miss. State Democratic Party, 529 F.3d at 545.

This case is patently ripe for adjudication. The issues presented to this Court are "purely legal" and "further factual development of the issues" would not aid the Court in its determination. See Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998). The [**25] defendants would obfuscate the point by drawing attention to requirements for an "as-applied" challenge to the Rules. However, the plaintiffs' challenge is facial; the Court need only inquire as to whether the Rules pass constitutional muster, a textual and historical exercise. Further, the plaintiffs have asserted injury sufficient to establish hardship if the Court delays adjudication. The [*552] Supreme Court instructs that HN14 requiring a regulated party "to proceed without knowing whether the [statute] is valid would impose a palpable and considerable hardship." Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 581, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985).

III. THE FIRST AMENDMENT

The United States Supreme Court first recognized that HN15 commercial speech is protected by the First Amendment in Virginia State Board of Pharmacy in 1976. 425 U.S. at 770. The Court recognized that some regulation of commercial speech is "clearly permissible," but cautioned also that a state "may not do so by keeping the public in ignorance" of truthful information. Id. The High Court has pointedly commented that commercial speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment [**26] protections, . . . allowing modes of regulation that might be impermissible in the realm of noncommercial expression." Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 457, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). The Court specifically applied First Amendment protections to attorney advertising in Bates v. State Bar of Arizona, holding that HN16 "advertising by attorneys may not be subjected to blanket suppression," but reiterating that advertising by attorneys may still be regulated in some ways. 433 U.S. 350, 383, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

HN17 "For commercial speech to come within [the First Amendment's protections], it at least must concern lawful activity and not be misleading." Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). The Supreme Court has focused and made essential the integrity of the information: "Because disclosure of truthful relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information, only false, deceptive, or misleading commercial speech may be banned." Ibanez v. Fla. Dep't Of Bus. And Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 142, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994) (internal citations omitted). Therefore, "truthful advertising related to lawful activities [**27] is entitled to the protections of the First Amendment," but "[m]isleading advertising may be prohibited entirely." In re R.M.J., 455 U.S. 191, 202-03, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); see also Fla. Bar v. Went For It, Inc., 515 U.S. 618, 624, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995)). However, "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. at 203. If a form of advertising is not misleading, or is only potentially misleading, under the test first articulated in Central Hudson Gas & Electric Corp. v. Public Service Commission, states may regulate if they articulate a substantial interest in doing so, if the regulation is narrowly drawn, and if the challenged interference with speech is in proportion to the interest served. Id. (citing Central Hudson, 447 U.S. 557, 563-64, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)).

This Court must decide first if the advertising that the Rules target is either inherently misleading or has been proven to be misleading; if so, the state may "freely regulate" it. Went for it, 515 U.S. at 623-24. HN18 If the advertising is not misleading, or is only potentially misleading, this Court must then apply the [**28] Central Hudson test to determine if the restrictions are narrowly tailored to further a substantial government interest, making regulation still permissible. In making these determinations, [*553] the Court notes that "[i]t is well established that 'the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" Edenfield v. Fane, 507 U.S. 761, 770, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 n.20, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983)). "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." Id. at 770-71. The Fifth Circuit has held that evidence used to justify the state's regulation need not exist pre-enactment. Pruett v. Harris County Bail Bond Bd., 499 F.3d 403, 410 (5th Cir. 2007).

A. Misleading or Deceptive Advertising

HN19 If the State can show that the subject advertising is "inherently likely to deceive" or has produced a "record indicat [ing] that a particular form or method of advertising has in fact been deceptive," it is entitled to prohibit [**29] that advertising. In re R.M.J., 455 U.S. at 202. Commercial speech is misleading when it is "inherently likely to deceive the public" and if it "is devoid of intrinsic meaning." Joe Conte Toyota, Inc. v. La. Motor Vehicle Comm'n, 24 F.3d 754, 756 (5th Cir. 1994) (quoting Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91, 112, 121, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990)).

In support of their contentions that the advertising sought to be regulated under the Rules is misleading, the defendants point to the LSBA's Findings and Recommendations. These findings were submitted to the Louisiana Supreme Court in April 2009 to report the results from the surveys conducted in December 2008 and January 2009 that gathered information about public perceptions of lawyer advertising in Louisiana. The LSBA Findings refer to survey results from LSBA members and the general public.

A staple of the plaintiffs' argument is that the Rules are nothing more than political platitudes. This argument, however, is betrayed both by this Court's textual and historical analysis.

