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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.

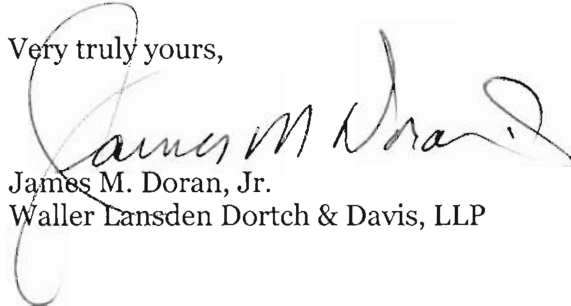
Typically, the Court will order the plaintiffs to provide a document known as either a Plaintiff Profile Form or a Plaintiff Fact Sheet which the law firm will send to the client for the client to fill out. The law firms seldom provide assistance to the client in completing the document. Pursuant to 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,

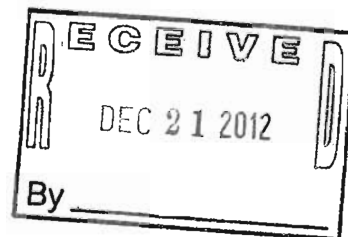


James M. Doran, Jr.
Waller Lansden Dortch & Davis, LLP

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.

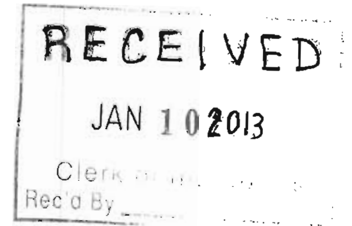
For these reasons, I ask that a two-week extension be granted. Thank you for your attention to this matter.

Sincerely,

Scott Michelman

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

Apperson Crump
The Law in Memphis Since 1865



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

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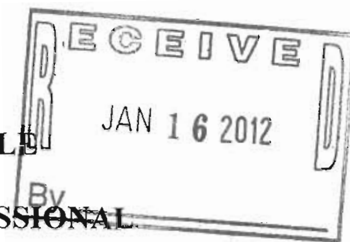
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JAN 16 2012
By

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,

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January 23, 2013

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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
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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.)

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[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

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[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

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[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

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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.

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[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,

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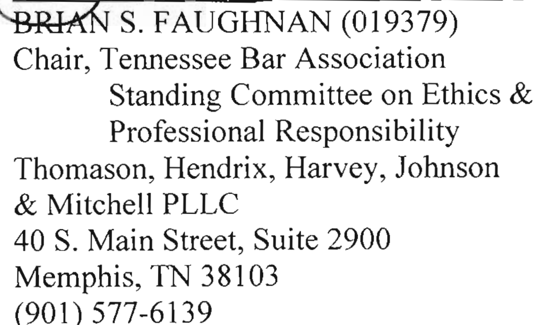

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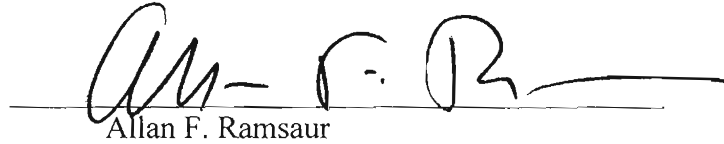
CERTIFICATE OF SERVICE

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.



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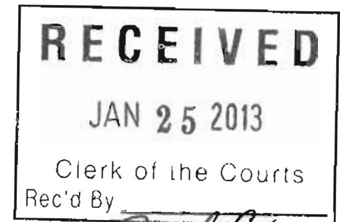


Office of Policy Planning
Bureau of Competition
Bureau of Consumer Protection
Bureau of Economics

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.

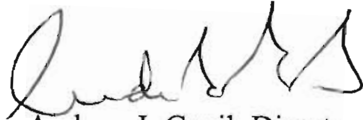
Given the potential burden on competition and consumers, FTC staff recommends that the Court forego the filing and pre-screening components of the Proposed Rules. Instead, the Court should continue to enforce the general prohibition against deceptive and misleading claims through sanctions for violations. 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,



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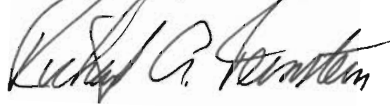

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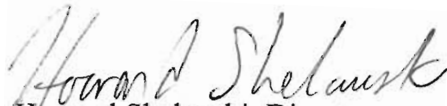

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[1] This staff letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection and Bureau of Economics. The letter does not necessarily represent the views of the Federal 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*).

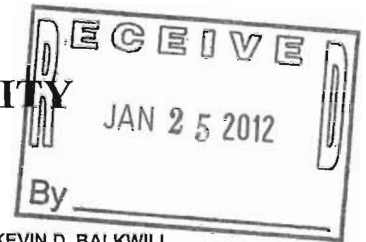
[11] *See* FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1.

[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



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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

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[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

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10 Cadillac Drive, Suite 220
Brentwood, TN 37027
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[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,

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[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,

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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:

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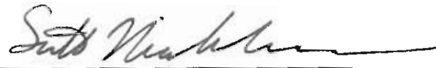
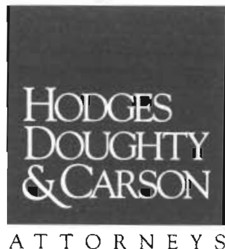


Scott Michelman



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January 24, 2013

Michael W. Catalano, Clerk
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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

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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

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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.

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[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.

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[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

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[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.

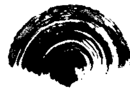
III. Conclusion

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



Elder Law

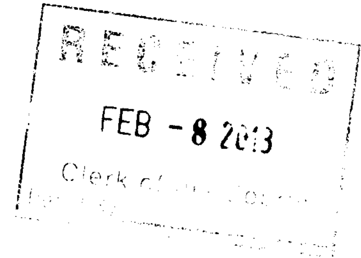
OF EAST TENNESSEE

Amelia Crotwell
Certified Elder Law Attorney

elderlawetn.com

Connie Taylor LCSW
Elder Care Coordinator

February 5, 2013



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:

Please consider my objection to proposed Rule 7.1(c)(1)(K) and 7.1(b)(1)(L) because of the overly broad nature of the rules.

My focus is Elder Law. We use stock photographs of diverse persons of all ages for our blog, newsletter and website. How is the use of an actor "inherently deceptive?" It isn't. It is how the actor is used in the ad that will potentially be deceptive, and therefore, the rule as it stands is sufficient to protect the public.

Second, I would regret being confined to the symbols listed in this proposed Rule 7.1(b)(1)(L). The symbols are narrow and give little opportunity for a non-traditional, non-litigation attorney to convey her message. My practice is not about courthouses, the scales of justice, litigation or the American flag. My practice is about helping people with the problems of aging. Where in the proposed rule is the image that conveys my message?

I see no need to revamp the rules. The proposed rules are overly broad and will unreasonably restrict the free speech of non-traditional lawyers it may not be intending to affect.

Sincerely,

Amelia Crotwell
Certified Elder Law Attorney
Amelia@elderlawetn.com

AGC:tjh

Certified as an Elder Law Attorney by the National Elder Law Foundation
and the Tennessee Commission on Continuing Legal Education and Specialization
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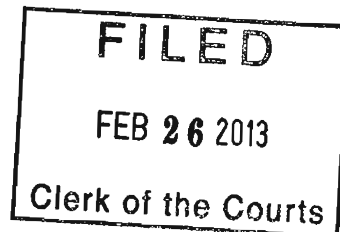
Executive Director
Marsha S. Wilson
mwilson@knoxbar.org

February 26, 2013

VIA EMAIL & U.S. MAIL



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

Re: Comment of The Knoxville Bar Association Regarding the Petition to Adopt Changes to the Rules of Professional Conduct on Lawyer Advertising

Dear Mr. Catalano:

Pursuant to the Tennessee Supreme Court's Order soliciting comments on the proposed changes to Rules of Professional Conduct on Lawyer Advertising, the Knoxville Bar Association (KBA) has carefully considered the proposed amendments and at its meeting on February 20, 2013, and adopted the attached recommendation of the KBA Professionalism Committee.

As always, we appreciate the opportunity to comment on proposed rules promulgated by the Tennessee Supreme Court.

With kind regards,

Sincerely yours,

Heidi A. Barcus, President
Knoxville Bar Association

cc: Hon. John Weaver, Co-Chair, KBA Professionalism Committee
Garry Ferraris, Co-Chair, KBA Professionalism Committee

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Hon. John F. Weaver
Shelly L. Wilson

Executive Director
Marsha S. Wilson
mwilson@knoxbar.org

RECOMMENDATION OF THE PROFESSIONALISM COMMITTEE TO SUBMIT COMMENT In re: Petition to Adopt Changes to Rules of Professional Conduct on Lawyer Advertising; In the Supreme Court of Tennessee No. M2012-01129-SC-RL1-RL

The Professionalism Committee of the Knoxville Bar Association has studied the proposed rule changes to the Rules of Professional Conduct regarding attorney advertising. The Knoxville Bar Association asked the Court to extend the comment period, and the Court extended the deadline to March 11, 2013. The committee had assistance in analyzing the proposed rules from UT College of Law professors Alex Long and Paula Schaefer. Their memorandum is attached to this recommendation. The Tennessee Bar Association has filed comments that are strongly critical of the proposed rules. At its meeting on February 12, 2013, the Professionalism Committee agreed to recommend that the Knoxville Bar Association comment as follows:

1. The KBA cannot support the proposed rules because the proposed rules would likely violate the First Amendment and in many cases are unacceptably vague.

2. While the KBA cannot support the current proposals, the Association believes that the proposals identify legitimate and important issues regarding potential harm to the public that deserve further study. Those issues include whether an atmosphere is being created that harms consumers by encouraging high volume practices attracting inexperienced consumers of legal services who may not fully understand their rights during the representation.

3. The KBA suggests to the Court that it consider, whether by committee or otherwise, engaging in a study of issues that go beyond whether the advertising rules can be restricted. For example, the Court might want to consider studying whether there is any way to measure potential harm to consumers of legal services from the type of high volume practice that some of the advertising firms may engage in; whether current advertising practices have a measurable effect on potential jury pools; whether there are public education opportunities to assist the public in making informed choices regarding representation and the client's rights during the representation; and whether there could be enforcement initiatives within the framework of the existing rules to prevent harm to consumers.

MEMORANDUM

To: Members of the KBA Professionalism Committee

From: Professor Alex B. Long, University of Tennessee College of Law
Associate Professor Paula Schaefer, University of Tennessee College of Law

Date: January 31, 2013

RE: Proposed Amendments to the Tennessee Rules of Professional Conduct Concerning Advertising

Marsha Wilson asked if we would be willing to take a look at the Tennessee Association for Justice's (TAJ) proposed changes to the advertising rules contained in the Tennessee Rules of Professional Conduct. This memo discusses those proposed amendments. Specifically, the memo addresses recent litigation challenging the constitutionality of similar advertising rules in other jurisdictions and identifies other areas of concern with the proposed amendments. Given the time constraints involved, the memo addresses only the first petition filed by the TAJ, and not the second filed by Matthew C. Hardin. [1]

To briefly summarize the contents of the memo,

(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.

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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." (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 those "that have tendencies to distract the viewer from what they are seeing." (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." (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(l). 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(l)(D) would also prohibit a communication "in which an actor and/or model plays a client." (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.

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

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[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 have recovered large settlements would be inherently deceptive because individuals who have recovered large settlements "have typically suffered serious and irreparable harms or death." (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.

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." (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 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.

[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.

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. (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.

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.

ORIGINAL

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

No. M2010-01129-SC-RL1-RL

COMMENTS OF TENNESSEE ASSOCIATION OF BROADCASTERS

Pursuant to this Court's order of November 26, 2013 soliciting public comments for this matter, the Tennessee Association of Broadcasters, by and through counsel, submits the following comments opposing changes to the rules of professional conduct on lawyer advertising.

The Tennessee Association of Broadcasters ("TAB") is a voluntary association of radio and television broadcast stations located in Tennessee, organized and existing as a not-for-profit Tennessee corporation. Its purpose includes promoting a high standard of public service among Tennessee broadcast stations, fostering cooperation with governmental agencies in all matters pertaining to national defense and public welfare, and encouraging customs and practices in the best interests of the broadcasting industry and the public it serves. Broadcasters, as federal licensees, are required to serve the public interest. 47 U.S.C. § 303(f); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d. 597, 599 (3rd Cir.), *cert. denied,* 327 U.S. 779 (1946) ("broadcasting station must operate in the public interest and must be deemed to be a 'trustee' for the public").

After reviewing the previously submitted comments of such respected, but diverse persons as First Amendment scholar David L. Hudson, Jr., the United States Federal Trade

Commission, faculty of the University of Tennessee College of Law, and the Tennessee Bar Association, TAB does not believe that it can add any more legal argument to explain why the petitioned change is constitutionally suspect and would most likely be stricken as a violation of the First Amendment of the United States Constitution. As an association of the persons and businesses charged with the responsibility of serving the public interest, TAB submits these comments to briefly address the public interest related to lawyer advertising.

Generally, the comments in favor of the proposed changes do not acknowledge the very strong constitutional arguments presented by the group of commentators opposing the change. Rather, those comments in support of the changes paternalistically suggest the changes will protect uninformed consumers of legal services by minimizing confusion about legal services being offered in advertisements. In today's society, there are many issues about which many persons, including many very intelligent persons, are confused because the issues are so diverse, technical, and complex. The fundamental First Amendment principle for dealing with the possibility of confusion caused by speech is to allow more speech, not to restrict speech. This principle is certainly applicable to commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 ("people will perceive their own best interest if only they are well enough informed, and ... the best means to that end is to open the channels of communications rather than to close them").

