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, in his official capacity as Chair of the Louisiana Attorney Disciplinary Board; and CHARLES B. PLATTSMIER, in his capacity as Chief Disciplinary Counsel for the Louisiana Attorney Disciplinary Board's Office of Disciplinary Counsel; Defendants.	Master Docket: Civil Action No. 08-4451 Relates To: Civil Action No. 08-4994 Section F (Judge Feldman) Mag 2 (Mag. Judge Wilkinson)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

On April 1, 2009, sweeping new regulations on the content of lawyer communications will go into effect in Louisiana. For the first time under these new rules, Louisiana will specifically regulate communications made by attorneys on the Internet.

The proposed regulations, however, lack an understanding of how attorneys communicate online, and are not tailored to any state interest in correcting a problem with Internet advertisements.

Despite the Internet being a separate and unique medium, the rules subject attorney "computer-accessed communications" to advertising regulations that are *identical* in form, substance and effect, to communications made by attorneys on television, radio and in print.

Although it's clear from First Amendment jurisprudence that those restricting speech face a heavy burden of demonstrating – with actual evidence – that the purported harms it seeks to address are real and its chosen restraints will in fact substantially alleviate those harms, the Louisiana Supreme Court adopted the amendments related to "computer-accessed communications" without articulating the interests the rules are supposed to serve, much less relying on evidence that the rules are necessary and effective to serve those interests.

Louisiana's motivation for the amendments at controversy seem to relate to its belief that lawyer advertising has become "undignified." Notwithstanding the constitutional problems of this justification, in every instance Louisiana has reviewed

television and print lawyer advertisements to support its belief, and throughout the drafting process has not once considered "advertisements" by lawyers on the Internet.

Moreover, the rules are too vague to give adequate guidance to lawyers and disciplinary authorities, and are overbroad, which will inevitably lead to a broad chilling effect on commercial and non-commercial speech.

Plaintiffs are entitled to summary judgment on the ground that the rules violate the First and Fourteenth Amendments to the United States Constitution.

BACKGROUND AND FACTS

Procedural Background and Incorporating Public Citizen's Motion by Reference

The instant action was filed with this Court on November 24, 2008, and consolidated with the Master Docket on January 5, 2009. The "master docket," containing a suit against the Defendants herein by William Gee, Morris Bart and Public Citizen, Inc., is hereinafter referred to as the "Public Citizen" matter.

The Public Citizen matter and this matter have common issues of law and fact, as both suits seek to declare the new Louisiana attorney advertising regulations unconstitutional, and both suits aver that (a) the rules are not supported by a legitimate state interest; (b) the state does not have evidence that the amended rules are necessary or effective; (c) the rules are not narrowly drawn; and (d) the rules are unconstitutionally vague.

In the interests of judicial economy, in support of its Motion for Summary Judgment, the Plaintiffs herein cite Public Citizen's Memorandum in Support of its

Motion for Summary Judgment, and its enclosed declarations, appendixes and exhibits, filed on February 17, 2009, as Document No. 42 through 42-54, and incorporate it by reference.

Throughout this Memorandum, the Plaintiffs will discuss the features that differentiate its complaint from the Public Citizen matter.

Louisiana's Restrictions on Lawyer Communications Made On The Internet

As discussed by the Public Citizen Motion for Summary Judgment, the Louisiana Supreme Court has promulgated amendments to Rule 7 of the Louisiana Attorney Rules of Professional Conduct, currently scheduled to take effect on April 1, 2009 (hereinafter "Amended Rules").

Among other changes, the Amended Rules add a provision identified therein as Rule 7.6, which purport to regulate "computer-assessed communications." The text of Rule 7.6 provides as follows:

> **Rule 7.6 Computer-Assessed Communications**
>
> (a) **Definition.** For purposes of these Rules, "computer-accessed communications" are defined as information regarding a lawyer or law firm's services that is read, viewed or heard directly through the use of a computer. Computer-accessed communications including, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appear on World Wide Web search engine screens and elsewhere.
>
> (b) **Internet Presence.** All World Wide Web sites and home pages accessed via the Internet that are controlled, sponsored, or authorized by a lawyer or law firm and that contain information authorized by a lawyer or law firm and that contain information concerning the lawyer's or law firm's services:

1) Shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law;
2) Shall disclose one or more bona fide office location(s) of the lawyer or law firm or, in the absence of a bona fide office, the city or town of the lawyer's primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2; and
3) Are considered to be information provided upon request and, therefore, are otherwise governed by the requirements of Rule 7.9

(c) **Electronic Mail Communications.** A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless:
   1) The requirements of subdivisions (b)(1), (b)(2)(A), (b)(2)(B)(i), (b)(2)(C), (b)(2)(D), (b)(2)(E) and (b)(2)(F) of Rule 7.4 are met;
   2) The communication discloses one or more bona fide office location(s) of the lawyer or lawyers who will actually perform the services advertised or, in the absence of a bona fide office, the city or town of the lawyer's primary registration statement address, in accordance with subdivision (a)(2) or Rule 7.2; and
   3) The subject line of the communication states "LEGAL ADVERTISEMENT."

(d) **Advertisements.** All computer-accessed communications concerning a lawyer's or law firm's services, other than those subject to subdivisions (b) and (c) of this Rule, are subject to the requirements of Rule 7.2.

Unlike the pre-amended rules, the Amended Rules for the first time separate "computer-accessed communications" from other types of attorney communication, and attempt to restrict that communication with specific regulation.[1]

[1] Pre-Amended Rule 7.1 provided simply that "A lawyer shall not make or permit to be made a false, misleading or deceptive communication about the lawyer, the lawyer's services or the services of a lawyer's firm"

Rule 7.6 separates "computer-accessed communications" into three categories: (1) the lawyer's website; (2) an "e-mail;" and (3) all other communications read, viewed or heard directly through the use of a computer.

Depending on the "category" of the computer communication, the speech is regulated differently.

If the speech is made on the lawyer's website, the Amended Rules consider the speech to be "information provided upon request," and therefore, exempt from the evaluation requirement of Rule 7.7.

If the speech is an e-mail communication, it is subject to the requirements of Rule 7.7, as well as components of Rule 7.4, which concerns "direct contact with prospective clients."

The chief complaint of Plaintiffs in this Motion for Summary Judgment, however, concerns speech that is neither made on an attorney's website nor through an email. According to the new Rule 7.6, all other "computer-accessed communications" are subject to regulation under Rule 7.6(d).

Rule 7.6(d) communications are subject to the requirements of Rule 7.2, and must therefore undergo the 7.7 evaluation process.

Plaintiffs Scott G. Wolfe Jr. and Wolfe Law Group, LLC

Plaintiff Scott G. Wolfe Jr. is a practicing lawyer in New Orleans, LA, and member of the firm Wolfe Law Group, L.L.C. (hereinafter collectively "Plaintiff" or "Wolfe"). Wolfe mainly advertises his practice and services to the public through the use of the Internet.

Specifically, Wolfe traditionally advertises its service by paying an advertising fee to Google.com, and similar organizations. In exchange for the fee, Google.com and other organizations display "Adwords" or text ads on search engine screens in response to searches by members of the public for certain keywords. The ads may appear on Google's search engine at www.google.com, on other websites in its network, on mobile phones, or elsewhere.

An example of an advertisement placed by Wolfe with Google is copied within paragraph 22 of Wolfe's November 24, 2008 Complaint, and provides as follows:

Wolfe Law Group
Louisiana Construction Lawyer
Disputes, Contracts, Liens
http://www.wolfelaw.com

According to the settings of an online advertising campaign, this advertisement will appear on computer screens when users are requested information or viewing information related to certain keywords, such as "construction lawyer," "construction law," "construction dispute," "New Orleans law firm," etc.

Aside from advertising its practice through traditional arrangements, whereby Wolfe pays an organization to display its ad, Wolfe also communicates through the use of a computer about its services. Wolfe does so in the following non-exhaustive ways:

1) By writing articles about construction law and its services that appear on blogs not belonging to it;
2) By writing articles and "legal guides" that appear on websites not belonging to it;
3) By making comments on legal blogs about certain legal topics and its services that appear on blogs not belonging to it;

4) By making information contained on its websites and blogs available for syndication through Really Simple Syndication (RSS) networks;

5) By participating in legal and non-legal social networks, such as Facebook, Twitter, LinkedIn, Plaxo, and Construction Exchange;

6) By designing and organizing the content placed by it on the Internet in a way such that search engines will display it to the public.