1. Rule 7.2(c)(1)(D): References or Testimonials to Past Results

Reference to past results, even if truthful, the surveys reflect, could also be inherently [**30] misleading. The LSBA Findings are impressive. And the defendants point out that the Rules do not prohibit "truthful testimonials," such as "John Smith is my lawyer. He was responsive to my needs and helped me with my legal problems." [5]

FOOTNOTES

[5] The LSBA Findings point out the following survey results: "eighty-three (83%) percent of the public interviewed and sixty (60%) percent of LSBA members interviewed indicated that they 'disagreed' with the statement that 'client testimonials in lawyer advertisements are completely truthful,' while seventy-two (72%) of LSBA members interviewed 'agreed' with the statement that 'client testimonials imply that the endorsed attorney can obtain a positive result without regard to facts or law.'" These findings do not specifically reference statements about past results, but such statements would seem to cause an attitude of even greater reliance by those seeking lawyers, whether the public or other referring lawyers.

2. Rule 7.2(c)(1)(E): Communications that Promise Results

The Court finds that HN20 Rule 7.2(c)(1)(E)'s prohibition of communications that promise results regulates only speech that is inherently misleading. As plaintiffs acknowledge, a promise of prevailing [**31] in a particular case is deceptive and untruthful; no one can predict a future [*554] result. The plain text of the Rule prohibits only communications that are inherently misleading and untruthful: those that promise results that no one can predict. Therefore, the defendants may freely regulate this type of advertising. [6]

FOOTNOTES

[6] The plaintiffs speculate that certain slogans and phrases will be interpreted to "promise results," resulting in an unconstitutional application of the Rule. However, the plaintiffs have not submitted any advertising language to the LSBA Committee that has been ruled out-of-bounds; as such, the Court can only look at the language of the Rule, not its hypothetical application.

3. Rules 7.2(c)(1)(J): Portrayal of a Judge or a Jury [7]

FOOTNOTES

[7] The defendants also refer to Rule 7.2(c)(1)(I) in their discussion about misleading advertisements. However, they

argue merely that the LSBA committee determined reenactments of events or portrayal of a client by a non-client to be potentially misleading. As noted, a "potentially misleading" advertisement must be evaluated under the Central Hudson test.

The Court agrees that HN21 a portrayal of a judge or jury in an ad is inherently misleading. The defendants [**32] point to survey and anecdotal evidence that the portrayal of a judge or jury in an ad does not enhance the public's confidence in the Louisiana court system. While another survey question revealed that 59% of the public felt that those advertisements implied that Louisiana courts can be manipulated by the lawyers in the ads, only 27% of the public agreed with the statement that seeing a judge or jury in an advertisement implies that a lawyer has more influence on Louisiana courts than other lawyers. In spite of some inconclusive aspects in these surveys on this point, the fact remains, and is inescapable, that such material simply conveys an untrue message. It is compellingly misleading. This Court should not speculate on which recipients of such messages are smart enough to know better.

4. Rule 7.2(c)(1)(L): Use of Mottos that State or Imply An Ability to Obtain Results

While this Rule appears similar to the prohibition on promises of results, there is one major difference: the Rule also prohibits mottos and trade names that imply results. This does not limit enforcement to such advertising techniques that are inherently misleading - those that promise results - but also creates an [**33] unidentified grouping of advertisements for which it is unfair to determine whether they are misleading. As such, this Rule must be evaluated under the Central Hudson test.

B. Central Hudson Test

HN22 Absent material that is inherently misleading, the State may also regulate commercial speech if it satisfies the three-prong Central Hudson test: (1) the State must assert a substantial interest in support of the regulation; (2) the State must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation must be narrowly drawn. Went For It, 515 U.S. at 624 (citing Central Hudson, 447 U.S. at 564-65).

1. Substantial Interest

HN23 The Supreme Court "has given consistent recognition to the State's important interests in maintaining standards of ethical conduct in the licensed professions," Edenfield v. Fane, 507 U.S. 761, 770, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993); it has also expressed some reservation whether "the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights." Zauderer, 471 U.S. [*555] at 648. But, the High Court has "recognize[d] that the [**34] States have a compelling interest in the practice of professions within their boundaries, . . . [and the] interest of the States in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice, and have historically been 'officers of the courts.'" Goldfarb v. Va. State Bar, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975).

