UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

SCOTT G. WOLFE, JR.; and WOLFE LAW GROUP, L.L.C. Plaintiffs, v. LOUISIANA ATTORNEY DISCIPLINARY BOARD; BILLY R. PESNELL, et al. Defendants.	Master Docket: Civil Action No. 08-4451 Relates To: Civil Action No. 08-4994

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Scott Wolfe, Jr., and Wolfe Law Group, L.L.C. (hereafter "Wolfe") seek summary judgment[1] to have the recently enacted Rules of Professional Conduct pertaining to Lawyer Advertising ("Lawyer Advertising Regulations" or "Regulations") declared unconstitutional because they improperly restrict legitimate speech under the First Amendment.

The main problem with the Regulations is that they thwart legitimate promotional activities that attorneys might undertake on the Internet. The

[1] Although, this memo will focus on the problems with the Regulations' application to Internet marketing and promotion, we adopt by reference the legal arguments made by Plaintiff Public Citizen, Inc.

Regulations were passed without a proper examination of how ordinary businesses (much less lawyers) use the Internet to promote their services. Also, the drafters never bothered to assess whether internet promotion was actually creating problems for consumers of legal services.

The Regulations' internet provisions fail to meet constitutional muster for three reasons: (1) there is no evidence that the internet provisions were necessary;[2] (2) the internet provisions were not narrowly drawn; and (3) the internet provisions are unconstitutionally vague.

PART I. There is no Evidence that the Internet Provisions are Necessary

This is the first time Louisiana has regulated speech made by attorneys on the Internet; yet, the Regulations were not created in response to any problems with lawyers' promotional activities on the Internet. Rather, the Regulations arose as a result of a resolution in the Louisiana legislature to address the "undignified" nature of traditional TV and print advertising.[3]

In response to this resolution, the Louisiana Supreme Court created a "Study Committee" to "study attorney advertising and the need and feasibility of [the Regulations]."[4] Despite the call to study attorney advertising in Louisiana, the Study Committee made no such efforts..[5]

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[2] Plaintiffs also contend that Louisiana does not have a legitimate state interest for the Regulations, but avers that this argument is more carefully outlined in the Public Citizen Summary Judgment Memorandum.

[3] Sen. Con. Res. 113, 2006 Leg. 32nd Reg. Sess. (La. 2006), Exhibit 1.

[4] See Louisiana Legislature Concurrent Resolution, Exhibit 1.

[5] See footnote 4 to February 2007 report by the Study Committee to the Louisiana Supreme Court, Exhibit 2: The committee "discussed at some length the possible need to have conducted a survey of the public's perceptions of attorney advertising. Principally because of the cost involved…the

Instead, it relied on "empirical data already available in other states concerning citizens' perceptions of attorney advertisements," and "comments received from public hearings and web postings" in concluding the Regulations were necessary. [6]

After the initiation of this litigation and the litigation by Public Citizen, the Defendants did engage a company to conduct a survey regarding attorney advertisments in Louisiana ("SCI Survey"). Like the empirical data from other states used by the Study Committee, the SCI Survey did not examine attorney speech or advertisements on the Internet.

A. The SCI Survey Does Not Examine Internet Advertisements

After constitutional challenges to the Regulations were filed with this Court, between December 2008 and January 2009, SCI Research in Baton Rouge conducted a survey of Louisiana residents and attorneys regarding attorney advertising.

The survey did not, in any respect, question respondents about advertisements or communications by attorneys on the Internet. The survey specifically questions its audience solely in regards to print, television and/or radio advertisements.[7]

More revealing than the questions asked on the telephone and web survey are the advertisements reviewed by the focus groups, which consisted exclusively of

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Committee has not recommended…that a survey be conducted." Instead of studying advertising, the committee merely studied the advertising rules in Florida, and whole-heartedly adopted recommended them for Louisiana.