To the extent that the proposed changes would prohibit actors from appearing in lawyer advertising, they impose restrictions upon advertising of legal services that do not exist for advertising other goods or services. To the extent the proposed changes are intended to protect the "dignity" of the legal profession, this is also a paternalistic approach in violation of the First Amendment. The United States Supreme Court has recognized that lawyers have a First

Amendment right to advertise even if some members of the public find those advertisements "embarrassing or offensive" or if some members of the bar find it "beneath their dignity." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-48 (1985).

Even if someone lacks experience with legal services, people in this state are experienced consumers of broadcast advertising. Relying upon a decision of this Court, the Connecticut Supreme Court has observed that "television and radio are the informational media of choice for many, and of necessity for others." *Grievance Committee v. Trantolo*, 470 A.2d. 228, 234 (Conn. 1984), *citing*, *In re Petition For Rule of Court*, 564 S.W.2d 638, 643 (Tenn. 1978). Few members of the public will blindly believe whatever they hear or see in any particular advertisement. As a very strong general rule, anyone old enough and competent enough to consider seeking legal service understands that any advertisement is a "pitch" made by someone who is most likely in competition with others offering similar goods or services. Those persons who see and hear broadcast ads, including lawyer ads, fully understand that the ad is slanted toward convincing viewers to do business with the person presenting the ad. Therefore, the public is not served by, and would in fact suffer from, the restriction of commercial speech suggested in the petitions.

The current rules related to lawyer advertising are fully capable of preventing or correcting any false or misleading legal advertising, and these current rules should not be supplanted by constitutionally suspect rules that restrict free speech. For the forgoing reasons, the Tennessee Association of Broadcasters urges this Court to reject the proposed changes to the rules of professional conduct on lawyer advertising.

Respectfully Submitted:

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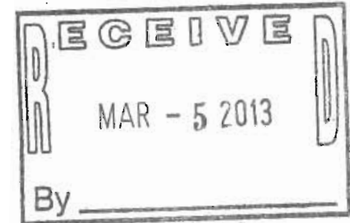
Gupta / Beck *Issues & Appeals*



March 5, 2013

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

Re: Comments of the Tennessee First Amendment Society on Proposed Amendments to the Tennessee Rules of Professional Conduct Relating to Lawyer Advertising (No. M2012-01129-SC-RL1-RL)

Dear Mr. Catalano:

I represent the Tennessee First Amendment Society, an association of Tennessee lawyers whose practices depend on their ability to effectively communicate with potential clients through print, broadcast, and Internet advertising. The association's members (listed in an attachment to this letter) collectively have many decades of practical experience in lawyer advertising and with Tennessee's lawyer advertising rules. They have asked me to submit these comments because, as lead counsel for the plaintiffs in successful constitutional challenges to the New York, Louisiana, and Florida rules on which the proposed amendments are based, I have a unique perspective on the history, purpose, and likely effect of the proposals.

As outlined in the attached comments, we believe that the proposed amendments would harm consumers by inhibiting competition and restricting access to legal services, while doing nothing to prevent genuinely false and misleading advertising. For those reasons, the proposed rules would likely be declared unconstitutional. We therefore urge the Court to deny the petitions.

We thank you for providing us this opportunity to comment on the proposed rules. In the event that the Court is considering adopting the proposed amendments, we respectfully request the opportunity to participate in oral argument to more fully inform the Court on these issues.

Sincerely,

Gregory A. Beck

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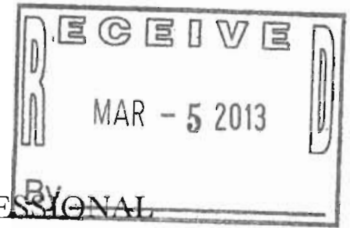

IN THE SUPREME COURT OF TENNESSEE

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

NO. M2012-01129-S C-RL1-RL

COMMENTS OF THE TENNESSEE FIRST AMENDMENT SOCIETY

March 5, 2013

The petitions on which this Court requested comments propose sweeping new lawyer advertising restrictions that would limit competition in the legal-services market by prohibiting or seriously restricting a wide range of common advertising content—including the use of actors and celebrities, visual depictions, statements about the quality of a lawyer's services and past cases, and background sounds—that are essential to effective advertising and that have no reasonable possibility of misleading consumers. The most notable feature of the proposed restrictions is that the majority are based on the rules of other states that federal courts have within the past few years held to violate the First Amendment. The petitions follow in the footsteps of similar efforts to comprehensively restrict lawyer advertising in New York, Florida, and Louisiana. In each of those states, federal courts rejected the states' asserted interests in restricting the precise forms of advertising that petitioners urge the Court to restrict here. *See Pub. Citizen v. La. Attorney Advertising Bd.*, 632 F.3d 212 (5th Cir. 2011); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010); *Harrell v. Florida Bar*, 08-0015, 2011 WL 9754086 (M.D. Fla. Sept. 30, 2011), *on remand from* 608 F.3d 1241 (11th Cir. 2010).

Adopting the proposed rules would inevitably invite similar First Amendment challenges in Tennessee. And because the state has no real interest in prohibiting commonplace advertising techniques that could not realistically mislead anyone, such constitutional challenges would likely succeed. We therefore respectfully urge the Court to deny both petitions.

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HISTORICAL BACKGROUND

1. Restrictions on lawyer advertising in the United States originated in 1908 with the American Bar Association's adoption of its Canons of Professional Ethics. *See* American Bar Association, *Laywer Advertising at the Crossroads* 33 (1995). Before then, many of the country's most prominent firms and respected lawyers, including Abraham Lincoln, advertised their services in newspapers, handbills, or pamphlets. *See id.* at 30-32. The 1906 canons, ultimately adopted in every state, changed that longstanding practice by adopting an absolute prohibition on advertising. *Id.* at 33. There is no evidence that the change was prompted by concerns about protecting consumers. Rather, the canons were more likely designed to "limit entry into the profession and restrict trade" in response to a large influx of new lawyers at the time. *Id.* at 33.

Lawyer advertising remained largely prohibited in every state until 1977, when the U.S. Supreme Court declared Arizona's version of the canons unconstitutional under the First Amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). By that time, evidence was mounting that the advertising ban had left "a substantial portion of the public ... ill-informed about its rights, fearful about going to an attorney, and ignorant concerning how to choose one." *Id.* at 366. The Court in *Bates* rejected the state's argument that lawyer advertising would "undermine the attorney's sense of dignity and self-worth" or "tarnish the dignified public image of the profession." *Id.* at 364. As the Court noted, "[b]ankers and engineers advertise, and yet these professions are not regarded as undignified." *Id.* at 369-70. On the contrary, citing evidence that "[t]he absence of advertising may be seen to reflect the profession's failure to reach out and serve the community," the Court concluded that "the fact that [the legal profession] long has publicly eschewed advertising" had likely led to "public disillusionment" and "cynicism with regard to the profession." *Id.* at 370-71. Moreover, advertising restrictions, the Court noted,

isolate lawyers from competition, thus reducing "the incentive to price competitively" and "perpetuat[ing] the market position of established attorneys." *Id.* at 377.

Following *Bates*, states began to follow the lead of the American Bar Association's revised model rules by broadly permitting lawyer advertising as long as it was not false or misleading. *See In re Rules Regulating The Fla. Bar*, 494 So. 2d 977, 1071–72 (Fla. 1986) (discussing the history of post-*Bates* advertising regulation). Remaining state restrictions on common advertising techniques were subjected by the courts to rigorous and skeptical scrutiny and, for the most part, held unconstitutional under the First Amendment. *See, e.g.*, *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer*, 471 U.S. 626; *In re RMJ*, 455 U.S. 191 (1982).

2. The Florida Supreme Court abruptly broke with the developing national consensus in 1990, adopting a "complete overhaul" of the state's rules "in response to the proliferation of attorney advertising in the wake of *Bates*." *See In re Petition to Amend the Rules Regulating the Fla. Bar*, 571 So. 2d 451 (Fla. 1990). In an attempt to ensure that lawyer advertising would "provide only useful, factual information presented in a nonsensational manner," the Court restricted a range of common advertising content. *Id.* Those restrictions—many of which are the basis for the amendments proposed by the petitioners here—included prohibitions on "reference[s] to past successes or results obtained," statements that "describ[e] or characteriz[e] the quality of the lawyer's services," visual or verbal depictions considered to be "manipulative," and background sounds. *Id.* In dissent, Florida's Chief Justice wrote that many of the prohibited devices "can be, and undoubtedly ha[ve] been, used effectively to provide the consumer with clear and truthful information concerning the availability of important legal services." *Id.* at 474. The majority was, he complained "out of frustration and annoyance, swatting at a troublesome and persistent Bar fly with a sledgehammer." *Id.*

For many years, Florida stood alone as the most restrictive jurisdiction on lawyer advertising. Even after the Eleventh Circuit concluded that the state's prohibition on statements regarding the "quality of the lawyer's services" lacked "any sort" of evidentiary support and thus violated the First Amendment, the state continued to maintain and expand its comprehensive set of advertising rules. *Mason v. The Florida Bar*, 208 F.3d 952, 957–58 (11th Cir. 2000). In 2007, the Court rejected a proposed amendment that would have repealed the ban on "manipulative" ads as too vague and difficult to apply, and adopted—over the unanimous objection of the task force appointed to study the issue—a new rule requiring lawyers to file their advertisements for review and approval by Florida Bar staff. *In re Amendments to The Rules Regulating The Florida Bar*, 971 So. 2d 763 (Fla. 2007). But aside from a comprehensive set of restrictions in Mississippi held unconstitutional in *Schwartz v. Welch*, 890 F. Supp. 565, 577 (S.D. Miss. 1995), most states continued to follow the ABA in disclaiming any intent to regulate advertising based on "[q]uestions of effectiveness and taste." Model R. Prof'l Conduct 7.2, cmt.

3. Over the past decade, a few states began moving closer to Florida's model. In June 2006, the Appellate Division of the New York Supreme Court requested comments on what the court described as "sweeping new restrictions on lawyer advertising" designed to "ensur[e] that the image of the legal profession is maintained at the highest possible level." *Significant Restrictions on Lawyer Advertising To Be Adopted in New York*, June 15, 2006.[1] Among other things, New York's proposed rules would have restricted the use of actors, client testimonials, celebrity spokespeople, reenactments, and fictional scenes. *See id.* But in response to public comments—including a warning by the Federal Trade Commission that the proposed rules would "unnecessarily restrict truthful advertising and may adversely affect prices paid and services received by consumers"—

[1] *available at* http://www.courts.state.ny.us/press/pr2006_13.shtml.

the court withdrew most of the proposed amendments. *See* Letter from FTC Staff to Michael Colodner (Sept. 14, 2006).[2] The rules ultimately adopted by the court, which restricted advertising that "implies an ability to obtain results," depicts actors portraying judges, or includes "techniques to obtain attention," were declared unconstitutional on the ground that evidence supporting a need for the restrictions was "notably lacking." *Alexander v. Cahill*, No. 07-cv-117, 2007 WL 2120024, at *6, 8 (N.D.N.Y. July 23, 2007). That decision was affirmed by the Second Circuit, which agreed that the state had not proved that consumers would be harmed by "the kind of puffery that is commonly seen, and indeed expected, in commercial advertisements generally." *Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir. 2010).

While New York's appeal in *Alexander* was pending in the Second Circuit, the Louisiana Supreme Court in 2008 adopted its own set of "comprehensive amendments" taken mostly verbatim from the Florida and New York rules. La. Supreme Court, *Press Release*, July 3, 2008.[3] Over the FTC's objection that the rules would stifle competition and make it more difficult for consumers to find a lawyer, the Court approved new prohibitions on "portrayal of a client by a nonclient," "portrayal of a judge or a jury," references to "past successes or results obtained," reenactments and fictional scenes, and celebrity spokespeople. *See* Order of July 3, 2008;[4] Letter from FTC Staff to Richard Lemmler (Mar. 14, 2007).[5] The Court later amended those rules, after a First Amendment challenge had been filed, to allow actors playing clients, reenactments, and celebrity spokespeople when accompanied by a disclaimer that was both "spoken aloud" and

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[2] http://www.ftc.gov/os/2006/09/V060020-image.pdf.

[3] *available at* http:/www.lasc.org/press_room/press_releases/2008/2008–13.asp.

[4] *available at* http:/www.lasc.org/rules/orders/2008/ROPCnewrule.pdf.

[5] *available at* http://www.ftc.gov/be/V070001.pdf.

written in "a print size at least as large as the largest print size used in the advertisement." *See* La. Supreme Court, Press Release, June 4, 2009;[6] Order of June 9, 2009.[7] Despite the amendment, a federal district court declared the celebrity-endorsement rule unconstitutional on the ground that the state had not proved that the required disclaimer was either necessary or effective. *Pub. Citizen v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539 (E.D. La. 2009). And the Fifth Circuit on appeal held unconstitutional the remaining disclaimer requirements (for actors portraying clients, reenactments, and fictional scenes), as well as the prohibitions on portrayal of judges and references to past results. 632 F.3d 212 (5th Cir. 2011).

Shortly after the Fifth Circuit's decision, a federal district court in Florida declared Florida's rules against statements related to quality of services, "manipulative" advertisements, and background sounds unconstitutional under the First Amendment. *Harrell v. Florida Bar*, 08-0015, 2011 WL 9754086 (M.D. Fla. Sept. 30, 2011). The decision in *Harrell* came on remand from the Eleventh Circuit, which reversed the district court's earlier dismissal of the plaintiff's claims for lack of standing. 608 F.3d 1241 (11th Cir. 2010) (holding that the plaintiff had "convincingly explained" why the prohibitions were vague enough to cause him to "steer wide of any possible violation lest [he] be unwittingly ensnared"). The Florida Bar then petitioned the Florida Supreme Court to "eliminate the existing rules in their entirety and replace them" with rules that were "easier for advertising lawyers to understand and the [state bar] to apply, and. easier and less costly to defend." Pet. to Amend the Rs. Regulating the Fla. Bar, July 5, 2011.[8] On January

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[6] *available at* http:/www.lasc.org/press_room/press_releases/2009/2009-13.asp

[7] *available at* http:/www.lasc.org/rules/orders/2009/ROPC_ARTICLE_XVI.pdf.