Underscoring their attack of politics and platitudes, the plaintiffs argue that the State has not articulated a substantial interest in restricting lawyer advertising with the Rules. This Court disagrees. Supreme Court precedent, while mixed, also disagrees. HN24 The State may not by scatter-shot condemn lawyer advertising, but does indeed have a substantial interest in addressing the ethical standards of the profession, as well as in preventing public confusion or deception. Edenfield, 507 U.S. at 769 (noting that the State's "interest in ensuring the accuracy of commercial information in the marketplace is substantial"); see also Va. State Bd. of Pharmacy, 425 U.S. at 771-772 ("The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."). The State [**35] therefore articulates a substantial interest in both maintaining the standards of the legal profession and in protecting consumers from misleading or deceptive advertising. [8]

FOOTNOTES

[8] Plaintiffs are correct that because an advertisement is "potentially misleading" is not of itself a sufficient justification to support a general ban on advertising without fulfilling the other Central Hudson factors. The State does, however, have a substantial interest in ensuring that the public is not misled.

2. Advancing that Interest and Being Narrowly Drawn

HN25 The State must demonstrate that the challenged regulation advances a governmental interest "in a direct and material way." Went For It, 515 U.S. at 625 (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 487, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995)). That burden cannot be "satisfied by mere speculation or conjecture;" rather, the State must show that the harms are real and the "restriction will in fact alleviate them to a material degree." Id. at 626. The Supreme Court has required evidentiary support in the forms of empirical data or anecdotes to support the State's regulation. See Edenfield, 507 U.S. at 771 (invalidating regulations when the governmental body presented no studies or anecdotal [**36] evidence, and only relied on a "series of conclusory statements" to justify the regulations). Empirical data need not be "accompanied by a surfeit of background information," and the regulation can be justified "by reference to studies and anecdotes pertaining to different locales altogether," or can be "based solely on history, consensus, and simple common sense." Went For It, 515 U.S. at 628. In short, the State must demonstrate some basis for its regulation with

evidentiary support. It has done so. To be "narrowly drawn" in the commercial speech context, the regulation need not be the "least restrictive means" of advancing the State's interest. Went For It, 515 U.S. at 632. Instead, there must be "a reasonable fit" between the State's interest and the means chosen to accomplish those ends. Id. They should be "no more extensive than reasonably necessary to further substantial interests," Fox, 492 U.S. at 477, and "in proportion to the interest served," Went For It, 515 U.S. at 633.

[*556] *I. Rule 7.2(c)(1)(D): Testimonials and References to Past Results*

The defendants, who carry the burden of proving that the Rules directly and materially advance the State's interest, point to the survey [**37] results that target the public's perception of testimonials. Those results ably and statistically support the State's position. [9]

FOOTNOTES

9 See supra note 5.

II. Rules 7.2(c)(1)(I), 7.5(b)(2)(C), and 7.2(c)(10) Non-authentic scenes, portrayal of a client by a non-client, or use of a spokesperson without a disclaimer

HN26 The Rules governing the use of events, scenes, or pictures that are not authentic, portrayals of a client by a non-client, and use of a non-lawyer spokesperson, condone each of these advertising techniques as long as they include a disclaimer as provided by Rule 7.2(c)(10). The disclaimer provision requires that written disclaimers be in a print size at least as large as the largest print size used in the advertisement, spoken disclosures be spoken at the same or slower rate of speed as the other spoken content of the advertisement, and all disclosures used in advertisements that are televised or displayed electronically shall be both spoken aloud and written legibly. Additionally, when a spokesperson is used, a spoken and written disclosure must identify the spokesperson as such, that the spokesperson is not a lawyer, and that the spokesperson is being paid to be a spokesperson, [**38] if paid.

HN27 The Supreme Court advises that there are "material differences between disclosure requirements and outright prohibitions on speech." Zauderer, 471 U.S. at 650. "Warnings or disclaimers" as safeguards "might be appropriately required in order to dissipate the possibility of consumer confusion or deception." Id. at 651. At the same time, the Supreme Court also admitted "that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling the protected commercial speech." Id. The Court then held that "an advertizer's rights are adequately protected as long as the disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." Id.

The LSBA learned that 63% of the LSBA members and 59% of the public disagreed with the statement that they can always tell if a testimonial in a lawyer advertisement is made by a client and not an actor. This Court emphasizes that such dramatizations are in and of themselves capable of unintended guile or delusion.