[6] *Id.*

[7] Moreover, many of the questions were weighted to inquire about television advertisements, such as the question "In the lawyer ads that contain the statements I recognized, I am able to tell who is a lawyer and who is an actor." Clearly, the reference to "actor" contemplates a television, or at least a television or radio commercial. *See* Exhibit 6, p. 15. See also the question on Exhibit 6, p. 19, "I can always tell if a testimonial in a lawyer advertisement is made by a client and not by an actor."

television, print and radio advertisements. Not a single Internet communication or advertisement was reviewed by the focus group.[8]

B. The Comments Received from Public Hearings and Web Postings Do Not Address the Regulations' Applicability to the Internet

The Study Committee arranged four public hearings throughout the state to discuss the Regulations; those meetings were held between November 6th and 16th, 2006. During these four public hearings, the word "Internet" was uttered only 6 times in total. Almost every utterance of the term is attributed to the moderators' reading of Rule 7.6 aloud.[9]

The Defendants also accepted public comments through online web posts. The comments related to Internet advertisements were combined into one section of commentary for the Study Committee's review, and are attached as Exhibit 4. The comments contain no complaints of Internet advertisements or communication, and instead exclusively critize the proposed Rule 7.6.

C. Empirical Data Already Available in Other States, Concerning Citizen's Perceptions of Attorney Advertisements, Does Not Examine Internet Advertising

Among the empirical data reviewed by the Study Committee was an April 2005 survey conducted by Frank N. Magid Associates, Inc., titled Florida Consumer Opinions on Lawyer Advertisements. See Exhibit 5, hereinafter "Florida Survey."

[8] Similar to fn 7, the questions asked of the focus groups also regarded non-Internet advertisements. For example, see Exhibit 3, p. 24, "Have you ever seen or heard a disclaimer used in a print, a television or a radio advertisement…" See also p. 35, "Do you think the general public thinks all lawyers are like those that are on TV."

[9] The transcripts of the four public hearings are available online at the following link: http://www.lsba.org/2007MemberServices/advertisingadvisoryservice.asp?Menu=CM

According to the Florida Survey, 87% of respondents remembered seeing or hearing advertisements for laywers, and of those, most (91%) saw the advertisement on television. None of the persons surveyed remembered seeing an advertisement online.[11]

Also among the empirical data reviewed by the Study Committee is an American Bar Association article, attached as Exhibit 6, titled The Role of Lawyer Advertising Within the Goals of the ABA.

While it's unclear when this article was published, the study on the effects of attorney advertisements contains data through 1993. Needless to say, there is no data on Internet advertisements by attorneys, which were not widespread in 1993.

It is unclear how the already available empirical data demonstrates that communications by attorneys online is harming the reputation of the legal profession, or is otherwise, of a class of attorney communication that requires regulation.

D. The Internet is a Unique and Wholly New Medium of Worldwide Human Communication

Presumably, the Defendants will argue that the advertising techniques in controversy are harmful and misleading regardless of whether performed on or offline. The trouble with their argument is this: The Internet is not the T.V.

[11] The non-appearance of the Internet in this part of the study does not appear to be an oversight, as the Internet does appear in the survey at large. On page 5, the survey lists the "Internet" as an attorney advertisement that may be used by a respondent to find an attorney if they were to seek counsel. That the Internet is missing from the above-discussed portion of the survey, therefore, indicates that those who remember seeing advertisements by attorneys do not remember Internet advertisements.

In the seminal Bates v. State Bar of Ariz., the court went out of its way in footnote 37 to state that "determination whether an advertisment is misleading requires consideration of the legal sophistication of its audience...Thus, different degrees of regulation may be appropriate in different areas."[15]

The Supreme Court was called upon to address the protection of speech on the Internet in Reno v. ACLU, 521 U.S. 844 (1997). In Reno, the Supreme Court declared the Communication Decency Act of 1996 (CDA) unconstitutional as it related to the online publication of pornography and obscenity, comparing Internet speech with other broadcast speech as follows:

> The Internet is a unique and wholly new medium of worldwide communication...
>
> Those factors [present in broadcast mediums] are not present in cyber space. Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as 'invasive' as radio or television. The District Court specifically found that 'communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' *Id.* at 896.

