waller

511 Union Street, Suite 2700
P.O. Box 198966
Nashville, TN 37219-8966

615.244.6380 main
615.244.6804 fax
wallerlaw.com

James M. Doran, Jr.
Waller Lansden Dortch & Davis, LLP
615.850.8843 direct
jim.doran@wallerlaw.com

December 19, 2012

RECEIVED
DEC 20 2012

Michael W. Catalano, Clerk
State Appellate Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Docket No. M2012-01129-SC-RL1-RL

Dear Mr. Catalano:

I have reviewed the materials submitted by the Tennessee Association for Justice, of which I am not a member, filed in support of its petition to amend the Rules of Professional Conduct relating to attorney advertising. I write in support of the proposal.

By way of history, for the last 15 years, I have been actively involved in representing pharmaceutical companies in mass tort litigation. In the course of that practice I have been amazed at the number of Tennesseans, many disabled and poorly educated, who have responded to television and less frequently internet ads run by out of state lawyers and law firms. Those individuals respond to those ads by calling an 800 number and sign up to be represented by those firms or lawyers. The intent of that massive advertising program is merely to obtain a critical mass of clients for the purpose of attempting to obtain a global settlement for the benefit, primarily, of the lawyers. It is purely a business model.

The problem with that business model for the Tennessee residents who sign up is that, in my experience, the clients do not end up with a lawyer who is interested in their individual interest. Those client never meet a lawyer, or even a paralegal, unless the defendant notices the plaintiff's deposition. When that occurs, typically an associate with the law firm will fly in to meet with the client for an hour or so before the deposition.

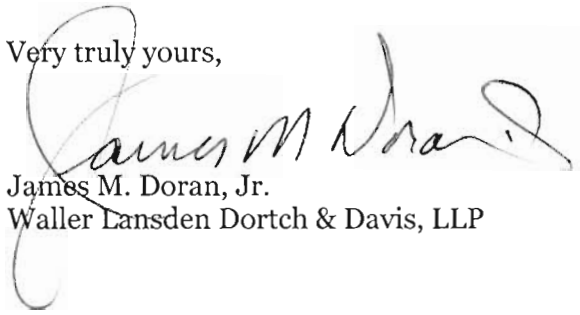
Typically, the Court will order the plaintiffs to provide a document known as either a Plaintiff Profile Form or a Plaintiff Fact Sheet which the law firm will send to the client for the client to fill out. The law firms seldom provide assistance to the client in completing the document. Pursuant to court order, the plaintiff will be asked to sign a medical release for the defendant to collect the plaintiff's medical records. As a result, it is typical for the defendant to know more about each of the individual plaintiffs than their own lawyers know unless that plaintiff becomes the focus of a group of Bellwether plaintiffs for which the court orders discovery.

While it can be said that the business model adopted by those firms benefits all of the plaintiffs by forcing a global settlement with some return to each of the clients, in my experience the lawyers never do a proper investigation to determine whether in fact the plaintiffs who call their 800 number have a legitimate claim which they then pursue with vigor.

I have served as national settlement counsel for a pharmaceutical company in its effort to resolve mass tort litigation. In many instances I met with lawyers who simply knew nothing about their individual clients and insisted upon trying to settle their clients' cases as a group.

The one disadvantage of the proposal by the Tennessee Association for Justice is that it might cause some citizens to be unaware that they have a potential law suit. However it is my view that that disadvantage is outweighed by those individuals being represented by instate lawyers who are more likely to view them as an individual client, investigate their cause of action and pursue their claim vigorously if it is meritorious.

Very truly yours,



James M. Doran, Jr.
Waller Lansden Dortch & Davis, LLP

JMD:ecm

PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW • Washington DC 20009
202/588-1000 • www.citizen.org

December 17, 2012

Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: *In re Petition To Adopt Changes to Rules of Professional Conduct on Lawyer Advertising*, No. M2012-01129-SC-RL1-RL

Dear Mr. Catalano:

On November 26, the Supreme Court of Tennessee issued an order soliciting comments by January 25, 2013, regarding the above-referenced petition to change the professional conduct rules of Tennessee. On behalf of the national non-profit organization Public Citizen, Inc., I am writing respectfully to request that the deadline for accepting comments be extended for two weeks, to and including February 8, 2013.

Public Citizen is an organization with a longstanding interest in freedom of speech, in particular as it affects the opportunity of consumers, including our 925 members in Tennessee, to receive information about products and services. Public Citizen litigated one of the seminal Supreme Court commercial-speech cases, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Public Citizen also regularly litigates First Amendment challenges to attorney advertising restrictions, as in *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010); *Harrell v. The Florida Bar*, 608 F.3d 1241 (11th Cir. 2010); and *Public Citizen Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011).

We wish to comment on the proposed rule changes in Tennessee and the constitutional issues they raise. We have commented on similar proposals in other states, including Louisiana and New York. Because of the press of business, including three briefs due in the next seven weeks, and a prepaid family vacation, an extra two weeks would allow me the time necessary to prepare thorough comments that adequately addresses the issues implicated by the petitions for rule changes.

For these reasons, I ask that a two-week extension be granted. Thank you for your attention to this matter.

Sincerely,

Scott Michelman

Cc: Matthew C. Hardin, Petitioner
Tennessee Association for Justice, Petitioner

Apperson Crump
The Law in Memphis Since 1865

RECEIVED
JAN 10 2013
Clerk of the Courts
Rec'd By

January 8, 2013

#M2012-01129-SC-RL1-RL

The Honorable Michael Catalano
Clerk Tennessee Supreme Courts
Supreme Court Building
Room 100
401 7th Ave. North
Nashville, TN 37219

RE: Petition to Amend Rule 33 of the Rules of the Supreme Court

Dear Mike:

I would like to add my voice to the list of those who feel that there needs to be greater scrutiny and accountability for lawyer advertising. There is no question that lawyer advertising, at least in its current form, serves to diminish the prestige of the profession. That is evidenced in many ways but the venue in which it is a constant refrain is jury selection. It always comes out and always in the negative. Something needs to be done.

Not to be lost in this is what probably should be the overarching consideration. That is service to the clients. It can hardly be argued that the current form of advertising serves to mislead and therefore to ill serve the clients and their needs. I strongly urge consideration of implementing new rules designed to reign in the prevalent abuses.

Yours truly,

APPERSON CRUMP PLC

Gary K Smith

Gary K. Smith

GKS/cah

GARY K. SMITH
Direct Dial 901-260-5170
gsmith@appersoncrump.com

APPERSON CRUMP PLC, ATTORNEYS AT LAW
Memphis · Nashville
6070 Poplar Avenue, Suite 600, Memphis, TN 38119-3954
Tel 901-756-6300 · Fax 901-757-1296

RECEIVED
JAN 16 2012
By

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

IN RE: PETITION TO ADOPT CHANGES TO RULES OF PROFESSIONAL CONDUCT ON LAWYER ADVERTISING

No. M2012-01129-SC-RL1-R – Filed: November 26, 2012

Introduction

My name is David L. Hudson Jr., a member of the Tennessee Bar since 1994. I teach First Amendment law classes at the Nashville School of Law and Vanderbilt Law School. I also teach Professional Responsibility at Vanderbilt Law School and Tennessee Constitutional Law at the Nashville School of Law. For 17 years, I worked as a research attorney or First Amendment Scholar for the First Amendment Center in Nashville, Tennessee. I am a co-editor of *The Encyclopedia of the First Amendment* (CQ Press, 2008), the author of *The First Amendment: Freedom of Speech* (Thomson Reuters, 2012) and a former editorial board member of the *Commercial Speech Digest*.

I believe my background as a First Amendment expert qualifies me to offer the Court insights into why the recent petitions to change the attorney advertising provisions of the Tennessee Rules of Professional Conduct are problematic, unwarranted and, ultimately, unconstitutional.

The existing Tennessee Rules of Professional Conduct, which closely track the ABA Model Rules of Professional Conduct, are sufficient to deal with false and misleading attorney advertising. There is no need for wholesale revision of rules that adequately address any perceived problems. Furthermore, there is no evidence that there needs to be changes made to the existing rules.

The Proposed Changes Conflict with Fundamental First Amendment Principles

The proposed changes to the Tennessee Rules of Professional Conduct on Lawyer Advertising are contrary to numerous, fundamental First Amendment principles. These include:

> Advertising is an important form of speech in our culture and in our history. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 495 (1996).
>
> Blanket bans on speech are disfavored. *Butler v. Michigan*, 352 U.S. 380, 381 (1957), *Bolger v. Young Drug Products*, 463 U.S. 60, 75 (1983)
>
> Such bans are especially disfavored when justified on paternalistic impulses to protect the public, *Virginia Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976).
>
> The preferred First Amendment position is more speech, not enforced silence. *Whitney v. California*, 274 U.S. 357, 377 (J. Brandeis, concurring).
>
> The First Amendment favors a system of a free marketplace of ideas and information free from government censorship. *Abrams v. United States*, 250 U.S. 616, 630 (J. Holmes, dissenting).
>
> The First Amendment generally prevents the government from enforcing good taste. *Cohen v. California*, 403 U.S. 15, 24 (1971).
>
> People have a First Amendment right to receive information and ideas. *Board of Education v. Pico*, 457 U.S. 853, 867 (1982).
>
> The government bears the burden of proof when seeking to prohibit commercial speech. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).
>
> The government must show that its restrictions will materially advance its substantial interests. Id. at 566.

Advertising communicates valuable information to the public about what may be necessary and needed legal services. Attorney advertising informs the public about the cost of legal services, the availability of legal services and the importance of legal services. The American Bar Association's Commission on Advertising determined "it is

clear that advertising is a major factor in the delivery of legal services, especially to the poor." *Lawyer Advertising at the Crossroads* (1995) at p. 3. Twenty percent (20%) of persons from low-income households finds lawyers through advertising. Id. at 4.

Severe restrictions on attorney advertising impact not only the free-speech rights of the attorneys who wish to advertise, but also the consuming public who have a First Amendment right to receive information and ideas.

The United States Supreme Court has explained that "special care" must be taken by courts when reviewing complete bans on speech. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 500 (1996). Such bans on speech are anathema to the First Amendment. Rather, the preferred course of action for the government is to require an appropriate disclaimer rather than a flat ban on speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 373 (1977); *In Re R.M.J.*, 455 U.S. 191, 201 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). In *Bates*, the Supreme Court explained that under the First Amendment "the preferred remedy is more disclosure, not less." 433 U.S. at 350.

Some individuals and attorneys may not like television advertising by attorneys. But, that is not a sufficient reason to ban speech in a constitutional democracy. "The fact that protected speech might prove offensive to some people has never justified its suppression for all people, and the Supreme Court forbids us from banning speech merely because some subset of the public or the bar finds it embarrassing, offensive or undignified." *Ficker v. Curran*, 119 F.3d 1150, 1154 (4th Cir. 1997).

"The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503.

Under the Supreme Court's commercial speech jurisprudence, the state bears the burden of showing that its advertising regulations directly and materially advance the state's substantial interests. *Edenfeld v. Fane*, 507 U.S. 761, 771 (1993); *44 Liqourmart*, 517 U.S. at 505. This burden is not satisfied by "mere conjecture." Rather, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfeld*, 507 U.S. at 771.

History of the Commercial Speech Doctrine and Attorney Advertising

For much of the 20th century, commercial speech, or purely commercial advertising, possessed no First Amendment protection. The U.S. Supreme Court bluntly declared in *Valentine v. Chrestenson*, 316 U.S. 52, 54 (1942): "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." The Court simply wrote regulations on advertising were "matters of legislative judgment." Id.

This finally changed in the mid-1970s. The U.S. Supreme Court rejected the truncated reasoning of *Valentine* and declared that commercial speech was entitled to First Amendment protection in *Virginia Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976), a case involving the X drug for Y price. The Supreme Court criticized the "simplistic approach" of *Valentine.* Id. at 759. The Court rejected a ban on price advertising by pharmacists, rejecting the state's purported interest in shielding consumers. Instead, the Court famously wrote:

> There is, of course, an alternative to this *highly paternalistic approach.* That alternative is to assume that this information is not in itself harmful, *that people will perceive their own best interests if only they are well enough informed,* and that the best means to that end is to open the channels of communication rather than to close them.

Id. at 770 (emphasis added). The Court added that consumers often may be more interested in commercial speech than noncommercial speech: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Id. at 763.

The very next year the High Court ushered in a new era for attorneys by striking down an Arizona rule prohibiting price advertising in newspapers, radio or television by lawyers in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The Court aptly observed the Arizona disciplinary rule "serves to inhibit the free flow of commercial information and to keep the public in ignorance." Id. at 365. The Arizona Bar concocted a litany of purported justifications for the flat price advertising ban, including: adverse effect on professionalism, the inherently misleading nature of attorney advertising, adverse effect on the administration of justice, undesirable economic effects of advertising, adverse effect on quality of service and enforcement difficulties. Id. at 368 – 379.

The U.S. Supreme Court rejected these arguments, finding that none of them rose to a sufficient level to justify the suppression of speech. Significantly, the Court found the "postulated connection" between lawyer advertising and professionalism "severely strained." Id. at 368. The Court also questioned the strained rationale that lawyer advertising harmed the reputation of attorneys. Instead, the Court warned that the lack of advertising – not the prevalence of advertising – may contribute more to a negative reputation of attorneys. Id. at 370.

The Court explained that advertising by lawyers "may offer great benefits." Id. at 376. These benefits include helping people find lawyers and letting people know they

can afford their services. Id. The Court also determined that "it is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer." Id. at 377.

The Court concluded that attorney advertising could not be subject to "blanket suppression." Id. at 383. The next year in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Court upheld a restriction on direct, face-to-face solicitation by attorneys. The Court emphasized that direct, in-person solicitation "may exert pressure and often demands an immediate response." Id. at 457.

A few years later, the U.S. Supreme Court developed a test for evaluating restrictions on commercial speech – including attorney advertising – in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). The case examined the constitutionality of a New York regulation banning "promotional advertising" by electrical utilities. The regulation banned such advertising in order to further the national policy of conserving energy.

The high court struck down the regulation, finding it to be more extensive than necessary: "To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First Amendment." Id. at 570. The court wrote that the state did not show that a "more limited restriction on the content of promotional advertising would not serve adequately the State's interests." Id.

Far more important than the Court's ruling on the facts of the case was the test laid out by the high court in the case. The high court, in an opinion written by Justice

Lewis Powell, articulated a four-part test for analyzing the constitutionality of commercial-speech regulations.

The court wrote:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Id. at 566.

The *Central Hudson* test provides:

- Does the speech concern lawful activity and is it non-misleading?

  If the answer is no and the speech concerns illegal activity or is misleading, the analysis ends.

- Does the government have a substantial interest in its regulation?

- Does the regulation directly advance the substantial governmental interest?

- Does the regulation restrict more speech than necessary to serve the governmental interest?

In the years after *Bates and Central Hudson*, the U.S. Supreme Court invalidated various restrictions on attorney advertising, including:

> Prohibitions on listing areas of practice using different language (real estate instead of property), listing the courts and states an attorney is licensed to practice, and mailing announcement cards. *In Re R.M.J.*, 355 U.S. 191 (1982)
>
> A prohibition on the use of illustrations in attorney ads. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985);
>
> A complete ban on attorney solicitation letters in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1986);

A rule prohibiting lawyer certification by private organizations in *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990).

A rule prohibiting an accountant from also advertising that she was a licensed attorney. *Ibanez v. Florida Department of Business and Revenue*, 512 U.S. 136 (1994).

These decisions invalidated a series of state restrictions on attorney advertising that reflected a mentality on the part of state bar regulators inconsistent with the First Amendment principles of *Virginia Pharmacy* and *Bates*. In *In Re R.M.J.*, the Supreme Court emphasized that bar regulators could not flatly ban many types of "potentially misleading" attorney advertising, 455 U.S. at 191.

The Supreme Court in *Zauderer* explained a fundamental principle of First Amendment law when it favored disclaimers or disclosures over flat bans on speech. 471 U.S. at 672. The Court also recognized that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." Id. at 673.