ARGUMENT

I. The Challenged Rules Unconstitutionally Restrict the Content of Commercial Speech

"[T]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 168 (5th Cir. 2007). Thus, "on summary judgment and at trial, the government bears the burden of justifying the challenged enactment by introducing sufficient evidence." *J & B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 373 (5th Cir. 1998).

Here, as in Public Citizen's Motion for Summary Judgment, it is argued that the state cannot justify its restrictions on commercial speech. Specifically as it relates to this matter, the state lacks a valid interest in regulating the truthful, non-misleading information about legal services that attorneys make on the Internet.

As discussed in Public Citizen's memorandum, the Louisiana Supreme Court has apparently adopted its amendments because it considers certain speech to be "undignified" or in bad taste. Notwithstanding the constitutional dilemmas of regulating speech based on "lawyer dignity," in its determination that lawyer advertisements

undermine the profession, the drafters of the rules at controversy exclusively considered television and print advertisements.

In other words, while the Amended Rules separately and specifically regulate Internet communications, the state's justification for the rules was based exclusively on non-Internet communications.

The state cannot show that they considered any Internet advertisements when drafting the new rules, that Internet advertisements are undermining the dignity of the legal profession, or that the regulation of attorney Internet communications are necessary to serve any other legitimate state interest.

Further, the Amended Rules as they relate to "computer-assessed communications" are vastly overbroad and vague, as they prohibit all forms of communication and content from being disseminated on the Internet that are regularly used by attorneys in ways that are not misleading or undignified. The state has made restrictions of this non-problematic speech without considering whether its purposes could be achieved in a way that imposes a lesser burden on speech.

A. The Amendments Are Not Supported by A Legitimate State Interest and State Does Not Have Evidence that the new Rule 7.6 is Necessary or Effective

Borrowing from the argument of Public Citizen in its Motion for Summary Judgment, the *Central Hudson* standard requires that in determining whether a legitimate state interests exists for speech regulation, the Court consider the *actual* purpose of the regulations relied upon by the state. *See generally Edenfield*, 507 U.S. at 768.

As explained more fully in Public Citizen's Memorandum, the Louisiana Supreme Court "took up the amendments based on its belief that lawyer advertising, in

general, makes lawyers look bad." *Public Citizen's Memorandum in Support of its Motion for Summary Judgment* at 11. As further explained in the Public Citizens memorandum, regulating advertisements that are "embarrassing or offensive" does not meet constitutional muster. *Id* at 12.

Assuming that "lawyer dignity" is a valid state interest for the purposes of justifying these regulations, what distinguishes Wolfe's complaint from the Public Citizen matter is that the evidence relied upon by Louisiana to determine that there was a "dignity" problem focused nearly exclusively on television and print advertisements, and did not consider whether attorney communications on the Internet is harming the reputation of the profession.

Through its initial disclosures, the Defendants have produced a survey produced for the Florida Bar purporting to demonstrate "Florida Consumer Opinions of Lawyer Advertisements."[2] Attached to this Memorandum as Exhibit 1.

What is interesting about this particular survey is found on the page Bates Labeled LASC 01526. According to the survey, 87% of all respondents remembered seeing or hearing a lawyer advertisement in the prior twelve months, with the breakdown of where they recalled seeing or hearing the advertisement as follows:

91% television
22% newspaper
16% billboards
14% radio

[2] It is refreshing that this particular survey was conducted in April 2005, as the other surveys and legal articles produced by Defendants were taken and/or written in 1993, 1997, 2000 or during similar years when Internet advertising was not yet remotely popular. Plaintiffs discuss this survey only because it was produced by Defendants, and do not concede that the survey and information related to Florida can serve as a valid interest for regulation of advertisement in Louisiana. Further, as expressed in the Public Citizen memorandum on p. 14 regarding the same Florida survey, "Although the committee considered the questions in Florida's survey not to be 'germane' to the rules at issue, the survey in fact directly contradicted the committee members' assumptions about the impact of lawyer advertising, concluding that lawyer advertising 'doesn't change [the public's] opinions about the Florida justice system.'"

9% yellow pages
3% direct mail
1% magazines
7% other media

As the Court can plainly see, advertisements seen on the Internet did not even register in the survey. If those who remember seeing attorney advertising do not remember seeing it online, it is unclear how this study can demonstrate that communication by attorneys online is harming the reputation of the legal profession.