[8] available at http:/www.floridasupremecourt.org/decisions/probin/sc11-1327_Petition.pdf.

31, 2013, the Court granted the petition, thus eliminating the remaining rules on which the petitioners' proposed amendments are based.[9]

ANALYSIS

Because lawyer advertising is a form of commercial speech protected by the First Amendment, a state may restrict it only in response to evidence of a serious and intractable problem, and then only when the restriction is "a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). Unless the restricted advertising is false or misleading or involves illegal goods or services, the state must satisfy the three-part test first set forth by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), by showing: (1) that "the asserted governmental interest is substantial," (2) that the regulation "directly advances the governmental interest asserted," and (3) that the regulation "is not more extensive than is necessary to serve that interest." *Thompson*, 535 U.S. at 367 (internal quotation marks omitted). The Court has stressed that this burden is a "heavy" one, *44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996), requiring *actual evidence*, not just speculation and conjecture, "that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

Given the well-established and heavy burden of justifying restrictions on speech, it is remarkable that neither petition cites *any* evidence that the prohibited forms of advertising would mislead consumers or that the proposed rules would serve any other valid purpose. The petitioners identify no consumer complaints, disciplinary records, studies, or empirical research of any kind demonstrating that even a *single consumer* has ever been misled by any of the advertising techniques they ask this Court to prohibit. Instead, the petitioners uncritically adopt

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[9] *available at* http://www.floridasupremecourt.org/decisions/2013/sc11-1327.pdf.

language from the most restrictive lawyer advertising rules of other states. But the evidence on which those states relied has already been examined by federal courts and found wanting. *See Pub. Citizen*, 632 F.3d 212; *Alexander*, 598 F.3d 79; *Harrell v. Florida Bar*, 08-0015, 2011 WL 9754086 (M.D. Fla. Sept. 30, 2011). The proposed rules, at least in the absence of additional evidence, would fail to satisfy the First Amendment's requirements for the same reasons as the unconstitutional rules on which they are based.

I. The Proposed Amendments Would Harm Consumers by Inhibiting Competition and Restricting Access to Information about Legal Services.

As the U.S. Supreme Court has emphasized, commercial speech is critically important not only to speakers and recipients of speech, but to the functioning of a free-enterprise economy. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). That principle holds true for lawyer advertising as much as for advertising for other products and services. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646–47 (1985). Indeed, lawyer advertising is undoubtedly *more* valuable than other forms of advertising" because it can educate consumers about their rights, inform them when they may have a legal claim, and enhance their access to the legal system. *Zauderer*, 471 U.S. at 647-48. As this Court recognized in adopting the current rules, the importance of advertising "is particularly acute in the case of persons of moderate means who have not made extensive use of legal services." Tenn. R. Prof'l Conduct 7.2, cmt. The legal needs of such consumers often go unmet because they fear the perceived costs of legal services or do not know how to locate a competent attorney. *See Bates*, 433 U.S. at 376–77; *see also Peel*, 496 U.S. at 110 (recognizing that advertising "facilitates the consumer's access to legal services and thus better serves the administration of justice"). The sorts of common advertising techniques that the proposed amendments would prohibit can "be an effective way of reaching consumers who do not know how legal terminology corresponds to their experiences and problems," and can

therefore be "useful to consumers in identifying suitable providers of legal services." FTC Letter to Colodner, at 3; *see also Grievance Comm. v. Trantolo*, 470 A.2d 228, 234 (1984) ("[T]elevision and radio are the informational media of choice for many, and of necessity for others.").

Restrictions on advertising for legal services would also harm consumers by inhibiting competition, frustrating consumer choice, and ultimately increasing prices while decreasing quality of service. *See, e.g.*, FTC Letter to Colodner at 2–3 & 3 n.10. The FTC has thus consistently opposed restricting techniques that "are related to the style and content of media advertising but do not necessarily target deception." *See id.* at 1–2; *see also* Federal Trade Commission Staff, *Improving Consumer Access to Legal Services: The Case For Removing Restrictions on Truthful Advertising* ix (Nov. 1984) (detailing research showing that fewer restrictions on lawyer advertising "tends to lower prices, stimulate competition, and … enable millions of Americans to find an affordable attorney who can help them resolve or represent legal problems"). By acting "as a barrier to professional entry," advertising restrictions "skew[] the market … in favor of established attorneys who are already known by word of mouth." *Ficker v. Curran*, 119 F.3d 1150, 1153 (4th Cir. 1997); *see also Bates*, 433 U.S. at 378. It is thus not surprising that, in every case of which we are aware, state restrictions on lawyer advertising were prompted not by consumer complaints, but by complaints of other lawyers. The vast majority of members of petitioner Tennessee Association for Justice, for example, do not run television advertising and thus have an economic interest in the amendments they propose.

II. The Tennessee Association for Justice's Proposed Restrictions Advance No Legitimate State Interest And Would Be Unconstitutional Under the First Amendment, the Constitution's Privileges and Immunities Clause, and the Dormant Commerce Clause.

The Tennessee Association for Justice (TAJ) proposes three new restrictions on lawyer advertising in Tennessee. Of these, the first two—which would prohibit portrayal of clients and

"manipulative" advertising—are derived from Louisiana and Florida rules recently held to violate the First Amendment. *See Pub. Citizen*, 632 F.3d 212 (actors portraying clients); *Harrell*, 2011 WL 9754086 ("manipulative" depictions). The third—requiring all advertising lawyers to have a "bona fide office" in Tennessee—has never faced constitutional challenge because no other state has ever adopted it. The rule's admittedly protectionist purpose not only fails to justify the restriction under the First Amendment, but would independently render it unconstitutional under the Privileges and Immunities Clause and the dormant Commerce Clause of the U.S. Constitution.

A. The Proposed Rule Against Portrayal of Clients Would Impose an Overly Burdensome Restriction on a Practice that Has No Reasonable Chance of Misleading Anyone.

1. Proposed Rule 7.1(1)(D) would impose a blanket prohibition on lawyer advertisements in which "an actor and/or model portrays a client." TAJ Pet. 3. By entirely prohibiting the practice, the proposed rule would be even more restrictive than the Louisiana rule held unconstitutional in *Public Citizen v. Louisiana Attorney Advertising Board*, 632 F.3d 212. Unlike the proposed rule here, Louisiana's rule required only a *disclosure* that actors appearing in advertisements were not actual clients. *Id.* at 228. The Fifth Circuit thus subjected the rule to a relaxed standard of review, requiring a showing only that the rule was "reasonably related to the State's interest in preventing deception of consumers." *Id.* Nevertheless, the court held the rule unconstitutional because the large and intrusive disclosures the rule required were unnecessary for achieving the state's purported purpose. *See id.*; *see also Alexander v. Cahill*, 598 F.3d 79 (declaring unconstitutional the portrayal by actors of judges).

If Louisiana's *disclosure* requirement violated the First Amendment, the petitioner's proposed *categorical ban*—at least in the absence of additional evidence—would necessarily violate it as well. Because the proposed amendment would impose an "affirmative limitation on speech" rather

than a disclosure requirement, the state's "heavy" burden under *Central Hudson* would apply rather than the "less exacting scrutiny" applied by the Fifth Circuit. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-40 (2010). The petition's unsubstantiated assertion that ads featuring actors are "inherently misleading" even if they "do not appear to be false or misleading on their face," TAJ Pet. 10, is no substitute for satisfying that burden. The First Amendment requires *proof*, not "speculation or conjecture," that speech is inherently misleading. *See Edenfield*, 507 U.S. at 770.[10]

2. Nor is there even a common-sense reason to believe that consumers are likely to be confused by the use of actors. Like almost every other sort of advertising, lawyer ads frequently use actors to portray, for example, generic scenes of lawyers conferring with clients in law firm or courtroom settings or illustrating one of the lawyer's practice areas. That common practice is allowed in every state except Texas, and there is no reason to believe that Tennessee or the 48 other states that allow the portrayal of clients have been unable to effectively protect consumers.[11] Moreover, neither the ABA's model rules nor the FTC's rules against unfair and deceptive trade practices prohibit use of actors, and the FTC has opposed efforts to adopt such restrictions in other states. *See, e.g.*, FTC Letter to Lemmler (stating that similar practices were "unlikely to hoodwink unsuspecting consumers, because consumers are usually familiar with them").

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[10] *See also Zauderer*, 471 U.S. at 640-41 & 640 n.9 (rejecting the state's unsubstantiated argument that illustrations in advertisements were inherently misleading); *Bates*, 433 U.S. at 372 (rejecting the state's argument that advertising is "inherently misleading" because "services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement").

[11] *See* Tex. Disciplinary Rules of Prof'l Conduct R. 7.02(a)(7). Although Texas's rule, to our knowledge, has never been subjected to constitutional challenge, its constitutionality is controlled by the Fifth Circuit's decision in *Public Citizen* that a less-restrictive rule violated the First Amendment.

After more than a half-century of acculturation to television and radio commercials for all manner of products and services, consumers are by now accustomed to the notion that those appearing in television commercials and other advertisements are very often played by actors or models. They are thus particularly unlikely to make the credulous assumption that everyone appearing in a television commercial is in fact the character he or she is portraying. The U.S. Supreme Court, recognizing that consumers are not so easily misled by stock advertising techniques, has refused to credit similar "paternalistic assumption[s]" that consumers of legal services "are no more discriminating than the audience for children's television." *Peel*, 496 U.S. at 105.

Even if a consumer did make such a mistake, there is no reason to believe that it would likely influence the client's decision to hire the lawyer. Whether a person depicted in an advertisement is an actor will rarely have anything to do with the price or quality of the lawyer's service, and a consumer's inability to identify an actor would thus almost certainly be immaterial to the consumer's decision. *See* Tenn. R. Prof'l Conduct 7.1 (prohibiting "*material* misrepresentations of fact or law" (emphasis added)); *id.* R. 1.0(o) (defining "material" as "something that a reasonable person would consider important in assessing or determining how to act in a matter"); *cf. FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) (noting that an advertisement is deceptive under the Federal Trade Commission Act only "if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect"). As the U.S. Supreme Court explained in *Zauderer*, "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." *Id.* at 648–49.

Indeed, a consumer who made the important decision about hiring a lawyer based on the appearance of clients in advertising would be acting entirely irrationally.

3. At the very least, the proposed restriction is overbroad. Although the stated basis for the amendment is that "[s]ome advertisements currently distributed in Tennessee show young, attractive, and healthy individuals leading active lives after receiving large settlements," TAJ Pet. 10, the proposed rule would prohibit even portrayal of clients who appear old or seriously injured. It would also prohibit use of actors by lawyers practicing family, immigration, or other areas of law in which clients do not seek settlements for injuries. The state cannot ban *all* portrayal of clients on the ground that "*some*" such portrayals may be misleading. *See Peel*, 496 U.S. at 111 (holding that the state's "concern about the possibility of deception in hypothetical cases" did not render lawyer advertising "inherently misleading"); *Alexander*, 598 F.3d at 96 (holding that, because portrayals of judges are "no more than potentially misleading, the categorical nature of New York's prohibitions would alone be enough to render the prohibitions invalid").

Finally, even if petitioners could substantiate their assertions that all portrayals of clients are "inherently misleading," the rules could address the problem by requiring lawyers to disclose the use of actors, as eight other states currently do. *See Alexander*, 598 F.3d at 96 (holding that a disclosure that judges are played by actors would accomplish the state's purpose without restricting speech).[12] As the current rules recognize, "the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to … mislead a prospective client." Tenn. R. Prof'l Conduct 7.1, cmt. Although the Fifth Circuit's decision in *Public Citizen* makes clear that disclosure requirements still have the potential to violate the First

[12] *See* Ark. Rules of Prof'l Conduct R. 7.2(e); La. Rules of Prof'l Conduct 7.1(a)(vii); Mo. Rules of Prof'l Conduct R. 4-7.1(i); Nev. Rules of Prof'l Conduct R. 7.2(b); N.Y. Code of Prof'l Resp. DR 2-101(c)(4); Or. Rules of Prof'l Conduct R. 7.1(a)(8); Pa. Rules of Prof'l Conduct R. 7.2(g); Va. Rules of Prof'l Conduct R. 7.2(a)(2); Wyo. Rules of Prof'l Conduct R. 7.2(f).

Amendment if unnecessary or unduly burdensome, requiring disclosure would at least be less restrictive than an outright ban.

B. The Proposed Prohibition on "Manipulative" Depictions Is Unworkably Vague And Based on Misguided Assumptions About the Public's Perception of Lawyer Advertising.

1. The second proposed restriction would prohibit "visual or verbal descriptions, depictions, illustrations, or portrayals" that are "deceptive, misleading, manipulative, or likely to confuse the viewer." TAJ Prop. R. 7.1(2). To the extent the proposed rule would prohibit advertisements that are genuinely misleading, it is unobjectionable but unnecessary. Existing Rule 7.1 already prohibits all "false or misleading communication[s] about the lawyer or the lawyer's services," including "material misrepresentation[s] of fact or law" and omissions of "fact necessary to make the statement considered as a whole not materially misleading." Because the First Amendment does not prohibit restrictions on false or misleading commercial speech, *see Thompson*, 535 U.S. at 367, it would not prohibit this Court from adopting a separate rule specifically targeting misleading "descriptions, depictions, illustrations, or portrayals"—or, for that matter, from adopting additional rules prohibiting misleading business cards, billboards, refrigerator magnets, or any other conceivable means of communication. Dividing the rules by medium, however, would serve only to increase the rules' complexity, while doing nothing to protect consumers.

