UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

PUBLIC CITIZEN, INC., et al	*	Docket 08-CV-4451-F
versus	*	New Orleans, Louisiana
LOUISIANA ATTORNEY DISCIPLINARY BOARD, et al	*	July 29, 2009

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ORAL ARGUMENT BEFORE THE
HONORABLE MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Public Citizen, Inc., Morris Bart, and William N. Gee III:	Public Citizen Litigation Group BY: GREGORY A. BECK, ESQ. 1600 20th Street NW Washington, DC 20009
For Morris Bart, LLC and Morris Bart:	Sher Garner Cahill Richter Klein & Hilbert, LLC BY: JAMES M. GARNER, ESQ. JOSHUA S. FORCE, ESQ. CHRISTOPHER CHOCHELES, ESQ. 909 Poydras Street, 28th Floor New Orleans, Louisiana 70112
For Scott G. Wolfe Jr. and Wolfe Law Group, LLC:	The Wolfe Law Offices, LLC BY: SCOTT G. WOLFE JR., ESQ. ERNEST E. SVENSON, ESQ. 4821 Prytania Street New Orleans, Louisiana 70115

APPEARANCES:

For Louisiana Attorney Disciplinary Board, Charles B. Plattsmier, and Billy R. Pesnell:	Stone Pigman Walther Wittmann, LLC BY: PHILIP A. WITTMANN, ESQ. KATHRYN M. KNIGHT, ESQ. MATTHEW S. ALMON, ESQ. 546 Carondelet Street New Orleans, Louisiana 70130
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Proceedings recorded by mechanical stenography, transcript produced by computer.

PROCEEDINGS

(July 29, 2009)

THE DEPUTY CLERK: All rise.

Be seated, please.

THE COURT: Good morning. Call the case, please.

THE DEPUTY CLERK: Civil Action 08-4451, *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board, et al.*

THE COURT: Appearances, Counsel.

MR. WITTMANN: Good morning, Your Honor. Phil Wittmann, Kathryn Knight, and Matt Almon here on behalf of defendants Louisiana Attorney Disciplinary Board, Mr. Plattsmier, and the chairman of the committee.

MR. GARNER: James Garner, Joshua Force, and Chris Chocheles for Morris Bart, LLC and Morris Bart personally.

THE COURT: Welcome all.

MR. BECK: I'm Greg Beck, Your Honor. I'm representing Public Citizen, Morris Bart, and William Gee.

MR. WOLFE: Your Honor, Scott Wolfe Jr. and Ernest Svenson representing Scott Wolfe Jr. and Wolfe Law Group.

THE COURT: You're the Internet people.

MR. WOLFE: Yes.

THE COURT: You may leave; either that or be prepared to say things in very, very simple terms. You have a judge who studied English literature, anthropology, and Spanish, so

assume I don't even know what an "on" button is. All right? I said that once to some patent lawyers. They didn't take me seriously.

Mr. Garner.

MR. GARNER: Mr. Beck is going to go first, Your Honor, 25 minutes. I'm going to go second, 20 minutes. Mr. Wolfe will go third at 15 minutes. If Steve so designates, I will keep the time.

MR. WITTMANN: I would just rise to point out, Your Honor, we have a motion to dismiss that I think should go first before any of theirs go.

THE COURT: Mr. Garner.

MR. GARNER: It really wraps up into two issues. I don't know why we can't deal with it all at once.

THE COURT: I can multitask, Mr. Wittmann.

MR. WITTMANN: I know that.

THE COURT: Wearing a bow tie reminds me of a case I once had when I was practicing and I had a case before Judge Roberts in Civil District Court. We were walking to court and my partner asked me why I was wearing a bow tie to court because he had never seen me wear a bow tie in court before. Judge Roberts came in and opened court wearing a bow tie, and I won. Unfortunately, I'm not wearing a bow tie today.

MR. GARNER: That doesn't bode well.

THE COURT: I think we should get some preliminaries out of the way. Why don't we assume for the sake of this morning that there is standing -- and I presume that ends your argument right now -- and that the state does have a substantial interest in trying to regulate lawyer advertising. I'm really more interested in the rules themselves.

MR. BECK: I'm happy to talk about that, Your Honor, and specifically how the rules are tailored to fit the interest that is supposed to be served here, which I think is the most important question.

THE COURT: Give me an example of how the proposed rules would inhibit a current lawyer ad. Let's take a specific ad. You must have something in mind. Tell me how these proposed rules would inhibit that particular ad.

MR. BECK: Well, we actually brought some examples that might be helpful. There's two kinds of restrictions that are at issue now because there used to be only blanket restrictions, but now there are some blanket restrictions and some disclosure disclaimer requirements. They both inhibit speech, we think, but in different ways. So the prohibitions, we don't have any examples to show you today, but they include things like past results and --

THE COURT: Sorry?

MR. BECK: Statements about past results in a case, for example, verdict awards in particular cases.

THE COURT: Oh, past results.

MR. BECK: Right. There's a number of our clients' ads, as we set forth in the declarations, that contain that information that would be prohibited under the rules. So a statement from, for example, a former client saying that they recovered this amount of money would appear in both of my clients' ads.

THE COURT: You disagree with the LSBA finding that that could suggest, without regard to the facts of a particular case, that the result might be the same?

MR. BECK: Well, the argument, I guess, that they are asserting is that it's inherently misleading. We have put forth some examples in our brief of cases where past results are used on the websites of law firms and others where it's pretty patently not misleading. You can look at those. It's not apparent why anyone would be misled.

So I think what they are really arguing here is not that there's an inherently misleading nature to these kinds of ads but that they are potentially misleading. In some cases they are going to be misleading; in many cases they won't, perhaps most cases they won't. Although it's now called inherently misleading, that's really the argument that's being made here as to a potentially misleading form of advertising.

In fact, the Louisiana Supreme Court, when it put out a second press release actually announcing the change

in effective date of the rules, it said straight-out that the rules were geared towards potentially misleading advertising. The Supreme Court said again and again -- because states keep raising this argument again and again -- that potentially misleading is not good enough because, after all, every kind of communication is potentially misleading. You can always find a way to mislead someone using an image like in *Zauderer*, or using a dramatization, or any kind of communication tool can also be misused. So the idea is that the state is supposed to make that case-by-case effort to find the cases that are actually misleading and not just have the potential to mislead.

THE COURT: Is that the test, do you think, under *Bates* and *Central Hudson*, that there must be evidence of actual misleading?

MR. BECK: I think almost always the answer to that would probably be yes. I can't say for certain that there won't be other cases. In *Zauderer*, for example, the Supreme Court did -- and this is the only time this has ever happened -- use the phrase *inherently misleading*, and this is where this all comes from. It said that when a lawyer advertised that there were no fees for services but left out the fact that the client would be responsible for costs, because that is sort of a technical/legal profession use of terminology that the average person would not necessarily understand, that it at least justified imposing a disclaimer

requirement. So it upheld a disclaimer requirement there without requiring showing actual evidence.

I think that's telling because the defendants are arguing that lawyers are somehow special, that they have to be treated in a different way than other kinds of professions and businesses. I think that that could be true -- because the Supreme Court has applied *Central Hudson* to lawyer ads so many times now -- only in those cases where there's something about being a lawyer that makes it difficult for ordinary people to understand what the lawyer is talking about.

If a lawyer is using terminology that means something to the public and means something else to lawyers, then you could make the argument that there should be a different rule for lawyers. When you're talking about past results, that could happen in any industry, and there's no reason to believe people are going to be more misled with lawyers than any other kind of industry.

THE COURT: So the profession of law is now an industry? You have just made a very big error, Counsel, at least with this Court.

MR. BECK: I apologize for that, Your Honor. I understand that the professions have had a long-standing special status.