The remaining survey results focus on the use of disclaimers in advertising. Those results, particularly the anecdotal evidence, indicate that the public finds [**39] lawyer advertising that uses disclaimers to be less truthful and more misleading than advertising that doesn't use disclaimers. [10] The Supreme Court in Zauderer noted the benefits of disclaimers, and this Court believes such disclaimers would have a beneficial purpose. [11]

FOOTNOTES

10 Forty-five (45%) percent of the public thought the use of disclaimers in lawyer advertising was "less truthful" than the use of disclaimers in advertising for other businesses. The focus groups reported such responses as "I think it's very misleading" for lawyers to use disclaimers; "Don't say anything that MAKES you put a disclaimer;" "It gives you a positive image, but when you read the fine line you get wiped out."

11 The Supreme Court held HN28 a disclaimer in Ibanez, however, to be unconstitutionally restrictive when "the detail required in the disclaimer . . . effectively rule[d] out [the desired advertising] on a business card or letterhead, or in a yellow page listing." 512 U.S. at 146-47.

[*557] The LSBA surveys reflect that the public and LSBA members have less confidence in the integrity of lawyers that use advertisements that include scenes of accidents or accident victims. Although the survey did not differentiate [**40] between authentic scenes and portrayals of such scenes, and while the Rules only prohibit nonauthentic scenes and reenactments, reason dictates that this might be looked upon as a distinction without a difference.

Therefore, the Court finds that Rule 7.2(c)(1)(I) does not violate the First Amendment, nor do the written disclaimer requirements of Rule 7.2(c)(10).

The LSBA Findings, however, do not support the additional disclosure requirements for a spokesperson under Rule 7.5(b)(2)(C). The survey results teach that 62% of the public disagreed that lawyers whose advertisements include endorsements by a celebrity have more influence on Louisiana courts than other lawyers. Therefore, the Court finds that because of lack of evidentiary support, HN29 Rule 7.5(b)(2)(C) fails the commands of Central Hudson, does not directly

and materially advance the State's interests, and, therefore, violates the First Amendment.

iii. Rule 7.2(c)(1)(J) Portrayal of a Judge or Jury

The Court also finds that the defendants have produced sufficient evidence to show that HN30 Rule 7.2(c)(1)(J)'s regulation of portrayals of a judge or jury in an advertisement directly and materially advances the State's interests. The LSBA [**41] Findings point to survey results that show that 27% of the public and 50% of LSBA members agreed that advertisements that portray a judge or jury imply to the public that the lawyer can assert more influence over judges or juries than other lawyers. Sadly, 59% of the public indicated that those lawyer ads imply that Louisiana courts can be manipulated by the lawyers in the ads. Further, public opinion and LSBA member opinion supports the conclusion that such ads reduce confidence in Louisiana courts. The anecdotal evidence adds further support; comments from the focus group included: "You're saying 'I can get this through the court system.' Like you got a hold on somebody down the river;" "It does seem he would manipulate the system more;" "It gives the impression that the judge could be bought by this attorney." The Court finds that, with this evidence, the Rule on the portrayal of judges and juries directly and materially advances the State's interest in maintaining the standards of the legal profession, as well as protecting against the deception of the public. [12]

FOOTNOTES

[12] But see Alexander v. Cahill, No. 07-117, 634 F. Supp. 2d 239, 2007 U.S. Dist. LEXIS 53602, 2007 WL 2120024, at *8 (N.D.N.Y. July 23, 2007) (invalidating a restriction [**42] on portrayals of judges in attorney advertising on the grounds that the restriction was not narrowly tailored). However, many of the rules in Cahill differ from those before this Court, and, more telling, the evidence of the ruling body's investigation was far less conscientious, indeed skimpy, than what the LSBA ambitiously and patiently undertook.

iii. Rule 7.2(c)(1)(L) Mottos, trade names that state or imply an ability to get results

The Court finds that HN31 Rule 7.2(c)(1)(L) materially advances the State's interest in preventing deception of the public, and is narrowly tailored to achieve those ends. The defendants point to survey results that reveal the public may be deceived by mottos or trade names that state or imply an ability to get results; specifically, 61% of the public agreed that example statements promised that the lawyer will achieve a positive result. 56% of [*558] the public believed lawyer advertising in Louisiana is misleading, and 61% of the surveyed public believe that lawyer advertising is less truthful than advertisements for other businesses. Therefore, this regulation, aimed at prohibiting lawyers from using mottos or slogans that imply to the public that they can achieve [**43] results when future results can never be predicted, directly and materially advances the State's interests.