2. In contrast, the rule's proposed prohibition on "manipulative" depictions would be more than just useless—it would violate the First Amendment. Indeed, like the proposed prohibition on portrayal of clients, the rule's language is based on the recently invalidated rule of another state. *See Harrell*, 2011 WL 9754086. As the Eleventh Circuit in *Harrell* explained in its decision reversing summary judgment for the Florida Bar, "almost every television advertisement employs visual images or depictions that are designed to influence, and thereby 'manipulate,'' the viewer into following a particular course of action, in the most unexceptional sense." *Harrell*, 608 F.3d at

1255. That broad scope, combined with the lack of "meaningful standards" to guide interpretation and enforcement, *id.*, inevitably led to arbitrary and unpredictable enforcement of Florida's rule. The state at various points concluded, for example, that the image of a tiger's eyes and a claim to have the "strength of a lion in court" were manipulative, but an image of two panthers was not; that an image of a fortune teller was manipulative, but an image of a wizard was not; and that an image of an elderly person looking out of a nursing home window to represent nursing home neglect was manipulative, but an image of a man looking out of a window to represent victims of drunk driving was not. *See id.* at 1255-56. The result was confusion and frustration among lawyers in the state. *See* Nathan Koppel, *Objection! Funny Legal Ads Draw Censure*, Wall Street Journal, Feb. 7, 2009, at A1.[13]

Based on the Eleventh Circuit's reasoning in *Harrell*, the district court on remand granted summary judgment for the plaintiffs. *Harrell*, 2011 WL 9754086. The rule's vague language and the Bar's history of arbitrary enforcement, the court wrote, "fail[ed] to adequately put members of the Bar on notice of what types of advertisements are prohibited" and gave the state "unbridled discretion in determining which advertisements it wishes to prohibit ... even where there appears to be no actual misrepresentation." *Id.*; *see also United Food & Commercial Workers Union v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (finding the term "aesthetically pleasing" to be impermissibly vague because it is not susceptible to an objective definition).[14]

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[13] *available at* http://online.wsj.com/article/SB120234229733949051.html.

[14] As the Eleventh Circuit held in *Harrell*, the possibility that a lawyer could obtain an advisory opinion about the permissibility of an advertisement did not mitigate the rule's vagueness. *Harrell*, 608 F.3d at 1264 n.8. The availability of a procedure for obtaining the "necessarily arbitrary opinions" of state officials did nothing to render those opinions less arbitrary. *Id.*

After spending years issuing interpretations in an attempt to give meaning to the rule, Florida's contradictory decisions succeeded only in making it more unpredictable. We urge the Court not to take up that task where Florida left off.

3. Even setting aside the rule's inherent vagueness, petitioners have not shown a state interest in the rule sufficient to survive First Amendment scrutiny. The rule is intended to prohibit "[s]ensationalistic and dramatic visuals in advertisements" that "undermine the public's perception of attorneys." TAJ Pet. 4. But the U.S. Supreme Court has repeatedly held that the protection of the legal profession's reputation is not an interest that justifies restricting speech. In *Bates*—the first decision to recognize First Amendment protection for lawyer advertising—the Court rejected an attempt by the Arizona Bar to justify advertising restrictions on the ground that lawyer ads "undermine the attorney's sense of dignity and self-worth" and "tarnish the dignified public image of the profession." 433 U.S. at 364. Since then, the Court has reaffirmed the principle that lawyers have a First Amendment right to advertise even if the advertisements are "embarrassing or offensive" to some members of the public or "beneath [the] dignity" of some members of the bar. *Zauderer*, 471 U.S. at 647-48. If petitioners are correct that the public reacts negatively to certain advertisements, it is a problem for the marketplace, not the state, to resolve. Consumers, after all, are unlikely to hire lawyers based on ads they find distasteful, and lawyers are not likely to invest in advertisements that drive away potential clients. *Cf. Central Hudson*, 447 U.S. at 557 ("Most businesses . . . are unlikely to underwrite promotional advertising that is of no interest or use to consumers.").[15]

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[15] *See also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992) ("[A] State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) ("[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.") (internal quotation omitted); *RMJ*, 455 U.S. at 205-06 (holding unconstitutional a prohibition on commercial speech that was "at least [in] bad taste," but where the state had no evidence it harmed consumers);

In any event, the petition supplies nothing beyond unsupported speculation on which to conclude that "sensationalistic" or "dramatic" commercials in fact damage the public's perception of lawyers. Although many lawyers are quick to blame advertising for a decline in the reputation of the profession, the available evidence does not back up that assumption. In the most comprehensive study on the issue, the American Bar Association found that consumers responded with neutral or positive reactions to advertisements that lawyers tended to view negatively. *Lawyer Advertising at the Crossroads* 109. And when asked open-ended questions about factors affecting the profession's reputation, most consumers identified the honesty and ethical conduct of lawyers, the availability of affordable representation, and the quality of legal services. *Id.* Only two percent named advertising. *Id.*

The evidence on which the Florida Bar relied in its unsuccessful defense of its rule against "manipulative" ads is consistent with these findings. The Bar's own consumer survey concluded that attorney advertising "doesn't change opinions about the Florida justice system." Florida Bar, *Florida Consumer Opinions of Lawyer Advertisements* (Apr. 2005).[16] And participants in a focus group conducted by the Bar, after watching six lawyer advertisements on videotape, were *less* likely to

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Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) ("[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it."); *Va. State Bd. of Pharmacy*, 425 U.S. at 748 ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."); *Ficker v. Curran*, 119 F.3d 1150, 1154 (4th Cir. 1997) ("[T]he Supreme Court forbids us from banning speech merely because some subset of the public or the bar finds it embarrassing, offensive, or undignified.").

[16] *available at* http://www.floridasupremecourt.org/clerk/comments/2005/05-2194_Exhibit%204.pdf

attribute negative influences on the justice system from lawyer advertising than they were before being shown the ads. *Harrell v. Florida Bar*, No. 08-0015, 2011 WL 9754086.[17]

Ironically, state ethics rules that restrict commonplace advertising techniques are likely to evoke the very negative reactions they seek to prevent. By limiting lawyer advertisements to depictions of bland "talking heads," these rules make lawyer ads appear dated and cheap compared to the "stylish," professionally produced advertisements consumers are accustomed to seeing in the media. *See* William E. Hornsby, Jr., *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 Geo J. Legal Ethics 325, 350-56 (1996). Advertising restrictions also reduce the perceived availability of legal services and contribute to the profession's "elitist" image—both factors that evidence *does* suggest negatively influence the public's opinion of the profession. *See* Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States?*, 27 J. Legal Stud. 503, 508, 512 (1998).

C. The "Bona Fide Office" Requirement Would Discriminate Against Out-of-State Lawyers for a Protectionist Purpose And Would Thus Violate the First Amendment, the Constitution's Privileges and Immunities Clause, and the dormant Commerce Clause.

1. The TAJ's third proposed rule—which would prohibit *all* advertising in Tennessee by lawyers who lack a regular place of business in the state—has never faced constitutional challenge because it has never been adopted by any other state. The rule would require all

[17] Contrary to the view of many lawyers, there is no evidence that the public's view of lawyers today is worse than it has been historically. *See generally* Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 42 UCLA L. Rev. 1069 (1994) ("As a practical matter, lawyers in the United States have almost always had an image problem."). Public distrust of lawyers long predates television advertising. *See* Marc Galanter, *Lowering the Bar: Lawyer Jokes and Legal Culture* 3 (2005) ("From ancient Greece and the New Testament to our own day, lawyers have long been objects of derision."); *see, e.g.*, Ambrose Bierce, *The Devil's Dictionary* (1911) ("LAWYER, n. One skilled in circumvention of the law."); Charles Dickens, *Bleak House* (1853) ("The one great principle of the English law is, to make business for itself."); William Shakespeare, Henry VI, Part 2 ("The first thing we do, let's kill all the lawyers.").

lawyer advertisements to state the location of "a bona fide office in the state of Tennessee," which the rule defines as a "physical location maintained by the lawyer" where the lawyer "reasonably expects to furnish legal services in a substantial way on a regular and continuing basis." TAJ Pet. 4 (Prop. R. 7.2(1)). The proposed restriction is not merely a disclosure requirement akin to the existing rule that advertisements must disclose the lawyer's name and address. Rather, because the rule would require the location of the office disclosed to be "in the state of Tennessee," lawyers who are not present in the state on a "regular and continuing basis" cannot comply with the rule, and thus cannot run *any* advertisements in the state. The proposed rule makes that point expressly, providing that lawyers who "do not have a bona fide office in the state of Tennessee may not advertise here." *Id.*

The rule's stated purpose is to prevent "[o]ut-of-state attorneys practicing here [who] limit the client base of Tennessee attorneys." TAJ Pet. 10. Tennessee, however, has no legitimate interest in providing an economic advantage to lawyers in Tennessee that would justify a restraint on speech. The rule's admittedly protectionist purpose threatens a core concern of the U.S. Constitution—to prevent "the tendencies toward economic Balkanization that had plagued relations" among the States. *Granholm v. Heald*, 544 U.S. 460, 472 (2005). The petitioner's asserted interest thus not only fails to satisfy the First Amendment, but would itself render the rule unconstitutional under both the Privileges and Immunities Clause and dormant Commerce Clause of the U.S. Constitution. *See Supreme Court of Va. v. Friedman*, 487 U.S. 59, 66 (1988); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280 (1985).

The Privileges and Immunities Clause 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. As its text indicates, the Clause places "the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are

concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1869). The right of nonresidents to "ply their trade, practice their occupation, or pursue a common calling" unhindered by state boundaries, *Hicklin*, 437 U.S. at 524, is "one of the most fundamental of those privileges protected by the Clause." *United Bldg.*, 465 U.S. at 219. For the same reason, the Clause also prohibits states from granting special employment privileges to residents of particular localities *within* a state. *See id.* at 219 (declaring unconstitutional a law that preferred residents of a city for municipal construction jobs).

The proposed rule is exactly the sort of discriminatory prohibition that the Privileges and Immunities Clause is intended to prohibit. It is well-established that a "nonresident's interest in practicing law on terms of substantial equality with those enjoyed by residents is a privilege protected by the Clause." *Friedman*, 487 U.S. at 66; *see also Piper* 487 U.S. at 280–81. The U.S. Supreme Court has thus held unconstitutional restrictions on the right to practice law within a state on terms of substantial equality with resident lawyers. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (holding unconstitutional a New Hampshire rule excluding nonresident attorneys from the state Bar); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (holding unconstitutional a Virginia rule allowing only resident attorneys to be admitted on motion); *see also Schoenefeld v. New York*, No. 09-0504, 2010 WL 502758 (N.D.N.Y. Feb. 8, 2010).

And there is also little question that the "bona fide office" requirement would unconstitutionally restrict that protected privilege. A discriminatory law need not provide for "the total exclusion of nonresidents from the practice of law" to violate the Clause. *Piper*, 470 U.S. at 66. Rather, the relevant question is "whether the State has *burdened* the right to practice law ... solely on the basis of citizenship or residency." *Id.* (emphasis added). In *Ward v. State*, the Supreme Court held unconstitutional a Maryland law that charged out-of-state salespeople higher licensing fees for the privilege of "offering ... or exposing for sale" their goods "by written or printed tradelist or catalogue," and from selling goods "under their name or the name of their

firm." 79 U.S. 418, 424 (1870). Here, the proposed requirement that lawyers maintain a "regular and continuing" practice in the state is far more burdensome than the fee held unconstitutional in *Ward*—it does not merely *burden* advertising by out-of-state citizens, but virtually prohibits such advertising. Indeed, the law's expressed purpose is to "prevent out-of-state attorneys from taking business out of Tennessee." TAJ Pet. 12.

The proposed rule's protectionist and anticompetitive purpose also demonstrates its unconstitutionality under the dormant Commerce Clause. "Time and again," the U.S. Supreme Court has reiterated that, "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 472 (internal quotation marks omitted). A state law that "discriminates against interstate commerce," whether on its face or in its practical effect, "is virtually per se invalid." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2009) (internal quotation marks omitted). The proposed rule would stifle competition, and, if other states followed Tennessee's lead, would create precisely the "economic Balkanization" that the Framers sought to eliminate. *Granholm*, 544 U.S. 472.

2. Having already admitted the rule's blatantly unconstitutional purpose, the petition also asserts, without substantiation, that advertising by out-of-state attorneys "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 Pet. 10. But the petition fails to explain why it is more difficult to oversee advertising by out-of-state lawyers than advertising by lawyers within the state. As the U.S. Supreme Court noted in rejecting a similar argument, a state "has the authority to discipline *all* members of the bar, regardless of where they reside." *Piper*, 470 U.S. at 285-86 (emphasis added); *see also Barnard v. Thorstenn*, 489 U.S. 546, 556–57 (rejecting argument of the Virgin Islands that its inability to "monitor the ethical conduct of nonresident practitioners" justified

discriminatory treatment). If anything, enforcement of advertising rules against out-of-state lawyers would be *easier* than enforcement of other rules, such as rules against conflicts of interest, because advertisements are publicly distributed and thus often accessible to enforcement authorities.

Regardless, difficulty of enforcement would not justify a blanket ban on speech protected by the First Amendment. "Although administering broad prophylactic rules may be easier than prosecuting specific false or misleading ads, the state cannot broadly suppress nonmisleading advertising 'merely to spare itself the trouble of distinguishing such advertising from false or deceptive advertising.'" *Zauderer*, 471 U.S. at 646.