THE COURT: How do you react to the material that the bar association apparently put together as a first step toward

trying to promulgate some sort of rules about lawyer advertising, at least tightening the rules? How do you comment about the findings of the LSBA?

MR. BECK: Well, I think that the finding and recommendation of the LSBA --

THE COURT: I will overlook our disagreement that law is a profession or an industry.

MR. BECK: All I can do for that, Your Honor, is refer you to *Bates*, where the Supreme Court very realistically looks at what's happening to the legal profession -- and it is still a profession -- but how it has become part of the daily economy, like many other kinds of professions, and part of daily industry for many people. I don't mean to demean lawyers.

THE COURT: I know that. Well, let's get to the LSBA.

MR. BECK: So the LSBA has the findings and recommendations, which I think is what you're referring to.

THE COURT: Maybe your argument will be persuasive enough to even get Sher Garner and Stone Pigman to advertise.

MR. BECK: Well, you know, Sher Garner and Stone Pigman do advertise on the World Wide Web, and they will be affected by these rules.

THE COURT: Well, I have these guys off to one side over there. I think you should just treat me as though I'm

ignorant of everything, but I'm certainly ignorant of the World Wide Web. We'll get to that in a little while.

MR. BECK: That's fine, Your Honor.

THE COURT: Tell me in just a few simple sentences: How do you react to the methodology of the bar association prerules before they suggested the rules to the Louisiana Supreme Court?

MR. BECK: It was inconsistent. They set out in the minutes recognizing that there is a burden, that the First Amendment imposed a burden, and that they better get some evidence. Of course, by that point they had already written the rules that they wanted to find evidence for. So even at the very beginning of this evidence accumulation process, it was already post hoc rationalizations for what had already happened.

So they set about doing that by looking at a couple things. They looked at a survey that was done in Florida, and they determined that it had no applicability to the rules here. Then they took comments from the public. There were some lawyers, of course, who felt strongly that there shouldn't be lawyer advertising. There are also lawyers who felt the other way.

The Federal Trade Commission submitted a lawyer saying that they thought that the rules would be harmful to consumers and that they would not protect consumers and that,

in its role as the agency in charge of interpreting the unfair competition law, that it did not think these rules were a good idea.

That was the extent of the record. There were public hearings, as well, but no evidence was presented at those, and that was the extent of the record at the time that the initial draft of the rules went to the Louisiana Supreme Court and was approved.

I would characterize it as having no evidence whatsoever, and that is reflected in the briefing because there hasn't been any evidence from that time period that's been identified. So after the lawsuit is filed is when the evidence accumulation process really begins because they had put off doing a survey before, now they have to do one, but they have already decided that they need to do a survey that will --

THE COURT: When was the anecdotal evidence put together? Was that after the lawsuit was filed or before?

MR. BECK: I wouldn't characterize it as "anecdotal evidence," but it was before, I think, what you're talking about. You're talking about the comments from members of the bar. It's not so much anecdotal evidence as lawyers' opinions about whether the rules are a good idea or not. I read them all. I didn't see anecdotal evidence, but that's my reading.

That was before, so that was the state of the record when the rules were enacted, and then the lawsuit was

filed, and then a survey began. After that survey was completed, the report and recommendation was written, and this was during a time period when the case had been stayed because the rules had been pushed back until October 1.

The thing about the survey, the most striking thing to me is that it didn't ask about most of the rules that were enacted. It doesn't ask anything about past results. It asks about testimonials, which could be related in some cases but often not, and even then I don't think those questions are really relevant. It asks about scenes only to the extent that they are accident scenes. It does not ask about slogans or mottos that imply an ability to achieve results.

THE COURT: Are there ads involving slogans -- well, slogans, yes, but mottos and things like that? Are there ads that do that?

MR. BECK: Well, I think, you know, this --

THE COURT: I know in the New York case there were wispy things of smoke --

MR. BECK: Wispy smoke, right. Special effects.

THE COURT: -- and all sorts of theater that Judge Scullin said was okay.

MR. BECK: Well, he did, but --

THE COURT: Are there firms here that -- I'm familiar with Mr. Bart's things. I don't think he does that.

MR. BECK: Well, special effects --

THE COURT: I've often wondered how he shot that basketball. Being a short person, I would never even bother to try.

MR. BECK: Well, they can keep doing retakes until it works.

THE COURT: How did you shoot that basketball?

MR. BART: Morris Peterson's sister was standing on a stepladder off the side, so I threw the ball out of frame, and then she took the ball and dunked it.

THE COURT: Now, see, that's inherently misleading. What would the Supreme Court say about that?

MR. BART: Well, Judge, if you look closely, you can see her hand.

MR. BECK: It's an "incompetently done misleading" defense. That's also, we would argue, not material to the selection of a lawyer.

In any case, yes, there are all sorts of different lawyer ads that are going on here, but I would note that there's no rule that specifically bans special effects in this jurisdiction.

THE COURT: What about the portrayal of judges and juries?

MR. BECK: I know that there is at least one that's running in the market now.

THE COURT: There were some political ads at one

time. Whenever somebody wanted to appear smart and was running for some office, they had a judge in a courtroom. I'm not so sure that made them look so smart. Have there been ads out in which there are portrayals of judges and juries in a scene in a lawyer ad?

MR. BECK: There's at least one ad out there that's doing that right now. I would note that -- the defendants point this out -- the judicial code of conduct would generally prohibit a judge from being in a commercial for a lawyer for obvious reasons. So if we are going to be talking about a judge appearing in an advertisement, it's going to be an actor playing a judge or perhaps a retired judge.

THE COURT: That's what I mean. There are portrayals.

MR. BECK: Mike Hingle is the one that we know of now, yes. The portrayal is by an actor and, as you know, the rules prohibit actors in a variety of circumstances -- judges, clients, and lawyers -- but for some reason the rules will allow only the depiction of the client when accompanied by a disclaimer, but will not allow a depiction of the judge without a disclaimer. The report concludes, without explaining why, that it would be impossible to provide an adequate disclaimer for that.

THE COURT: As to the disclaimer, the rules that focus disclaimer, is it your position that disclaimers are

inherently or per se constitutionally tainted or that factually, as the rules are written, that the disclaimers present an undue burden?

MR. BECK: I think that in every case the state is going to need some reason to impose a disclaimer, and I think in many cases it will be substantially less of a burden. I don't think that the state can impose disclaimers for no reason because it is at least some imposition on speech.

Now, in this case we have a big imposition on speech. Actually, I'm going to show you. In general, I think disclaimers are a good idea because, as the Supreme Court says, you get to have more information rather than less, and it achieves the goals of the First Amendment by making sure everyone knows what the truth is.

So, in general, I think they are a good idea. But when they are enacted for the purpose of making it difficult to speak, then that's a bad idea. I think that's what we have here because the rules require that the disclaimer be in a font size that's at least as large as the largest --

THE COURT: In a what size?

MR. BECK: A font size.

THE COURT: What is that? I've already warned you that I'm a English lit, anthropology, and linguist major. Speak English. What is a font?

MR. BECK: Typesetting. The letters.

THE COURT: Thank you. That wasn't too difficult, was it?

MR. BECK: You will ink them up and then stamp them on the page, but it's on the computer screen.

THE COURT: Okay.

MR. BECK: So the size of those letters has to be --

THE COURT: Don't be afraid to talk down to me.

MR. BECK: I was half joking. Those letters have to be at least as big as the largest text size anywhere in the advertisement. So if you have a very big headline --

THE COURT: I understand.

MR. BECK: You measure fonts in point size. If there's a 36-point, you have to have a 36-point. We have some examples. In addition to that, there has to be a verbal disclaimer if it's on the television at the same time. It has to be spoken at a reasonable speed.