Following this suit and the complaint within the Public Citizens matter, the Louisiana State Bar Associated retained Survey Communications, Inc. to conduct a survey with regard to the public's perceptions related to attorney advertisement. Interesting about this survey, participants in focus groups were asked specifically about their opinions of certain attorney television, print and radio advertisements, but no inquiries were made with regard to advertisements or communications by attorneys on the Internet. SCI Research "Opinion and Perceptions Study" is attached as Exhibit 2.

Presuming, therefore, that the purported interest in maintaining the "dignity" of attorneys is found not offensive to the First Amendment, and the Louisiana Supreme Court has sufficient evidence to demonstrate a harm of this nature that requires regulation, the Plaintiffs purport that the Defendants cannot demonstrate that there is a harm as it relates to Internet communications by attorneys.

Moreover, the state cannot show that the regulation of Internet communications as found with Rule 7.6 is either necessary or effective.

The Public Citizen memorandum discusses the lack of evidence, in the form of disciplinary records, studies, surveys or empirical research of any kind to suggest that

Louisiana's regulations are necessary to target false or misleading communications, or advance any other legitimate state interest. *Public Citizen Memorandum* at 13-15. With respect to the state's inability to introduce such evidence, Wolfe avers it is even more unlikely that the state has any evidence to suggest that the regulations are specifically necessary with respect to Internet communications or advertisements.

Wolfe avers that the state cannot show any nexus between its 7.2 regulations and communications made by attorneys online that are false, misleading or otherwise disgraceful.

B. The Rules Are Not Narrowly Drawn

"If the First Amendment means anything, it means that regulating speech must be a last – not first – resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (U.S. 2002). Here, Louisiana appears to have adopted its regulations without any attempt to study how they would be applied to Internet communications and advertisements, any attempt to tailor them to legitimate state interests, or any consideration of readily available alternatives.

To survive the final prong of the *Central Hudson* test, a restriction on allegedly deceptive speech must not be "broader than reasonably necessary to prevent the [targeted] deception." *In re R. M. J.,* 455 U.S. 191, 203 (U.S. 1982). Moreover, even when the state has a compelling interest, "if the government [can] achieve its interests in a manner that does not restrict speech or that restricts speech less, it must do so." *Thompson*, 535 U.S. at 371.

Here, the Louisiana Supreme Court has adopted Rule 7.6 without tailoring the rule to meet its purported goal of protecting the dignity of the legal profession, and

without any regard of possible readily available alternative regulations that would restrict speech less.

1. The Effect of Rule 7.6(d)

As mentioned in the Introduction to this Memorandum, Rule 7.6 categories Internet communications into three categories: (1) speech made by attorneys on its own website; (2) speech made in an e-mail; and (3) all other Internet communications.

For the purposes of this Motion for Summary Judgment, Wolfe's chief complaint rests with the third category of speech that is defined by Rule 7.6(d), which provides that "all computer-accessed communications concerning a lawyer's or law firm's services, other than those subject to subdivisions (b) and (c) of this Rule, are subject to the requirements of Rule 7.2"

Rule 7.6(a) defines the term "computer-accessed communications" as "information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere."

To better understand the meaning of what type of speech with qualify as 7.6(d) speech, the Louisiana Bar Associations "Handbook on Lawyer Advertising and Solicitation" discusses 7.6(d) by stating as follows:

> c. Other Computer-Accessed Advertisements – Rule 7.6(d) All other forms of lawyer advertisements disseminated via computer, including, but not limited to, advertisements that appear on search engines, on the Web site of a person or entity other than that of an advertising lawyer or law firm, or on a computer bulletin boards or "BLOGS," must comply with the general requirements of Rule 7.2. These would include "banner" ads and must be filed for review by the RPCC, unless specifically exempt under Rule 7.8.

See Handbook on Lawyer Advertising, Attached Exhibit 3, at p. 17

The handbook further qualifies the meaning of Rule 7.6(d) on page 23 as follows:

> All other forms of computer-accessed communications – i.e., not a lawyer's or law firm's own Web site or unsolicited information disseminated by e-mail – are subject to the general rules applicable to all forms of lawyer advertising, namely Rule 7.2 Rule 7.6(b)(3) exempts from the filing requirement only those ads appearing on the Internet through a lawyer's or law firm's Web site or home page.