II. The Rules Proposed by Matthew C. Hardin's Petition Are Extreme And Have Been Virtually Abandoned by the Only State to Have Adopted Them.

A. The Proposed Amendments Would Make Tennessee's Rules the Most Restrictive in the Nation.

In addition to endorsing the proposed amendments in the TAJ's proposal, lawyer Matthew C. Hardin proposes numerous new rules—not endorsed by the TAJ—that would impose a litany of even harsher restrictions on lawyer advertising in the state. The amendments would prohibit, among other things, any communication that "contains any reference to past successes or results obtained," "describ[es] or characteriz[es] the quality of the lawyer's services," "includes … any celebrity whose voice or image is recognizable to the public," or, in the case of broadcast advertisements, "contains … any background sound other than instrumental music." The petition also proposes that lawyers be required to file advertisements with the Board of Professional Responsibility for evaluation.

These lengthy, complicated, and redundant proposals take their structure and the majority of their language from the Florida Bar's recently abandoned advertising rules, which long stood apart from the rules of every other state as the most restrictive in the nation. Most of the

significant proposed amendments have either been declared unconstitutional in Florida or the Florida Bar has recognized their likely unconstitutionality. Acknowledging that the "complexity" and "ambiguity" of its rules has led to confusion and excessive litigation costs, the Bar in 2011 petitioned the Florida Supreme Court to "eliminate the existing rules in their entirety and replace them" with rules that were "easier for advertising lawyers to understand and the [state bar] to apply, and easier and less costly to defend." Pet. to Amend the Rs. Regulating the Fla. Bar, July 5, 2011. On January 31, 2013, the Court granted the Bar's petition.[18]

If adopted by this Court, the amendments would thus make Tennessee's lawyer advertising rules the most restrictive of any state. It would also undo the Tennessee Bar Association's long and careful effort to simplify the rules and bring them into conformity with the rules of other jurisdictions, an effort that only recently culminated in this Court's 2010 adoption of comprehensive amendments to the Rules of Professional Conduct. For that reason alone, the Court should deny the petition in its entirety.

B. The Petitioner Fails to Show Any State Interest Sufficient to Justify Burdensome Restrictions on Commercial Speech.

Although the petition proposes numerous amendments that would change the rules in many subtle ways, several stand out as proposing dramatic changes in this Court's policy toward lawyer advertising regulation. Each of these proposed rules would violate the First Amendment.

a. Statements of Past Results. Proposed Rule 7.1(c)(1)(F) would prohibit advertisements that "contain[] any reference to past successes or results obtained." The Fifth Circuit in *Public Citizen* held Louisiana's materially identical rule unconstitutional under the First Amendment. 632 F.3d 212. As the court explained, the rule would prohibit publication of even "verifiable facts" about a lawyer's record, for which the First Amendment's protection is "well established." *Id.* at

[18] *available at* http://www.floridasupremecourt.org/decisions/2013/sc11-1327.pdf.

222. The court rejected Louisiana's argument that such ads have the "potential for fostering unrealistic expectations in consumers," holding that "the First Amendment does not tolerate speech restrictions that are based only on a 'fear that people would make bad decisions if given truthful information.'" *Id.* (quoting *W. States Med. Ctr.*, 535 U.S. at 359). The court also held that the rule was unconstitutional as applied to statements "not susceptible of measurement or verification" because the state had not proved that such statements are misleading or that any confusion could not be alleviated by a less-restrictive disclaimer requirement. *Id.*

Following *Public Citizen*, Florida was the only state that retained a comparable prohibition on references to past results. *See* Fla. Rules of Prof'l Conduct R. 4-7.2(c)(1)(F).[19] And the Florida Bar has now successfully petitioned the Florida Supreme Court to abandon its rule as well, arguing that "the public wants this information available to them." Fla. Pet. 14. In a public survey conducted by the Bar, 74% of respondents said "past results are an important attribute in choosing a lawyer." *Id.* at 14. And as the Bar acknowledged, "[t]he U.S Supreme Court has generally struck down regulations restricting advertising truthful information." Fla. Pet. 14.

Like the Louisiana and Florida rules, the proposed rule here would deprive the public of truthful and relevant information about an attorney's record without evidence that the prohibited statements are misleading or could not be addressed with the less-restrictive alternative of a disclaimer. Accordingly, the proposed rule would violate the First Amendment.

b. Quality of Services. The petition also seeks to prohibit statements that "describ[e] or characteriz[e] the quality of the lawyer's services," Prop. R. 7.2(c)(2), which the petitioner contends are "*likely* to be unsubstantiated and have the *potential* to effectuate unreasonable

[19] Six states allow such references if accompanied by a disclaimer. *See* Mo. Rules of Prof'l Conduct R. 4-7.1(c); N.M. Rules of Prof'l Conduct R. 16-701(A)(4); N.Y. Code of Prof'l Resp. DR 2-101(e); S.D. Rules of Prof'l Conduct R. 7.1(c)(4); Tex. Disciplinary Rules of Prof'l Conduct R. 7.02(a)(2); Va. Rules of Prof'l Conduct R. 7.2(a)(3).

expectations in clients." Hardin Pet. 5 (emphasis added). The language of the proposed prohibition, and the Florida rule from which it originates, is extraordinarily broad in scope. Given that the primary purpose of advertising is to convey information about the quality of a product or service, the rule, if applied literally, would prohibit virtually *all* advertising. *See Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 499 (5th Cir. 2000) (holding that, if statements of quality and routine puffery were considered misleading, "the advertising industry would have to be liquidated in short order" (internal quotation marks omitted)). As the Eleventh Circuit noted in *Harrell*, the rule's broad language and lack of limiting standards has resulting in unpredictable and contradictory applications of the rule by the state's enforcement authorities. 608 F.3d at 1256. The state, for example, has concluded that the slogans "When who you choose matters most" and "MAKE THE RIGHT CHOICE!" improperly characterized quality of services, but "Choosing the right person to guide you through the criminal justice system may be your most important decision. Choose wisely" did not; and that "you need someone who you can turn to, for trust and compassion with this delicate matter" violated the rule, but "Caring Representation in Family Law Matters. I Want to Help You Through this Difficult Time" was permissible. *Id.*

As with the rule against references to past result, Florida currently stands alone as the only state to prohibit the practices prohibited by this proposed rule, and the Florida Bar has also proposed to abandon the restriction. In its 2011 petition to amend the rules, the Florida Bar concluded that "such a prophylactic bar would be unlikely to meet the *Central Hudson* test" and would restrict the "free flow of truthful information to the public that is necessary for the selection of a lawyer." Pet. 16. And also like the past-results rule, the rule has been declared unconstitutional by federal courts. The Eleventh Circuit in *Mason v. The Florida Bar* rejected Florida's contention that truthfully claiming to have received the "highest rating" from Martindale-Hubbell would "mislead the unsophisticated public," noting that the Bar had

"presented no studies, nor empirical evidence of any sort" to back up its alleged concern. 208 F.3d 952, 957–58 (11th Cir. 2000) (holding that the Bar's concerns were "mere speculation" and "unsupported conjecture"). And the rule was again held unconstitutional in *Harrell v. The Florida Bar* as applied to the slogan "Don't settle for less than you deserve," which the state had interpreted to violate the rule. *Harrell* at 36–37; *see also Public Citizen*, 632 F. 3d at 223 (holding that the state had not proved that unverifiable statements of quality are "so likely to be misleading that a complete prohibition is appropriate"); *Alexander*, 598 F.3d at 93 (declaring unconstitutional New York's rule against statements that 'imply the ability to obtain results in a matter," which the state had sought to apply against the slogan "The Heavy Hitters.").

Like the Florida Bar, petitioners have no evidence that statements of quality—a feature present in nearly every advertisement—is misleading to consumers. This rule too would thus be unconstitutional.

c. Use of Celebrities. The petition would prohibit lawyers from using in their advertisements any celebrity "whose voice or image is recognizable to the public." Prop. R. 7.1(c)(14). Although, as far as petitioners are aware, the constitutionality of the Florida rule on which this proposed rule is based has not been adjudicated, the district court in *Public Citizen* held a watered-down version of the rule unconstitutional under the First Amendment.

Louisiana in 2008 adopted a prohibition on celebrity spokespeople modeled on Florida's rule, but, in the face of a First Amendment challenge, amended the rule to allow any "non-lawyer spokesperson speaking on behalf of the lawyer or law firm, as long as that spokesperson shall provide a spoken and written disclosure" that the spokesperson is not a lawyer but a paid spokesperson. *See Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 545 (E.D. La. 2009). Despite the amendment, the district court in *Public Citizen* held the rule unconstitutional based on the rule's "lack of evidentiary support"—a determination that the state did not appeal.

Id. at 557. Other than Florida, only Pennsylvania continues to maintain a rule comparable to the one petitioner proposes.[20]

Once again, the petition provides no evidence to suggest that the 48 states allowing celebrity endorsements in lawyer advertisements have been unable to adequately protect their citizens from misleading ads. Nor does it even attempt to show that Tennessee could not adequately protect consumers with a less-restrictive disclosure requirement. The FTC's *Guide Concerning the Use of Testimonials and Endorsements in Advertising*, for example, allows celebrity endorsements in all forms of advertising provided that the celebrities disclose their financial interest in contexts (such as press interviews) where that fact would be relevant but not obvious to consumers. *See* 16 Fed. Reg. Part 255; *see also* Va. R. Prof'l Conduct 7.2(a)(1) (requiring celebrity endorsements to disclose that the celebrity is not a client and is being paid). For example, the credibility that consumers are likely to give a tennis star's statement in a talk-show interview that her tennis game has been greatly improved by laser eye surgery at a particular clinic would likely be affected by the knowledge that she is being paid to promote that clinic. *Id.* Such concerns are not implicated by typical commercial advertising, for which consumers understand that a celebrity will "be reasonably compensated for his appearance in the ad." *See id.*

d. Background Sounds. In a rule applicable only to "[a]dvertisements on the electronic media such as television and radio," the proposed rules would prohibit "any background sound other than instrumental music." Prop. R. 7.7(b)(1)(C). Again, the petition presents no evidence that this commonplace advertising technique is harmful to consumers. The Florida rule from which this language is derived—which, before the Florida Supreme Court's recent amendments,

[20] *See* Pennsylvania Rule 7.2(d) ("No advertisement or public communication shall contain an endorsement by a celebrity or public figure"). As with Florida's rule, the constitutionality of Pennsylvania's restriction has apparently never been adjudicated.

was the only such rule in the nation—was routinely applied to prohibit advertising that is not even arguably misleading, such as "the sounds of kids playing with a bouncing ball; the sound of a computer turning off; the sound of a light switch turning off; the sound of a seagull in the background; and the sound of a telephone ringing." *Harrell*, 608 F.3d at 1251 (modifications omitted). The Florida Bar in its successful petition to eliminate the rule recognized that a prohibiting such harmless sounds "would be unlikely to meet the *Central Hudson* test." And, indeed, the district court in *Harrell* held the rule unconstitutional, concluding that the prohibition did not advance the state's asserted interest in preventing misleading advertisements. 2011 WL 9754086. The petition presents no evidence to counter that conclusion, and its proposed rule would thus be equally unconstitutional.

C. The Heavy Costs of the Proposed Filing Requirement Would Substantially Outweigh Any Limited Benefit.

The petition's final, and most elaborate, proposed rule would require lawyers to file a copy of each of their advertisements with the Board of Professional Responsibility for evaluation of compliance with the rules. Recognizing the prior-restraint implications of a pre-clearance requirement, however, the petition is careful to provide that a lawyer may publish the filed advertisement even without a Board determination of compliance. The resulting proposed rule is in principle similar to the filing requirement in this Court's former Rule 7.2(b), which the Court eliminated in 2011 in favor of the current rule's less burdensome rule that a lawyer retain a copy of all advertisements for two years following public distribution. *See* Tenn. Pet. at 184. But in stark contrast to this Court's simple, one-paragraph former filing requirement, the petition proposes nearly four pages of complicated, redundant, and confusing requirements and exceptions. Prop. R. 7.8, 7.10. It appears that the most significant of these additions are:

(1) the Board is *required* to evaluate *every* filed lawyer advertisement for compliance with the rules and notify the lawyer of its determination within 15 days of receipt, Prop. R. 7.8(a)(1)(C);[21]

(2) the Board's determination of compliance is, subject to certain exceptions, "binding" on the Board, Prop. R. 7.8(a)(1)(F), (b)(1)(F);[22] and

(3) lawyers are required to pay a $150 fee for each filed advertisement "to offset the cost of evaluation and review."

Given the proposed rule's express provision that lawyers may distribute advertisements regardless of Board approval, the primary practical effect of the mandatory review process appears to be that the "binding" nature of the Board's approval of a particular advertisement provides a sort of safe harbor against later prosecution.[23] But to achieve that purpose, the rule would impose a substantial burden on the Board, requiring it to review and issue written compliance determinations for *every* broadcast and print advertisement run in the state. The

[21] The proposed rule actually sets forth two separate filing requirements for broadcast and non-broadcast advertisements, which differ in subtle and inexplicable ways. For example, the proposed rule would require non-broadcast advertisements to be filed contemporaneously with their first public distribution, but provides no deadline for filing broadcast advertisements. The petition does not explain the purpose of this distinction, or of other differences between the two requirements.

[22] For non-broadcast advertisements, the rule provides that a determination of compliance is not binding on the Board if the "advertisement contains a misrepresentation that is not apparent from the face of the advertisement." Prop. R. 7.8(a)(2)(F). But the rule contains no such exception for broadcast advertisements. *Id.* R. 7.8(a)(1)(F). Again, the petition does not explain this different treatment for broadcast ads.