THE COURT: It has to be spoken at a reasonable speed? Is that in the rule? I must have missed that. Is that in the rule?

MR. BECK: Something to that effect. I might have got the exact language wrong. It basically says reasonable speed.

(WHEREUPON the video was shown in open court.)

THE COURT: Can you turn it up?

MR. BECK: I've given you a printed-out copy of the

screenshot of this as well. It should be up there.

THE COURT: Hold on one second. Try it again.

MR. BECK: So there's two disclaimers here now.

THE COURT: Wait, can you play it again.

(WHEREUPON the video was shown in open court.)

MR. BECK: This is a 10-second advertisement. More than half is taken up by the reading of the disclaimers. As you can see, about three-quarters of the screen, I would say, is taken up by this.

There's two kind of disclaimers here. One is the requirement that you disclaim a spokesperson, which is new. That's one of the amendments that we are challenging. In the process of going about addressing our complaint and making those modifications, they changed some of the prohibitions to disclaimers but at the same time adding this rule that all disclaimers under the rules -- not just the ones that were recently enacted but all disclaimers under the rules must be in a font size at least as large as the largest text otherwise in the ad.

So now there's a variety of other kinds of disclosures that are required by the rules. You always have to put the name of a responsible attorney, for example. You have to put the location of a bonafide office address. There's a variety of other ones. After a while, when you start adding those in -- the second one was an example. He has an office in

Lafayette, Louisiana. That's a disclaimer that's also now required to be in gigantic letters.

The best case I'm pointing to for this is *Ibanez* by the Supreme Court. *Ibanez* was about a lawyer and CPA, and she simply wanted to say that she was licensed by this certain organization of financial people. The rule required that if she did that, she had to use explanations of what that meant. The Court noted that it was simply impossible to add those kinds of explanations in the space of a business card or a letterhead or any of a number of other places where they are required to be. So what you end up having is a substantial burden on her ability to advertise at the same time the state hadn't shown that it was accomplishing any benefit.

I think my microphone has got a lot louder.

THE COURT: That's okay. It makes you seem more imposing. You think *Ibanez* is factually similar to this case?

MR. BECK: I do. The reason is both require some sort of disclosure of information that's triggered by an inclusion of some other information. That disclosure requirement was burdensome enough that it made it difficult to communicate the original message.

THE COURT: It almost eliminated the business card, didn't it?

MR. BECK: Right.

THE COURT: How does that square with what you just

showed me?

MR. BECK: Well, we could fit it on that page. We could fit it on the screen, but it ate up the majority of the message, the space for the message by the lawyer. So the lawyer, out of ten seconds of advertising time, is only going to have a few seconds of advertising time and a tiny bit of screen space.

THE COURT: Basically, what you're saying is a reasonable person wouldn't know that that was an ad by William Gee III, Attorney-at-Law?

MR. BECK: Well, even --

THE COURT: Isn't that what Mr. Gee wants to convey to potential consumers?

MR. BECK: I don't think so. That's Robert Vaughn, *The Man from U.N.C.L.E.* He is a minor celebrity, but his role is not to be the lawyer. In fact, Mr. Gee has that disclaimer on already. He has always run that disclaimer. It's not in a gigantic type size so he can continue to do his regular advertising.

This is why I say the reasonable fit part of the *Central Hudson* test is so important. Even assuming that it was misleading in some cases for lawyers to use a spokesperson, that just means that the state should be doing some sort of reasonableness disclaimer instead of making it impossible to advertise all together.

Your Honor, did you get the other printouts that I had for you?

THE COURT: I don't think so.

MR. BECK: May I approach?

THE COURT: Sure. Maybe we could turn the volume down now.

MR. BECK: The first one there is the screenshot of the disclaimer that was on the video. You can see what proportion of the screen is taken up. That's just because the font size of his name there, as in most ads, is relatively large because that is what is going to be the attention grabber.

THE COURT: Let me make sure I understand what you are saying. This is the one you're talking about?

MR. BECK: I thought we had changed the order, but yes. We'll go to that one first.

THE COURT: Tell me the one you want me to look at.

MR. BECK: Well, there's one that should be a picture of Robert Vaughn.

THE COURT: Just show it to me. Let's see what you are talking about and then I will find it.

Okay. Hold on. That's this one?

MR. BECK: Yeah. That was just to point out to you that the proportion of the screen that's taken up here looks like about three-quarters. I didn't measure it, but I'm

estimating it.

The other one that you are looking at is the Web site for Morris Bart. Now, the font size on this page is relatively --

THE COURT: That's this one?

MR. BECK: Yes, that one, yes. This one --

THE COURT: This is a current ad, one you claim would be inhibited by the rules or one that you claim is compelled by the rules?

MR. BECK: Everything on this ad is current except that I took it and I added these disclaimers to it. Otherwise, it looks likes it does. It has a picture of a car crash and it has this person, and these disclaimers are some of the ones that are required.

MR. WITTMANN: I going to object to this, Your Honor. This is not an ad. Its a Web site. There's a difference.

MR. BECK: I'm willing to agree that it's a Web site, Your Honor, but I still believe that it's relevant.

THE COURT: I'm willing to agree that I don't know what the difference is.

MR. WITTMANN: Well, one, on a Web site, it's information by request. It's not an advertisement. You have to request it.

THE COURT: Oh, I see.

MR. BECK: My point, Your Honor --

THE COURT: Go ahead. What's your point?

MR. BECK: My point is that is the information -- there is a category of advertising that's called "information delivered upon request" or some such thing, but it doesn't make any exception for depiction of scenes or actors playing clients. So the same rules would apply to the ad if it's on the Web or anywhere else.

THE COURT: Maybe I'm confused. Do the rules deal with requests for information?

MR. BECK: Yes.

THE COURT: They do?

MR. BECK: Everything --

THE COURT: Except other than on the Internet?

MR. BECK: Right. So everything, I think, is considered an advertisement. There is this other category of semiadvertisement called solicitation, and that's where the lawyer reaches out and communicates actually with the client. Everything else, I think, is considered an advertisement or a subset of advertisement.

One kind of advertisement is information provided upon request. The rules governing that --

THE COURT: Which is what this is?

MR. BECK: Yes, because the rules specifically say that a Web site will be considered information delivered upon request. The relevant exception for that kind of ad in this

case is that information provided upon request is allowed to include information about past results. So you can put on your Web site that you won $10 million for so-and-so.

THE COURT: You can?

MR. BECK: You can. You're allowed to do that.

THE COURT: If it's truthful.

MR. BECK: If it's truthful. It must always be truthful, that's true. I think that's another mark against these rules, though, because it's not at all clear to me why someone is likely to be misled if they read a verdict in the Yellow Pages but not likely to when they read it on a Web site. It's the exact same kind of information. There's an exception made here for the Web for some reason, probably because a lot of the large law firms wouldn't want to be regulated in their advertisement.

I do believe that is advertising, Your Honor. You can call it what you want. It's considered more civilized and it's more acceptable by many lawyers, but I do think that Web sites are advertising. I do think going to whatever social functions and networking is a form of advertising. In fact, that's in-person solicitation and prohibited by many states, although it's not enforced in that way.

These are all ways that lawyers use to get their names out to the public or relevant clients. In some cases, the lawyers are marketing to a group of people who aren't

likely to hire them after seeing them on TV. That's doubtless true for many law firms here. There are other kinds of lawyers who are trying to solicit or advertise for clients who are likely to hire lawyers they see on TV because they don't know any other way to reach a lawyer, and that's the kind of lawyer advertisement that's more effective because -- by this past result rule in particular.