According to the terms of 7.6(d) and its purported interpretation on p. 17 and p 23 of the advertising handbook, all communications by an attorney accessed through a computer concerning a lawyer's services are subject to Rule 7.2 and the 7.7 evaluation procedure.

2. 7.6 (d) restricts speech that is not undignified, untrue or misleading

As drafted, the following speech by Wolfe could fall under the preview of Rule 7.6(d) because it is (a) communication; (b) about his services; (c) accessed by the computer; and (4) not on his homepage or sent through e-mail. These "advertisements" would likely not be considered by Louisiana as undignified or false and misleading, yet under the regulation, it would be regulated:

1. Articles written by Wolfe that appears on websites of entitles other than that of the advertising lawyer, such as the articles written and published online attached hereto as Exhibit 4;
2. Comments made by Wolfe on "blogs" or "bulletin boards" that are not on the website of the advertising lawyers, such as the comments made by Wolfe online and attached hereto as Exhibit 5;

3. Profiles and communications about the firm that are made on social networking websites such as Facebook, LinkedIn, and information that provides legal information to the public like JDSupra, Knol or Avvo, and attached hereto as Exhibit 6.

The above-identified speech would qualify as speech / advertisements regulated by Rule 7.6(d), and therefore, subject to the heavy regulations of Rule 7.2 and the evaluation process of Rule 7.7.

While the 7.6(d) "advertisements" attached as Exhibit 4, 5 and 6 would not likely be considered undignified or misleading, they would be heavily regulated by the Amended Rules.

The regulations could have been more appropriately tailored to exclude communications like Exhibit 4, 5 and 6, which are not undignified or misleading. In fact, it appears that someone from the drafting committee contemplated such tailoring for perhaps a split-second as evidenced by the attached Exhibit 7. On this attached page from the Defendant's Initial Disclosures and bates labeled LASC1020 is handwritten notes next to Rule 7.6 that says "Safe harbor is Martindale-Hubble."

It seems that the drafting committee contemplated that certain types of online directories might not be misleading or undignified, but from a review of the minutes, they unfortunately did not discuss this handwritten note and the possible tailoring of Rule 7.6 to exclude speech where regulation was not justified.

3. 7.6 has practical application problems

Rule 7.6(d) and Rule 7.6 as a whole are poorly tailored for other, more practical reasons.

First, as suggested by Public Citizens in its Memorandum, because the rule classifies attorney web pages as "information provided upon requests," the "safe harbor" of rule 7.6(b) actually has illogical implications, as television advertisements and other types of "harmful communications" may be posted to the attorney's website without regulation. This seems to be in contrast to the state's alleged interest, and Rule 7.6 is therefore not narrowly drawn to meet the state's goals.

Second, Rule 7.6(d) would apply to advertisements by attorneys on search engines, and particularly, through web-outfits such as Google.com. However, online advertising through organizations such as Google, Yahoo, Microsoft and YouTube have practical limitations, especially when those advertisements are designated to appear within videos or on mobile phones.

Particularly at practical odds with the Amended Rules are Google text adwords that appear on search engine screens and mobile phones. These ads have character limits, sometimes restricting an attorney from using more than 36 total characters within an advertisement.[3] Among other requirements, Amended Rule 7.2(a) would require these advertisements to contained certain required information, such as the attorneys' name and the location of the practice. "Scott Wolfe Jr New Orleans, LA," contains a total of 30 characters.

[3] Attached as Exhibit 8 is information from Google, Yahoo, Youtube and other organizations regarding its advertising restrictions.

As they relate to search engine advertisements, therefore, the practical application of Rule 7.6(d) would be almost completely limit an attorney's message to saying its name and location. There is no nexus to this evasive regulation on speech and the state's interests, and Rule 7.6 is not narrowly drawn to meet the state's goals.

Third, the rules restrict "advertisements" by lawyer's or law firm's, and communications by the same, that are largely out of the attorney's control. Because of Internet search engines and directories, the syndication of online content, and online applications such as Google Maps, communications are made online by attorneys and on behalf of attorneys that are largely subject to restrictions by those applications, and not by the attorneys themselves.