[23] As to broadcast advertisements, the benefit of this safe harbor is significantly undermined by the rule's proviso that "approval shall not prohibit the Board of Professional Responsibility from reviewing advertisements for compliance with these Rules after a written complaint is made to the Board of Professional Responsibility by an attorney licensed in Tennessee or member of the public." Prop. R. 7.8(a)(1)(C); *see also* Prop. R. 7.8(a)(1)(F) (providing that the "binding" nature of the Board's determination is "[s]ubject to a written complaint"). In that case, the rule provides only that an "attorney's reliance on compliance found by the Board of Professional Responsibility shall be a mitigating factor in application of any discipline." *Id.*

Florida Bar's implementation of its comparable screening requirement is costly—its advertising department alone spends more than $850,000 per year, mostly in staff salaries and office expenses. Florida Bar, *Proposed Budget for Fiscal Year 2012-13*.[24] To be sure, the cost of additional staff required by the rule would be partially offset, as it is in Florida, by the proposed filing fee. But the fee is itself a costly burden on lawyers, who the rule would require to pay $150 every time they run a new advertisement or modify an existing one, even if they do not need or want the safe harbor.

The limited benefits of the proposed safe harbor do not justify these high costs. If the Court wishes to provide certainty to those lawyers who are concerned about the lawfulness of their ads, it could achieve that with a *voluntary* filing and review process. Even better, it could decline to adopt rules that are so difficult to understand and apply that providing lawyers with certainty about their meaning would require creation of a new state bureaucracy devoted to their interpretation.

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[24] *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/73A35E28803FF27C852579DB004EFDD8/$FILE/ProposedBudget12-13n.pdf?OpenElement.

CONCLUSION

This Court should deny the petitions to amend the Rules of Professional Conduct.

Respectfully submitted,

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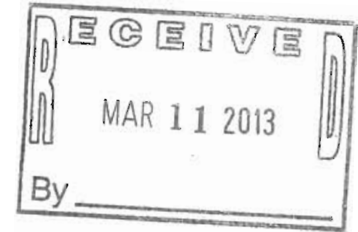

From: "Tom Gordon" <tom@responsivelaw.org>
To:
Date: 03/11/2013 3:39 PM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Monday, March 11, 2013 - 3:38pm
Submitted by anonymous user: [141.161.127.75]
Submitted values are:

Your Name: Tom Gordon
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Your Position or Organization: Executive Director
Rule Change: Supreme Court Rule 8, Sections 7.1 and 7.2
Docket number: M2012-01129-SC-RL1-RL
Your public comments:
Consumers for a Responsive Legal System ("Responsive Law") appreciates the opportunity to provide the following comment in response to the request for public comments on the Petitions To Adopt Changes To Rules Of Professional Conduct On Lawyer Advertising ("Petitions") filed by the Tennessee Association for Justice ("TAJ") and attorney Matthew C. Hardin ("Hardin"). Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people.

We urge the Court to reject the Petitions. The proposed rules contained in the Petitions impose broad, unjustified, and largely inexplicable restrictions on lawyer advertising. These restrictions would affirmatively harm consumers by precluding lawyers from effectively communicating, and denying consumers essential information concerning legal representation.

1. Content Restrictions

Both proposals appear to be based on the assumption that the average Tennessean is particularly stupid. According to the petitioners, the Tennessee public is a mass of gullible, unthinking dupes, willing to believe anything they see on TV, and easily manipulated by loud noises and scary pictures. TAJ's hypothetical "potential client" is ludicrously naïve.
An ad that "stretches the bounds of reality" distracts and confuses him.
An actor or model playing a client "inherently" deceives him.
"Sensationalistic and dramatic visuals" overwhelm his power of reason.
Hardin's imaginary "viewer/reader" is also misled by "recognizable" voices and "ambulance sirens." It should hardly need to be said that these caricatures bear no resemblance to the actual people of Tennessee.

The broadest prohibitions in the proposed rules involve "false, misleading, or deceptive" content. On its face, this appears unproblematic: deceptive attorney advertising undoubtedly harms consumers, just as any deceptive advertising does. It is for this reason, however, that deceptive attorney advertising is already prohibited by the Tennessee Rules of Professional Conduct. Deceptive advertising of any sort is also illegal under both Tennessee and federal law. The proposed definition of "misleading and deceptive," however, not only goes well beyond current ethical and legal standards, it goes well beyond the bounds of common sense. TAJ describes its proposed prohibition on "false and misleading" content as encompassing

"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, describing TAJ Proposed Rule 7.1(1)(B)). Hardin uses precisely the same language to describe "deceptive." (Hardin Petition at 10, describing Hardin Proposed Rule 7.1(c)(1)(E)). Both petitioners provide the particular example of an ad that includes "space aliens or talking dogs assisting clients." Neither petitioner indicates if "space aliens" or "talking dogs" have been an especial problem in Tennessee. Rather, they appear to solely rely on the conclusory, and highly insulting, assertion that the average Tennessean cannot help but be fatally distracted by the mere sight of imaginary creatures. It is not immediately clear why the petitioners are not similarly lobbying to have the Pillsbury Dough-Boy and Cheerios Honey-Bee banned from Tennessee television. Surely the petitioners cannot support advertising that "impairs" consumers' "ability to objectively decide" on breakfast food.

Contrary to the bizarre assertions of the petitioners, consumers of legal services are not being injured by "space aliens" or "talking dogs." What is injuring them in attorney advertising is the absence of essential information – essential information that, to a significant extent, petitioners' proposals would further restrict. The same Tennesseans who can choose their cereal, notwithstanding the "distract[ion]" of a talking bumble-bee, can intelligently choose their attorney, notwithstanding ordinary advertising gimmicks with which they are intimately familiar. When someone needs a lawyer, he needs to know who is available, how they can help him, and what it will cost him. It makes very little difference if he learns this information from a talking alien, a talking dog, or a talking magical unicorn.

The proposed rules do helpfully provide a list of permissible illustrations. That list, in its entirety, consists of: the American and Tennessean flags, American eagle, Statue of Liberty, scales of justice, a courthouse, column, diploma, gavel, "traditional renditions of Lady Justice," "an unadorned set of law books," and attorney photographs "against a plain, single-colored background or unadorned set of law books." (Hardin Proposed Rule 7.1(b)(1)(L)). These particular illustrations were evidently selected because they "either stand for justice or are effectively neutral in terms of persuasion." (Hardin Petition at 8). Even if "neutral[ity] in terms of persuasion" were particularly desirable in advertising, it not at all clear why "unadorned" law books are any more "neutral" than adorned law books, or indeed than a "space alien," "talking dog," or talking magical unicorn.

In addition to talking animals and adorned law books, the proposed rules would prohibit "any background sound other than instrumental music" on radio or television. (Hardin Proposed Rule 7.7(b)(1)(C)). All other sounds evidently "serve only to mislead the viewer," and Hardin's petition provides illuminating example of such inherently misleading sounds: "honking horns . . . and ringing cash registers." (Hardin Petition at 15). Presumably sound-effects that "serve only to mislead" in lawyer advertising also "serve only to mislead" in other commercial advertising. Accordingly, the consumers of Tennessee are apparently currently suffering from a deluge of misleading advertising, in the form of "honking horns" in car commercials, not to mention the frequent and insidious use of non-instrumental music. The contention that Tennesseans are misled by horns, cash-registers, and singing voices would be laughably absurd if were not so

insulting to the consumers of this state.

Other common advertising practices prohibited by these proposed rules include "any actor/model portraying a client," (Hardin Proposed Rules 7.1(c)(1)(K), 7.7(b)(1)(D); TAJ Proposed Rule 7.1(1)(D)), and use of a celebrity or spokesperson whose image or voice is "recognizable to the public." (Hardin Proposed Rules 7.1(c)(3)(14), 7.7(b)(1)(B)). The sole justification given for the former prohibition is the unsupported assertion that "[m]ost people will view these types of advertisements and believe people are getting large amounts of money without substantial injuries or permanent harms." The sole justification for the latter is that the "star quality" of a recognizable voice or image would overwhelm consumers' capacity to choose a lawyer. (Hardin Petition at 12, 14). Again, the petitioners appear to be operating on the assumption that Tennesseans are the most gullible and least savvy consumers on the planet.

2. Information Restrictions

The expansive prohibitions in the proposed rules are by no means limited to sounds and pictures. Substantively, any "statements describing or characterizing the quality of the lawyer's services" are also categorically forbidden. (Hardin Proposed Rule 7.1(c)(2)). Statements of opinion and other "unverifiable" claims are also barred by the proposed rules' ban on "unsubstantiated" statements. Such claims – e.g., "John Smith, Esq. is a very nice man" – evidently "undermine the image of the legal profession." (Hardin Petition at 10, describing Hardin Proposed Rule 7.1(c)(1)(D); TAJ Petition at 4, describing TAJ Proposed Rule 7.1(1)(C)). Unverifiable comparisons with other lawyers – e.g., "Bob Smith, Esq. is an even nicer man than John Smith, Esq. – are evidently akin to political "mudslinging," and are therefore singled out for special prohibition. (Id. at 11, describing Hardin Proposed Rule 7.1(c)(1)(I)). In defense of this blanket prohibition, petitioner asserts that statements on the quality of lawyers' services "are likely to be unsubstantiated and have the potential to effectuate unreasonable expectations." (Id. at 12). No explanation is given for why describing quality of services is particularly "likely" to be unsubstantiated; nor is there any elaboration on precisely what "unreasonable expectations" such statements will potentially "effectuate." Indeed, if anything, it is actually this proposed rule that would "effectuate unreasonable expectations." Precluding consumers from learning about a lawyer's services denies them the basic information necessary to form reasonable expectations.

The proposed rules further restrict consumers' access to information by specifically forbidding any "reference to past successes or results." (Hardin Proposed Rule 7.1(c)(1)(F)). This prohibition would preclude an astonishingly wide array of non-misleading advertising. For example, a lawyer would be subject to disciplinary sanctions for uttering the truthful statement "I've won two hundred defective construction cases, and gotten my clients money in each one." It is wholly absurd to propose that this kind of accurate, factual information would not be relevant to a prospective client considering a case involving defective construction. The proposed rules do contain a limited exception for referencing past results on websites and in email communications. Even then, however, referencing past results is only permitted if the lawyer obtains "written permission" from each former client involved, and describes the case "in a manner to accurately

reflect the injuries and damages incurred." (Hardin Proposed Rule 7.9(d)). Accordingly, our hypothetical defective construction litigator could only state on her website that she had "won two hundred defective construction cases" if she first obtained written permission from all two hundred plaintiffs and sufficiently described the "injuries and damages incurred" in each case. The imposition of this ludicrous burden means that, realistically, she is precluded from referencing her past results in any medium. Oddly enough, the proposed rules do, cryptically and with absolutely no explanation, permit lawyers to state their "role in changing/establishing law/law rules of state via case law or otherwise." (Hardin Proposed Rule 7.1(b)(1)(N)). It is unclear how a lawyer can advertise his past of changing the law "via case law" without referencing his past results or successes, and he petitioner makes no attempt to explain this inconsistency.

In addition to the wide array of prohibited content, certain content is expressly permitted. Specifically, fourteen instances are "presumed to be permissible." (Hardin Proposed Rule 7.1(b)(1)). This list, however, is not only grossly underinclusive, but wholly unsupportable. No justification is given for why these, and only these, fourteen are presumptively permissible. Moreover, the list appears to have been largely compiled at a whim. Illustrative examples include "parking arrangements"; "common salutary language such as, 'best wishes,'"; and "punctuation and common typographical marks." (Hardin Proposed Rule 7.1(b)(1)(A), (J), (K)). Absent this last paragraph, a lawyer who dared to include a comma in his advertising would apparently be doing so at his peril. Lawyers will doubtlessly be reassured that they can provide parking information, wish potential clients well, and employ semicolons without fear of disciplinary proceedings.

The proposed rules' various and sundry prohibitions, taken together with the list of "permissible" content, would limit the information available to consumers to dates of bar admissions, former positions, years of experience, number of attorneys, licensed jurisdictions, legal field(s), other "technical or professional" licenses, foreign language ability, and public or military service. (Hardin Proposed Rules 7.1(b)(1)(B)–(F)). When justifying the proposed ban on recognizable voices, Hardin expresses the concern that consumers might select attorneys "based on the recognized spokesperson instead of an attorney's legal skills, diligence, and reputation." (Hardin Petition at 15, describing Hardin Proposed Rule 7.7(b)(1)(B)). The proposed rules then proceed to expressly prohibit any statement pertaining to skills, diligence, or reputation.

3. Other Restrictions

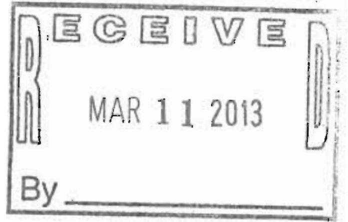
The proposed rules expressly and unapologetically prohibit any advertising by non-Tennessee lawyers. (Hardin Proposed Rule 7.0(c); TAJ Proposed Rule 7.2(1)). This prohibition extends to any lawyer who lacks a "bona fide office" in the state. A lawyer licensed to practice in Tennessee, who sees clients from Tennessee, and primarily works in Tennessee would nonetheless be absolutely barred from advertising in Tennessee if his office were just across the Mississippi River in West Memphis, Arkansas. In justifying this absurd result, the petitioners candidly, and somewhat refreshingly, admit an intent to "prevent[] out-of-state attorneys from taking business out of Tennessee" and from "limit[ing] the client base of Tennessee attorneys." (Hardin Petition at 5; TAJ Petition at 5). Although the

petitioners' commercial interest in securing their market share is unsurprising, it has no place in a rule of professional conduct.