THE COURT: I will grant you that I'm about to put what might be an absurd example to you, but it might also implicate the same constitutional issues. What if Mr. Garner put out an ad saying that he appears regularly in federal court, that he wears bow ties before a judge who also wears bow ties, that he has been very successful in federal court; would that be prohibited or would that be permissible constitutionally? Everything that I just said is true.

MR. BECK: The question is could you constitutionally create a rule that would prohibit that kind of advertising?

THE COURT: No, no. The question is whether these rules would prohibit that and whether that would be unconstitutional if they did.

MR. BECK: I don't think that any of the rules that we are challenging in this case would have anything to do with that advertisement, but I think that there are existing rules on the books about misleading advertisements, which include advertisements where you suggest an ability to improperly

influence a judge. I think that's quite right that that should be prohibited.

Now, you present obviously a tough fact question which would be good for a law school exam. I think you have a pretty good argument in a case-by-case basis to say that's a misleading advertisement, but then again --

THE COURT: You could? You would say that?

MR. BECK: I think maybe, but the point is, though, Your Honor, that that's a decision that has to be made by disciplinary authorities when they see an ad that's misleading, not when they think that there might someday be an ad that's misleading like that and, therefore, we should prohibit all other ads that are similar. That's the critical difference as *Zauderer* sets out.

Zauderer makes clear that, yes, it's going to be more expensive, it's going to be more difficult, it's going to take more resources for a state to go through the ads one by one and only get rid of the misleading ones. That's, as *Zauderer* says flat out, the price that the First Amendment demands, that you cannot just take a category of speech and just totally prohibit it because there might --

THE COURT: That's true except the category of speech that you're seeking to protect is not entitled to the same dignity as other categories of speech.

MR. BECK: It's not entitled to the same dignity,

Your Honor?

THE COURT: That's right. Commercial speech is not held on the same pedestal, when measured against the First Amendment, as other forms of speech.

MR. BECK: Somewhat lower. The Supreme Court has always said, though, it's still very important.

THE COURT: I'm not suggesting it's not.

MR. BECK: I understand that, but I do think the defendants are suggesting that it's not. I think that the level of protection that they think commercial speech gets is something more akin to the level of First Amendment protection that prisoners and school children get where the government, if it thinks it's in the best interest of everybody, can go ahead and restrict that speech at will. I think that, as the Supreme Court said, advertising is very, very important to the capitalist economy and it's vital to --

THE COURT: Do we still have a capitalist economy?

MR. GARNER: That's an issue for another day.

THE COURT: I think Mr. Garner is trying to tell you that your time is up.

MR. BECK: Yes. Unless there's further questions, Your Honor, I will hand off.

THE COURT: Thank you.

Mr. Garner, who is next, you?

MR. GARNER: I am, Your Honor. I'm going to pick up

with your example, except I would suggest we delete the bow tie comment because that actually implicates another rule about influence with a particular judge. I'm going to give a real-life example, then I'm going to modify yours.

If I want to take a full page ad out in *The Times-Picayune* and say in this Court, the United States District Court for the Eastern District of Louisiana, I got bad-faith sanctions against a lawyer, which is true, and it went to the Fifth Circuit and was affirmed and therefore --

THE COURT: If you're trying to pander to me, it's working.

MR. GARNER: Good. It was his case.

All that is truthful. Under these rules, I could not say that.

THE COURT: I got affirmed on every issue.

MR. GARNER: Every issue. Every issue.

These rules could be constitutional if they said past results if not accurate and not misleading, because the state interest is to regulate provably untruthful and provably misleading.

THE COURT: Right.

MR. GARNER: I know you said assume there is a state interest. I don't think there is a state interest. We have platitudes. They're all great platitudes. I agree with the platitudes. I'm sure Mr. Wittmann agrees with the platitudes.

You agree with the platitudes, I know. Even Justice Scalia agrees with the platitudes, but he has said --

THE COURT: Why is it that every time I'm in court somebody likes to remind me of my friendship with Justice Scalia?

MR. GARNER: Let's talk about his view of the First Amendment.

THE COURT: I'm friendly with Justice Breyer too.

MR. GARNER: He doesn't have as good of quotes.

In the *44 Liquormart* case, which is Rhode Island, in commercial speech regulating the liquor industry, Justice Scalia said, "We have an aversion to a paternalistic regulation of commercial speech that assumes people will make bad decisions."

THE COURT: I was waiting for that one to come out. I was wondering how long it would take. It only took 38 minutes.

MR. GARNER: Jim Garner says, "I have gotten sanctions in this Court." I'm not going to suggest a particular judge in this Court. "The Fifth Circuit has affirmed it, therefore, hire me." That is prohibited by these rules even though there's nothing inaccurate in what I said.

The argument they make is people are stupid, although I don't think their evidence shows that, and that's been rejected. That was rejected by the Court in *Bates.* It

was rejected since then. Just because people will make a bad decision -- you know, they hear the moniker "One Call, That's All." By the way, the basketball ad was not actually a legal ad. It was showing support for the Hornets --

THE COURT: I know.

MR. GARNER: -- and his prowess with the basketball with Morris Peterson's sister's help.

THE COURT: It just so happens that he is an attorney, however. That didn't hurt.

MR. GARNER: "One Call, That's All" is arguably prohibited by these rules.

THE COURT: How is that misleading?

MR. GARNER: It's not. I think their view is that might suggest: You make one phone call, and I'm going to solve all your problems.

THE COURT: *Bates* said commercial speech that is false, misleading, or deceptive can be regulated.

MR. GARNER: But it has to be provably misleading.

THE COURT: Yes. Well, of course. I was at some point going to ask you to tell me the difference between *imply* and *infer*. The struggle I have is: What should the bar association have done that it didn't do? That really implicates your argument about --

MR. GARNER: Past results?

THE COURT: Well, proving misleading, deceptive, or

false, in which case commercial speech, notwithstanding your colleague's inference, is entitled to less constitutional dignity than other speech. Other than the power of reason, what should the bar association have done? For example, in *Cahill*, in that New York case, the judge said they didn't do anything, basically. There was hardly any evidence that the four people who put out the rules had done anything. What should the bar association have done here that they didn't do?

MR. GARNER: Let's see where we came from to answer that question. This started with a legislator going into the house in Baton Rouge saying, "Can't do this." Then somebody reminded him of *Marbury v. Madison* and separation of powers, then we come over to Royal Street. We have this political hot potato.

They articulated -- and these are in the exhibits, Exhibit 1 -- "We want to regulate. We have become undignified, and it poses a threat to the way attorneys are perceived in this state."

That's the starting statement, Exhibit 1. "The manner in which some members of the Louisiana state bar are advertising their services in this state has become undignified and poses a threat to the way attorneys are perceived in this state."

That's not good enough. They should have said, "Look, we have a problem. We have done real research that has

analyzed whether it's Mr. Garner saying he has got sanctions or Mr. Bart saying, 'One Call, That's All,' and the people he is advertising to are being misled. Here's the concrete evidence, so this is why we need to change the rules."

THE COURT: I think it would be impossible to say that "One Call, That's All" is misleading.

MR. GARNER: They won't agree that that doesn't violate the rules. My point is, rather than starting from platitudes, enacting a bunch of rules we don't really need because they can -- without these rules, they can regulate misleading speech or untruthful speech. These rules go beyond that.

What can they do? Enforce the rules they have. As Mr. Plattsmier said, they haven't even had an issue in enforcing the rules they have. It's probably not relevant to the constitutional issue, but this is a political thing. People wanted to come out and say, "We don't like 'One Call, That's All.'"