As the Reno court explains, the Internet is not a "broadcast" or "invasive" medium, and perhaps the Defendant's most enormous mistake in drafting the Regulations is in failing to distingiush the Internet from other mediums.[16]

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[15] 433 U.S. 350, 384 (1977), *emphasis ours.*

[16] Interestingly, the Florida Survey of Public Perceptions relied upon by the Study Committee hints at this same distinguishing factor between broadcast media and other media, when it comments that: "The relatively poor performance of yellow pages – even among those who have used a lawyer in the last year – is further evidence to support the idea that people don't consciously use advertising when selecting a lawyer. Rather, they are aware of lawyer advertising as background, in media where they cannot purposely seek out information for a specific need." Exhibit 3, pg. 2, or p. 3 of 5.

The Defendants have no evidence that Internet advertisements and communications are causing harm, or that Rule 7.6 is necessary. Relying on a presumption that the harm in broadcast advertisements is equal to the harm in Internet advertisements is not constitutionally permissible according to the reasoning in Bates and Reno.

In addition to the Defendants lack of evidence, practical application of the rules to Internet communication is problematic, which reveals that the Regulations were not narrowly or reasonably tailored to any end.

Part Two: Rule 7.6 Is Not Narrowly or Reasonably Tailored

Insofar as "traditional advertising" is concerned, the Internet offers its version through "pay-per-click" ads.[17] Far and away, the leader in offering "pay-per-click" advertising is Google. In 2008, Google had more than $21 *billion* in revenue that came strictly from web advertising.[18]

It is stunning to discover that in the Study Committee and Defendant's analysis of attorney advertising, and their eventual regulation of Internet advertisements, there is no examination of the pay-per-click ("PPC") advertising scheme or the world's largest seller of Internet ads. The Defendant's failure to study Internet advertisements has resulted in the Regulations, which are irreconcibile with the way attorneys actually use the Internet to advertise.

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[17] See explanation and history of Pay-Per-Click advertising from Wikipedia, attached as Exhibit 7.
[18] See Google Investor Financial Tables printed on July 9, 2009, from the below link, and attached to this Memorandum as Exhibit 8. Note that Google Ad Revenue is 97% of its general revenue, demonstrating that Google nearly exclusively makes money from web advertising. http://investor.google.com/fin_data.html

Christopher Schultz, an experienced Internet advertiser and leader in New Orleans' technology community, concluded as follows in his expert report for Plaintiffs:

> I have found the lawyer advertising rules to be incompatible with the standard PPC [Pay-Per-Click] advertising methodology on all major search engines. Complaince to the rule would make it very difficult for a lawyer to run ads on the major search enginges.[19]

The incompatability of the Regulations with Internet advertising is not to be blamed on the general effort by Defendants to regulate commercial speech, as this they clearly can do. The blame is with the Defendants' failure to tailor the Regulations to a specific harm.

In Florida Bar v. Went For It, Inc., for example, a bar associations regulation of commercial speech was upheld because of its narrow application to a substantial state interest. In that case, Florida had empirical evidence that the profession was harmed when attorneys solicitied injury victims within 30 days of the incident, and the proposed regulation specifically prevented attorneys from speaking to victims during this period.

The regulation and its tailoring to a specific harm in Went For It is worlds apart from the regulation currently before this Court.