The U.S. Supreme Court upheld a partial restriction on lawyer advertising in *Florida Bar v. Went For It*, 515 U.S. 618 (1995). A sharply divided Court ruled 5-4 that a 30-day ban on attorney solicitation letters furthered the state bar's interests in protecting the privacy interests of accident victims and the reputational interests of the Bar. The Court relied in part on a two-year study by the Florida Bar examining the impact of advertising. The Bar commissioned surveys, conducted hearings and solicited extensive public commentary before instituting the new rule. It is important to note the *Florida Bar*

decision upheld a 30-day ban on attorney solicitation letters – rather than a complete or total ban on such speech.

Increased Protection for Commercial Speech

After *Florida Bar v. Went for It*, in the mid to late 1990s, the U.S. Supreme Court significantly increased protection for commercial speech. The Court has invalidated numerous restrictions on various types of advertising, including liquor price advertising, *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); broadcast gambling advertising by casinos, *Greater New Orleans Broadcasting v. United States*, 527 U.S. 173 (1999); tobacco advertising, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); the advertising of compounded drugs, *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

In *44 Liquormart*, the U.S. Supreme Court recognized the value of advertising in society both currently and historically. "Advertising has been a part of our culture throughout our history." 517 U.S. at 495. The Court adhered to the spirit of *Virginia Pharmacy* that complete speech bans are anathema to the First Amendment: "A state paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it." Id. at 496. The Court explained that courts must use "special care" when examining complete bans on speech. Id. at 500. "Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression," the Court explained. Id. at 502.

In a concurring opinion, Justice Clarence Thomas even questioned the distinction between noncommercial and commercial speech. "I do not see a philosophical or historical basis for asserting that "commercial" speech is of "lower value" than

"noncommercial" speech." 517 U.S. at 518 (J. Thomas, concurring). Some learned jurists and commentators also have even questioned the rationality of the distinction between noncommercial and commercial speech. See Alex Kozinski and Stuart Banner, "Who's Afraid of Commercial Speech," 76 Virginia Law Review 627 (1990).

The Court, particularly since *44 Liquormart*, has examined advertising restrictions with greater scrutiny under the 3rd and 4th prongs of the *Central Hudson* test. The result has been much greater protection for commercial speech. See, Nat Stern, "Commercial Speech, 'Irrational Clients,' and the Persistence of Bans on Lawyer Advertising," 2009 B.Y.U. L. Rev. 1221, 1227 (2009).

Another legal commentator explains: "The arc of the Supreme Court's commercial speech decisions in recent years has been unmistakable: in case after case the Court has enforced the First Amendment protections set forth in Central Hudson with increasing rigor, expanding protection for commercial speech, and expressing ever-heightening skepticism and impatience for governmental restrictions on advertising grounded in protectionism and paternalism." Rodney Smolla, "Lawyer Advertising and the Dignity of the Profession," 59 Arkansas Law Review 437, 452 (2006).

"In general, the Court has carefully scrutinized the government's rationales for restrictions, and has usually found them wanting. In particular, the Court has insisted that state attempts to cabin lawyer advertising be supported by the strong justifications demanded of limitations on other forms of commercial speech." Stern at 1248.

The Petitions in Question are Contrary to Existing Constitutional Law

Fundamental First Amendment principles and the expansion of protection for commercial speech counsel strongly against the proposed advertising changes in

Tennessee. These proposals – if adopted – would place the state in a virtual First Amendment-free zone for attorneys and the public. The proposals would limit a significant amount of truthful and non-misleading speech. There is no evidence that such proposals are necessary or needed. The current Tennessee Rules of Professional Conduct – which closely track the ABA Model Rules of Professional Conduct – suffice to protect the public from attorney advertising that might cross the line to false and misleading speech.

Existing Tennessee Rule of Professional Conduct Rule 7.1 – which is identical to the ABA Model Rule 7.1 – is sufficient to deal with attorneys who engage in false and misleading speech. The existing rule 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.

False and misleading commercial speech – including attorney advertising – is not protected speech. But, the Petitions to amend the rules take a breathtakingly broad view of what constitutes misleading speech. For example, Proposed Rule 7.1(1)(B) would prohibit attorney ads that are "false or misleading." This provision appears innocuous enough, but the petition would expand this provision to cover any attorney ads that "have tendencies to distract the viewer from what they are seeing." (See Appendix A, "Supplemental Petition to Tennessee Supreme Court to Adopt Changes to Rules of Professional Conduct on Lawyer Advertising, at p. 3).

There is no logical stopping point to a rule that would prohibit anything in an attorney advertisement that might "distract the viewer." This highly subjective language

imposes an impermissible eye-of-the-beholder standard into the "false and misleading" inquiry.

In the Petitions to Amend the Tennessee Rules, the drafters claim the various and sundry proposals would not violate the First Amendment. These petitions conveniently ignore the history of increasing protection for commercial speech and other key precedents on attorney advertising. Consider for example the 2nd U.S. Circuit Court of Appeal's recent decision in *Alexander v. Cahill*, 598 F.3d 79 (2010). In that decision, the appeals court upheld a lower court's invalidation of several changes to New York's attorney advertising rules, including restrictions on client testimonials, portrayals of judges, so-called "irrelevant techniques" and nicknames, mottos or trade names.

The 2nd U.S. Circuit Court of Appeals in *Alexander* noted that the state failed to introduce evidence that many of these type of restrictions were misleading. Furthermore, the appeals court subjected these restrictions to the rigorous review required by the last two prongs of the *Central Hudson* test.

The 2nd Circuit explained the state failed to meet its burden under the penultimate prong of Central Hudson by showing how its interests would materially and directly advance the state's interests. Id. at 91. The appeals court also determined the restrictions were not narrowly tailored. The appeals court explained that "each would fail the final inquiry because each wholly prohibits a category of advertising speech that is *potentially* misleading, but is not inherently or actually misleading in all cases." Id. at 96.

Restriction on Actor or Model Playing a Client

The restriction – proposed rule 7.1(1)(D) on having an actor or model portray a client violates the First Amendment. The comments to this proposal state that "the use

of actors or models to portray clients is thus inherently deceptive." (See Appendix A at p. 4). Advertisements using actors or models are not "inherently deceptive." There is no evidence to support this conclusory allegation. Even if there were, a more constitutionally palatable solution would be to require a small disclaimer, stating that the individual in the ad is an actor, not an actual client. For example, New York Rule 7.1(c)(4) provides that attorneys may not "use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same." This disclaimer was approved by the 2nd Circuit in ...

The 5th U.S. Circuit Court of Appeals recently upheld a Louisiana restriction that prohibited the portrayal of clients, scenes or pictures unless there was an appropriate disclaimer. *Public Citizen v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011). The 5th Circuit explained that the use of actors to portray clients is not inherent misleading. The appeals court explained that actors and others portraying clients can be used in a "non-deceptive manner." Id. at 219. Rather, the 5th Circuit upheld the measure because the Louisiana law was not a flat ban on speech – like the current Tennessee proposals – but because there is an included disclaimer.

Proposed Rule 7.1(2): Restriction on "Prohibited Visual and Verbal Portrayals and Illustrations

The proposed restriction on "prohibited visual and verbal portrayals and illustrations" would constitute an impermissible blanket ban on speech. There is no evidence supporting such an onerous restriction. It also flies in the face of U.S. Supreme Court precedent. The U.S. Supreme Court in *Zauderer* invalidated a similar restriction decades ago: "The State's arguments amount to little more than unsupported assertions:

nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban" 471 U.S. at 648. The Court added that "illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising." Id. at 649.

The 2nd Circuit Court of Appeals in *Alexander v. Cahill*, 598 F.3d 79 (2010), invalidated a similar sort of restriction on "irrelevant techniques." The Alexander firm had television ads featuring wisps of smoke, blue electrical currents and special effects. Id. at 94. The 2nd Circuit concluded that the state failed to "provide evidence that consumers have, in fact, been misled by these or similar advertisements." Id.

Proposed Rule 7.1(b)(1)(L) – Listing of Permissible Symbols

In the various and sundry proposed Tennessee rules by Petitioners Appendix B provides for a related rule by listing a series of permissible illustrations – "an unadorned set of law books, the scales of justice, a gavel, traditional renditions of Lady Justice, the Statue of Liberty" to name a few. This is a grossly under-inclusive list. There are an infinite number of other symbols that should be permissible. Why can't attorneys have ads depicting an adorned set of law books or a gryphon? It is unlikely that a symbol could mislead any member of the general public. Furthermore, by naming just a few permissible symbols, the rule bans a significant amount of protected speech.

Furthermore, the ban on symbols presumes the public is too stupid and easily influenced by a symbol in an attorney advertisement. This strange assumption ignores the fact that members of the public routinely fulfill their civic duty by serving on juries.

In that capacity, they analyze evidence, listen to expert and lay witness testimony, sift through multiple exhibits, listen to jury instructions and decide questions of fact in contested cases. If people are smart enough to serve as jurors, how are they not smart enough to watch attorney advertisements?

The idea of utilizing only certain government-approved symbols is a patent effort to legislate taste and morality. It constitutes impermissible viewpoint discrimination and flies in the face of First Amendment jurisprudence.

Rule 7.1(c)(1)(F) – Any Reference to Past Results

This proposed rule also violates the First Amendment by prohibiting a significant amount of truthful, non-misleading speech. Lawyers should be able to advertise truthfully when they have won large jury verdicts, obtained large settlements or otherwise obtained favorable results. All that should be required is a disclaimer, stating that "Past results do not guarantee success in particular cases. Results may vary."

The current Tennessee Rules of Professional Conduct addresses this well. Comment 3 to Rule 7.1 explains that sometimes a disclaimer is the best way to address references to past results. The Comment explains that "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." The better course is to leave the rule as it is – and allow attorneys to include appropriate disclaimers about past results.

The overwhelming majority of states do not impose a particular provision preventing statements about past successes. It makes no sense for lawyers to decline to discuss their past successes. Do the petitioners simply want lawyers to discuss their past

failures – or to not advertise at all? The vast majority of states do not impose a particular restriction on statements regarding past statements. (ABA, "Differences between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct (December 1, 2012)). There is nothing false or misleading about reporting past successes. At most, a state could require the inclusion of a disclaimer, "Prior results do not guarantee a similar outcome." A minority of states require a disclaimer if attorneys reference past results. See, e.g. Missouri Rule 4-7.1(c): "A communication is misleading if it proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits." Only three states – Florida, Indiana and Louisiana – flatly prohibit all such references to past successes.

Proposed Rule 7.2(1) and (2) – bona fide offices

The rule requiring that attorneys advertising have a bona fide office in Tennessee is not nearly as constitutionally problematic as many of the other proposals. However, this proposed change to Rule 7.2 is not necessary. There has been no showing and no evidence of any need to amend Rule 7.2. The current Tennessee rule 7.2(d) provides: "Except for communications by registered intermediary organizations, any advertisement shall include the name and office address of at least one lawyer or law firm assuming responsibility for the communication." The current rule ensures that the public would not be misled.

Rule 7.7 – Special Proposed Rule for Television and Radio Ads

Rule 7.7 proposes especially onerous requirements for attorney television and radio advertisements. It ignores other types of print advertisements and places special restrictions on this particular medium. Attorney ads occur everywhere in many forms and media – firm newsletters, circulars, yellow pages, and billboards. There does not need to be a targeting of the broadcast medium. An overwhelming number of states do not impose special restrictions on broadcast attorney advertisements. Only three states – Florida, Iowa and Louisiana – have similar such rules currently in place. See Florida Rule 4-7.5(b), Iowa Rule 32:7.2(e), Louisiana Rule 7.5(b).

Rule 7.7(b)(1) – only instrumental music

The entire proposed Rule 7.7 is problematic for numerous reasons. It is unlikely that any person would be swayed by instrumental music in an attorney advertisement. But, the proposal on a prohibition on "all background sound other instrumental music" is particularly strange. 49 out of 50 states have not adopted such a bizarre restriction. Only the state of Florida has a special rule identifying "prohibited sounds."

Rule 7.7(b)(2) – Prohibition on Celebrities

Proposed amendment 7.7(b)(2) provides that television and radio ads may use non-attorney spokespersons but that celebrities not recognizable to the public cannot be used. This rule makes no sense. There is no showing that the use of celebrities would somehow mislead the public. 49 out of 50 states do not contain a rule selectively targeting celebrities. *Only* the state of Florida has a rule like this. See Florida Rule 4-7.2(c)(15): "A lawyer shall not include in any advertisement or unsolicited written communication any celebrity whose voice or image is recognizable to the public."

Conclusion

The great irony of state restrictions on attorney advertising is that it contradicts history. John Marshall, arguably the greatest chief justice in the history of the U.S. Supreme Court, advertised his law practice in the *Virginia Gazette* in 1784. See Steven G. Brody and Bruce E.H. Johnson, "Advertising and Commercial Speech: A First Amendment Guide (2nd. Ed.)(2012) at 14-151, quoting Jean Edward Smith, *John Marshall* (Henry Holt & Co., 1996) at p. 101. Abraham Lincoln advertised his legal services in the 1830s and 1850s. William Hornsby, "Clashes of Class and Cash: Battles from the 150 Years War To Govern Client Development," 37 Arizona State Law Journal 255, 262 (1996).

The existing Tennessee Rules of Professional Conduct, which closely track the ABA Model Rules of Professional Conduct, are sufficient to deal with false and misleading attorney advertising. There is no need for wholesale revision of rules that adequately address any perceived problems. Furthermore, there is no evidence that there needs to be changes made to the existing rules. This Honorable Court recently adopted revisions to the Rules of Professional Conduct – including advertising – in September 2010 to go into effect in July 2011. There is simply no need to revisit and revise the existing rules.

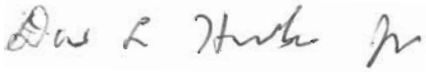
The instant petitions calling for drastic and draconian changes to the Tennessee Rules of Professional Conduct on attorney advertising are unreasonable, unnecessary and unconstitutional. There has not been any evidence that establishes harm caused by existing attorney advertising. The petitions are undergirded with a subjective opinion

that attorney advertising is harmful and distracting. But, there is not a shred of evidence to support this.

Even if there were some evidence of harm, many of these restrictions simply fail to pass muster under a reasoned application of the *Central Hudson* test. Many of the restrictions do not directly and materially advance the state's supposedly substantial interests. Many of the proposals are far from narrowly tailored – they are complete bans on different forms of communication. Many of the proposals ignore the well-settled principle of constitutional law that disclosures and disclaimers are preferable to complete bans on speech.

These rules flout fundamental First Amendment principles and ignore the prevailing trend in the U.S. Supreme Court to protect commercial speech. The existing rules on attorney advertising are well-reasoned. There is no need to overhaul existing rules and replace them with rules that violate constitutional free-speech principles.