What do I think the bar association should do? Go find a real problem. Don't start with platitudes and try to deal with political issues in Baton Rouge. Go find a real problem. Back it up with real evidence and then state, "This type of real advertising is misleading, is untruthful, these are the harms, and this is the rule that's going to fix it," rather than starting with this general platitude, coming up

with a bunch of rules that are very paternalistic and inconsistent, and the Web issue is that.

I know Mr. Wittmann says, "That's invitation for information. I'm going to get it." But if Jim Garner says, "I have gotten sanctions" on my Web site, it's perfectly okay. But if I put it on billboard, I can't do it. That shows the inconsistency, and that's what I think happens when you start with a platitude with no real evidence, try to satisfy a political cause, and then *ex post facto* try to prove it with the survey, which was done after litigation.

THE COURT: So basically your argument is that there must be actual evidence of --

MR. GARNER: Yes.

THE COURT: -- false, misleading, or deceptive. Does there have to be a victim? Is it impossible to say that a particular ad is, in and of itself, misleading without evidence of a victim?

MR. GARNER: Yes. I say, "I've gotten sanctions. They have been affirmed by the court. Hire me because I will get you sanctions in every case." That's not truthful and it's misleading. You don't need a victim. They can say on the face you can't do that.

THE COURT: So don't always need a victim?

MR. GARNER: You don't always need a victim. "One call, that's all, and I guarantee you will get a million

dollars if I represent you," you don't need a victim in that.

THE COURT: He doesn't say that.

MR. GARNER: He doesn't say that. They don't need these rules. That's really my opinion, as a lawyer, reading all the constitutional case law.

The Supreme Court says provably; provably untruthful, provably misleading. Greg said it, and I read it last night. The idea that something is potentially misleading is not good enough, just like protecting the dignity of our great profession is not good enough. I may disagree with that, but the First Amendment stops you even in commercial speech.

THE COURT: All right. I understand your argument. Let me ask you this: Are there any other cases -- beyond this case, of course -- other than *Cahill*, the New York case, involving lawyer advertising?

MR. GARNER: Currently pending?

THE COURT: No. Decided.

MR. GARNER: Decided on these issues? *Cahill* is dead on four.

Anything else, Greg? You know all the cases.

MR. BECK: Probably not right on point as to these rules.

MR. GARNER: I'll end with one.

MR. BECK: I would say *Zauderer* is about images, which is very similar to dramatization. That's all.

THE COURT: Thank you.

MR. GARNER: A late Irish lawyer once told me in his Irish brogue -- and you know who I'm talking about -- "James, the road to hell is paved with good intentions." I think here the road to violating the First Amendment is paved with good intentions. I don't question the motive and intent of the seven justices on Royal Street. However, they just didn't do it the right way. Because of that, I don't think we need a trial. I think given the case law, given *Bates*, given the progeny on commercial speech, these rules are facially unconstitutional and we should win today. Thank you, Your Honor.

THE COURT: Thank you very much. Anybody else on the plaintiffs' side?

The Internet people. Come speak to me. Teach me something.

MR. WOLFE: Sure. Good morning.

THE COURT: I assume that the Internet stuff is different. If I'm wrong, someone tell me. I have to tell you of my ignorance of technology, so don't use technical terms, please.

MR. WOLFE: I'm going to try to use as little bit of technical terms as possible. When I do, I'm going to try to explain them.

THE COURT: Tell me why, as to the Internet, these

rules are verboten.

MR. WOLFE: Okay. Well, let's look at the rules. Rule 7.6 is the rule we are talking about. Rule 7.6, as we have alluded to during some of the previous conversations, (a), (b), and (c), regard what lawyers post on their Web site like Morris Bart's Web site that was shown on the screen. It also regards e-mails, unsolicited e-mails that lawyers will send to potential clients.

These types of advertisements are considered information provided upon request and they are subject to a different type of rule. They can't be false, they can't be misleading, but they don't have to be submitted for evaluation, for example, under Rule 7.7 and pay a $175 fee.

THE COURT: I know you give an example where, I think, the amount involved in doing it is less than the penalty --

MR. WOLFE: The fee of doing it.

THE COURT: What did the bar association do to investigate this aspect of lawyer advertising?

MR. WOLFE: That's one of the key things that distinguishes --

THE COURT: That's why I make so much money.

MR. WOLFE: -- our case.

THE COURT: I get to ask the really seemingly brilliant questions --

MR. WOLFE: That's what distinguishes our --

THE COURT: -- thanks to my law clerks.

MR. WOLFE: -- case from the other plaintiffs' case because there's an argument here. There's an argument here about whether the state has shown a harm. There's an argument about whether the contents of their advertisements are harmful. There's an argument. I'm not going to say whose side I come down on, but there's no argument with regard to Internet advertising. No one is going around and saying:

"Man, all those Internet advertisements, they're cheesy."

"Those Internet advertisements, they disgrace the profession. They're misleading."

No one said that. No one has looked into it. No one has investigated it. They have conducted a survey, and they didn't ask a single person from the survey if they had seen an Internet advertisement.

What happened was, they produced these regulations with a goal of restricting certain types of speech in certain mediums: Broadcast television and print television. They didn't come to that goal trying to restrict anything with the Internet, but what they did was they created 7.6 and said, "All the regulations that apply to television and that apply to radio, they are going to apply to the Internet, too, without any reason, without any investigation.

So that's one of the distinguishing factors of our argument is that there's a debate about whether there's a harm here. There's a debate about whether these regulations were necessary and whether they were tailored. There's really no debate from our standpoint because there is no harm. They haven't shown a harm, they haven't alleged a harm, and I don't even know if they fear a harm.

I'm going to get back to the rules themselves. I talked about the seminal rule, 7.6, information upon request. I'm not concerned about that stuff. I'm concerned with 7.6(d).

THE COURT: 7.6(d)?

MR. WOLFE: 7.6(d).

THE COURT: Advertising.

MR. WOLFE: It basically says if you are not advertising on your Web site or you're not sending an e-mail, everything else you do online is subject to all the rules. That's not information provided upon request. That's subject to all the rules. It has to go through evaluation. It has to have the required information. It has to have the disclaimers. It has to have everything.

This is a problem. There's a disconnect between the rules and the reality of what's going on of how people advertise online, and that's where we're going to get slightly technical because we are going to talk about the one most popular way that people use the Internet to advertise and

that's with Google.

THE COURT: Believe it or not, I know what Google is.

MR. WOLFE: You don't know what Google is?

THE COURT: I do know what Google is. I was very embarrassed once. Being a widower, I had been fixed up with someone in Philadelphia. One of my colleagues here said, "Well, Google her," and I thought he was being vulgar. That's how I discovered what *Google* means. Go ahead. So I do know.

MR. WOLFE: Since then you have probably read about them, though; right? Because they are a hugely successful company, and they're one of the biggest companies in the world. The reason why they are a huge company is because they sell Internet advertisements. That's all they do. All their income comes from Internet advertisements, so this is the best example to look at and say, "Do these regulations work?"

If the state was interested in regulating Internet advertisements, a prudent thing they would have done was said, "Well, how do people advertise online? Let's figure out how to regulate that." Since they didn't do that, they didn't tailor their rule to how the world actually works online. There's a disconnect between how the rules are and what the reality of Internet advertising is.

An Internet advertisement through Google is through what's called targeted search advertisement. It's different from what is known as a banner ad. The reason why

I'm bringing up banner ads is because they were mentioned by the defendants in the handbook, the Louisiana handbook. When these rules were promulgated in Florida, they were concerned with banner ads because that was popular at the time.

If you have ever visited nola.com, for example, you see all these advertisements. Those are banner ads. They are there all the time. I would go to nola.com. I'd say, "I'm going to give you $5,000 a month. You display this single ad all the time on this page." That is a dying form of advertising online.

That's why Google is so enormously successful, because they changed the way that advertising works. Most advertisements online are through Google, where you pay Google every time your ad is clicked.