An example of this practical problem is enclosed as Exhibit 9, and relates to the online application commonly referred to as "Google Maps." While Rule 7.2(a) requires that certain information be contained within every attorney communication, the Google Map application only has fields for certain types of information, and may not allow an attorney to "fill in" the information that is required by the rules. Furthermore, the Google Maps application invites "reviews" of the business, and accordingly, an anonymous Internet user can review the law firm and provide a "testimonial." The attorney has no control over this testimonial, but it is assigned to the lawyer's Google Map page, and Rule 7.2 would forbid the testimonial.

4. State Has Ignored Readily Available Alternatives to Address Its Supposed Interest.

Aside from the alternative remedies available to Louisiana as discussed in Public Citizen's Memorandum, with respect to the drafting of Rule 7.6 particularly, the state has

ignored the following non-exhaustive list of available alternatives to address its supposed interest:

- Requiring that the 7.2(a) required information be included on the "landing page" of a search engine advertisement, as opposed to being within the advertisement itself, which is constrained severely for space;
- To avoid the rules applying to lawyer directories like Martindale-Hubble, or the "computer accessed communications" identified in Exhibit 4, 5 and 6, the state could have defined "advertisement" in its rules;[4]
- Restricting how the Rule 7.7 evaluation process applies to Google Advertisements, or other targeted-search advertisement, whereby an advertiser may create multiple variations of an ad, and whereby ads may change dynamically. The number of ad variations in these types of online campaigns differ from traditional television or print ad campaigns that require only one or two variations. In such instances, the $150.00 filing fee is reasonable. With Google Ads however, and the numerous variations that may exist, the $150.00 filing fee may be multiplied 10, 20, 50 or more times.
- The rules could address the practical problems discussed under the subheading "3" supra.

[4] 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, and for no apparent reason. Without discussion or explanation, for example, the committee voted to change Florida's Rule 7.2(b)(1) to "delete 'A' and add the words 'an advertisement or' to the beginning of the second sentence before the word 'communication.'" *See Exhibit 10*, on page Bates Labeled LSBA00010. Further, it is noted in these same meeting minutes on the page Bates Labeled LSBA00011, 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 – presumably, communications that were not advertisements.

II. The Rules Are Unconstitutionally Vague and Overbroad

The Amended Rules are unconstitutionally vague for the reasons expressed below, as well as those reasons expressed in the Public Citizens matter.

Due process prohibits vague regulations for two interrelated reasons: (1) to provide fair notice so that people may avoid unlawful conduct and to prevent the risk of chilling protected expression, and (2) to provide standards to authorities to prevent arbitrary and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Kolender v. Lawson*, 461 U.S. 352 (1983).

Here, the rules fail to satisfy either of these goals because: (a) They do not give lawyers and disciplinary authorities guidance on what "computer-accessed communications" are covered by the regulations; and (b) They were written without discussion of the Internet media, or an apparent understanding of the Internet medium, and therefore are vague in how they will apply as a practical matter.

(a) What "Computer-Accessed Communications" are Regulated?

The first and most apparent problem with the language of Rule 7.6 is that its unconstitutionally vague as to what types of communications would be included versus what would not be included.

As touched upon briefly in the above-discussion, Amended Rule 7.6(d) is a broad stroke by the drafting committee to essentially include all online communication that is (i) not on an attorney's own homepage; or (ii) sent through an e-mail.

Unfortunately, while the broad language has utility, it is so broad as to possibly include all types of communications by attorneys online – including communications that are not commercial speech at all.[5]

According to the sweeping language of Amended Rule 7.6(d), the rule could be interpreted to regulate: (i) articles written for bar journals and publications that appear on those publication's website if the article contains a "by-line" with the attorney's firm information; and (ii) participation by an attorney in an online forum or blog regarding any topic – including a political topic – when the attorney's profile information includes information about his or her practice.

The state's attempt to simply all Internet communication as either being (a) on a firm's website; (b) in an e-mail; or (c) elsewhere, is simply a non-workable approach to the complicated medium, and renders Rule 7.6(d) – which deals with the "elsewhere" classification – too generally applicable, broad and vague, such that neither those required to comply nor those required to enforce can have the constitutionally required notice or guidelines.

(b) Written Without Discussion or Understanding of the Internet

It is apparent from the above-discussion that the language of the new Rule 7.6 presents practical problems with regard to enforcement. This seems to be a product of the Louisiana Supreme Court adopting these rules without an inquiry into the function of Internet advertisements, or the infrastructure of the medium.