Respectfully submitted,



David L. Hudson Jr., B.P.R. #016742

600 12th Avenue South, #434

Nashville, TN 37203

(615) 479-3098

TENNESSEE BAR
ASSOCIATION

PRESIDENT
Jackie Dixon
424 Church Street
Suite 2260
Nashville, Tennessee 37219
(615) 986-3377
FAX (615) 635-0018
Email: jdixon@wmdlawgroup.com

PRESIDENT-ELECT
Cindy Wyrick
P.O. Box 5365
Sevierville, Tennessee 37862
(865) 453-2866
FAX (865) 429-1540
Email: crwyrick@ogrlawfirm.com

VICE PRESIDENT
Jonathan Steen
464 North Parkway, Suite A
Jackson, Tennessee 38305
(731) 660-2332
FAX (731) 664-1109
Email: jsteen@rsslawfirm.com

TREASURER
Sherie Edwards
P.O. Box 1065
Brentwood, Tennessee 37024
(615) 846-8205
FAX (615) 846-6070
Email: sheriee@svmic.com

SECRETARY
Jason Pannu
424 Church Street
Suite 2500
Nashville, Tennessee 37219-8615
(615)259-1366
Fax: (615)259-1389
Email: jpannu@lewisking.com

IMMEDIATE PAST PRESIDENT
Danny Van Horn

BOARD OF GOVERNORS
Dan Berexa, Nashville
Tasha Blakney, Knoxville
Carl Carter, Memphis
Jason Creasy, Dyersburg
James Crumlin, Nashville
Kim Helper, Franklin
Bobby Hibbett, Lebanon
The Honorable Robert Holloway, Columbia
Frank Johnstone, Kingsport
Jason Long, Knoxville
David McDowell, Chattanooga
Andrew Sellers, Jackson
Michelle Sellers, Jackson
Charles Trotter, Huntingdon
Chris Varner, Chattanooga
David Veile, Franklin
Guy Wilkinson, Camden
Randall York, Cookeville

GENERAL COUNSEL
Paul Ney, Nashville

EXECUTIVE DIRECTOR
Allan F. Ramsaur, Nashville
Email: aramsaur@tnbar.org

January 23, 2013

RECEIVED
JAN 24 2013
Clerk of the Courts
Rec'd By

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 Seventh Avenue North
Nashville, TN 37219

IN RE: PETITION TO ADOPT CHANGES TO
RULES OF PROFESSIONAL CONDUCT
ON LAWYER ADVERTISING

Dear Mike:

Attached please find an original and six copies of the Comment of the Tennessee Bar Association in reference to the above matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Jackie Dixon, President, Tennessee Bar Association
Brian Faughnan, Chair, TBA Standing Committee on
Ethics & Professional Responsibility
Paul Ney, TBA General Counsel
Service List

Tennessee Bar Center
221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421 • (800) 899-6993
FAX (615) 297-8058
www.tba.org

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
JAN 24 2013
Clerk

IN RE: PETITION TO ADOPT CHANGES TO RULES OF PROFESSIONAL CONDUCT ON LAWYER ADVERTISING

No. M2012-01129-SC-RL1-RL

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, Jacqueline B. Dixon; Chair, TBA Standing Committee on Ethics and Professional Responsibility, Brian S. Faughnan; General Counsel, Paul C. Ney; and Executive Director, Allan F. Ramsaur, in response to this Court's Order entered November 26, 2012, submits the following comment in opposition to the Petitions To Adopt Changes To Rules Of Professional Conduct On Lawyer Advertising ("Petitions") recently filed by the Tennessee Association for Justice ("TAJ") and attorney Matthew C. Hardin ("Hardin"):

Summary of the Position of the Tennessee Bar Association

While the prevailing sentiment of manyTennessee Bar Association members is sympathetic to that expressed in the Petitions, and the Association remains mindful of the concerns expressed regarding any perceived effect of lawyer advertising on the reputation of lawyers generally, these views and opinions cannot form the basis for policy regulating speech by lawyers. This is especially so given the role that lawyer advertising can play in increasing public awareness of access to justice. In its dealing with the Court regarding matters of lawyer regulation, the TBA has consistently offered not just the views of some Tennessee lawyers, but

the advice of the bar regarding defensible and workable ways in which to accomplish proper regulation to protect the public from harm.

The Tennessee Bar Association, upon the advice of its Standing Committee on Ethics and Professional Responsibility, urges this Court to deny these Petitions because they propose revisions to Tennessee's ethics rules which are unneeded, contrary to the public interest, and of dubious constitutionality. The TBA's opposition to these Petitions can be summed up in just three sentences:

1. The Petitions, which fail to acknowledge the existence of multiple United States Supreme Court cases striking down restrictions on lawyer advertising over the last 30 years, include a number of proposed revisions to Tennessee's lawyer advertising rules of dubious constitutionality under the First Amendment.[1]

2. The Petitions are unsupported by any evidence that the proposed revisions are needed to address any actual harms being inflicted upon Tennessee citizens as a result of lawyer advertising in Tennessee.

3. The Petitions lack any such actual evidence because Tennessee's current lawyer advertising rules sufficiently protect the public from actual harm and provide the Board of Professional Responsibility with the tools and authority to investigate, charge, and sanction any lawyer advertising in Tennessee that is false or misleading.

The Petitioners Would Have This Court Adopt Rules Likely to Be Stuck Down as Unconstitutional.

---

[1] The Tennessee Constitution generally affords at least as much protection to speech as the First Amendment to the U.S. Constitution. *See* Tenn. Const. art. I, § 19; Leech v. American Booksellers Ass'n, 582 S.W.2d 738, 745 (Tenn. 1979). Thus, the TBA assumes that this Court would find that the Tennessee Constitution provides at least as strong a protection for lawyer advertising as commercial speech as does the First Amendment and, consequently, the TBA submits that these Petitions seek the enactment of law by this Court that would also offend the Tennessee Constitution.

A line of United States Supreme Court cases stretching back 36 years have addressed the application of the First Amendment to lawyer advertising. The Petitions only discuss the first such case, Bates v. State Bar, 433 U.S. 350 (1977), and act as if other than precedent prohibiting prior restraints on commercial speech, this Court would be writing on a clean slate if it adopted the Petitions.

As this Court knows, however, United States Supreme Court case law addressing lawyer advertising makes clear that, although states have the authority without running afoul of the First Amendment to regulate and prohibit advertising that is actually false or misleading, 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."[2] As the Supreme Court articulated in one landmark case involving lawyer advertising, the constitutional protection afforded to commercial speech requires that state regulators incur the "costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."[3] Tennessee's current rules concerning lawyer advertising are now squarely grounded upon these constitutional principles.

An examination of one type of advertisement targeted in both Petitions readily demonstrates how the proposed revisions would do exactly what the United States Supreme Court has repeatedly said the First Amendment prohibits. The Petitions propose to ban the use of actors or models to portray clients as a way of regulating television ads that, Petitioners claim, use actors or models to depict "young, attractive, and healthy individuals leading active lives after receiving large settlements." (Hardin Petition at 11; *see also* TAJ Petition at 3.)

---

[2] In re R.M.J., 455 U.S. 191, 203 (1982).
[3] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646 (1985).

As explained below in more detail, no new rule is needed to address the type of advertising targeted by the Petitioners. Any lawyer who uses an actor to falsely or misleadingly portray a client in a particular case as young, active, and healthy, when in fact that client is old, infirm, and disabled (whether from their injury or otherwise) would be subject to being disciplined under Tennessee's advertising rules as they already exist because RPCs 7.1 and 7.2 clearly and expressly prohibit ads that are actually false or misleading.[4]

Petitioners each assert, firmly and unequivocally, that *all* ads involving actors or models to portray clients are false and misleading. Yet, a lawyer could have an actor portray a client in a commercial in a manner that is neither false nor misleading by, for example, using a disclaimer[5] in the ad to make clear that the actor is not the actual client and by having the actor portraying the client be, for example, appear to be as old (or young) and unhealthy (or healthy) as the client in question. This kind of effort to avoid the regulatory obligation to separate the wheat from the chaff is what thirty years of United States Supreme Court precedent makes clear is constitutionally unacceptable. The Hardin Petition would go even further than the TAJ, trampling truthful commercial speech by banning all ads that "contain any reference to past successes or results obtained." (Hardin Petition, Exhibit 1 at 4 (proposed Rule 7.1(c)(1)(F).)

Many lawyers, in all parts of Tennessee and in practice settings from big firms to small firms and solo practitioners, whether they advertise on television, radio, or on their (or their

---

[4] Tenn. Sup. Ct. R. 8, RPC 7.1 ("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."); Tenn. Sup. Ct. R. 8, RPC 7.2(a) ("Subject to the requirements of paragraphs (b) through (d) below and RPCs 7.1 . . ., a lawyer, may advertise services through written, recorded, or electronic communication, including public media.").

[5] *See* Tenn. Sup. Ct. R. 8, RPC 7.1, Comment [3] ("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.").

firm's) own website, include information about matters they have handled as a legitimate means for potential clients to evaluate whether to hire the lawyer. Each and every statement about a lawyer's prior experience is already covered by the obligation under current RPC 7.1 to avoid false and misleading statements. The ban on commercial speech proposed by Hardin would quite clearly reach many entirely truthful statements in lawyer advertising about a lawyer's past experience. (Exhibit 1 to Hardin Petition at 4, proposed Rule 7.0(c)(1)(F) (prohibiting altogether in lawyer advertising "any reference to past successes or results obtained").

Beyond the First Amendment challenges which adoption of the proposed revisions advocated by Petitioners would bring, the Petitioners' proposed "bona fide office" rule would subject Tennessee's ethics rules to other constitutional challenges. There is no way that the Petitioners' proposal could conceivably be enforced by the Board of Professional Responsibility without attempting to police, for example, multi-state cable and satellite television commercials, satellite radio, and nationwide advertising on the Internet. Further, Tennessee's current ethics rules, as adopted by this Court, not only expressly provide that lawyers not licensed in Tennessee can ethically practice law in Tennessee but also clearly contemplate that lawyers not licensed in Tennessee can "offer to provide" legal services in Tennessee.[6] Enactment of the "bona fide office" proposal offered by Petitioners would not only fly in the face of this Court's past approach of attempting to align Tennessee's lawyer regulation with the increasingly multi-state nature of clients' legal matter and needs,[7] but also would subject Tennessee's rules to challenges

---

[6] *See* Tenn. Sup. Ct. R. 8, RPC 8.5(a) ("A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.")

[7] As just two examples, this Court has a adopted a version of ABA Model Rule of Professional Conduct 5.5, on multi-jurisdictional practice, that carefully regulates the presence and activity in Tennessee of lawyers licensed only in other jurisdictions. Tenn. Sup. Ct. R. 8, RPC 5.5. This Court also rejected – and removed from Tennessee law – a reciprocity requirement in our *pro hac vice* rules,

under the dormant[8] Commerce Clause[9] and perhaps even the Privileges and Immunities Clause of the U.S. Constitution.[10]

The Petitioners Offer No Actual Evidence of Harm to Tennessee Citizens to Support The Need For New Rules.

Any neutral, uninformed reader of the exceptionally detailed proposed rule in the Hardin Petition would conclude that Tennessee must have a serious problem on its hands with consumers of legal services being subjected to, and harmed by, false and misleading lawyer advertisements of all sorts, and that the only way to combat wholesale deception of the public in Tennessee is to enact regulations giving the most detailed possible "cookbook" of proscribed (and prescribed for that matter) ad content. Yet, neither Hardin nor TAJ offer any evidence reflecting such problems in Tennessee.

The disparity between the remedy proposed by Petitioners and the alleged problem to be addressed is particularly revealing. Neither Petitioner offers evidence of a string of serious disciplinary sanctions imposed on lawyers for ads that misled clients or members of the public. Neither Petitioner offers up a list of obviously misleading ads that were determined to somehow

---

presumably believing that no public policy interest would be served by such a protectionist approach. *See* Tenn. Sup. Ct. R. 19.

[8] The Commerce Clause of the U.S. Constitution confers the power upon Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. A "dormant" aspect of the Commerce Clause "has long been recognized [involving] a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." S. Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984).

[9] *See, e.g.*, Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (holding that a state law that discriminates against out-of-state economic interests is "virtually per se invalid); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (demonstrating that if a state law directly discriminates or if "its effect is to favor in-state economic interests over out-of-state interests" then the state law is "generally struck down . . . without further inquiry").

[10] *See generally* Locke v. Shore, 682 F. Supp. 2d 1283, 1294-97 (N.D. Fla. 2010) (holding that a state law prohibiting out-of-state (non-Florida licensed) interior designers from stating that they are "interior designers" violated the First Amendment but rejecting a Privileges or Immunities Clause challenge).

have been beyond the reach of the current ethics rules. Neither Petitioner submits evidence demonstrating any public sentiment that regulation of lawyer advertising is lax and that such laxity is resulting in the public being misled.

Likewise, with respect to the proposed "bona fide office" requirement for advertising, Petitioners point to no examples of where RPC 8.5(a) failed because lawyer advertisements were deemed unreachable by Tennessee enforcement efforts; nor do Petitioners point to instances of clients in Tennessee being harmed by representation performed by a lawyer who had no "bona fide office"[11] in Tennessee.

Rather, Petitioners appear to ask this Court to transform opinions and tastes regarding lawyer advertising into law. In so doing, Petitioners would replace Tennessee's current clear standard for the regulated (lawyers), the regulator (the Board of Professional Responsibility), and those to be protected (the public) with a patchwork of rules that are, in many respects, similar in form to the rules this Court replaced when it adopted our current rules in 2002. *Compare* Hardin Petition, Exhibit 1 at 2 (proposed Rule 7.1(b)) *with* Tenn. Sup. Ct. R. 8, DR 2-101(B) (former rule, in force prior to March 2003).

The Current Rules Sufficiently Protect the Public and Provide the Board of Professional Responsibility With the Tools and Authority Necessary to Address False or Misleading Lawyer Advertising.

Tennessee's current ethics rules governing lawyer advertising simply and clearly prohibit any "false or misleading communication about the lawyer or the lawyer's services," and defines a prohibited communication as one that "contains a material misrepresentation of fact or law, or

[11] The proposal also provides no guidance as to what constitutes a "bona fide office." May a lawyer satisfy this requirement by establishing an "of counsel" relationship with a Tennessee lawyer? Perhaps not, as the language suggests that non-Tennessee lawyer or law firm must "reasonably expect[] to furnish legal services in a substantial way on a regular and continuing basis" in this office. Would a Louisville lawyer in a multistate firm be able to consider his firm's Nashville office a "bona fide office"? Under what circumstances? The proposal does not say.

omits a fact necessary to make the statement considered as a whole not materially misleading." Tenn. Sup. Ct. R. 8, RPC 7.1. Our current rules also unambiguously explain that the prohibition against false or misleading communications apply to all types of lawyer advertising in the public media. Tenn. Sup. Ct. R. 8, RPC 7.2(a). The Petitions before this Court do not demonstrate any reason to believe that further revisions to the ethics rules are needed to discipline lawyers who run advertisements that are false or misleading or to protect the public from actual harm.

As indicated above, Petitioners have not offered any evidence of any sort to demonstrate a need for changes to the currently regulatory approach to lawyer advertising under Tennessee's ethics rules. Petitioners cite not a single example of any lawyer ad that they claim is injurious to the public that has somehow survived scrutiny by the Board – whether by the Board's approval of it use under existing rules or, what would be more directly convincing, by a failed effort by the Board to successfully prosecute an improper ad as "false and misleading."

The TBA would note that the Board of Professional Responsibility substantially supported this Court's adoption in 2002 of the type of lawyer advertising rules currently in place. The Board of Professional Responsibility also fully supported this Court's more recent deletion of the prior requirement in the ethics rules for all advertisements to be filed with the Board.[12] Nothing in the public reports or statements of the Board of Professional Responsibility has suggested, over the past decade, that the current standard is insufficient to allow the Board of

---

[12] Hardin would reinstate the former requirement that many ads be filed with the Board of Professional Responsibility, as well as a paid, pre-broadcast approval process for television ads. (Hardin Petition at 30-32 & Exhibit 1 thereto at 7-11.) In the process by which the TBA proposed the deletion of this requirement, Disciplinary Counsel for the Board and the Board supported this change and noted that resources constraints on the Board generally meant that neither the Board nor its staff reviewed lawyer ads then filed, unless some specific cause for review existed, such as a complaint. The Hardin Petition appears to require the Board to review all ads file with the Board, which appears to the TBA to be both impractical and unnecessary, as the experience of the Board has taught. (Hardin Petition, Exhibit 1 at 9 (proposed Rule 7.8(a)(1)(C), (a)(2)(C)).)

Professional Responsibility to adequately protect the public from harmful lawyer ads, and Petitioners nowhere cite to any such report or statement.