THE COURT: Every hit.

MR. WOLFE: Every hit. You pay them for certain key words. I practice construction law, so I would say, "When someone searches for a construction lawyer, I want my ad to appear." Your ad appears, and it's about that big.

THE COURT: What does it say?

MR. WOLFE: My particular ad? I have a few. I have a bunch of them, actually. Some of them would say:

"Wolfe Law Group. File A Lien. Protect Your Rights."

"Learn more about construction liens."

"Do you have a construction dispute?"

"Are you having trouble getting paid on your construction project?"

Things like that, and the key thing about it is it can't say much. The reason why --

THE COURT: Because it's too small.

MR. WOLFE: Because it's like trying to advertise on a mini Post-It note. You don't have very much room to say what you are going to say; but immediately, when they click on your advertisement, they are being thrown to your Web page.

THE COURT: Switch sides for a second.

MR. WOLFE: Sure.

THE COURT: Argue to me what is wrong with that and what should be regulated.

MR. WOLFE: What's wrong with that and what should be regulated?

THE COURT: You're now Mr. Wittmann.

MR. WOLFE: All right. Well, attorneys' speech should be regulated. Commercial speech should be regulated. It's clear the government has a right to do it. The government has a right to regulate commercial speech when it's going to be misleading, and they should put rules together that are going to try to prevent that on the Internet.

Just because it's on the Internet doesn't mean that the attorney can speak something that's untruthful. It

doesn't mean he can use a jingle or an actor or an image, although those things don't exist on the Internet through the Google advertisements, for example, but they still have a right to regulate that.

One of the things I would presume that Mr. Wittmann is going to argue is that the harms of an attorney communicating incorrectly and untruthfully are the same regardless of where it applies.

THE COURT: Which of your ads -- I'm sorry. "Mr. Wittmann," which of Mr. Wolfe's ads are harmful and misleading?

MR. WOLFE: None, and that's why --

THE COURT: You think Wittmann is going to tell me that?

MR. WOLFE: No. He may.

THE COURT: I've known him for 50 years. I can tell you he is not going to tell me that.

MR. WOLFE: He may because I don't know of any of my ads that are harmful and misleading. That's one of the cases that distinguishes us from the plaintiffs' case; not that their ads are harmful and misleading, but that we are not concerned about content. At the end of the day, my ads will likely be compliant because I'm not saying anything -- I don't use jingles. I don't use slogans. I don't --

THE COURT: You're arguing the pure constitutional

theory of regulation and how it came about in the case of the Internet.

MR. WOLFE: In one sense, yes, but the other sense is the problem that the rules themselves are flawed in how they are applied to the Internet, and that creates a problem for me.

THE COURT: I understand.

MR. WOLFE: With Google advertisements, the required information such as your name and town, well, now I have to take 50, 60, 70 percent of my ad space where I can't communicate very much. I don't even get 10 seconds. I get, like, this tiny, tiny space. I'm not going to be able to say what we need to say in the ad.

One of the bigger problems with how these rules apply to Google ads is the evaluation process. A Google advertisement is an Internet advertisement, is a way for companies --

THE COURT: When you say "the evaluation process," you mean the evaluation process by the bar association?

MR. WOLFE: Correct.

THE COURT: Okay.

MR. WOLFE: Rule 7.7. Every time that you have an advertisement, it's $175. I'm not concerned about them evaluating it. I'll really concerned about the $175 and for this reason: The reason is that when you advertise online, it's not a television commercial. You don't spend $5,000 to

produce it. You don't spend $3,000 every week to run it. A billboard -- you don't print a big canvas and spend money on it and leave it up there for six months. The Internet is completely opposite.

Advertising on the Internet is completely opposite to how you advertise in the other broadcast mediums because these little-bitty ads, they take so long to get right. What Google does, it goes and it learns about what people are searching for. It learns that when they are searching for this, these ads are more effective. So when you start a Google campaign, you use a number of variations.

One of the examples I gave in my brief is in 2008 we ran a three-month ad. Three months. We had 17 variations, 17 different ways of saying our message, advertising the different key words. As we learned the success of those variations, we would change it and say, "Well, you know what? This ad, when I say *lien*, I'm 30 percent effective. But when I say *mechanic's lien*, that gets people's attention more." So I changed it to say *mechanic's lien*.

The result is, over a three-month period, I spent $160 on a Google ad campaign. If I had to go through an evaluation process, it would have cost me $2,900 to go through an evaluation process. This is a tiny, tiny advertising campaign. It's not a big advertising campaign. And it's not to say that they can't regulate it. They can regulate it.

THE COURT: What do other states do? Do you know?

MR. WOLFE: Nothing.

THE COURT: Nothing?

MR. WOLFE: In the other states, they don't have the evaluation period except for Florida, because these rules are from Florida. They don't have the evaluation period like we do here. Basically, in New York, Internet advertisements are regulated; but since there's no evaluation, there's not as much harm, and they don't have the required information which restrict the space on the small advertisement. There are better ways for the defendants to regulate this.

THE COURT: What happened in *Cahill* after Judge Scullin's decision? Did it ever go to the Second Circuit?

MR. WOLFE: It's pending. I think that Judge Sotomayor was sitting on that case, and there's been no decision yet.

MR. GARNER: That's correct.

MR. WOLFE: So it's pending. Our particular argument, as it relates to the Internet, wasn't really put before then.

THE COURT: I know that.

MR. WOLFE: This is a unique --

THE COURT: I do read cases. Look, I'm familiar with your position. I don't mean to cut you off, but I don't know

that you have anything to add. People might want to take about a five-minute stretch, including some of the people from the public, so we are going a five-minute recess. I assume that the plaintiffs are finished?

MR. GARNER: Unless you have more questions.

THE COURT: "Finished" is a very poor choice of words, but I just want to let people have a stretch. Be back in five minutes. All right. We will be adjourned for five minutes.

THE DEPUTY CLERK: All rise.

(WHEREUPON the Court took a brief recess.)

THE DEPUTY CLERK: All rise.

Be seated, please.

THE COURT: Mr. Wittmann.

MR. WITTMANN: Good morning, Your Honor. Phil Wittmann on behalf of the defendants.

The point that Mr. Wolfe was making when we broke a moment ago is sort of a good lead-in to what I would like to argue to the Court this morning. He was talking about the Google ads on the Internet that neither you nor I are particularly familiar with. In any event, those Google ads can all fit within the safe harbor provisions of the rules and are not subject to prefiling requirements. As long as they're truthful, you don't have to go through any filing requirements at all. So they have created a problem without looking at any

concrete example to show you why it's a problem.

THE COURT: Are you saying that these rules don't apply to the Internet?

MR. WITTMANN: What's that?

THE COURT: Are you saying that these don't apply --

MR. WITTMANN: Oh, no, they do, but I am saying there are safe harbor provisions, like in Rule 7.2 of these rules, where you don't have to go through any prefiling requirement. You can go ahead and run your Google ad and there's no problem.

That leads into the basic problem we have here because, in each of these cases, they're asserting a facial challenge to the rules which don't become effective until October 1 of this year. Your Honor, the Court presently lacks subject matter jurisdiction because there's no actual controversy that presently exists.

THE COURT: Let's just assume that I do have jurisdiction. What about the adequacy under the Constitution of the rules themselves?

MR. WITTMANN: The adequacy of the rules themselves, the rules were adopted after careful study by the Louisiana State Bar Association --

THE COURT: They say that --

MR. WITTMANN: -- promulgated by the Supreme Court.

THE COURT: They say no careful study.