The Court is unpersuaded that the Rule could be made even narrower. The Rule includes those mottos and trade names that "imply" results. HN32 While the least restrictive means need not be utilized, the State must ensure that the restricted speech is proportional to the State's interest. Here, the State's interest is of serious proportions: maintaining professional dignity and public confidence. Plaintiffs' characterization of Louisiana lawyers as members of an "industry", rather than a profession, seems to enhance the State's regulatory interest in the current lawyer advertising culture. The defendants point to the availability of advisory opinions; and although such opinions are not binding on the disciplinary board, they provide helpful guidance.

The Court finds Rule 7.2(c)(1)(L) could not be more narrowly tailored and prevails over the plaintiff's attack.

iv. Rule 7.6: Computer-Accessed Communications

The Wolfe plaintiffs challenge several aspects of the Rule governing computer-accessed communications, but focus their discussion in this motion on the disclosure requirements of Rule 7.2 [**44] as noted in Rule 7.6(d). [13] Rule 7.6(d) is titled "Advertisements," and requires that "All computer-accessed communications concerning a lawyer's or law firms services, other than those subject to subdivisions (b) [law firm websites] and (c) [unsolicited e-mails] of this Rule, are subject to the requirements of Rule 7.2 when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." The Wolfe plaintiffs' primary argument is that this requirement is incompatible with a form of online advertising known as "pay-per-click" ads. [14] They assert that the defendants have produced no evidence that this requirement directly advances the State's interests and that it is not narrowly tailored.

FOOTNOTES

[13] The Wolfe plaintiffs challenge Rule 7.6(c)(3) in their complaint, which requires unsolicited e-mail communications to state "LEGAL ADVERTISEMENT" in the subject line. They do not, however, address this argument in their motion. Further, the defendants point out that this Rule is similar to a rule in the previous lawyer advertising requirements. The Wolfe plaintiffs also challenge Rule 7.2(c)(11), which provides that "[n]o lawyer shall, directly or indirectly, pay all or a part of the [**45] cost of an advertisement by a lawyer not in the same firm." Again, the Wolfe plaintiffs do not address this Rule in their motion for summary judgment. Thus, their attack does not reach those Rules.

[14] As described in the Wikipedia article submitted by the Wolfe plaintiffs, "pay-per-click is an Internet advertising model used on search engines, advertising networks, and content sites, such as blogs, in which advertisers pay their host only when their ad is clicked." Pay-per-click ads limit the space available to advertisers to display their message.

This Court agrees. The defendants point to no empirical or anecdotal evidence relating to online attorney advertising. They have not shown that the State studied online advertising techniques or methods and then attempted to formulate a Rule that directly advanced the State's interests and was narrowly tailored with respect to Internet advertising. Instead, the State, through its high court, simply applied the same Rules as those developed [*559] for television, radio, and print ads to Internet advertising. This Court is persuaded that HN33 Internet advertising differs significantly from advertising in traditional media. The Supreme Court has recognized [**46] the uniqueness of the Internet as compared to other broadcast media: "the Internet is not as 'invasive' as radio or television." Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868-69, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). While that Court's later comment that communications do not "appear on one's computer screen unbidden" may not be relevant here, when pop-up ads do exactly that, the premise still remains valid: that the Internet presents unique issues related to advertising, which the State simply failed to consider in formulating this Rule. This Court cannot say that Rule 7.6(d) directly and materially advances the State's interests or is narrowly tailored; the defendants have presented no evidence to that effect. Because they have not met their burden, HN34 Rule 7.6(d) is unconstitutional.

The Wolfe plaintiffs also challenge the application of Rule 7.7 to Internet advertising, which requires that advertisements that are not exempt under Rule 7.8 must be filed for approval prior to or concurrently with the lawyer's first dissemination of the advertisement. Rule 7.8 exempts from filing certain advertisements and announcements, including those that only include the information listed in Rule 7.2(b). [15] The Wolfe plaintiffs [**47] state that the fee for each filing is $ 175, which would be prohibitively expensive for the nature of Internet advertising. They provide a compelling example: the Wolfe Law Group ran pay-per-click ads during the months of April, May, and June, spending a total of $ 160.63 with Google (the "leader" in such advertising). They ran approximately 12 total ad variations, which would have required 12 separate filings with the LSBA, and would have cost the firm approximately $ 2,100. The LSBA Findings note that the plaintiffs need not submit each advertisement to the LSBA for approval, if the ad complies with the permissible content in Rule 7.2(b). However, again, neither the LSBA Findings nor the defendants address the unique considerations with Internet advertising, specifically, the short length of ads and the multiple variations used, each of which would be required to be filed as a unique advertisement. As such, the application of Rule 7.7 to Internet advertising is not supported by sufficient evidence. Therefore, HN35 Rule 7.7 as it applies to the filing requirements for Internet advertising is unconstitutional.