The proposed rules would also impose a "pre-filing" requirement – which the petitioner is careful to distinguish from a "pre-clearance" requirement – for all lawyer advertising. (Hardin Petition at 31). This would require that every radio and television advertisement be filed with the Board of Professional Responsibility. (Hardin Proposed Rule 7.8(a)(1)). Tennessee's former, less expansive, filing requirement was deleted at the urging of the Tennessee Bar Association, the Board of Professional Responsibility, and the Disciplinary Counsel for the Board. (Tennessee Bar Association, Comment, at 8 n. 12). In addition to filing the ad itself, lawyers would be compelled to file a statement "listing all media" in which it will appear, its "anticipated frequency of use" in each medium, and the "anticipated time period" in which it will be used. (Hardin Proposed Rule 7.8(b)(6)). Just in case these practical burdens were not sufficiently onerous, the proposed rule also imposes a fee of $150 for each timely filed ad, and $250 for each filing deemed late. (Hardin Proposed Rule 7.8(b)(7)). The filing fees are also, apparently arbitrarily, mandated to increase by 3% each year; the current inflation rate is only 1.6%. As noted by the very Board that would be charged with administering it, this system would be "burdensome, time consuming and costly to enforce." (Comment, at 2).

On behalf of the users of the legal system, we strongly urge the Court to oppose the Petitions.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/5075



IN THE SUPREME COURT OF TENNESSEE

IN RE: PETITION TO ADOPT CHANGES TO RULES OF PROFESSIONAL CONDUCT ON LAWYER ADVERTISING	No. M2012-01129-SC-RL1-RL

COMMENT OF THE TENNESSEE CHAPTER OF
THE AMERICAN BOARD OF TRIAL ADVOCATES ("ABOTA")
TO PETITIONS TO AMEND THE TENNESSEE RULES OF PROFESSIONAL
CONDUCT GOVERNING LAWYER ADVERTISING

The Tennessee Chapter of the American Board of Trial Advocates submits the following comment pertaining to the petitions filed by the Tennessee Association of Justice (called the "TAJ Proposal" or the "TAJ Petition" in this comment) and Matthew Hardin (called the "Hardin Proposal" or the "Hardin Petition" in this comment).

I. Introduction

The American Board of Trial Advocates ("ABOTA") comprises a group of experienced trial lawyers, from both traditional segments of the trial bar – plaintiff and defense, with a strong commitment to preserving the civil justice system in place under the United States and state (in this case, Tennessee) constitutions; lawyers selected for membership in ABOTA have demonstrated a commitment to maintaining standards of professional integrity that cultivate citizen confidence in the fair and equal administration of justice.

ABOTA sets for itself the mission of fostering "improvement in the ethical and technical standards of practice in the field of advocacy to the end that

individual litigants may receive more effective representation and the general public be benefited by more efficient administration of justice consistent with time-tested and traditional principles of litigation."[1]

ABOTA understands that mass media advertising constitutes the manner in which many persons in today's society receive initial information about the availability of legal services. For a period exceeding eighteen months prior to October 2009, ABOTA undertook a study of lawyer advertising using a committee within its national organization. Based on the study, ABOTA promulgated an advertising standards document to provide guidance to lawyers and state bar organizations and rule-making bodies; on 3 October 2009, ABOTA's National Board of Directors adopted the "Principles of Good Practice in Attorney Advertising." A copy of the Principles document is included as Appendix A to this comment and can be obtained from the ABOTA website at www.abota.org using the Publications tab at the top of the page and the "Advertising Guidelines" link in the Publications tab or at http://www.abota.org/index.cfm?pg=AdvertisingGuidelines.

The Tennessee Chapter of ABOTA ("Tennessee ABOTA") supports the effort to improve regulation upon lawyer advertising so long as that regulation protects the administration of justice within Tennessee. Courts repeatedly have stated that citizen perception of lawyers constitutes a component of the fair, equal, and efficient administration of justice: low opinions of lawyers by non-lawyer citizens impairs the administration of justice, because lawyers form an important part of our legal

[1] A more complete statement of the goals and purposes of ABOTA may be found at http://www.abota.org/index.cfm?pg=Mission (last accessed 10 March 2013).

system; when lawyer advertising contributes to citizen distrust of lawyers, the administration of justice suffers. This Court acknowledged as much in adopting the preamble language to the current Tennessee Rules of Professional Conduct, which state:

- "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."[2]
- "Lawyers play a vital role in the preservation of society."[3]

The United States Supreme Court credited, in its most recent lawyer advertising case, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), the state's assertion there that it had a "paramount (and repeatedly professed) objective of curbing activities that negatively affect the administration of justice" and that part of that objective could be accomplished by "preserving the integrity of the legal profession." 515 U.S. at 624 (internal quotation marks and ellipsis omitted). The U. S. Supreme Court went on to say: "The regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families." *Id.* at 625 (internal quotation marks omitted).[4]

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[2] Tenn. S. Ct. R. 8, TRPC *Preamble* ¶2.

[3] Tenn. S. Ct. R. 8, TRPC *Preamble* ¶14.

[4] At least one federal appellate court has pointed out that the U. S. Supreme Court did not find the "dignity" of the legal profession itself to be an important governmental interest. *See, e.g., Public Citizen, Inc. v. Louisiana Attorney*

Put another way, when lawyer advertising brings the legal profession into disrepute or low esteem, the administration of justice suffers, and, in Tennessee, this Court has a responsibility (perhaps the ultimate responsibility) to oversee the administration of justice. Accordingly, the petitions filed by TAJ and Matthew Hardin together with the comments filed to date, should be treated as an assertion by a significant segment of the bar in Tennessee that a potential problem may exist with the administration of justice in this state.

Tennessee ABOTA asserts that an *ad hoc* committee should be appointed by this Court in order to further investigate the petitions filed by the TAJ and Matthew Hardin.

II. Regulation of Commercial Speech, Such as Lawyer Advertising, Requires Empirical Data Demonstrating The existence of a Problem Affecting a Substantial Governmental Interest and The Efficacious Advancement of the Interest by the Regulation.

Because lawyer advertising constitutes "commercial speech," it receives some protection from the First and Fourteenth Amendments to the United States Constitution; several comments have discussed this fact in detail and have provided the Court with a great deal of information about First Amendment case law.

To reiterate an important point briefly: the United States Supreme Court addressed the parameters of state regulation of lawyer advertising most recently in

Disciplinary Board, 632 F.3d 212, 220 (5th Cir. 2011). *Cf. Ficker v. Curran*, 119 F.3d 1150, 1154 (4th Cir. 1997) (noting the issue with "dignity" but not passing on the question). A distinction needs to be kept in focus between "dignity" and "integrity": while dignity of the profession may not be a substantial governmental interest, integrity is; integrity involves citizen perceptions to the extent that those perceptions affect the ability of lawyers to perform their function as components of the justice system. *Florida Bar*, 515 U.S. at 624-625.

Florida Bar v. Went for It, Inc., 515 U.S. 618, 623–624 (1995); in that case the U.S. Supreme Court held that while the states may freely regulate misleading lawyer advertising (and misleading commercial speech generally), regulations governing non-misleading attorney advertising must be analyzed under a three-part test (reiterated in TAJ and Hardin Petitions and in several of the comments filed in this Court already).[5] The three-part analysis entails consideration of the following items: the regulation must be directed to support a substantial state interest, must be reasonably arranged so that the restriction materially advances the substantial state interest, and must be narrowly drawn (but not necessarily drawn according to the least restrictive alternative). *See* 515 U.S. at 623–624. The *Florida Bar* opinion demonstrates that parts two and three of the test must be supported by empirical data: in that case, the Florida Bar had undertaken a two-year study that included public hearings, surveys, and anecdotal data in order to support the changes it proposed that the Florida Supreme Court make to that state's attorney advertising rules, including the challenged restrictions on lawyer solicitation of accident victims within thirty days of the incident. *Id.* at 626.[6] "Empirical data" may include many types of information, including anecdotal evidence, surveys, and, under some circumstances, "history, consensus, and 'simple common sense[.]'" *Id.* at 628.

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[5] The analysis sometimes goes under the name the "*Central Hudson*" three-prong test or four-part test (i.e., the first question, "is the advertising misleading?" plus the three-part test for regulating non-misleading advertising). David L. Hudson Jr. provided a succinct summary of the analysis on pages 6-7 of his comment.

[6] Now also a part of the Tennessee Rules of Professional Conduct at Tenn. S. Ct. R. 8, RPC 7.3(b)(3).

In the wake of *Florida Bar*, courts of appeal have upheld various restrictions on lawyer advertising based upon empirical data presented by the bar authorities implementing and supporting the restrictions. For example, the Sixth Circuit Court of Appeals upheld Kentucky's prohibition and criminalization of solicitations by lawyers to injured persons and their families within thirty days after an injury incident occurred. *Chambers v. Stengel*, 256 F.3d 397, 399–400, 404 (6th Cir. 2001). In deeming the statute constitutional, the Sixth Circuit stated:

> [The Kentucky authorities supporting the regulations] submitted ample evidence establishing that the statutes directly and materially advance the state's interests, including (1) the 106-page Florida study from the Went For It case; (2) an affidavit from Kentucky Representative Lawrence D. Clark, who sponsored the statutes and stated that after he was involved in a vehicular accident, he received at least fifteen solicitation letters from attorneys; (3) an affidavit from the Executive Director of the Kentucky Bar Association setting forth a summary of a Kentucky survey report, which revealed the public's displeasure with attorney solicitation following an accident; (4) articles and letters appearing in The Courier-Journal and the Kentucky Bench and Bar; and (5) statistics of the frequency of automobile accidents in Kentucky.

Id. at 404. The empirical data formed the cornerstone of upholding Kentucky's restriction on immediate-post-incident solicitations: the Sixth Circuit determined that the data submitted fulfilled the second part of the commercial speech restriction test by showing that the harms created by immediate-post-incident lawyer solicitation were real. *Id.*

In a more recent decision relying upon and applying the *Florida Bar* opinion, the Fifth Circuit upheld certain advertising restrictions adopted by the Louisiana Supreme Court and enforced by the Louisiana Attorney Disciplinary Board and struck down certain other restrictions. *Public Citizen, Inc. v. Louisiana Attorney*

Disciplinary Board, 632 F.3d 212 (5th Cir. 2011). The provisions upheld by the Fifth Circuit had specific empirical support in the record. A comparison of three of those provisions provides an important analytic guideline:

- For the rule prohibiting any depiction of a judge or jury in a lawyer advertisement, the Fifth Circuit noted that the LADB presented no evidence that citizens would find the depiction misleading, and so the court invalidated the rule on First Amendment grounds; but,

- Prohibitions on using nicknames or mottos that state or imply an ability to obtain results and on using actors in lawyer advertisements without a disclaimer that actors were being used both had been revealed to be misleading to a large number of persons (including other lawyers) surveyed by the committee that studied and proposed the Louisiana rules. The Fifth Circuit used the empirical data in both instances as a basis to uphold the regulations.

632 F.3d at 223–228.

In a recent treatise on lawyer advertising, First Amendment scholar Rodney Smolla reiterates the general rule and states:

> Empirical evidence, or the lack of it, will often play an important role in the application of *Central Hudson*. This is typically manifest in statements by courts critical of the lack of persuasive empirical data supporting the critical legislative assumptions embedded in the regulatory scheme.
>
> * * * *
>
> The Supreme Court now repeatedly emphasizes that the government must have real evidence that the regulation it is defending is effective, refusing to accept mere "common sense" or legislative or administrative speculation or discretion as a sufficient basis for advertising restrictions.

1 RODNEY A. SMOLLA, LAW OF LAWYER ADVERTISING §2:26, pp. 71, 73 (2006).

The record now before this Court, unfortunately, does not appear to contain the type of empirical data necessary for this Court to make a full evaluation of the constitutionality of the TAJ Proposal or the Hardin Proposal.[7] Nonetheless, the Court has before it now two petitions, one by a large association of attorneys involved daily in the administration of justice in Tennessee, (especially the resolution of civil damages claims, an area where much advertising occurs), and one from a member of the bar of this Court; both petitions assert that the current system of regulating attorney advertising in Tennessee fails to protect the citizens of this state. Comments have been filed for and against the petitions; importantly, though, the comments against the petitions mainly discuss First Amendment principles while the few comments from practicing lawyers demonstrate that lawyer advertising as currently permitted in Tennessee does affect the administration of justice in a negative way. At a minimum, the petitions and the comments taken

[7] As the *Louisiana Attorney Disciplinary Board* opinion demonstrates, justification for the rules can be obtained after adoption but before implementation. 632 F.3d at 216 (the Louisiana Supreme Court directed the study committee to conduct further research after filing of the lawsuit challenging the amended advertising rules and the committee then "conducted a survey of Louisiana residents and a survey of members of the Louisiana Bar Association (Bar Members) regarding both groups' perceptions of attorney advertising within the state" upon which the LADB relied during the lawsuit and that the Fifth Circuit found supported certain of the amended rules). Tennessee ABOTA does not believe this procedure to be best and urges the Court to direct a committee to undertake the necessary investigation and fact-gathering prior to adoption, if any, of amended attorney advertising rules.

together manifest the existence of a potential problem and a need for further consideration by this Court.[8]

Though the petitions as filed by TAJ and Mr. Hardin do not appear to contain sufficient empirical information to permit this Court to make a determination about the scope of the problem with lawyer advertising in Tennessee and the proper form of a solution, certain comments filed in response to the petitions demonstrate the need for further investigation of the problem asserted to exist by TAJ and Mr. Hardin: the comment of Gary K. Smith, for example, reveals that certain forms of advertising appear to be affecting the attitudes of potential jurors in Tennessee; the comment of James M. Doran, Jr. demonstrates that advertising by out-of-state lawyers may be negatively affecting claims asserted by Tennessee citizens in mass tort cases; and, the comment of B. Chase Kibler demonstrates that lawyer advertisements provide information to potential clients that may be less than helpful to them in pursuing their claims. While these comments might not suffice alone as justification for new or amended rules, the comments show that the basic assertions of the TAJ and Hardin Petitions have merit and should be investigated further, i.e., the comments manifest a substantial potential that lawyer advertising as currently permitted and practiced in Tennessee negatively affects the

[8] Certain of the proposals made by TAJ and Mr. Hardin are aligned with ABOTA's Advertising Guidelines, but implementation of regulations with the same or similar restrictions upon the communications of Tennessee lawyers requires some empirical justification, which may exist, but has not yet been demonstrated to this Court.

administration of justice in the state and disserves the citizens of this State and also the legal profession.[9]

Taking the teaching of *Florida Bar* seriously means that legal arguments alone will not, perhaps cannot, determine whether or not new or revised regulations pertaining to lawyer advertising in Tennessee are warranted: the impact of currently occurring advertising upon the administration of justice must be considered, and that impact must be analyzed by considering what actually is happening in Tennessee. Consequently, the Tennessee ABOTA urges the Court to undertake further examination of the proposals in accordance with the principles set out by the U.S. Supreme Court *Florida Bar*. Tennessee ABOTA supports expanded regulation of attorney advertising in keeping with the ABOTA Advertising Guidelines, and believes that the specific proposals advanced by the TAJ and Matthew Hardin should lead to further study and formulation of proposals for expanded regulation of attorney advertising.