MR. WITTMANN: Look at the United States

Supreme Court's decision in *Florida Bar v. Went For It,* which is one of the cases we cite. The Court said you don't have to prove everything down to a gnat's eyelash. What you do is you look at the wealth of information that you have available to you. The case law doesn't require empirical data accompanied by a surfeit of background information but instead has permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales all together. So their criticism of our relying on the Florida work is misplaced. They also overlook the public hearings that were conducted by the bar association before the rules were adopted.

THE COURT: Maybe I used the wrong word, but that's what I was referring to regarding anecdotal material.

MR. WITTMANN: There was anecdotal material. There was evidence that --

THE COURT: There were public hearings; is that correct?

MR. WITTMANN: Yes, there were. There were. Lots of people had an opportunity to come and speak at those hearings, including these plaintiffs. So the bar association did carefully consider and then --

THE COURT: Did Garner wear a bow tie?

MR. WITTMANN: I don't know whether Mr. Garner made it or not. But then the Supreme Court withdrew the rules and

restudied them again, did further empirical work, came back -- they changed some of the rules and repromulgated. So the criticism that no one had any evidence to go forward with these disciplinary rules, Your Honor, just isn't right.

THE COURT: Let me ask you to step over into Mr. Garner's shoes. How could the rules have been drafted narrower in order to support or meet the test of *Central Hudson*? You're now Jim Garner.

MR. WITTMANN: If the ad is inherently misleading, *Central Hudson* doesn't even apply.

THE COURT: That's true.

MR. WITTMANN: My particular point to make to Your Honor is that one of the difficulties we are having in this argument this morning is that the plaintiffs have shown no injury in fact. They haven't shown any concrete and particularized ad that they have proposed that has been turned down by the committee, that has been threatened with some action --

THE COURT: Well, I don't think they should have to do that. If Mr. Bart wants to -- as he probably is. If someone is advertising and they are planning an advertising campaign to reach consumers -- in Mr. Bart's case, let's say personal injury cases -- it seems to me the fear of offending the rules is enough.

Quite frankly, I've sort of overcome any

hesitancy about these preliminary questions. I'm much more interested in getting right to the constitutional issues.

MR. WITTMANN: Well, I understand that, Your Honor, but I would call Your Honor's attention to the recent case of *Harrell v. The Florida Bar*, where the federal court in the Middle District of Florida, I believe it was, found that plaintiffs' fears about what might or might not happen with respect to ads that have not been submitted for review by the committee of the bar were simply based on rank speculation.

THE COURT: I know. I'm not minimizing district court opinions because I think mine are the most important in the world, but the fact of the matter is, if I'm going to discount *Cahill* and wonder whether it's a helpful guide, I don't know that that case is any more helpful to me than *Cahill*.

MR. WITTMANN: One final point.

THE COURT: This is a very important case.

MR. WITTMANN: One final point I want to make on causal connection, though, if I may, Your Honor --

THE COURT: All right.

MR. WITTMANN: -- is it's a standing requirement to be a causal connection. Even if the plaintiffs could establish a concrete injury -- and we don't concede that they have -- there's no causal connection between any injury and the actions of these defendants.

These defendants -- Mr. Plattsmier, the disciplinary board, the chairman of the board -- did not draft these rules. The Louisiana State Bar Association rules committee did. These defendants didn't adopt the rules. The Louisiana Supreme Court did. These defendants are not charged with making the initial determination as to whether any particular ad complies or doesn't comply with the rules. The Louisiana State Bar Association rules committee or a designated subcommittee has that job.

These facts are not disputed, and these facts establish that these plaintiffs can't establish the causal connection required for standing in this case. I think that's an important point, Your Honor, that needs to be considered because without standing you're right back into the *Harrell* case.

The case here is even more compelling than it was in *Harrell*. In *Harrell*, the rules were in effect. They are not in effect here. In *Harrell*, the plaintiffs raised an anticipatory challenge based on their assessment that planned future advertisements might run afoul of the rules. The plaintiffs in that case had not sought an advisory opinion as to whether planned future advertisements would comply with the rules, and the district court held that the plaintiffs didn't have standing and their claims were not ripe. The same results should apply here.

We are not dealing with any specific advertisement. You saw a few that were flashed up on the screen. That was their interpretation of how the rules committee might interpret what the rules say, but the rules committee may well reach a different result. Those disclaimers could have been set on separate frames. They didn't have to be flashed over the face of the person who is paying for the ad. The committee is going to have the responsibility for doing all that.

What they are really asking Your Honor to do is render advisory opinions on how these rules should apply to ads that have not yet been crafted or developed and for which they have not requested any assistance from the bar association. So you are in a situation, Your Honor, where you really are sort of taking over a role that I think courts have traditionally been unwilling to take over, that is, ruling on ads in a vacuum.

As to Public Citizen, they also lack associational standing, Your Honor. I mention that in passing. I think I have covered that in the brief, so I won't beat that to death here. They have failed to identify any specific and particularized harm that their members have suffered or that they are in imminent danger of suffering, no claim to that at all.

Your Honor, Article III of the Constitution

requires a plaintiff to allege a distinct and palpable injury to himself, and Public Citizen's overbreadth argument and its assertion that the mere existence of the challenged rules causes injury also fails. The overbreadth doctrine just is not appropriate in commercial speech cases. The possibility that overbroad regulations may chill commercial speech has not convinced the Supreme Court of the United States to extend the overbreadth doctrine into the commercial speech area.

Even if you entertain an overbreadth argument, Judge, it still fails because it's an exception only to prudential considerations of judicial administration. The plaintiffs still must allege a distinct and palpable injury to themselves, and they just have failed to do it.

Ripeness goes along with it. It's another way of saying essentially the same thing. To be ripe, a claim must not be premature and the injury can't be speculative. A court should dismiss a case for lack of ripeness when a case is abstract or hypothetical, which is what you're dealing with here.

THE COURT: So you're basically arguing that they have pointed to no specific threat of harm or injury.

MR. WITTMANN: That's right. You get down to the point where the courts have deferred to the bar association or the committees that are responsible for conducting the analysis of whether there is or is not a violation. At that point in

time, then you have something specific that you can deal with.

They have an opportunity to go to the committee, present an ad, if they want to get a ruling in advance, and that they can get that ruling without fear of any reprisal whatsoever. So there is an opportunity there. If it's turned down, then you go on from there to litigation, if you want to do that, but you don't throw out the baby with the bathwater and throw all the rules out based on speculative --

THE COURT: I understand your argument.

MR. WITTMANN: -- guesses as to what might happen in the future, Judge.

THE COURT: I really short-circuited the plaintiffs on that argument. Since you have raised it so passionately, I'm going to let them respond briefly.

MR. WITTMANN: Well, I think we can really sort of sum it up that courts generally don't want to give advisory opinions. I know you don't want to give advisory opinions. I would be remiss if I didn't mention that Justice Scalia doesn't like advisory opinions.

THE COURT: I once was presiding over an abortion case and the lawyer quoted -- may his soul rest in peace -- my dear friend and mentor, Justice Rehnquist, and I couldn't resist the temptation to respond by quoting Justice Stevens. I'll have to find something from Justice Ginsburg, or maybe my old pupil Judge/Justice -- whatever -- Sotomayor will say

something that I can throw back at a lawyer one of these days when they bring up my buddy. At any rate, go ahead. What did Justice Scalia say that you want me to hear?

MR. WITTMANN: "Commercial speech is not as likely to be deterred as noncommercial speech and therefore does not require the added protection afforded by the overbreadth approach." That's his opinion in *Ohralik v. Ohio State Bar Association.*

THE COURT: Which is not a deviation from existing precedent.