As Rule 7.6(d) is written, the Regulations certainly imply application to each pay-per-click advertisement. Accordingly, Rule 7.2(a) requires each PPC ad to contain the name of the lawyer and the location of the practice; Rule 7.2(c)(1)(I)

[19] See Exhibit 9, the expert opinion of Christopher Schultz. Defendants have offered no expert opinion to contradict the findings of Mr. Schultz.

requires each qualifying PPC ad to contain a disclaimer; Rule 7.7 requires each PPC ad to be submited for evaluation with a $175.00 filing fee.

Notwithstanding that there is no nexus between the rules and any identified harm with PPC ads, there are two inherent problems with the rules as they practically apply to PPC advertisements. Examination of these two problems underscore the failure of the Defendants to consider lesser alternatives.

First, PPC ads limit the space available to advertisers to display their message. As Christopher Schultz comments on pg. 3 of his report, "the requirement to include the name and address of the firm in the ad is incompatible with the number of characters that Adwords allows in each ad unit and would likely leave no space for marketing copy."

Requiring the 7.2(a) information, and/or any applicable disclaimers, to appear on the advertisements "landing page"[20] is one example of a less restrictive alternative regulation that would achieve the Defendants' goals, yet preserve the attorneys' abiltity to use this widespread advertising medium.

Second, and perhaps more importantly, the evaluation process stated in Rule 7.7 is overly burdensome and excessively restrictive. Since the nature of advertising online is different from advertising on other mediums, the Rule 7.7 evaluation is irreconcible with the PPC advertising method.

Christopher Schultz identifies the benefits of online advertising as follows:

> There are several advantages to marketing on the Internet that level the playing field for new entrants into a market:

[20] "In online marketing, a landing page…is the page that appears when a potential customer clicks on an advertisement or a search-engine result link." *See* entry for "Landing Page" on Wikipedia, at the following link: http://en.wikipedia.org/wiki/Landing_page

> •Marketing budgets can start small (as little as $10/month) and grow as a business grows.
> •Marketing management is self-serve and automated so it can easily be managed by a small business.
> •These tools (Google Adwords) are designed to be iterative and allow a marketing campaign to be optimized over time.
> •A small business advertisement can appear right next to a established, larger competitor.[21]

Rule 7.7's evaluation requirement, and evaulation fee, is irreconcible with the goals and advantages of PPC advertising campaigns. Unlike a television ad, which is recorded infrequently and used frequently, a PPC ad can be said to be recorded frequently and used infrequently.

As an example, we can review the Adwords campaign run by Wolfe Law Group in 2008. In 2008, Wolfe Law Group ran PPC ads only during the months of April, May and June, and spent a total of $160.63 with Google. The PPC campaign operating during these months had 4 ad groups, with approximately 12 total ad variations.

Had the Regulations been in effect in 2008, Rule 7.7 would have required 12 filings at $175.00 each to operate this ad campaign, which would have cost Wolfe approximately $2,100.00.[22]

This disparity in expense demonstrates the problems with Rule 7.7's application to PPC ads.

Assuming the Regulations were drafted to protect against a subsantial interest, Central Hudson's third and fourth prongs require the Defendants to show that Rule

[21] Exhibit 9, page 2.
[22] See Exhibit 10, and Verification of Scott G. Wolfe Jr. Exhibit 10 includes print-outs from the control panel to Wolfe Law Group's AdWords account, and a report of the amounts spent on the PPC ad campaign in the year 2008. The Wolfe Law Group 2008 advertising example is an uncomplex example of PPC ad campaigns. As Christopher Schultz explains in his expert report, he has overseen Google PPC campaigns that cost $40,000 per month, which would certainly contain a large number of ad groups, ad campaigns and ad variations.

7.6 directly advances that interest, and that it is not more extensive than necessary to serve that interest.[23] In order to meet this burden, the Defendants must establish a "reasonable fit" between the interest and the means it has chosen to further that interest.

Concerning Rule 7.6, the Defendants have imposed regulations on Internet advertisements that are "incompatable" with the single most popular manner of advertising on the Internet. Assuming Defendants have a substantial interest in regulating Internet advertisements, there are less restrictive ways of doing so. The Defendants have ignored these less restrictive alternatives, and accordingly, Rule 7.6 cannot measure up to this nation's and state's constitutional minimums.