FOOTNOTES

[15] Rule 7.2(b) permits the following information: Names of lawyers and contact [**48] information; dates related to school graduation, Bar membership, and employment; membership in the Louisiana State Bar Association sections or committees; technical and profession licenses; military service; foreign language ability; fields of law; prepaid or group legal service plans; fee for initial consultation and fee schedule; common salutary language; punctuation marks; and photographs of lawyer or lawyers who are employed at the firm.

Accordingly, the defendants' motion to dismiss is DENIED; the defendants' motions for summary judgment are GRANTED IN PART and DENIED IN PART; the Public Citizen plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART; and the Wolfe plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART.

IT IS ORDERED: that the defendants' summary judgment motions are GRANTED as to Rules 7.2(c)(1)(D), 7.2(c)(1)(E), 7.2(c)(1)(I), 7.2(c)(1)(J), 7.2(c)(1)(L), 7.2(c)(10), 7.2(c)(11), and 7.6(c)(3), and DENIED in all other respects.

IT IS FURTHER ORDERED: that the Public Citizen plaintiff's motion for summary judgment is GRANTED as to Rule 7.5(b)(2)(C) [*560] and DENIED in all other respects.

IT IS FURTHER ORDERED: that the Wolfe' plaintiffs' [**49] motion for summary judgment is GRANTED as to Rule 7.6(d) and 7.7 (as it pertains to filing requirements for Internet advertising) and DENIED in all other respects. [16]

FOOTNOTES

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

New Orleans, Louisiana, August 3, 2009.

/s/ Martin L. C. Feldman

MARTIN L. C. FELDMAN

UNITED STATES DISTRICT JUDGE

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UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE: OPINION NO. 09-01

OPINION NO. 09-01

MAIN OPINION:

Issued February 23, 2009

PDF Version

1. **Issue:** What are the ethical limits for the use of testimonials, dramatizations or fictionalized representations in lawyers' advertising on television or web sites?

2. **Opinion:** Advertising may not be "false or misleading". Testimonials or dramatizations may be false or misleading is there is substantial likelihood that a reasonable person will reach a conclusion for which there is no factual foundation or will form an unjustified expectation. The inclusion of appropriate disclaimer or qualifying language may prevent testimonials or dramatizations from being false or misleading.

3. **Background:** As this Committee explained in Opinion No. 00-02, "The U.S. Supreme Court has made it clear that public communication concerning a lawyer's services (including any form of advertising) is commercial speech, enjoys First Amendment protection, and can be regulated only to further substantial state interests, and then only in the least restrictive manner possible. The cardinal rule concerning all public communication about a lawyer and her services is that the communication not be false or misleading." 1

4. Since we issued our most recent opinion regarding advertising, Rule 7.1 of the Utah Rules of Professional Conduct (and of the Model Rules) has been amended to include only the simple paragraph set forth below. The amendments deleted subsections (b) and (c) which had specified that a communication was "false or misleading" if it "is likely to create an unjustified expectation about results the lawyer can achieve" or if "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." Instead these issues were dealt with less rigidly in the Comments to Rule 7.1. The ABA Ethics 2000 Commission that recommended these amendments to Rule 7.1 explained its rationale:

> The Commission recommends deletion of this specification of a "misleading" communication because it is overly broad and can be interpreted to prohibit communications that are not substantially likely to lead a reasonable person to form a specific and unwarranted conclusion about the lawyer or the lawyer's services. . . . . The Commission also believes that a prohibition of all comparisons that cannot be factually substantiated is unduly broad. Whether such comparisons are misleading should be assessed on a case-by-case basis in terms of whether the particular comparison is substantially likely to mislead a reasonable person to believe that the comparison can be substantiated. 2

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5. While some state regulators retained the old language and other regulators adopted detailed categories of statements that are "false or misleading," a leading commentator and original draftsperson of the Model Rules recommends against such an approach:

> In the end, the best course for state regulators is to adopt the current simple and direct language of Model Rule 7.1 and issue interpretive guidelines . . . .Attempts to impose more burdensome and categorical prohibitions are likely to lead to little but constitutional litigation. GEOFFREY HAZARD, W. WILLIAM HODES, AND PETER JARVIS, THE LAW OF LAWYERING (3rd) §55.3

6. **Analysis:** We issue the following "interpretive guidelines" relying upon suggestions of commentators, other state's suggestions and case law. We also suggest that Utah lawyers be aware of Utah's Truth in Advertising Statute, Utah Code Ann. §13-11a-1 et. seq; Utah's Consumer Sales Practices Act, §13-11-1 et. seq. which prohibit deceptive acts or practices.