Many of the proposed revisions desired by the Petitioners likely could never be supported by the kind of evidence necessary to overcome the First Amendment protections afforded commercial speech: for example, the claimed effort to preclude "advertisements which may not appear to be false or misleading on their face, but have tendencies to distract the viewer from what they are seeing." (TAJ Petition at 3 (citing to TAJ Proposed Rule 7.1(1)(B)).[13] Likewise, doomed from a constitutional standpoint would be a number of other of Petitioners' proposed rules, including but not limited to items such as (a) TAJ Proposed Rule 7.1(2) and its effort to restrict visual images or sounds that are "manipulative" given that all commercial advertising is, to one extent or another, designed to "manipulate" its target; and (b) Hardin Proposed Rule 7.7(b)(1)(C) which seeks to prohibit "any background sound other than instrumental music" in television or radio ads.

Regardless of the reasons for the failure, the Petitioners' failure to offer any evidence at all of any actual harm to consumers from lawyer advertising in Tennessee cannot be overlooked by this Court: the Petitions fail to convincingly establish that the current ethics rules on lawyer advertising have proven inadequate to the task of protecting Tennesseans from improper lawyer ads, or that the current clear ban on "false or misleading" lawyer ads does not appropriately and sufficiently include within its sweep lawyer ads that harm the public.

The TBA would urge this Court to be particularly sensitive to the potential anticompetitive effect of the kinds of serious restrictions on lawyer advertising being proposed.

---

[13] Aspects of the proposed revisions, if enacted, could also insult the intelligence of Tennessee citizens. Logic would suggest that, if a lawyer advertisement, did truly "stretch[] the bounds of reality" in the ways complained of such as showing talking dogs or space aliens, then the ad would not be deceptive as most viewers would recognize the situation and not be misled.

As with any governmental regulation, severe restrictions on lawyer advertising can have an effect on the marketplace for legal services and also can reduce the information available to citizens and consumers about their access to legal services. Further, any act of banning one form of advertising for legal services while not restricting others will place the government in the position of favoring the economic fortunes of the lawyers who rely on one form of marketing as opposed to others. The TBA believes that, to the greatest extent possible, the law on lawyer advertising should not pick winners and losers nor favor, for example, sponsorships of cultural events over testimonial ads. The TBA believes that the Court's current rules, which primarily rely upon a single touchstone – whether an ad is actually false or misleading – is the most neutral possible standard, and the one best designed to address any evils that may arise from improper lawyer advertising.

RESPECTFULLY SUBMITTED,

By: /s/ by permission

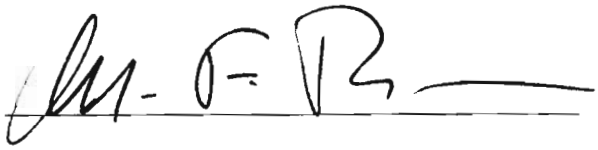
JACQUELINE B. DIXON (012054)
President, Tennessee Bar Association
Weatherly, McNally & Dixon PLC
424 Church Street, Suite 2260
Nashville, TN 37219
(615) 986-3377

By: _____

BRIAN S. FAUGHNAN (019379)
Chair, Tennessee Bar Association
Standing Committee on Ethics &
Professional Responsibility
Thomason, Hendrix, Harvey, Johnson
& Mitchell PLLC
40 S. Main Street, Suite 2900
Memphis, TN 38103
(901) 577-6139

By: /s/ by permission

PAUL C. NEY (007012)
General Counsel,
Tennessee Bar Association
Waddey & Patterson
3504 Richland Avenue
Nashville, Tennessee 37205
(615) 242-2400

By: 

ALLAN F. RAMSAUR (5764)
Executive Director,
Tennessee Bar Association
Tennessee Bar Center
221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.

Allan F. Ramsaur

Jeremy Ball
Dist Atty OFC
P.O. Box 690
Dandridge, TN 37725

Heidi Barcus
London & Amburn, P.C.
607 Market Street, Suite 900
Knoxville, TN 37902

Russell Blair
Blair And Parker
Po Box 804
Etowah, TN 37331--0804

Mark Blakley
Stansberry, Petroff, Marcum & Blakley
P O Box 240
Huntsville, TN 37756

Trace Blankenship
Bone McAllester Norton PLLC
511 Union St Ste 1600
Nashville, TN 37219

Ben Boston
Boston, Holt, Sockwell & Durham PLLC
P O Box 357
Lawrenceburg, TN 38464

Bill Brown
William J. Brown & Associates
PO Box 1001
Cleveland, TN 37364

Diana Burns
Child Support Magistrate
20 N Public Sq Ste 202
Murfreesboro, TN 37130--3667

Kirk Caraway
Allen, Summers, Simpson, Lillie & Gresham, Pllc
Brinkley Plaza 80 Monroe Ave Ste 650
Memphis, TN 38103--2466

William Cockett
Smith & Cockett Attorneys
247 West Main Street Po Box 108
Mountain City, TN 37683--0108

Bill Coley
Hodges, Doughty & Carson PLLC
P O Box 869
Knoxville, TN 37901

Doug Collins
P O Box 1223
Morristown, TN 37816

Daryl Colson
Colson & Maxwell
808 North Church St
Livingston, TN 38570

Bratten Cook
Bratten Hale Cook Ii
104 N 3rd St
Smithville, TN 37166

Terri Crider
Flippin, Atkins & Crider PC
P.O. Box 160
Humboldt, TN 38343

Robert Curtis
Robert W. Curtis Iii
209 W Madison St
Pulaski, TN 38478--3222

Creed Daniel
Daniel & Daniel
P O Box 6
Rutledge, TN 37861

Wade Davies
Ritchie, Dillard, Davies & Johnson PC
PO Box 1126
Knoxville, TN 37901

Jason Davis
Bussart Law Firm
520 North Ellington Parkway
Lewisburg, TN 37091

Michael Davis
364 Cumberland Mountain Cir Po Box 756
Wartburg, TN 37887--0756

Dilliha
Richert & Dilliha, PLLC
516 S. Main Street
Springfield, TN 37172

William Douglas
William Dan Douglas, Jr
109 N Main St Po Box 489
Ripley, TN 38063--0489

Hilary Duke
Reynolds, Potter, Ragan & Vandivort, PLC
210 East College Street
Dickson, TN 37055

Joseph Ford
McBee & Ford
17 S College St
Winchester, TN 37398

Andrew Frazier
Whitworth Law Firm
P O Box 208
Camden, TN 38320

Anne Fritz
Memphis Bar Association
80 Monroe Suite 220
Memphis, TN 38103

James Gass
Ogle, Gass & Richardson PC
PO Box 5365
Sevierville, TN 37864

Charles Grant
Baker, Donelson, Bearman, Caldwell & Berkowitz PC
211 Commerce St Suite 800
Nashville, TN 37201-1817

Tish Holder
Harvill & Assoc PC
820 Hwy 100
Centerville, TN 37033

Chuck Holliday
Law Offices of Jeffrey A. Garrety
65 Stonebridge Blvd.
Jackson, TN 38305

Jason Holly
Holly & Holly Pllc
415 Hudson Dr
Elizabethton, TN 37643--2881

Lynda Hood
Chattanooga Bar Association
801 Broad St Suite 420 Pioneer Bldg
Chattanooga, TN 37402

Carmon Hooper
C. Thomas Hooper Iii
P O Box 55
Brownsville, TN 38012

Jay Ingrum
Phillips & Ingrum
117 E Main St
Gallatin, TN 37066

Christopher Keeton
Keeton & Perry Pllc
401 Murfreesboro Hwy
Manchester, TN 37355--1580

Randy Kennedy
20th Judicial District
One Public Sq. #608 Rm 410
Nashville, TN 37201

John Kitch
Attorney
2300 21st Ave S Ste 305
Nashville, TN 37212

Lindsey Lane
Leonard, Kershaw & Hensley, Llp
131 S Main St Ste 102
Greeneville, TN 37743

Gerald Largen
PO Box 266
Kingston, TN 37763

William Lawson
William B. Lawson, Attorney At Law
112 Gay St, Suite A Po Box 16
Erwin, TN 37650--0016

William Locke
General Sessions Judge
Warren County Courthouse Po Box 228
Mcminnville, TN 37111--0228

Charles London
Herndon, Coleman, Brading, & McKee
P.O. Box 1160
Johnson City, TN 37605

Ira Long
Weill & Long, PLLC
1205 Tallan Building Two Union Square
Chattanooga, TN 37402

Matt Maddox
Attorney at Law
P O Box 827
Huntingdon, TN 38344

Timothy Mickel
Evans Harrison Hackett PLLC
One Central Plaza. Suite 800, 835 Georgia Avenue
Chattanooga, TN 37402

John Miles
John Miles, Atty.
P O Box 8
Union City, TN 38281

Robin Miller
Spears Moore Rebman & Williams PC
PO Box 1749
Chattanooga, TN 37401

William Mitchell
Mitchell Law Office
112 South Main Street
Sparta, TN 38583

Tracy Moore
Moore & Peden PC
PO Box 981
Columbia, TN 38402--0981

Charles Morton
Puryear Newman & Morton Pllc
130 Fourth Ave S Franklin, Tn 37064
Po Box 40
Franklin, TN 37065--0040

Rachel Moses
Legal Aid Society
9 S Jefferson Ave., Ste 102
Cookeville, TN 38501

David Myers
105 Monroe St Po Box 13
Maynardville, TN 37807--0013

Timothy Naifeh
227 Church St
Tiptonville, TN 38079

Tommy Parker
Baker, Donelson, Bearman, Caldwell & Berkowitz PC
165 Madison Ave Ste 2000
Memphis, TN 38103

Beau Pemberton
Law Ofc Of James H Bradberry
109 North Poplar Street Po Box 789
Dresden, TN 38225--0789

Jennifer Porth
J Stephen Brown Pc
224 W Gay St Po Box 792
Lebanon, TN 37088--0792

Brian Rife
Midkiff, Muncie & Ross, PC
110 Piedmont Ave
Bristol, VA 24201--4159

Alan Rose
Law Office of W. Alan Rose
1183 Lawrence Rd
Murfreesboro, TN 37128--5706

Stanley Ross
Harvill Ross Hogan Ragland
PO Box 925
Clarksville, TN 37041-0925

Dora Salinas
104 Frey St
Ashland City, TN 37015

Dana Scott
Dana Lee Scott, Attorney at Law
1800 Huntington Woods Circle
Kingsport, TN 37660

Linda Seely
Memphis Area Legal Services, Inc.
116 Tuckahoe Rd
Jackson, TN 38305

Randall Self
Randall E Self, Attorney At Law
131 A Market St E Po Box 501
Fayetteville, TN 37334--0501

Amber Shaw
Law Office of J. Houston Gordon
114 W. Liberty Avenue, Suite 300
Covington, TN 38019

Tom Sherrard
Sherrard & Roe PLC
150 3rd Ave S #1100
Nashville, TN 37201-2011

Ashley Shudan
Ford & Nichols
PO Box 905
Loudon, TN 37774

Craig Smith
Miller & Martin PLLC
832 Georgia Ave Ste 1000
Chattanooga, TN 37402

James Snyder
Law Office of James H. Snyder, Jr.
345 S Hall Rd
Alcoa, TN 37701--2643

David Stanifer
Stanifer & Stanifer
PO Box 217
Tazewell, TN 37879

John Tarpley
Lewis, King, Krieg & Waldrop PC
P.O. Box 198615
Nashville, TN 37219

James Taylor
1374 Railroad St Ste 400
Dayton, TN 37321--2211

Harriet Thompson
P O Box 600
Bolivar, TN 38008

Albert Wade
Greer & Wade, PLLC
70 Dowdy Lane
Paris, TN 38242

Tyler Weiss
Worthington & Weiss, P.C.
409 College St N Ste 1
Madisonville, TN 37354--3103

John White
Bobo, Hunt & White & Nance
P O Box 169
Shelbyville, TN 37162

Derreck Whitson
Law OFC of J Derreck Whitson
P.O. Box 1230
Newport, TN 37822

John Lee Williams
Porch Peeler WilliamsThomason
102 S Court Square
Waverly, TN 37185

John Willis
Fox & Farley
310 N. Main St.
Clinton, TN 37716-3752

Matthew Willis
Ashley Ashley & Arnold
PO Box H
Dyersburg, TN 38025

Marsha Wilson
Knoxville Bar Association
P O Box 2027
Knoxville, TN 37901

Gigi Woodruff
Nashville Bar Association
150 4th Avenue N; Suite 1050
Nashville, TN 37219

Imad Al-Deen Abdullah
Baker Donelson Bearman Caldwell & Berkowitz
165 Madison Ave #2000
Memphis, TN 38103

Syd Beckman Beckman
Lincoln Memorial University Duncan School of Law
601 West Summit Hill Dr.
Knoxville, TN 37902

Suanne Bone
Tennessee Association of Criminal Defense Lawyers
530 Church St # 300
Nashville, TN 37219

Emily Campbell Taube
Adams and Reese LLP
80 Monroe Avenue, Ste 700
Memphis, TN 38103

Erik Cole
Tennessee Alliance for Legal Services
50 Vantage Way Suite 250
Nashville, TN 37228

Jackie Dixon
Weatherly McNally & Dixon PLC
424 Church St Suite 2260
Nashville, TN 37219

Melanie Gober
Lawyers Assn for Women
P O Box 190583
Nashville, TN 37219

Chris Guthrie
Vanderbilt University
131 21st Ave. South, Room 108
Nashville, TN 37203-1181

Eric Hudson
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
6075 Poplar Ave Ste 500
Memphis, TN 38119

Suzanne Keith
Tennessee Assn for Justice
1903 Division St
Nashville, TN 37203

Ursula Bailey
Law Office of Ursula Bailey
422 S Gay St Ste 301
Knoxville, TN 37902--1167

Barri Bernstein
Tennessee Bar Foundation
618 Church St Suite 120
Nashville, TN 37219

Lucie Brackin
The Landers Firm
65 Union Ave., 9th Floor, Cotton Exchange Bldg.
Memphis, TN 38103

Bryan Capps
Adams Law Firm
7410 Broken Creek Lane
Knoxville, TN 37920

Craig Cowart
Fisher & Phillips LLP
1715 Aaron Brenner Drive, Suite 312
Memphis, TN 38120

Amanda Dunn
Luther Anderson, PLLP
P.O. Box 151
Chattanooga, TN 37401

David Green
Waller Lansden Dortch Davis
PO Box 198966
Nashville, TN 37219-8966

Lela Hollabaugh
Bradley Arant
1600 Division St. Suite 700
Nashville, TN 37203

Stephen Johnson
Ritchie, Dillard, Davies & Johnson PC
606 W Main Ave Ste 300
Knoxville, TN 37902

Charles Key
UT Medical Group, Inc.
1407 Union Avenue, Suite 700
Memphis, TN 38104--3641

John Barringer
Manier & Herod PC
150 4th Ave N, Ste 2200
Nashville, TN 37219

Doug Blaze
UT College Of Law
1505 W. Cumberland Ave Rm 278
Knoxville, TN 37996

Jack Burgin
Kramer Rayson LLP
PO Box 629
Knoxville, TN 37901

Hewitt Chatman
Public Defenders Office 26th Judicial District
511 Algie Neely Rd
Denmark, TN 38391--1909

Walter Crouch
Waller Lansden Dortch & Davis, LLP
P O Box 198966
Nashville, TN 37219

Sandy Garrett
The Board of Professional Responsibility
10 Cadillac Dr Ste 220
Brentwood, TN 37027--5078

Greg Grisham
Jackson Lewis, LLP
999 Shady Grove Road, Suite 110
Memphis, TN 38120

Earl Houston
Martin, Tate, Morrow & Marston, P.C.
6410 Poplar Ave Ste 1000
Memphis, TN 38119

Laura Keeton
Keeton Law Offices
PO Box 647
Huntingdon, TN 38344

Kaz Kikkawa
HCA Inc.
One Park Plaza 1-4-E
Nashville, TN 37203

Jeff Kinsler
Belmont University
1900 Belmont Blvd
Nashville, TN 37212

William Kratzke
University of Memphis Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103

Karol Lahrman
Tennessee Lawyers Association for Women
PO Box 331214
Nashville, TN 37203

Joe Loser
Nashville School of Law
4013 Armory Oaks Drive
Nashville, TN 37204

Scott McGinness
Miller & Martin PLLC
832 Georgia Ave Ste 1000
Chattanooga, TN 37402