In fact, its evident from a review of the drafting committee's meeting minutes and the public hearing transcripts that during the fairly lengthily drafting period, the topic of

[5] This topic discussed more specifically in Section III of the Memorandum.

how television advertisements would be regulated at a practical level was discussed extensively.

However a search through both the meeting minutes and the public hearing transcript will yield very little evidence of conversation about Rule 7.6, and the practical effects of regulating attorney speech online.[6] Instead, rule 7.6 was copied from the Florida rules *verbatim,* without much discussion at all throughout the drafting process.

Rule 7.6(d) appears to attempt to "copy and paste" all of the regulations related to television and print advertising, directly to any online communications that fall into the broad "other" category. The effect is that Rule 7.6(d) does not fully contemplate the infrastructure of the Internet medium, and renders the provision non-sensical, and certainly unconstitutionally vague and over-reaching.

III. As Drafted, the New Rules Regulate Non-Commercial Speech of Lawyers and Law Firms

The Amended Rule 7.6(d) prohibits communications by attorneys about its services regardless of whether the speech at issue is commercial or non-commercial. As drafted, the provision reads as follows:

"All computer-accessed communications concerning a lawyer's or law firm's services…"

The rules require no nexus between the communication and commercial activities, or even matters related to the lawyer's practice of law. As discussed in some of the above sections of this Memorandum, the rule by its terms would cover press releases, educational materials, law review or journal articles that contain either a brief biography

[6] Not to mention the lack of discussion for the *necessity* of such regulation.

or information about a lawyer's practice, educational seminars conducted online, or similar types of online communications.

Even fundamental examples of political speech could come within the purview of the rules, so long as they were made online, made by a lawyer, and made about the lawyer's services.[7] An example of political speech provided by the ACLU in its review of similar language in the New York rules is "a lawyer's letter to the editor of the *New York Times* criticizing Attorney General Alberto Gonzalez (a lawyer), or a lawyer candidate's statement in a televised debate of his qualifications for office would be covered by the plain language of the proposed rules." [8] Exhibit 11 at 9-10.

Although the Amended Rules, and specifically Rule 7.6(d), would not likely be applied in these circumstances, the vagueness of the rule's scope demonstrates that the rule is so broad and over-reaching that it includes speech that is not even commercial in nature, and could include speech that is at the core of First Amendment protection.

Even the *potential* application of the rule in such wide ranging contexts risks a chill on protected political speech. *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).

As the ACLU states in its analysis of the similar language of the New York rules,

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[7] *See* discussion of the New York proposed lawyer-advertising rules by the American Civil Liberties Union on November 15, 2006, attached as Exhibit 11, at p. 7-11. New York had a similar expansive scope of communications applicable to the rules, as the amendments defined the term "advertisement" as "any public communication made by or on behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer or law firm's services." Prior to the court in *Alexander v. Cahill* ruling that the new rules were unconstitutional, New York had actually amended its rules, and particularly this broad definition, to more narrowly quality the term "advertisement": "Advertisement means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers." See Exhibit 12. As discussed in footnote 4, rather than limit the scope of the Louisiana rules, the drafters made an extra effort to expand its scope to include "advertisements or communications."

[8] If communicated online, and on a site other than the attorney's own webpage as per Rule 7.6(d).

> "Attorneys subject to the amended rules will face an unacceptable dilemma: either comply with the rules or risk the possibility of professional discipline. Under these circumstances, many lawyers will have no choice but to forego speech in questionable cases."

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

IV. Conclusion

This Court should grant summary judgment to the Plaintiffs, declare unconstitutional and issue a permanent injunction against the enforcement of the following rules of the Louisiana Rules of Professional Conduct, as amended effective April 1, 2009: Rule 7.2(a); Rule 7(c)(11); Rule 7.6; Rule 7.7, and award Plaintiffs their costs, including reasonably attorneys fees, and grant any additional relief to which Plaintiffs are entitled.

(This section intentionally left blank. Signatures on following page).

Dated: February 17, 2009

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CERTIFICATE OF SERVICE

A copy of this motion was served electronically upon all counsel of record on this date: February 17, 2009.

/s Scott G. Wolfe Jr.
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