7. **Rules of Professional Conduct:** Rules of Professional Conduct: Rule 7.2 of the Utah Rules of Professional Conduct permits a lawyer to advertise on the "public media" as long as the ad includes "the name and office address of at least one lawyer or law firm responsible for its content" and it complies with Rule 7.1. Rule 7.1 provides:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.
> The Comments to Rule 7.1 state in relevant part: [2] . . . A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

8. **Testimonials:** Some states define "any advertisement that 'contains a testimonial' to be 'false, misleading, deceptive or unfair'" creating standards of dubious constitutionality according to HAZARD, HODES & JARVIS at§ 55.4 (hereinafter Hazard); see also Alexander v. Cahill, 2007 WL 2120024 (N.D.N.Y.) (restriction against testimonials held unconstitutional). Other states require that testimonials or endorsements be "paired with cautionary language about how results may differ depending on the case." HAZARD at §

55.4. It is legitimate to require such additional language when it is necessary to prevent the advertisement as a whole from being materially misleading or likely to create unjustified expectations. In our view when using testimonials to advertise prior accomplishments it is wise (and may be necessary depending upon the context) to include such qualifying language. Similarly, a "testimonial" should be given by the real person involved (e.g. a former client), unless the portrayal expressly states otherwise (e.g. an actor dramatizing a former client's letter of thanks) in order to avoid its being misleading.

9. Connecticut Informal Op. 01-07 (2001) addressed testimonials and concluded that client testimonials regarding a lawyer's "personal qualities such as being knowledgeable, patient or courteous, may be included in advertising copy if they are truthful." HAZARD at § 55.4 at p.55 21. However, comparative statements would require factual substantiation to avoid being misleading. Id. Because it is almost impossible to substantiate certain comparisons ("best attorney in town") the wiser course is to advertise qualities that can be substantiated. Id. At 55.4 See also In the Matter of Wamsley, 725 N.E.2d 75 (Ind. 2000) (ad stating "Best Possible Settlement . . . Least Amount of Time" created an unjustified expectation).

10. **Lawyer's Traits and Accomplishments:** Some states have attempted to ban "self-laudatory" statements about the quality of the lawyer's services. We agree with commentators HAZARD, et. al. that these bans will not withstand constitutional challenge and note some states have backed away from these rules. Id.; see Mason v. Florida Bar, 208 F.3d 952, (2000)(bar not justified in requiring disclaimer in advertisement of Martindale-Hubbell's AV rating.)Some regulators have attempted to prohibit nicknames or trade names that suggest an ability to get results (the "heavy hitters") and to prohibit advertising techniques that have no relevance to selecting a lawyer (attorneys portrayed as giants). But these rules were recently struck down as unconstitutional in Alexander v. Cahill, supra. (not reported in F. Supp.). In Florida, rules now prohibit statements characterizing the quality of a lawyer's services and depictions that are not "objectively relevant" to selecting an attorney; the Florida Supreme Court ordered the discipline of lawyers who used a "pit bull" logo and phone number. The Florida Bar v. Pape, 918 So.2d 240 (Fla. 2005).The Court reasoned that the pit bull image suggests that the lawyer "will get results through combative and vicious tactics . . . conduct that would violate our Rules of Professional Conduct." Pape, 918 So.2d at 246. The Florida Court then construed the prohibition against "false or misleading" advertisement to include advertising that suggests behavior or tactics that are contrary to the Rules. Id. We note that statements "implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules . . . or other law" are, according to Comment [4] to Rule 7.1, prohibited by Rule 8.4(e). In our view it is unnecessary and unwise to twist the meaning of "false and misleading" to additionally prohibit statements that already violate Rule 8.4 (e).

11. However, lawyers' factual statements about themselves can run afoul of the rule if they are not scrupulously factual or if they are misleading. Thus, we have opined that a lawyer on inactive status in another state may not ethically communicate by means of letterhead or otherwise that the lawyer is "admitted" in the state unless (i) the lawyer also affirmatively discloses the lawyer's inactive status or (ii) the lawyer reasonably concludes that the communication would not be materially misleading under the circumstances as a whole, Opinion No. 00-02. Similarly, a Utah lawyer cannot have a firm name "and Associates" unless there are at least two lawyer associates. Opinion No. 138 (1994).