Judy McKissack
Tennessee Commission on Continuing Legal Education
221 Fourth Avenue North SUite 300
Nashville, TN 37219

Mary Morris
Burch, Porter & Johnson, PLLC
130 North Court Avenue
Memphis, TN 38103

Lisa Perlen
TN Board of Law Examiners
66 Wyn Oak
Nashville, TN 37205

Andrea Perry
Bone McAllester Norton PLLC
511 Union Street, Suite 1600
Nashville, TN 37219

Nikki Pierce
Federal Defender Svc East Tn
129 W Depot St Ste 100
Greeneville, TN 37743--1103

Mario Ramos
Mario Ramos PLLC
611 Commerce St Suite 3119
Nashville, TN 37203

Allan Ramsaur
Tennessee Bar Association
221 4th Ave N Suite 400
Nashville, TN 37219

Kristi Rezabek
Court Of Appeals Western Div
231 Algie Neely Rd
Jackson, TN 38301

Kevin Ritz
Office Of Us Attorney
167 N Main St Ste 800
Memphis, TN 38103--1827

Chantelle Roberson
BlueCross BlueShield
1 Cameron Hill Circle
Chattanooga, TN 37402

Ross
FedEx
3620 Hacks Cross Rd. Building B, 3rd Floor
Memphis, TN 38125

Mary Smith
Constangy Brooks & Smith
401 Commerce St., Ste. 700
Nashville, TN 37219-2484

William Stover
W. Stover, Attorney at Law
500 Church St Ste 450
Nashville, TN 37219

Libby Sykes
Nashville City Ctr
511 Union St Ste 600
Nashville, TN 37219--1768

Chris Varner
Evans Harrison Hackett PLLC
835 Georgia Ave, Suite 800
Chattanooga, TN 37402

Terry Woods
Legal Aid of East Tennessee
502 S Gay St Suite 404
Knoxville, TN 37902

RECEIVED
JAN 25 2013
Clerk of the Courts
Rec'd By

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Competition
Bureau of Consumer Protection
Bureau of Economics

January 24, 2013

Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Request for Public Comment, Docket No. M2012-01129-SC-RL1-RL

Dear Mr. Catalano:

The staff of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics[1] appreciates this opportunity to provide comments to the Supreme Court of Tennessee ("Court") in response to its request for public comments on proposed amendments to the Tennessee Rules of Professional Conduct relating to attorney advertising. Based on the FTC's expertise in recognizing the adverse effects for consumers and competition of unduly broad restrictions on professional advertising, as well as prior staff comments on attorney advertising, FTC staff respectfully suggests that the Court consider several key competition and consumer protection principles (explained below) in its review of these proposals. Applying those principles, the Court should decline to adopt proposals that are likely to unnecessarily restrict the dissemination of truthful and non-misleading information, thereby limiting information available to consumers shopping for legal services in Tennessee.

I. INTEREST AND EXPERIENCE OF THE FTC

The FTC is charged under the FTC Act with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] Competition is at the core of America's economy, driving businesses to provide the goods and services that consumers desire, and to sell these goods and services at the lowest possible prices. For this reason, the Commission encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal policies. In particular, the Commission seeks to identify and prevent, where possible, business practices and regulations that impede competition without offering countervailing benefits to consumers.[3]

The Commission and its staff have a longstanding interest in the effects on consumers and competition of the regulation of attorney advertising and solicitation.[4] The Commission

consistently has taken the position that, while unfair or deceptive advertising by lawyers should be prohibited, consumers do not benefit from the imposition of overly-broad restrictions that prevent the communication of truthful and non-misleading information that some consumers value. These types of restrictions are likely to inhibit competition, frustrate informed consumer choice, and possibly lead to higher prices and decreased scope of, or access to, services.

II. PROPOSED AMENDMENTS TO THE TENESSEE RULES OF PROFESSIONAL CONDUCT RELATING TO ATTORNEY ADVERTISING

The Tennessee Rules of Professional Conduct currently address communications concerning a lawyer's services. Rule 7.1 prohibits "false or misleading communication about the lawyer or the lawyer's services."[5] Under the current rules, "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."[6] The proposed amendments under consideration would change this rule, among others.

- The first set of proposed amendments, offered by the Tennessee Association for Justice ("TAJ"), focuses on revising the rules to expand the definition of false and misleading advertising to include "an actor and/or model play[ing] a client"[7] and any "manipulative" visual or verbal description that is "likely to confuse the viewer."[8]

- In the second proposal, Attorney Matthew C. Hardin suggests changes to most of the rules relating to attorney advertising. As stated in his petition, his proposed changes purportedly would "prevent advertising abuses and encourage attorneys to advertise professionally and respectfully within Tennessee."[9] His proposed changes include lists of permissible and prohibited content that would apply to any form of attorney advertising.

III. COMPETITION AND CONSUMER PROTECTION PRINCIPLES

Based on the FTC's broad expertise regarding the characteristics of unfair or deceptive advertising, as well as prior FTC staff analyses of efforts to restrict attorney advertising, FTC staff respectfully urges the Court to consider the following competition and consumer protection principles as part of its review of the proposals. Each of these principles seeks to promote competition and protect consumers by discouraging unnecessary restrictions on the dissemination of truthful and non-misleading information. These principles are most important when proposed restrictions sweep broadly and may inhibit truthful and non-deceptive advertising; it is in those situations where proponents should bear the high burden of demonstrating that the proposed restrictions target legitimate and well-substantiated problems, and that the proposed restrictions are no broader than necessary to address those concerns.

As explained below, the Court also should consider the potential competitive impact of an advertisement pre-screening and evaluation system that would enable one group of attorneys to limit advertising by their competitors.

- While unfair or deceptive advertising by lawyers should be prohibited, restrictions on advertising should be specifically tailored to prevent deceptive claims and should not unnecessarily restrict the dissemination of truthful and non-misleading information. Imposing overly broad restrictions prevents the communication of truthful and non-misleading information that some consumers may value, which is likely to inhibit competition and frustrate informed consumer choice. Research indicates that overly broad restrictions also may adversely affect the prices consumers pay, as well as the scope and quality of services that they receive.[10]

  Some of the proposed regulations, such as the prohibition on using actors/models (TAJ Petition, Rule 7.1(D)), generally recognizable spokespersons (Hardin Petition, Rule 7.7(b)(1)(B)), and certain background sounds (Hardin Petition, Rule 7.7(b)(1)(C)), do not on their face target deception. Because these common advertising methods are not inherently deceptive, more narrowly tailored rules would better address the concerns underlying the proposed regulations. For example, requiring a clear and prominent disclosure that actors are portraying clients would be a less restrictive way to alleviate any concern about potential deception, in the event the Court decides this is a concern worth addressing.

  Likewise, it is not necessarily deceptive to use a spokesperson who purports to speak in the place of and on behalf of a lawyer or law firm. The risk of deception may increase, however, when that individual is a celebrity who is offering an endorsement. In those cases, requiring the celebrity to express his or her honest opinions, findings, beliefs, or experiences would reduce the risk of deception without unduly restricting the free flow of information.[11]

- Prohibiting any advertisement that is "unsubstantiated in fact" (Hardin Petition, Rule 7.1(c)(1)(D)) may prohibit some useful, non-deceptive claims that are difficult to verify. A substantiation requirement serves consumers by helping ensure that advertising claims are not misleading. However, some representations may concern subjective qualities that are not easy to verify with objective evidence – for example, claims about the quality or dedication of the lawyer.[12] A narrower rule governing claims that mischaracterize or promise particular outcomes might better address the concerns underlying this proposed rule.[13]

- The FTC supports industry self-regulation under certain circumstances. There are risks to consumers and competition, however, when one group of competitors regulates another. By requiring pre-screening and evaluation of most attorney advertisements by a review committee of the Board of Professional Responsibility (in accordance with the criteria as required under Hardin Petition, Rule 7.8), the Court would put some attorneys in a position to limit advertising by their competitors, giving the reviewing attorneys both the incentive and the ability to dampen competition under the guise of protecting consumers. Required pre-screening would also raise the cost of doing business for attorneys, which likely would result in higher prices for attorney services and discourage some truthful and valuable advertising.

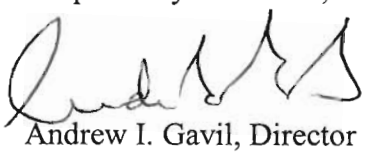
Given the potential burden on competition and consumers, FTC staff recommends that the Court forego the filing and pre-screening components of the Proposed Rules. Instead, the Court should continue to enforce the general prohibition against deceptive and misleading claims through sanctions for violations. If the Court nevertheless believes, based on credible evidence, that pre-screening is necessary to prevent harm to reasonable consumers, the Court should be mindful of the federal and state antitrust laws that would apply to the review committee as a whole and its members individually.[14]

- Both the TAJ Petition and the Hardin Petition propose rules prohibiting advertising in the state of Tennessee by individual lawyers or lawyers for firms without a bona fide office in the state (TAJ Petition, Rule 7.2(1), Hardin Petition, Rule 7.0(c)). A "bona fide office" is defined as "a physical location… where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis" (TAJ Petition at 5). The Tennessee Rules of Professional Conduct do not, however, impose a residency requirement for practicing law in Tennessee. Therefore, this restriction may be overbroad and eliminate competition to provide lawyer services by attorneys who are licensed to practice in the state but do not maintain an office in the state, as well as by attorneys who seek to represent Tennessee residents in national class action lawsuits, to the extent otherwise permitted by applicable Tennessee law. We urge the Court to consider whether prohibiting otherwise permissible advertising by attorneys without a bona fide office in Tennessee is necessary to protect the public.

IV. CONCLUSION

FTC staff believes consumers receive the greatest benefit when reasonable restrictions on advertising are specifically and narrowly tailored to prevent unfair or deceptive claims while preserving competition and ensuring consumer access to truthful and non-misleading information. Rules that unnecessarily restrict the dissemination of truthful and non-misleading information are likely to limit competition and harm consumers of legal services in Tennessee.

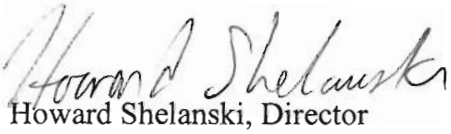
Respectfully submitted,



Andrew I. Gavil, Director
Office of Policy Planning

Richard A. Feinstein, Director
Bureau of Competition

Charles A. Harwood, Acting Director
Bureau of Consumer Protection



Howard Shelanski, Director
Bureau of Economics

---

[1] This staff letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

[2] Federal Trade Commission Act, 15 U.S.C. § 45.

[3] Specific statutory authority for the FTC's advocacy program is found in Section 6 of the FTC Act, under which Congress authorized the FTC "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce," and "[t]o make public from time to time such portions of the information obtained by it hereunder as are in the public interest." *Id.* § 46(a), (f).

[4] *See, e.g.*, Letter from FTC Staff to the Indiana Supreme Court (May 11, 2007), *available at* http://www.ftc.gov/be/V070010.pdf; Letter from FTC Staff to the Florida Bar (Mar. 23, 2007), *available at* http://www.ftc.gov/be/ V070002.pdf; Letter from FTC Staff to the Rules of Professional Conduct Committee, Louisiana State Bar Association (Mar. 14, 2007), *available at* http://www.ftc.gov/opa/2007/03/fyi07225.htm; Letter from FTC Staff to the Office of Court Administration, Supreme Court of New York (Sept. 14, 2006), *available at* http://www.ftc.gov/os/2006/09/V060020-image.pdf; Letter from FTC Staff to the Professional Ethics Committee for the State Bar of Texas (May 26, 2006), *available at* http://www.ftc.gov/os/*2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf*; Letter from FTC Staff to Committee on Attorney Advertising, Supreme Court of New Jersey (Mar. 1, 2006), *available at* http://www.ftc.gov/be/V060009.pdf; *see also, e.g.,* Letter from FTC Staff to Robert G. Esdale, Clerk of the Alabama Supreme Court (Sept. 30, 2002), *available at* http://www.ftc.gov/be/v020023.pdf. In addition, FTC staff has provided comments on such proposals to, among other entities, the Supreme Court of Mississippi (Jan. 14, 1994); the State Bar of Arizona (Apr. 17, 1990); the Ohio State Bar Association (Nov. 3, 1989); the Florida Bar Board of Governors (July 17, 1989); and the State Bar of Georgia (Mar. 31, 1987). *See also* Submission of the Staff of the

Federal Trade Commission to the American Bar Association Commission on Advertising (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra*).

[5] Tenn. Sup. Ct. R. 8, RPC 7.1.

[6] *Id.*

[7] TAJ Petition, Proposed Rule 7.1(1)(D).

[8] TAJ Petition, Proposed Rule 7.1(2).

[9] Hardin Petition at 1.

[10] *See, e.g.*, Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17,* 8 S. CT. ECON. REV. 265, 293-304 (2000) (discussing the empirical literature on the effect of advertising restrictions in the professions); *In the Matter of Polygram Holdings, Inc, et al*, FTC Dkt. No. 9298 (F.T.C. 2003), at 38 n. 52 (same); Frank H. Stephen & James H. Love, *Regulation of the Legal Professions,* 5860 ENCYCLOPEDIA OF LAW & ECON. 987, 997 (1999), *available at* http://encyclo.findlaw.com/5860book.pdf (concluding that empirical studies demonstrate that restrictions on attorney advertising likely have the effect of raising fees); Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising, 5-6 (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra*).

[11] *See* FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1.

[12] *See* FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

[13] *See* Hardin Petition at 32 (concern that misleading and deceptive advertising poses the threat of "false promises of easy results.").

[14] Due to the risk of anticompetitive behavior, a leading antitrust treatise advocates subjecting any governmental agency comprising members of the profession that it regulates to direct and active governmental supervision. *See* AREEDA & HOVENKAMP, I ANTITRUST LAW ¶227a, at 208 (3rd ed. 2006) ("Without reasonable assurance that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required."). *See also In the Matter of North Carolina State Board of Dental Examiners*, FTC Dkt. 9343 (Comm. Op. Feb. 8, 2011) (federal antitrust laws apply to actions of state dental board comprising mainly practicing dentists), *available at* http://www.ftc.gov/os/adjpro/d9343/110208commopinion.pdf (currently on appeal before the U.S. Court of Appeals for the 4th Cir., No. 12-1172).

BOARD OF PROFESSIONAL RESPONSIBILITY
of the
SUPREME COURT OF TENNESSEE

RECEIVED
JAN 25 2012
By

SANDY L. GARRETT
CHIEF DISCIPLINARY COUNSEL
KRISANN HODGES
DEPUTY CHIEF DISCIPLINARY COUNSEL – LITIGATION
JAMES A. VICK
DEPUTY CHIEF DISCIPLINARY COUNSEL - INVESTIGATION
ETHICS COUNSEL
BEVERLY P. SHARPE
CONSUMER COUNSEL DIRECTOR

10 CADILLAC DRIVE, SUITE 220
BRENTWOOD, TENNESSEE 37027
(615) 361-7500
(800) 486-5714
FAX: (615) 367-2480
ethics@tbpr.org
www.tbpr.org

KEVIN D. BALKWILL
ELIZABETH C. GARBER
PRESTON SHIPP
EILEEN BURKHALTER SMITH
RACHEL L. WATERHOUSE
A. RUSSELL WILLIS
DISCIPLINARY COUNSEL

January 24, 2013

Honorable Michael W. Catalano
Chief Clerk, Supreme Court of Tennessee
401 Seventh Avenue North, Suite 100
Nashville, TN 37219-1407

Dear Mr. Catalano:

Enclosed please find the original and one copy of the Comment of the Board of Professional Responsibility to Proposed Supplemental Petition to Tennessee Supreme Court to Adopt Changes to Rules of Professional Conduct on Lawyer Advertising.