Part Three: Rule 7.6 is Unconstitutionally Vague and Overbroad

Due process prohibits vague regulations for two interrelated reasons: (i) To provide fair notice so that people may avoid unlawful conduct; and (ii) to provide standards to authories to prevent arbitrary and discriminatory enforcement.[24]

Rule 7.6(d) provides as follows:

> All computer-accessed communications concerning a lawyer or law firm's services, other than [lawyer homepages and emails]...are subject to the requirements of Rule 7.2 when a signficiant motive for the lawyer's doing so is the lawyer's pecuniary gain.[25]

[23] Piazza's Seafood World, LLC v. Odom, 2004 U.S. Dist. LEXIS 25991, 19-22 (E.D. La. Dec. 22, 2004). Attached as Exhibit 11.
[24] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)
[25] "Other than those subject to subdivisions (b) and (c) of this Rule" is paraphrased in this quote as [lawyer homepages and emails]. Subdivision (b) addresses attorney websites and homepages; subdivision (c) addresses electronic mail.

This rule is unconstitutionally vague and overbroad because its sweeping language regulates non-commercial speech of attorneys.

On a number of occasions, federal judges have expressed concern about linking economic motivation and constitutional protection of speech.

In Central Hudson, for example, Justice Stevens stated in his concurring opinion that "the economic motivation of a speaker [should not] qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward."[26]

The concern was echoed by Justice Brennan's majority opinion in Riley v. National Federation of the Blind in his statement that "[i]t is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking."[27]

Rule 7.6 requires no nexus between the communication and commercial activities, or even matters related to the lawyer's practice of law. By its terms, Rule 7.6(d) would cover press releases, educational materials, law review or journal articles, educational seminars conducted online, general appearances in Internet communities, or other similar types of online communications, so long as the communication was made with a "significant motive" for the lawyer's pecuniary gain.[28]

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[26] 447 U.S. 557 (1980)
[27] 87 U.S. 781 (1988)
[28]. See Exhibit 12 for examples of communications made by Plaintiffs online that would come under the purview of 7.6(d)'s broad language.

Fundamental examples of political speech could also come within the purview of the rules, so long as they were made online, with a motive for pecuniary gain, and about a lawyer's services.[29]

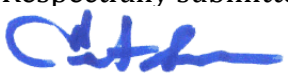
Even the potential application of the rule in such wide-ranging contexts risks a chill on protected political speech.[30]

Accordingly, Rule 7.6 (d) as drafted, is over-broad, and would unconstitutionally restrict an attorney's non-commercial speech.

Conclusion

The Regulations are not tailored to the Internet because no effort was made to examine how promotion on the Internet actually occurs. Furthermore, the provisions in the Regulations that focus on the Internet were not created to address a known problem with advertising on the web. Therefore, all the reason detailed above, the Regulations should be found to be unconstitutional.

Respectfully submitted,



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[29] In fact, instead of the drafting committee making attempts to narrowly tailor the rules, it appears that they instead made a concerted effort to broaden the rules to be more inclusive. It is noted in these meeting minutes attached as Exhibit 13 that "the Committee directed Richard Lemmler to make the rules consistent by adding "advertisement *or communication*" throughout the proposed rules." *Emphasis ours.* Instead of trying to tailor the rules to apply only to advertisements, or to define an advertisement, the committee wanted to broaden the rules to apply to both advertisements *and communications*.

[30] NAACP v. Button, 371 U.S. 415, 432-33 (1963); see also City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750-757 (1988).

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CERTIFICATE OF SERVICE

A copy of this motion was served electronically upon all counsel of record on this date: July 13, 2009.

/s Scott G. Wolfe Jr.
Scott G. Wolfe Jr.