12. **Dramatizations and Fictional Performances:** Some states have tried to ban dramatizations and fictional performances while other states require that these performances be accurately identified. HAZARD at §55.4. New York sought to prohibit the portrayal of a judge or fictitious law firm, and that rule was held unconstitutional. See Alexander v. Cahill, supra.

13. As an initial matter, we note that there is a difference between a "dramatization" and a fictional performance or sketch. To "dramatize" means to "adapt (a story, event, etc.) for performance on the stage, in a movie, etc." WEBSTER'S NEW WORLD DICTIONARY, SECOND COLLEGE EDITION (1986). Hence, calling something a "dramatization" may imply that the event actually occurred, such as "dramatizations" of historical events in television programs. This would be accurate language to use if a lawyer were accurately re-enacting the oral argument he delivered before the court. However, it would be misleading to use the word "dramatization" to label an entirely fictional presentation.

14. Certain fictional sketches have attracted the attention of regulators. One is what Hazard calls "the notorious 'Strategy Session' used by several plaintiffs' law firms" and describes thusly:

> In the spot actors portray insurance company adjusters or lawyers discussing a newly filed automobile injury claim, and at first consider employing delay tactics to see if the plaintiff will 'crack.' When they learn (to their apparent chagrin) that the plaintiff is represented by the advertising law firm, however, they immediately determine to settle the case. In each version of the advertisement, actor Robert Vaughn then faces the audience and suggests that persons with serious injury claims should engage that firm. Hazard §55.4 at p. 55-22 n. 3.

The Indiana Supreme Court reprimanded two lawyers for televising this advertisement in In re: Keller, 792 N.E.2d 865 (Ind. 2003). The Indiana rules prohibited advertising which contained an opinion as to the quality of legal services (a prohibition that is, in our view, overly broad). However, the court reasoned that sanctions were appropriate because the ads "create an impression that the claims they handle are settled, not because of the specific facts or legal circumstances of the claims, but merely by the mention of the name of the respondents' firm. . . ." 792 N.E. 2d at 868. Similarly, a U.S. District Court held that this advertisement was not protected speech but constituted a material misrepresentation of fact regarding the insurance industry and was likely to create an unjustified expectation that the lawyers advertised can obtain settlements based solely on their reputation and the insurance industry's fear of them and irrespective of the facts of the case. Farrin v. Thigpen, 173 F. Supp. 2d 427, 440 (M.D.N.C. 2001). In that case insurance industry experts testified about the various factors taken into consideration in deciding whether to settle a claim, and that reputation of the attorney was a small part of the equation. Hazard's commentary suggests that this outcome is correct. See Hazard §55.4 at p. 55-22 n. 3.

15. Nevertheless, this does not suggest that fictional portrayals are always misleading or likely to create unjustified expectations. An acceptable fictional vignette should be labeled as "fictional" or should be clearly identifiable as fictional, as with lawyers portrayed as giants towering over the town, counseling a space alien about an insurance matter, and "running as fast as blurs to reach a client in distress." See Alexander v. Cahill, supra. A fictional vignette can convey such a message about a lawyer or law firm so long as the message itself is not misleading or likely to create unjustified expectations. A clearly identified fictional sketch in which a fictional party or

opposing counsel shows frustration to learn that the opposing party has retained Firm X would be acceptable. The only limits are that these vignettes should be identified as fictional and ultimately must not lead a reasonable person to form an unjustified expectation. Obviously which fictional portrayals will be appropriate and which deemed misleading may depend, to some extent, on the facts about the lawyer and the contents of the vignette.

Conclusion: Advertising may not be "false or misleading." Testimonials or dramatizations may be false or misleading if there is a substantial likelihood that a reasonable person will reach a conclusion for which there is no factual foundation or will form an unjustified expectation regarding the lawyer or the services to be rendered. The inclusion of appropriate disclaimer or qualifying language may prevent testimonials or dramatizations from being false or misleading.

Footnotes:

1. *In re Utah State Bar Petition for Approval of Changes in Disciplinary Rules of Advertising*, 647 P.2d 991, 993 (Utah 1982) (state has substantial and compelling interest in protecting the public from false or misleading advertising by lawyers).

2. Ethics 2000 Commission, Report on the Model Rules of Professional Conduct, Reporter's Explanation of Changes, available at: http://www.abanet.org/cpr/e2k/e2k-report_home.html.