Respectfully,

Sandy Garrett

Sandy L. Garrett, Esq.
Chief Disciplinary Counsel

SLG:jt

Enclosures

cc w/encl: Honorable Cornelia A. Clark, Justice, Supreme Court of Tennessee
Allan Ramsaur, TBA Executive Director
Matthew C. Hardin, Rudy, Wood, Winstead, Williams & Hardin, PLLC
Lela Hollabaugh, Chair, Board of Professional Responsibility

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION TO ADOPT CHANGES TO RULES ON PROFESSIONAL CONDUCT ON LAWYER ADVERTISING

No. M2012-01129-SG-RL1-RL

COMMENT OF THE BOARD OF PROFESSIONAL RESPONSIBILITY TO PROPOSED SUPPLEMENTAL PETITION TO TENNESSEE SUPREME COURT TO ADOPT CHANGES TO RULES OF PROFESSIONAL CONDUCT ON LAWYER ADVERTISING

Pursuant to this Court's Order filed November 26, 2012, the Board of Professional Responsibility (the Board) submits the following comment to the proposed Supplemental Petition to adopt changes to the Rules of Professional Conduct on lawyer advertising.

Comment: While recognizing that proposed Rule 7.8(b)(7) provides for an advertising review fee to be paid to the Board, the Board is concerned about staff and resources needed to comply with the advertising evaluation requirements set forth in proposed Rule 7.8. Other jurisdictions including Florida, Kentucky, Louisiana and Mississippi currently have advertising rules similar to this proposed rule requiring filing of certain advertisements for review with a fee.[1] While the Board does not know the number of lawyer advertisements it would be required to review pursuant to this proposed rule, the Kentucky and Florida Bars' revenue and costs for advertising review

---

[1] Fla. Bar Reg. R. 4-7.7; Fla. Bar Reg. R. 4-7.8; Ky. SCR 7.05; Ky. SCR 7.06; Ky. SCR 7.07; La. St. Bar Ass'n. Art. XVI § 7.7; La. St. Bar Ass'n. Art. XVI § 7.8; Miss. RPC. Rule 7.5.

are illustrative.[2] The Board is concerned that the proposed Rule 7.8 would be burdensome, time consuming and costly to enforce. The current complaint-driven system of investigating advertisements that are the subject of a complaint provides an effective advertising review process.

Respectfully submitted,

Lela Hollabaugh By SG w/ permission

LELA HOLLABAUGH (#014894)
Chair
Board of Professional Responsibility
1600 Division Street, Suite 700
Nashville, TN 37203
(615) 244-2582

Sandy Garrett

SANDY L. GARRETT (#013863)
Chief Disciplinary Counsel
Board of Professional Responsibility
10 Cadillac Drive, Suite 220
Brentwood, TN 37027
(615) 361-7500

[2]The Kentucky Bar, with 14,475 members, received an average of 1,696 advertisements in the last two years. The Kentucky Advertising Commission currently reviews approximately 10% of advertisements submitted. Kentucky's all-volunteer Advertising Commission is supported by one full-time paid staff employee. Using their volunteer Advertising Commission, the Kentucky Bar's 2012 costs for advertising review were $102,636 while revenue collected was $129,120.

The Florida Bar with 93,895 members reviewed an average of 3,926 advertisements the last two years. The Florida Bar's Ethics and Advertising Department employs 8 lawyers, 1 paralegal and 4 support staff to review all advertisements submitted. The Florida Bar's advertising department is also assisted by a 7-member volunteer Committee on Advertising that acts as a review board. The Florida Bar's budget for advertising review in 2012 was $782,210 in costs and $547,615 in filing fees paid. The Kentucky Bar and Florida Bar graciously provided the Board with this information upon request.

CERTIFICATE OF SERVICE

I certify that the foregoing has been mailed to Allan F. Ramsaur, Esq., Executive Director, Tennessee Bar Association, 221 4th Ave. N., Ste. 400, Nashville, Tennessee, and to Matthew C. Hardin, Esq., Rudy, Wood, Winstead, Williams and Hardin, PLLC, 1812 Broadway, Nashville, TN 37203 by U.S. mail, on this the 24th day of January, 2013.

Lela Hollabaugh By SG w/ permission

LELA HOLLABAUGH (#014894)
Chair

Sandy Garrett

SANDY L. GARRETT (#013863)
Chief Disciplinary Counsel

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

2013 JAN 25 AM 9: 15
APPELLATE COURT CLERK
NASHVILLE

In re Petition To Adopt Changes to Rules of Professional Conduct on Lawyer Advertising
No. M2012-01129-SC-RL1-RL

COMMENTS OF PUBLIC CITIZEN LITIGATION GROUP

Public Citizen Litigation Group ("PCLG") respectfully submits these comments on the proposed amendments to the rules governing lawyer solicitation and advertising. PCLG is concerned that several proposed amendments would violate the First Amendment, the dormant Commerce Clause, and the Privileges and Immunities Clause of the U.S. Constitution. We urge the Court to reject the proposals to modify the rules. Existing Rules of Professional Conduct are sufficient to vindicate state interests in protecting consumers from false and misleading advertisements.

Interest of Public Citizen Litigation Group

PCLG is the litigation arm of Public Citizen, a nonprofit public-interest advocacy organization located in Washington, D.C., with approximately 300,000 members and supporters nationwide. Public Citizen appears before Congress, federal agencies, and the courts to advocate for freedom of expression, consumer protections, access to the courts, and open government, among other things.

As an organization devoted to advocating in the interest of consumers, Public Citizen has frequently opposed false and misleading advertising, while at the same time defending the First Amendment right of speakers to engage in truthful, non-misleading commercial speech. Among other cases, PCLG attorneys argued and won *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which the Supreme Court for the first time recognized a First Amendment right to commercial speech, and *Edenfield v. Fane*, 507 U.S.

761 (1993), in which the Supreme Court struck down a ban on in-person solicitation by certified public accountants. PCLG also successfully argued *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), challenging a decision of the Ohio Supreme Court to discipline a lawyer for advertisements informing women about his legal services in connection with Dalkon Shield litigation. More recently, PCLG litigated First Amendment challenges to attorney advertising restrictions in *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010); *Harrell v. Florida Bar*, 608 F.3d 1241 (11th Cir. 2010); and *Public Citizen Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011).

PCLG's support for free speech in the commercial context is based in part on the recognition that truthful commercial speech enhances competition and enables consumers to receive information on pricing and alternative products and services. As the Supreme Court noted in *Virginia State Board of Pharmacy*, a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." 425 U.S. at 763. PCLG is particularly interested in the right to engage in truthful advertising of legal services because commercial speech in this context not only encourages beneficial competition for those services, but can also educate consumers about their rights, inform them when they may have a legal claim, and enhance their access to the legal system. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646-47 (1985).

For the reasons outlined below, the proposed amendments are not justified by a state interest substantial enough to warrant broad restrictions on commercial speech, and they therefore would likely face a successful First Amendment challenge if adopted. Additionally, the proposed ban on advertising by lawyers without an office in Tennessee would violate the dormant Commerce Clause and the Privileges and Immunities Clause.

Analysis

Before the Court are two separate proposals for rule changes, one proposed by the Tennessee Association for Justice ("TAJ") and the other by an individual board member of that organization, Matthew C. Hardin. These comments identify problematic aspects with both proposals, each of which will be referenced by the name of its proponent (TAJ or Hardin) and proposed rule section. Both proposals contain sections that run afoul of the First Amendment. One aspect of the TAJ proposal also violates the dormant Commerce Clause and the Privileges and Immunities Clause.

I. First Amendment

Attorney advertising and solicitation are forms of commercial speech that are protected by the First Amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977). Both the TAJ and Hardin proposals would create new restrictions on commercial speech that would unconstitutionally limit lawyers' rights to communicate truthful information to consumers.

Under the current Rules of Professional Conduct, an attorney is prohibited from making a "false or misleading communication" about his or her services. Rule 7.1. This prohibition is defined to include a communication containing a "material misrepresentation of fact or law" and a communication that omits a fact whose inclusion is necessary to avoid creating a statement that is materially misleading. *Id.*

The Hardin and TAJ proposals would dramatically expand the restrictions on the content of attorney advertising, in at least four respects:

(1) by restricting who may appear and speak in advertisements, *see* TAJ R. 7.1(1)(D) (prohibiting advertisements in which an actor or model portrays a client); Hardin R. 7.1(c)(1)(K) (same); Hardin R. 7.7(b)(1)(D) (same); Hardin 7.1(c)(14) (prohibiting the use of the voice or image of any celebrity); Hardin 7.7(b)(1)(B) (prohibiting the use of "any spokesperson's voice or image that is recognizable to the public");

(2) by restricting what sounds may be used in advertisements, *see* Hardin R. 7.7(b)(1)(C) (prohibiting "any background sound other than instrumental music");

(3) by barring specific types of statements in advertisements, *see* Hardin R. 7.1(c)(2) (prohibiting "statements describing or characterizing the quality of the lawyer's services"); Hardin R. 7.1(c)(1)(I) (barring comparisons of the lawyer's services to other lawyer's services, "unless the comparison can be factually substantiated"); Hardin R. 7.1(c)(1)(F) (barring references to past results); and

(4) by imposing vague and overbroad restrictions on attorney advertisements that reach beyond speech that is false or misleading, *see* TAJ R. 7.1(2) (prohibiting "manipulative" portrayals or descriptions); Hardin R. 7.1(c)(3) (same); Hardin 7.1(c)(15) (same); Hardin R. 7.7(b)(1)(A) (same).

The current ban on attorney advertising that contains false or misleading communications addresses the state's legitimate interest in protecting consumers. The proposed rules extend further than necessary to protect that interest by adding a litany of restrictions that would neither benefit consumers nor advance any legitimate state goal. Indeed, the amendments appear to be intended less to prevent fraud than to prohibit the most effective forms of lawyer advertising and thus to impede competition in the market for legal services.

A state ordinarily may ban commercial speech only if it is false, deceptive, or misleading. *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994); *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990). "Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez*, 512 U.S. at 142; *accord Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Importantly, a state's assertion that speech is misleading is not enough to justify banning it. *Ibanez*, 512 U.S. at 146. Rather, the state must meet its burden of "demonstrat[ing] that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Id.* (citation and internal quotation

marks omitted). The Supreme Court has rigorously and skeptically scrutinized (and, for the most part, rejected) claims by bar authorities that particular forms of attorney advertising are misleading. *See, e.g.*, *id.* at 143-49; *Peel*, 496 U.S. at 101-10; *Zauderer*, 471 U.S. at 639-49; *In re RMJ*, 455 U.S. 191, 203-07 (1982); *Bates*, 433 U.S. at 381-82.

The proposed rules would prohibit a variety of specific advertising techniques that are unlikely to mislead any consumers, such as the use of actors, models, and celebrity spokespeople, *see* TAJ R. 7.1(1)(D); Hardin R. 7.1(c)(1)(K); Hardin R. 7.7(b)(1)(D); Hardin 7.1(c)(14); Hardin 7.7(b)(1)(B), and the use of sounds other than instrumental music, *see* Hardin R. 7.7(b)(1)(C). The common thread among these proposed provisions is that they target basic techniques of effective advertisements. There is nothing actually or inherently misleading, however, about these techniques. Consumers are accustomed to seeing and hearing actors, celebrities, dramatized scenes, and sound effects in commercials, and are unlikely to make the assumption that everyone and everything they see in a commercial is literally real. An actor's portrayal of a generic client in a depiction of a consultation is not likely to fool any consumers into believing that actual events occurred exactly as depicted. Indeed, the Supreme Court observed in *Zauderer* that "because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising." 471 U.S. at 649. Similarly, if consumers saw Harrison Ford endorsing a law firm in the persona of the movie character "Indiana Jones," they would be capable of understanding that Ford is a paid celebrity endorser. Particularly strange is the assumption that consumers would be misled by the use of a sound other than background music, such as a car horn or a gavel. The proposals do not

explain how the playing of a sound in an advertisement can render the advertisement false or misleading.

Restrictions on commercial speech cannot be upheld on the basis of "little more than unsupported assertions" without "evidence or authority of any kind." *Id.* at 648. Rather, the state must be prepared to "back up its alleged concern" that particular statements "would mislead rather than inform." *Ibanez*, 512 U.S. at 147. Here, neither TAJ nor Hardin has submitted evidence that supports the conclusion that the prohibited practices are misleading or that the broad restrictions in the proposed amendments are an effective means of combating any misleading practices there may be. *See Harrell v. Florida Bar*, ___ F. Supp. 2d ___, 2011 WL 9754086, at *16 (M.D. Fla. Sept. 30, 2011) (striking down as factually unsupported a Florida attorney advertising rule prohibiting the use of background sounds). Nor have the proponents of the new rules offered evidence that whatever misleading advertising exists could not be remedied in a less restrictive manner, such as by requiring a disclaimer in certain circumstances instead of prohibiting certain types of advertising entirely. *See In re RMJ*, 455 U.S. at 203 ("[T]he 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."); *see generally Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (requiring restrictions on commercial speech to be no more extensive than necessary to serve the government interest). For instance, a less restrictive rule would permit the use of actors and sounds in a television advertisement with the simple word "DRAMATIZATION" on the screen, rather than prohibiting such content entirely.

The Supreme Court has emphasized that the First Amendment generally does not tolerate restrictions on commercial speech that are premised "on the offensive assumption that the public

will respond irrationally to the truth." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (citation and internal quotation marks omitted). The Court has also "reject[ed] the paternalistic assumption" that consumers of legal services "are no more discriminating than the audience for children's television." *Peel*, 496 U.S. at 105. A state's general distaste for lawyer advertisements does not allow it to restrict truthful, non-misleading advertising to any greater extent than it can restrict similar advertising in other industries. *Zauderer*, 471 U.S. at 646-47 ("Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are [] equally unacceptable as applied to [attorney] advertising."). Yet, the proposed restrictions on advertising would be unthinkable in other fields of commerce. For example, a state could never justify regulating advertisements for athletic shoes to prohibit the use of actors to play athletes, referees, or spectators; to ban celebrities; or to restrict the use of sounds other than instrumental music (such as crowd noise or the buzzer that ends a basketball game).

In addition to prohibiting specific advertising techniques such as dramatization and sound effects, the proposed rules go so far as to single out for proscription particular categories of ideas: specifically, statements that describe the quality of the lawyer's services, *see* Hardin R. 7.1(c)(2), statements that compare the lawyer's services to other lawyer's services "unless the comparison can be factually substantiated," *see* Hardin R. 7.1(c)(1)(I), and references to a lawyer's past successes or results, *see* Hardin R. 7.1(c)(1)(F). A wide range of truthful and non-misleading advertising would be completely forbidden by these rules, including normal, everyday statements of opinion that pervade the advertising in myriad fields (such as the statement "We offer quality services by experienced professionals"). The proposed rules would prevent a lawyer from making an entirely truthful statement about her experience, such as "I have obtained monetary recovery for over a hundred individuals injured by faulty products." The

Fifth Circuit recently struck down an attorney advertising restriction of this type. *See Public Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 221-22 (5th Cir. 2011) ("It is well established that the inclusion of verifiable facts in attorney advertisements is protected by the First Amendment."). Neither TAJ nor Hardin has offered any evidence that truthful statements about an attorney's past successes are likely to mislead consumers. In fact, an attorney's past record is a factor that potential clients might reasonably wish to consider in choosing an attorney, and the state may not presume consumers will use this information irrationally. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) ("We have [] rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."); *see also Bates,* 433 U.S. at 374-75 (rejecting arguments that "the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information").

The proposed rule prohibiting advertising that compares an attorneys' services with those offered by competitors "unless the comparison can be factually substantiated," Hardin Rule 7.1(c)(1)(I), would bar generic puffery that would mislead no one. The kinds of comparisons that are most often featured in advertisements are usually not susceptible to factual substantiation. A firm will not be able to prove that "No one fights harder for our clients than we do," but there is no evidence to suggest that such statements mislead consumers.