Tennessee ABOTA therefore proposes that this Court establish a committee to undertake examination of the TAJ and Hardin Proposals, develop a method to investigate those proposals by survey and by obtaining anecdotal evidence and other relevant material, and report to the Court with a proposal of what changes, if any, might effectively and constitutionally be made to the rules governing attorney advertising in Tennessee. Without intending to limit the scope of the investigation

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[9] Tennessee ABOTA did not coordinate comments with Gary K. Smith and James M. Doran, Jr., but both are members of ABOTA. One represents primarily plaintiffs and one represents primarily defendants in civil compensation claims.

to be undertaken by any committee appointed by this Court, among the items to be investigated by the committee, Tennessee ABOTA provides the following items as examples of areas of investigation for any committee or commission appointed by this Court.

A. What is the experience of Tennessee residents with respect to advertising by lawyers and how does lawyer advertising affect the perception of citizens of the judicial system and the administration of justice?

In order to assemble the type of empirical data that would permit this Court to make an informed, constitutionally grounded decision about the TAJ and Hardin Proposals, information must be gathered to show the effect of advertising currently permitted upon the administration of justice in the state (e.g., through its effect upon public perceptions of lawyers); also information should be gathered about the experience of persons who responded to lawyer advertisements (did they find, for example, the quality of legal services provided to them to be consistent with their perception of what those services would be based upon the advertisement to which they responded).

Research exists that suggests that certain persons choose lawyers based largely on advertising, due to a lack of personal contact with lawyers.[10] At least one recent state bar study shows a significant impact upon the perception of lawyers and the administration of justice by lawyer advertising: a 2007 Pennsylvania

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[10] Nora Freeman Engstrom, *Legal Access and Attorney Advertising*, 19 J. GENDER, SOC. POL. & THE LAW 1083, 1092-1093 (2011) (citing the 1992 ABA Comprehensive Legal Needs study and stating that "the poor are far more likely to choose a lawyer on the basis of attorney advertising").

report (containing 2005 survey data) showed that lawyer advertising created a negative opinion of the legal profession by a majority of individuals surveyed.[11]

A need exists, therefore, to determine the impact of current lawyer advertising on citizen perceptions of lawyers and the administration of justice in Tennessee, perhaps with special care paid to include those who choose lawyers based largely or solely upon advertisements. If two items are found to be true, (i) that certain individuals obtain information about legal services from advertisements and (ii) that the current advertising rules permit advertisements that negatively impact the view of lawyers as participants in the administration of justice in this State, then a serious problem exists that changes to the advertising rules can help to rectify.

B. How have Tennesseans responded to advertisements containing actors and other portrayals?

The data assembled by the Louisiana study committee on advertising indicated that non-lawyer citizens and even other lawyers could not "always tell when a testimonial in a lawyer advertisement was provided by an actor rather than a real client." *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212, 227–228 (5th Cir. 2011). Based upon the data presented, the Fifth Circuit

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[11] *Report of the Pennsylvania Bar Association Task Force on Lawyer Advertising*, pp. 2-4 (May 2007) (available online at http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/050807_3082633_v3_PHILADELPHIA_PBA.authcheckdam.pdf [last accessed 11 March 2013]). *See also generally* William G. Hyland Jr., *Attorney Advertising and the Decline of the Legal Profession*, 35 J. LEG. PROF. 339, 344-351 (2011).

upheld the Louisiana prohibition on the use of portrayals without a disclaimer. *Id.* at 228.

The data from other states can provide a starting point, but for this Court to make an informed, constitutionally sound decision concerning the regulation of advertising, empirical data from Tennessee must be assembled for consideration.

C. What effect does lawyer advertising have on potential jurors?

The comment of Gary K. Smith reveals that, in his experience, potential jurors almost always indicate that lawyer advertising has had a negative impact upon them. Other anecdotal evidence from other states indicates a similar negative impact upon potential jurors.[12] At least one study demonstrates potential effect (but only potentially negative effect that did not appear to be very strong).[13]

As any negative effect of lawyer advertising upon potential jurors may have the most direct potential upon the administration of justice, empirical data upon this question should be presented to the Court in any further consideration of the TAJ and Hardin proposals.

D. What further guidance is necessary to make fully effective the general prohibition on misleading advertising?

The Pennsylvania advertising study mentioned above in Section II.A found a

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[12] Stephen Daniels and Joanne Martin, *Plaintiffs' Lawyers and the Tension between Professional Norms and the Need to Generate Business* in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT (Leslie C. Levin & Lynn Mather, eds.) 110, 122-124 (2012).

[13] Stephanie Moore Myers, Attorney Advertising: The Effect on Juror Perceptions and Verdicts 59-61 (1988) (unpublished M.A. thesis, University of Nevada, Las Vegas) (copy in possession of Lewis Jenkins).

need for clarification of the parameters of Rule 7.1, finding that the language from ABA Model Rule 7.1 "may have . . . rendered [Rule 7.1] too vague and fail[ed] to provide meaningful guidance beyond the fundamental prohibition against false or misleading advertising."[14] In a way, the TAJ and Hardin proposals support the conclusion of the Pennsylvania commission: some components of the TAJ and Hardin proposals concern "deceptive" advertising, which according to two widely-used dictionaries of American English is synonymous with misleading;[15] the duplication of those words in the TAJ and Hardin Proposals support the idea that a need exists for further guidance by example and discussion by this Court of the content of the term "misleading."

E. Does the existence of significant online advertising warrant amendments to Tennessee's lawyer advertising rules?

The existence of significant online advertising, through web sites, social media, and in other forms, gives rise to a set of concerns that have come about since the drafting of the Model Rules of Professional Conduct upon which Tennessee's Rules of Professional Conduct are based. Given that the internet has effected significant changes in the way that individuals receive all types of information (including, presumably, information about legal services and access to justice), any

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[14] *Report of the Pennsylvania Bar Association Task Force on Lawyer Advertising*, pp. 61-62 (May 2007) (available online at http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/050807_3082633_v3_PHILADELPHIA_PBA.authcheckdam.pdf [last accessed 11 March 2013]).

[15] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1444 (2002) (*q.v.* mislead and misleading). *See also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1126 (5th ed. 2011) (*q.v.* mislead and misleading).

committee appointed by this Court should be charged to determine whether any changes in the advertising rules are warranted to ensure that online lawyer advertising provides information so that the administration of justice is not affected in a negative way by that information. In addition, Tennessee ABOTA believes that any committee appointed by the Court should attempt to determine whether any distinction exists in public perception of the judicial system and the administration of justice as a result of the different types of advertising (e.g., advertising on the internet by attorneys such as maintaining a web site and other forms of attorney advertising such as television, radio, billboards, sponsored ads on the internet, and direct mail).

III. CONCLUSION

TAJ and Matthew Hardin have raised important issues in their petitions, and the petitions taken together with comments by members of the Tennessee Bar and existing research show that the need exists for further exploration of the issues raised in the petitions. The assertion of a problem (or set of problems) presented to this Court cannot be resolved fully by recourse to abstract legal arguments over the First Amendment; rather, the matter should be investigated fully in order to permit this Court to make an appropriate determination about the existence of any problem caused by the current form of lawyer advertising in Tennessee, the scope of that problem (if finally determined to exist), and the form of any attempt to address any problem identified. The investigation should occur because of the importance to

the administration of justice in Tennessee of the issues raised by the TAJ Petition and the Hardin Petition.

Justice Robert Jackson, who had seen the after-effects of doctrinaire logic run amok in his experience in Nuremburg in 1945-1946, stated in 1949: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). In the area of commercial speech, at least, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) opened the door for the application of practical logic to the problem of lawyer advertising, if applied to protect the administration of justice. Tennessee ABOTA urges this Court to use that opening to direct an investigation into the effects of lawyer advertising and to determine what action should be taken upon the TAJ and Hardin Proposals.

Respectfully submitted,

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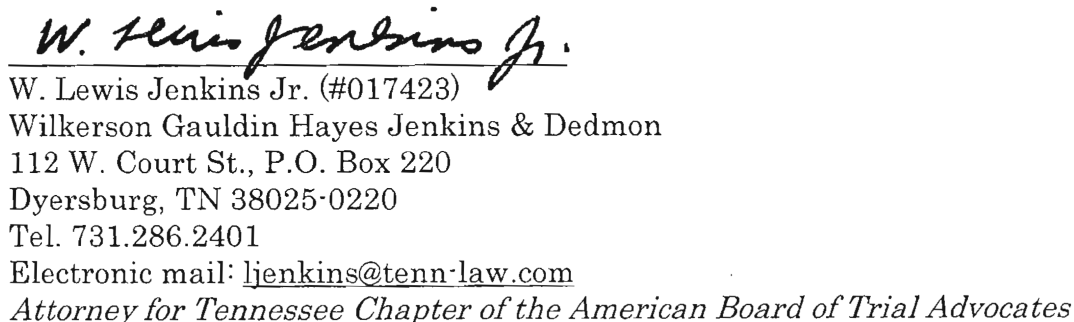

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by U.S. Mail, with a copy delivered by electronic mail, to Bryan L. Capps, TAJ President, The Adams Law Firm, 8517 Kingston Pike, Knoxville, TN 37919 (electronic mail: bcapps@terryadamslaw.com) and Matthew C. Hardin, Rudy, Wood, Winstead, Williams and Hardin, PLLC, 1812 Broadway, Nashville, TN 37203 (electronic mail: mhardin@matthewhardinlaw.com).

W. Lewis Jenkins Jr.

IN THE SUPREME COURT OF TENNESSEE

IN RE: PETITION TO ADOPT CHANGES TO RULES OF PROFESSIONAL CONDUCT ON LAWYER ADVERTISING	No. M2012-01129-SC-RL1-RL

APPENDIX A

TO

THE COMMENT OF THE TENNESSEE CHAPTER OF THE AMERICAN BOARD OF TRIAL ADVOCATES ("ABOTA") TO PETITIONS TO AMEND THE TENNESSEE RULES OF PROFESSIONAL CONDUCT GOVERNING LAWYER ADVERTISING

American Board of Trial Advocates

Principles of Good Practice in Attorney Advertising

Principles *of Good Practice in* Attorney Advertising

- Attorney advertising should foster respect and esteem for the practice of law and the legal profession.
- Attorney advertising should be informative and factual, and attorneys should be able to verify the truth of any statements or claims made in the advertising materials.
- Attorney advertising should never be misleading, false, deceptive or create improper expectations as to results.
- Attorney advertising should avoid exaggeration and emotion through words or depictions of fictional events.
- Attorney advertising should not contain testimonials or descriptions of results in other matters which might create an impression that the prospective client can expect the same or similar results in a different factual scenario.
- Attorney advertising should not be used by an attorney to impart the impression that he or she will be personally representing a client when it is known that the matter will be referred to another attorney for handling.
- Attorney advertising should contain information that will assist the potential client to understand his or her rights and the qualifications and competence of the attorney to address those concerns.
- Attorney advertising should never promote the filing or prosecution of frivolous or abusive litigation.
- Attorney advertising should never suggest or imply that the attorney is capable of accomplishing a particular result through means that are violative of the ethical standards of the profession or through other improper or illegal means.
- Attorney advertising should not utilize actors or recognized celebrities in any media advertising, and any non-lawyer spokesperson should be identified as such.
- Attorney advertising should be dignified and informative and designed to bring honor to the profession and respect for the civil justice system.

AMERICAN BOARD OF TRIAL ADVOCATES

ABOTA recognizes attorneys' and the public's right to advertise and believes that minimum standards and guidelines will encourage attorneys' adherence to those standards. The ABOTA Attorney Advertising Committee studied the issue of attorney advertising and related issues. As a result, the **Principles of Good Practice in Attorney Advertising** were drafted in an attempt to balance the public's right to be informed with truthful, ethical and professional practices by attorneys and law firms.

The **Principles,** drafted by the Attorney Advertising Committee, were adopted by ABOTA's National Board of Directors on Oct. 3, 2009.

- ABOTA is a national association of experienced trial lawyers and judges who are dedicated to the preservation and promotion of the civil jury trial right provided by the 7th Amendment to the U.S. Constitution. ABOTA membership consists of more than 6,400 lawyers and judges spread among 94 Chapters in all 50 States and the District of Columbia.

As of 10/03/2009