Other provisions of the proposed rules are likely to chill speech because they are vague. *See, e.g., NAACP v. Button*, 371 U.S. 415, 432-33 (1963) (explaining "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application"). Provisions of both proposals prohibit, for instance,

"manipulative" content. TAJ R. 7.1(2); Hardin R. 7.1(c)(3); Hardin 7.1(c)(15); Hardin R. 7.7(b)(1)(A). But that subjective term is nowhere defined and by itself gives no meaningful guidance to attorneys regarding what types of statements and depictions would be permitted. Some attorneys might believe an advertisement is "manipulative" if it contains an element of deceit. Others might find an advertisement featuring a true but tragic story of a client to be "manipulative" because it appeals to the viewer's emotions. And still others might argue all advertising is in some general sense "manipulative" because it attempts to "manipulate" consumers into choosing a particular provider of legal services. Attorneys subject to the proposed rules will face a constitutionally unacceptable dilemma: either comply with the narrowest interpretation of the rules or risk the possibility of professional discipline. Under these circumstances, many lawyers will have no choice but to forgo speech in close cases — a result the First Amendment forbids. *See Button*, 371 U.S. at 433 ("The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (citations omitted)). Moreover, the vagueness of the rules raises the risk of arbitrary and discriminatory enforcement. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). Notably, a federal court struck down Florida attorney advertising rules that relied on the subjective term "manipulative." *Harrell v. Florida Bar*, ___ F. Supp. 2d ___, 2011 WL 9754086, at *9 (M.D. Fla. Sept. 30, 2011) ("[T]he term "manipulative" is so vague that it fails to adequately put members of the Bar on notice of what types of advertisements are prohibited.").

In sum, the proposed rules would prohibit or unreasonably burden a wide range of speech without any evidence that such speech misleads consumers. Instead of helping consumers, the

proposed rules would stifle legitimate competition by making it more difficult for consumers to comparison-shop. The rules would also restrict channels of communications by which consumers may learn of their legal rights and how to protect them. Because the proposed rules are inconsistent with the First Amendment, PCLG urges the Court to reject them.

II. Dormant Commerce Clause and Privileges and Immunities Clause

In addition to the First Amendment flaws with both the Hardin and TAJ proposals, TAJ's proposed ban on advertising by out-of-state attorneys, TAJ R. 7.2(1), is unconstitutional under the "negative" or "dormant" aspect of the Commerce Clause and under the Privileges and Immunities Clause — two doctrines that prevent a state from discriminating against out-of-state individuals and businesses.

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although the Clause is an affirmative grant of power to Congress, it has "long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). Dormant Commerce Clause jurisprudence "is driven by concern about economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008) (citation and internal quotation marks omitted).

In assessing challenges under the dormant Commerce Clause, courts begin by asking whether "a state statute directly regulates or discriminates against interstate commerce," or whether "its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *accord Int'l Dairy*

Foods Ass'n v. Boggs, 622 F.3d 628, 644 (6th Cir. 2010). State laws that discriminate against interstate commerce in these ways are "generally struck down . . . without further inquiry." *Brown-Forman Distillers*, 476 U.S. at 579. A discriminatory law is saved only if the state can show that it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Ore. Waste Sys.*, 511 U.S. at 101. The "State's burden of justification is so heavy that facial discrimination by itself may be a fatal defect." *Id.* (citation and internal quotation marks omitted); *see also Davis*, 553 U.S. at 338 (discriminatory laws are "virtually *per se* invalid" (citation and internal quotation marks omitted)).

Of particular relevance here, the Supreme Court struck down under the dormant Commerce Clause a New York law requiring out-of-state wineries to open an in-state "branch office and warehouse" in order to ship their product directly to consumers. *Granholm v. Heald*, 544 U.S. 460, 474-75 (2005). The Court held that the law discriminated against out-of-state wineries, in part because "the expense of establishing a bricks-and-mortar distribution operation . . . is prohibitive." *Id.* at 475.

Like the "branch office" requirement the Court struck down in *Granholm*, the proposed requirement that lawyers advertising in Tennessee maintain a "bona fide office" in the state, TAJ R. 7.2(1), unconstitutionally discriminates against interstate commerce.[1] On its face, the proposed rule would allow lawyers with offices in Tennessee to advertise legal services, but would prohibit advertising by lawyers whose offices are located outside the state. TAJ R. 7.2(1) ("Individual lawyers or lawyers for firms which do not have a bona fide office in the State of Tennessee may not advertise here."). The restrictive effect of such a rule is not merely theoretical. For instance, a Google search for attorneys in the Memphis suburb of Southaven,

[1] There is no question that advertising constitutes commerce. *See Head v. N.M. Bd. of Examiners in Optometry*, 374 U.S. 424, 427-28 (1963).

Mississippi, readily identifies a number of attorneys who are licensed in Tennessee as well as Mississippi. TAJ's rule would prohibit Tennessee-licensed attorneys with a multi-state practice that includes Tennessee cases from advertising in Tennessee because their offices happen to be across the state line. The rule "thus deprives out-of-state businesses of access to a local market," *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 399 (1994), and therefore is exactly the kind of "geographic distinction . . . patently discriminat[ing] against interstate commerce," *Ore. Waste Sys.*, 511 U.S. at 100, that the dormant Commerce Clause is designed to prevent. *See Granholm*, 544 U.S. at 472 ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.").

TAJ's proffered justifications for the rule do not satisfy the "strictest scrutiny" to which discriminatory laws are subject. *Ore. Waste Sys.*, 511 U.S. at 101 (citation and internal quotation marks omitted). TAJ defends the rule on two grounds: (1) the rule "prevents out-of-state attorneys from taking business out of Tennessee" and (2) out-of-state advertising "creates difficulties in bar oversight as to whether or not Tennessee citizens are being treated in an ethical manner by out of state attorneys." TAJ Supp. Pet. 5.

The first rationale is not a legitimate goal under the dormant Commerce Clause; on the contrary, "[t]he central rationale for the rule against discrimination is to *prohibit* state or municipal laws whose object is local economic protectionism[.]" *C & A Carbone*, 511 U.S. at 390 (emphasis added); *see also Int'l Dairy Foods Ass'n*, 622 F.3d at 644 ("Economic protectionism is the core concern of the dormant commerce clause[.]" (citation and internal quotation marks omitted)). The competitive threat that TAJ fears, *see* TAJ Supp. Pet. 5 ("Out-of-state attorneys practicing here limit the client base of Tennessee attorneys."), is one that the Constitution requires Tennessee to tolerate. *See Granholm*, 544 U.S. at 472 ("States may not

enact laws that burden out-of-state [businesses] simply to give a competitive advantage to in-state businesses.").

The second proffered justification — protecting citizens from unethical attorney practices — is a legitimate purpose, but TAJ provides no evidence that attorneys working from out-of-state offices are likely to engage in unethical conduct that would be beyond the reach of state professional conduct rules or state law. *Cf. Granholm*, 544 U.S. at 490 (rejecting states' justification for discriminatory laws where the states "provid[ed] little evidence" of the problem the laws purported to address). Attorneys who are licensed to practice law in Tennessee (or practicing in the state on a pro hac vice basis) but who maintain their offices elsewhere are subject to bar discipline just like attorneys with offices in Tennessee. For those attorneys who attempt to practice in the state without appropriate authorization, a state statute already prohibits the unauthorized practice of law. *See* Tenn. Code. Ann § 23-3-103(a). TAJ does not present any evidence that state authorities are having difficulty combating such unauthorized practice so as to justify the proposed protectionist measure. TAJ's asserted justifications thus cannot overcome the "heavy" burden of justification on state laws that discriminate against interstate commerce. *Ore. Waste Sys.*, 511 U.S. at 101.[2]

For similar reasons, TAJ's proposed ban on non-resident attorney advertising would be unconstitutional under the Privileges and Immunities Clause, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art IV, § 2. Under this provision, a state may discriminate against individuals from

[2] Even absent discrimination, state laws are invalid if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Davis*, 553 U.S. at 338-39 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Because the proposed rule is facially discriminatory, it is unnecessary to look to this balancing test. In any event, for the reasons described in the text, the proposed rule does not demonstrate any non-protectionist local benefits that could outweigh the burden imposed on out-of-state attorneys.

other states only where "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective" — an analysis that includes consideration of "the availability of less restrictive means." *Sup. Ct. of N.H. v. Piper*, 470 U.S. 275, 284 (1985). One of the privileges protected by the Clause is the ability to practice law. *Id.* at 280-81, 288 (holding that states may not prohibit nonresidents from practicing law); *accord Barnard v. Thorstenn*, 489 U.S. 546, 558-59 (1989); *see also Sup. Ct. of Va. v. Friedman*, 487 U.S. 59, 70 (1988) (striking down state bar regulation that allowed only state residents to be admitted to the bar without taking entrance examination).

The fact that TAJ's proposed rule does not on its face discriminate between residents and non-residents does not save it. *See Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 67 (2003) ("[T]he absence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a Privileges and Immunities] claim."). For example, in *Chalker v. Birmingham & Northwestern Ry. Co.*, 249 U.S. 522 (1919), the Court struck down a state law taxing only construction companies with a "chief office outside of this state." *Id.* at 525. The fact that the statute made no reference to residency or citizenship was not controlling; rather, the Court acknowledged the reality that "the chief office of an individual is commonly in the state of which he is a citizen" and so the law would place discriminatory burdens on out-of-state citizens. *Id.* at 527. Here, as in *Chalker*, TAJ's proposed Tennessee-office requirement would impose discriminatory burdens on non-resident lawyers. A lawyer's "bona fide office" will "commonly [be] in the state of which he is a citizen." *Id.* Just as Tennessee could not prohibit non-resident lawyers from joining its bar, it may not prohibit non-resident lawyers from seeking business through advertising, while allowing resident lawyers that opportunity.

TAJ's justifications for its proposed rule fare no better in the context of the Privileges and Immunities Clause than they do in the context of the dormant Commerce Clause. Economic protectionism is not a "substantial reason" that justifies discrimination against non-resident lawyers. *Piper*, 470 U.S. at 285 n.18. And the Supreme Court in *Piper* already rejected TAJ's other argument — the difficulty of bar supervision of out-of-state lawyers. The Court there found "no reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner." *Id.* at 285-86. And of course "a nonresident lawyer may be disciplined for unethical conduct" when practicing law in Tennessee. *Id.* at 286.

Because the TAJ's proposed prohibition on advertising by non-resident lawyers would violate both the dormant Commerce Clause and the Privileges and Immunities Clause, it should not be adopted by this Court.

Conclusion

The proposed rules, if adopted, would be unconstitutional under the First Amendment, the dormant Commerce Clause, and the Privileges and Immunities Clause. We urge this Court to reject the proposed rules.

Dated: January 24, 2013

Respectfully submitted,

Scott Michelman (DC Bar No. 1006945)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon these individuals and organizations by regular U.S. Mail, postage prepaid within seven days of filing with the Court:

Tennessee Association for Justice
1903 Division Street
Nashville, TN 37203
Attn: B. Keith Williams

Matthew C. Hardin
Rudy, Wood, Winstead, Williams & Hardin, PLLC
1812 Broadway
Nashville, TN 37203

Scott Michelman

HODGES DOUGHTY & CARSON
ATTORNEYS

ROY L. AARON
DEAN B. FARMER
ALBERT J. HARB
EDWARD G. WHITE II
THOMAS H. DICKENSON
J. WILLIAM COLEY
J. MICHAEL HAYNES
T. KENAN SMITH
WAYNE A. KLINE
B. CHASE KIBLER
CHRISTOPHER D. HEAGERTY
KRISTI M. DAVIS
JOSHUA M. BALL
JOSHUA J. BOND
LISA J. HALL
KANDI R. YEAGER
E. MICHAEL BREZINA III
W. MICHAEL BAISLEY
OLIVER D. ADAMS

ASSOCIATES
WESLEY D. STONE
WILLIAM D. EDWARDS

SPECIAL COUNSEL
CHRISTOPHER A. HALL

OF COUNSEL
ROBERT R. CAMPBELL
JOHN W. WHEELER
DALTON L. TOWNSEND
DAVID N. WEDEKIND
JULIA S. HOWARD
HIRAM G. TIPTON

RETIRED
JONATHAN H. BURNETT
DAVID E. SMITH
DOUGLAS L. DUTTON
WILLIAM F. ALLEY, JR

J.H. HODGES (1896-1983)
J.H. DOUGHTY (1903-1987)
RICHARD L. CARSON (1912-1980)
JOHN P. DAVIS, JR. (1923-1977)

January 24, 2013

RECEIVED
JAN 25 2013
Clerk of the Courts
Rec'd By

Michael W. Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Sir:

I am writing in support of the proposed rules limiting attorney advertising, particularly proposed Rule 7.9 restricting computer-accessed communications, and proposed Rule 7.8 (a)(1)(c) which provides for the evaluation of advertisements by the Board of Professional Responsibility. Indeed, I do not believe that these rules go far enough, but they are an important first step.

I commend and echo Matthew Hardin's conclusion that these proposed changes "help attorneys effect a rise back to the exalted post attorneys once held in the public's eye and help our clients receive fair consideration from a jury. Some outrageous attorney advertising in Tennessee has led to the public's poor perception of attorneys and in turn, the public's biased participation as jurors in the court process. Misleading and deceptive advertising poses many threats to the legal profession, such as the public's negative perception of lawyers, the poisoning of jury pools, and false promises of easy results."

In my 15 years as a practicing attorney, our profession's reputation and prestige has continued to diminish, due at least in part to the willingness of some attorneys to engage in unprofessional and outrageous advertising. In my experience, the general public does not greatly distinguish between these attorneys and the methodical, professional attorney zealously advocating for his client. All are painted with nearly the same brush, and the credibility and influence of all lawyers is certainly diminished. Therefore, this advertising affects not only those attorneys engaging in it, but our entire profession.

The outrageous nature of certain advertisements, the enticing claims, and the "false promises of easy results" also diminishes access to justice for the very people who need it the most. Time and time again I have witnessed plaintiffs who have employed <u>not</u> the best attorney, but the best TV or internet star, as their representative. These plaintiffs have had meritorious claims dismissed due to attorney mistakes, or have only been compensated for a tiny fraction of their claim's true value due to their attorneys' inability, or unwillingness, to work up

617 MAIN STREET | P.O. BOX 869 | KNOXVILLE, TENNESSEE 37901-0869
PHONE (865) 292-2307 | FAX (865) 292-2321 | WWW.HDCLAW.COM
A Professional Limited Liability Company
ESTABLISHED 1931

the file. These attorneys are frequently unable to fulfill the promises implied in their advertisements.

I trust that these petitions will be given serious consideration given the wide-ranging effects attorney advertising has on our system of justice, and our profession.

Respectfully,

B. Chase Kibler

THE UNIVERSITY of TENNESSEE UT
KNOXVILLE

COLLEGE of LAW
Faculty Services
1505 W. Cumberland Avenue
Knoxville, TN 37996-1810
Phone: (865) 974-6816
Fax: (865) 974-0681

RECEIVED
FEB - 4 2013
Clerk of the Courts
Rec'd By

January 30, 2013

Mr. Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comment on the Proposed Amendments to the
Rules of Professional Conduct on Lawyer Advertising
of Professors Alex Long and Paula Schaefer

Dear Mr. Catalano,

We teach Professional Responsibility at the University of Tennessee College of Law. We also have written extensively on the subject. We write to comment on the proposed amendments to the Tennessee Rules of Professional Conduct regarding lawyer advertising. In the interest of brevity, we address in detail only the first petition filed by the Tennessee Association for Justice (TAJ), and not the second filed by Matthew C. Hardin. [1]

In short, we are concerned that

(1) the proposed prohibition on "deceptive" communications is already addressed by current Rule 7.1 and is subject to constitutional challenge;
(2) the proposed redefinitions of the terms "false" and "misleading" are flawed and are subject to constitutional challenge;
(3) the proposed prohibition on the use of actors or models to portray clients is subject to constitutional challenge;
(4) the proposed prohibition on manipulative advertisements is subject to constitutional challenge; and
(5) the proposed ban on advertising by out-of-state attorneys is subject to constitutional challenge.

A more detailed explanation appears below.

[1] We note, however, that some of the concerns identified with respect to TAJ's first petition apply with at least equal force to Mr. Hardin's proposed changes. Mr. Hardin's proposal represents a wholesale revision of the current rules. Some of the proposed rules are even more restrictive of speech than that proposed by the TAJ. For example, proposed Rule 7.1(b)(1)(L) would impose dramatic limitations on the use of visual images and illustrations in advertisements, limiting an attorney's choice of illustrations to a handful of options (e.g., the scales of justice, a gavel, an American eagle, etc.). For the reasons discussed in this memorandum, it is difficult to imagine a court upholding the constitutionality of some of these proposed restrictions.

I. The Proposed Changes to Rule 7.1

The proposed amendments would change the language of the current version of Rule 7.1 in several ways.

Prohibition on "deceptive" communications

Currently, Rule 7.1 prohibits a lawyer from making "a false or misleading communication about the lawyer or the lawyer's services." The proposed amendment would add the word "deceptive" to the list of prohibited forms of advertisement. A comment to the amendment explains that the word "deceptive" was included, in part, to cover communications that are false or misleading because they omit material facts. (Supplemental Petition p. 3). The comment goes on to say that the term "deceptive" communication also refers to an advertisement "that is unsubstantiated in fact" or contains "unverifiable claims." (Supplemental Petition pp. 3-4.)

Putting aside the question of whether inclusion of the word "deceptive" actually alters the current meaning of Rule 7.1, the problems that the proposed change seeks to address are already adequately addressed by the current version of Rule 7.1. Comment 2 to the current version of Rule 7.1 explains that "[a] truthful statement is misleading *if it omits a fact necessary* to make the lawyer's communication considered as a whole not materially misleading." (emphasis added). Thus, this proposed change adds nothing to the existing rule in terms of addressing deception through omission. Furthermore, the concerns over unsubstantiated or unverified claims raised by the amendments are also already addressed by the current version of Rule 7.1. Comment 3 already warns lawyers about the need to make "reference to the specific factual and legal circumstances" of a client's case when reporting the lawyer's achievements on behalf of a client so as not to potentially run afoul of the rule. Comment 3 also warns lawyers that "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." Therefore, it is debatable whether the proposed inclusion of the word "deceptive" and its attendant clarification in the comment add much of substance to the current version of Rule 7.1. Presumably, TAJ's concerns would be addressed if the Board of Professional Responsibility would discipline attorneys who violate the current rule.

There is also a constitutional concern concerning the prohibition on "unverifiable claims." Presumably, this restriction would prohibit statements of opinion or client testimonials such as "Lawyer Smith helped me" or "Lawyer Smith treated me with respect." The Fifth Circuit Court of Appeals recently considered the constitutionality of a similar ban on lawyer advertisements that contained statements of opinion or quality in Louisiana. The court noted that a claim of quality that is not verifiable or susceptible of proof may be so misleading as to warrant prohibition. Public Citizen Inc. v. Louisiana Disciplinary Board, 632 F. 3d 212, 222 (5th Cir. 2011). The court noted, however, that the disciplinary authority bears the burden of demonstrating that the unverifiable statements prohibited by the rule are so likely to be misleading that it may prohibit them. Id. In that case, the disciplinary authority offered little in

the way of support for its prohibition and the Fifth Circuit declared it unconstitutional. The Second Circuit Court of Appeals has also recently struck down a ban on client testimonials for similar reasons, noting that the defendants had failed to adequately explain why the ban was justified under the First Amendment. Alexander v. Cahill, 598 F.3d 79, 92 (2d Cir. 2010). Notably, the court concluded that client testimonials might "mislead if they suggest that past results indicate future performance -- but not all testimonials will do so, especially if they include a disclaimer." Id.

The TAJ's proposed rule is even more constitutionally suspect. The TAJ is proposing a *blanket* prohibition on unverifiable statements in lawyer advertisements. Thus, if the constitutionality of this rule were ever challenged, the Board of Professional Responsibility would bear the burden of establishing that *all* unverifiable statements are so likely to be misleading as to justify a blanket ban. The petition offers no justification for why a ban on statements of opinion like "Lawyer Smith helped me" or "Lawyer Smith treated me with respect" is necessary, let alone a justification as to why a blanket ban on any type of unverifiable statement is needed. Instead, comment 3 to current Rule 7.1, which allows for the use of disclaimers in such situations, already addresses the concerns over unverifiable statements in a manner that would almost certainly withstand constitutional scrutiny.

Redefinition of the terms "false" and "misleading"

A comment to the proposed amendment explains that the proposed prohibition on false and misleading communication would include not just communications that are false and misleading on their face, but those "that have tendencies to distract the viewer from what they are seeing." (Supplemental Petition p. 3.) As an example, the amendment cites an advertisement "that stretches the bounds of reality such as having space aliens or talking dogs assisting clients in the advertisement." (Supplemental Petition p. 3.).

There is an initial concern that the proposed rule attempts to define the terms "false" or "misleading" in a manner that conflicts with their common understanding. An advertisement that contains a talking dog legal assistant or space aliens cannot reasonably be taken as being factual in nature; therefore, it is not "false." Nor is such an ad likely to "mislead" anyone. An advertisement that features talking dogs or space aliens might be in bad taste, but it is not false or misleading as those terms are commonly understood.

There is also a First Amendment concern as to the breadth of a prohibition on advertisements that merely "have tendencies" to distract viewers as opposed to advertisements that are inherently misleading or that are likely to mislead a viewer. The Supreme Court has made clear that "States may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." In re R.M.J., 455 U.S. 191, 203. Two recent federal decisions involving similar restrictions on lawyer advertising have concluded that where a disciplinary authority seeks to restrict speech that is only *potentially* misleading, a defendant must satisfy the "demanding" test developed by the Supreme Court in Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980). Public Citizen Inc. v. Louisiana Disciplinary Board, 632 F. 3d 212 (5th Cir. 2011); Alexander v. Cahill, 598 F.3d 79, 89 (2d Cir. 2010). Under Central Hudson, a

restriction on commercial speech is permissible under the First Amendment if: (1) "the asserted governmental interest is substantial," (2) the regulation "directly advances" that interest, and (3) the regulation "is not more extensive than is necessary to serve that interest." Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002) (internal quotation omitted).

As these recent federal decisions establish, this is a difficult standard for a disciplinary authority to satisfy. The authority must "point to [a] harm that is potentially real, not purely hypothetical," Ibanez v. Fl. Bd. of Accountancy, 512 U.S. 136, 146 (1994), and must demonstrate how the proposed restriction on speech directly advances the governmental interest in a narrow fashion. The recent decisions from the Second and Fifth Circuits have concluded that the disciplinary authorities in question failed to carry their burdens, in part, because they failed to introduce evidence establishing how the restrictions on advertising satisfied the second and third prongs of Central Hudson. Public Citizen, Inc., 632 F.3d at 222; Alexander, 598 F.3d at 92. The generalized, unsubstantiated justifications offered by the TAJ for the restrictions are even less substantial than those offered in these cases. Thus, the proposed rule is likewise unlikely to withstand constitutional scrutiny. See Public Citizen, Inc., 632 F.d at 222 (noting the failure of disciplinary authority to "to point to any specific harms or to how they will be alleviated by" the prohibition in question).

Prohibition on the use of actors or models to portray clients

Another proposed change is the suggestion to include a new Rule 7.1(1). Parts of the proposed rule essentially repeat the prior prohibition on false, misleading, or deceptive communications, which, again, is already addressed in current Rule 7.1 But the new Rule 7.1(1)(D) would also prohibit a communication "in which an actor and/or model plays a client." (Supplemental Petition p. 2). A comment explains that "[t]he use of actors or models to portray clients is … inherently deceptive."

There are several potential concerns with this change. First is the fact that, contrary to the TAJ's suggestion, not every use of an actor or model is "inherently deceptive." There could be many instances in which no reasonable viewer would believe that an actor is actually a real client.[2] Thus, the prohibition is over-inclusive. Second, to the extent that a reasonable viewer might not realize that the purported client is really an actor or model, an advertisement could include a disclaimer to that effect. See RPC 7.1 cmt. 3 ("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.").[3] Thus, there are significantly less restrictive means available to address concerns over the potential for misleading clients that do not raise First Amendment concerns.

---

[2] For example, an ad in which actors portray space aliens in need of legal services.

[3] A comment to the proposed amendment suggests that an advertisement featuring "young, healthy, and attractive" actors or models portraying a client who has recovered large settlements would be inherently deceptive because individuals who have recovered large settlements "have typically suffered serious and irreparable harms or death." (Supplemental Petition p. 4.). This seems to overlook the obvious fact that the fact that a person is "young" and "attractive" does not necessarily have any bearing on whether the person suffered a serious injury. There are plenty of "young" and "attractive" people who have suffered serious injuries and who, nonetheless, remain young and attractive. It also overlooks the obvious fact that a "healthy" person may nonetheless have legitimately suffered a serious and irreparable harm.

The Fifth Circuit Court of Appeals recently struck down a similar rule on constitutional grounds in Public Citizen Inc. v. Louisiana Disciplinary Board, 632 F. 3d 212 (5th Cir. 2011). A Louisiana rule of professional conduct prohibited attorney advertisements that used actors to portray clients or judges. The Fifth Circuit rejected the argument that such portrayals are inherently misleading. Id. at 219. An argument to the contrary, the court noted, is based on the assumption that viewers are hopelessly unsophisticated. Accordingly, the Louisiana Disciplinary Board had to establish that "the regulation directly advances a substantial government interest" and "is not more extensive than is necessary to serve that interest" under the Supreme Court's Central Hudson test. Id. at 218. With respect to the prohibition on portrayals of *clients*, Louisiana's rule differs from the TAJ's proposed rule in one important respect: Louisiana's rule allowed the portrayal of a client by an actor if the advertisement also contained a disclaimer to that effect. The Fifth Circuit concluded that the disclaimer provision saved Louisiana's rule from being found unconstitutional. Id. at 228. In contrast, Louisiana's ban on the portrayal of *judges* did not allow for the inclusion of disclaimers. Thus, the court concluded that the ban did not advance the board's interest in prohibiting misleading communications in any meaningful way and was not narrowly tailored to achieve that end. Id. at 224. The reasoning of Public Citizen would suggest a similar fate for the TAJ's proposed rule.

Prohibited Visual and Verbal Portrayals and Illustrations

Proposed Rule 7.1(2) would prohibit advertisements containing visual or verbal descriptions, depictions, illustrations, or portrayals that are "deceptive, misleading, manipulative, or likely to confuse the viewer." A comment offers two justifications for the rule. First, "[v]isuals that manipulate or confuse the viewer undermine the public's perception of attorneys." Second, the proposed rule is said to be justified on the grounds that such advertisements "do not accurately reflect the legal experience to clients" and "create unjustified expectations that hinder a potential client from making an informed decision." (Supplemental Petition p. 4).

One potential problem with the proposed rule is its inclusion of the term "manipulative." The petition does not clarify what the term means. In some sense, all advertisements are "manipulative" in that they "sway," "influence," or "affect" - all common synonyms for "manipulate" - a viewer's decision. Thus, there is a potential constitutional concern regarding the vagueness of the rule. The remaining prohibitions on advertisements that are "deceptive, misleading, ... or likely to confuse the viewer" are arguably already addressed by the current version of Rule 7.1, which prohibits "false or misleading" communications.[4]

By seeking to ban ads that contain "manipulative" visuals or information, the proposed rule seems to be taking aim not just at misleading ads, but ads that convey information that is irrelevant to the selection of a lawyer. The Second Circuit declared a similar restriction on lawyer advertisements to be unconstitutional in 2010. Alexander v. Cahill, 598 F.3d 79, 89 (2d Cir. 2010). The lawyer challenging the restriction had run an ad which depicted the lawyer and the members of his firm "as giants towering above local buildings, running to a client's house so

[4] The inclusion of a ban on ads that "are likely to confuse the viewer" might possibly be seen as adding a new wrinkle to the current version of Rule 7.1. If so, this same idea could be added to the existing comments to Rule 7.1 more easily than amending the entire rule.

quickly they appear as blurs, and providing legal assistance to space aliens." The Second Circuit recently concluded that a prohibition on irrelevant advertising techniques is subject to the Central Hudson test. Alexander, 598 F.3d at 89. Absent evidence that information irrelevant to the selection of a lawyer actually misled potential clients, the Second Circuit concluded that the prohibition was unconstitutional.

Again, the TAJ has offered no support for their assertions in support of the rule. There is no evidence offered for the idea that ads containing "manipulative" or irrelevant techniques mislead viewers or create unjustified expectations. Nor has TAJ offered any support for the idea that manipulative visuals undermine the public's perception of lawyers. As such, the proposal is subject to constitutional challenge.

II. The Proposed Changes to Rule 7.2

The TAJ has also proposed major changes to Rule 7.2. Summarized briefly, the proposed rule would prohibit a lawyer who does not have a bona fide office in the State of Tennessee from advertising here. The primary justification offered for the rule is explicitly based on the desire to protect Tennessee lawyers from competition from out-of-state lawyers. (Supplemental Petition, p. 5). The secondary justification offered is concern over the bar's ability to effectively regulate out-of-state lawyers. (Id.)

This proposed rule raises serious constitutional concerns. Under the Dormant Commerce Clause of the federal constitution, "[s]trict or heightened scrutiny is triggered upon a showing that a state law or local ordinance discriminates against interstate commerce (1) on its face, (2) in its effects, or (3) was passed with a discriminatory [i.e., protectionist] purpose." Brannon Padgett Denning, The Glannon Guide to Constitutional Law 109 (Aspen 2010). In the present case, *all three* triggers to strict scrutiny exist. The proposed rule discriminates against out-of-state lawyers on its face, it would thus necessarily have the effect of discriminating against them, and it is being offered for an expressly protectionist purpose.

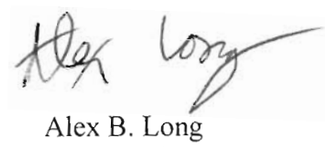
Such rules "are presumed invalid, subjected to strict scrutiny, and nearly always invalidated." Id. In order to satisfy strict scrutiny, "the state bears the burden of proving (1) a legitimate (i.e., nondiscriminatory or nonprotectionist) end and (2) the lack of any less discriminatory alternative to effectuate that end." Id. While the comment offers one arguably legitimate purpose (aiding in disciplinary enforcement), there are clearly less discriminatory alternatives already available. The current rules already address the issue of imposing discipline against out-of-state attorneys, see Rule 8.5, and the TAJ has presented no evidence suggesting any particular enforcement problems with this rule. The current rules also prohibit the unauthorized practice of law in Tennessee and provide an enforcement mechanism that allows for discipline of out-of-state attorneys who engage in the unauthorized practice of law. Again, TAJ has presented no evidence suggesting any problems with the current operation of these rules. The current rules also already require that an advertisement include the name and office address of at least one lawyer responsible for the advertisement, see Rule 7.2(d), thus limiting any concerns over deceptive advertising. Thus, the constitutionality of the proposed rule is subject to serious question.

There is also the practical concern that there are attorneys who are licensed to practice in Tennessee but who do not reside in Tennessee or have offices here. Tennessee does not impose a residency requirement on lawyers who are licensed to practice in the state. Therefore, the rule makes it significantly more difficult for those who have been determined fit to practice law in the state from doing so.

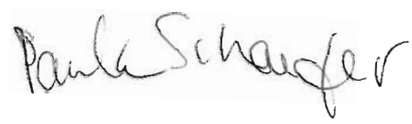
III. Conclusion

The proposed amendments are deeply flawed. Their adoption would almost certainly invite one or more challenges to their constitutionality, challenges that are likely to succeed. If the Tennessee Supreme Court and the Board of Professional Responsibility have concerns over the current state of lawyer advertising, there are other alternatives to the current proposal. These include more rigorous enforcement of current advertising rules and more narrowly tailored amendments. But the Court should decline to adopt these proposals.

Respectfully submitted,



Alex B. Long
Professor of Law



Paula Schaefer
Associate Professor of Law