MR. WITTMANN: I think that's correct, Your Honor. I think we have made the point that these rules don't reach noncommercial speech, although the Wolfe plaintiffs have alleged in their complaint that it's uncertain and unclear whether the challenged rules apply to discussions and discourse about legal topics conducted on the Internet. I think it's clear from the rules that the rules apply only to advertising, that's it. We are not trying to regulate noncommercial speech, and I don't believe the rules do.

THE COURT: All right.

MR. WITTMANN: On their face, the rules apply only to advertisements --

THE COURT: Back up one second. What about Mr. Wolfe's argument that nothing was done in the way of the bar association discharging what is its constitutional duty to

gather evidence that would support the rules regarding the Internet? He said they just don't do anything.

MR. WITTMANN: The rules relate to advertising of any sort, whatever medium you use it in. As I mentioned at the outset, you can qualify under the safe harbor rules and not have to go to the bar association at all to put your pop-up ads on the Internet. If you are actually advertising on the Internet and showing a lawyer ad there, you are subject to the requirements of the rules.

THE COURT: Go back to my original question to you. You're now Mr. Garner. How could the rules have been drafted narrower?

MR. WITTMANN: I'm Mr. Garner?

THE COURT: Yes. You have a bow tie on, believe it or not.

MR. WITTMANN: Okay. How could the rules be drafted narrower?

THE COURT: That has constitutional implications. I know your point was: If the rules are inherently misleading, then *Central Hudson* doesn't apply. Let's assume *Central Hudson* does apply. What is deficient about the rules, "Mr. Garner," and how could they have been more narrowly drawn to satisfy the *Central Hudson* test?

MR. WITTMANN: I think that under *Central Hudson*, Your Honor, commercial speech can be regulated if the

government establishes the substantial interest in support of its regulation, that the restriction on commercial speech directly and materially advances that interest, and that the regulation is narrowly drawn.

Now, focusing on the "narrowly drawn" part, in the case of these rules, I suppose Mr. Garner would say that, if I'm Mr. Garner now, "Well, you don't need to make these disclaimers that are provided for in the rules."

Well, it seems to me, Your Honor, that there's a difference between disclosures and disclaimers, and disclaimers are a way of providing truthful information. I'm now slipping away from being Mr. Garner.

THE COURT: I knew you would.

MR. WITTMANN: That would be one of the things I would assume he would protest is having disclaimers shown as a part of the ad. I think that in terms of what else could be done to narrow the rules down further --

THE COURT: Your colleague is trying to slip you a note to help you.

MR. WITTMANN: Good. I need help. I need help.

She reminds me that I do not represent the bar association, I can only refer to the public record at this point in time, and I can't speak to all that was considered by the drafting committee.

Just speaking generally in talking with you, I

suppose there were a few things that could have been done differently to make them a little narrower. That's not to say that even if you made them narrower we wouldn't still be here today with this fight because we don't have a specific concrete example of what it is they are complaining about.

They are making a facial attack on the constitutionality of these rules. We have got evidence that was developed and is in the record with respect to what was done to enable the bar association to reach the decisions that it reached and for the Supreme Court to adopt the rules. In fact, the study was not conducted once, it was conducted twice. There is substantial evidence in the record as to what was done and there's a justification --

THE COURT: Refresh my memory. Was the second study done after the lawsuit was filed?

MR. WITTMANN: Yes.

THE COURT: Were the rules changed in any way after the lawsuit was filed?

MR. WITTMANN: Yes.

THE COURT: That's why there have been some deferrals of this hearing date.

MR. WITTMANN: Right. We took into account the complaints that were made in this lawsuit, went back and said, "You know, maybe they have a point here," and we changed a few of the rules, and now we are here back again. That's why I

said I can narrow them done as much as I want, but Mr. Garner is going to be back here again attacking these rules.

THE COURT: Facially.

MR. WITTMANN: Facially. You know, if you are making a facial attack, you have got a pretty heavy burden to carry, and that's what they are doing here. They are not making it as applied; they are making a facial attack.

THE COURT: All right.

MR. WITTMANN: I think I have covered most of the points I wanted to make.

THE COURT: You don't have to take up all your time.

MR. WITTMANN: I know that. I know that.

THE COURT: I do want to give Mr. Garner some time to respond to your standing argument because I actually told him to assume standing.

MR. WITTMANN: You asked Mr. Garner one question -- I think I got it right -- must there be actual evidence of false, misleading, or deceptive in order to regulate.

THE COURT: Right, as opposed to evidence that implies or infers deception.

MR. WITTMANN: Right. Once you go there --

THE COURT: Let's make one thing clear. When we talk about deception, we are not talking about intentional deception. I'm simply talking about an ad that could result in some form of delusion or guile --

MR. WITTMANN: I understand.

THE COURT: -- not intended. I would never, ever accuse a lawyer who advertises, who I would consider a colleague of mine, of intentionally seeking to deceive the public. If there are any media in here, I certainly don't want that sort of inference to be the headline.

MR. WITTMANN: Where I was going with that is --

THE COURT: It's not true.

MR. WITTMANN: -- in answering your question, that question recognizes that there's a need for a real concrete case in order to deal with these constitutional questions. I think trying to deal with them in a vacuum, trying to deal with them in a global way, without having specific ads to shoot at, I don't think cuts it.

Insofar as *Central Hudson*, going back to that, Your Honor, the regulation advancing the state interest need not necessarily be the least restrictive means by which to do so. It simply must advance the state interest in a direct and material way and be in reasonable proportion to the interest served.

I don't think anybody can quarrel with the fact that the bar association and the Supreme Court have a direct and immediate interest in the regulation of lawyers, the promulgation of truthful and nondeceptive advertising material to the general public, and they are doing their very best to

discharge that obligation to make sure that people are given truthful information.

They're not trying to shut down lawyer advertising. The very first preamble to the rules says that they approve of advertising and they are providing these rules in order to guide lawyers as to how to make that advertising truthful and acceptable to the public.

So the state's interest in ensuring the accuracy of commercial information in the marketplace is substantial, and the rules are in reasonable proportion to the interest served. I'm not going to cite Your Honor to Scalia again.

THE COURT: Poor Justice Scalia. He has lost all credibility simply by being my close friend.

MR. WITTMANN: As to the chilling effect arguments that were made, there's no evidence that plaintiffs' speech has been chilled or they have been forced to self-censor their speech in any way as a result of the adoption of these rules. Until they actually have some application of the rules to them, they really have -- back to where I started -- no case of controversy under Article III, they are out of here, and I would move Your Honor to dismiss their case.

THE COURT: Thank you. Thank you very much. I want to thank everybody for their hard work in this case.

Mr. Garner, standing, the *Harrell* case in Florida, and the Court should not render an advisory opinion.

MR. GARNER: In this context, you're not. It's interesting they spend so much time talking about standing and very little time talking about constitutionality. It probably has its own implications.

The Fifth Circuit in *Association of Community Organizers for Reform Now v. Fowler*, 178 F.3d 350, 1999 --

THE COURT: Is this a new cite?

MR. GARNER: No. It's in the papers, but this is why I think you are dead right on standing. I'm just going to reiterate my arguments. "An identifiable trifle" --

THE COURT: When you said "community organizer," it sent chills. I thought it was maybe a new citation.

MR. GARNER: No. "An identifiable trifle" justifies review by the court. The Supreme Court in *Virginia v. American Booksellers,* the injury is "one of self-censorship; a harm that can be realized even without an actual prosecution."

THE COURT: That's the self-censorship --

MR. GARNER: Correct.

THE COURT: That's a Fifth Circuit case; right?

MR. GARNER: Yes. Most recently, the Fifth Circuit in *Randra v. Brown*, 566 F.3d 515, 519 (2009), "[W]hen dealing with . . . statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary interest."

They have not come forward and said that Mr. Bart's -- and he has ads: "I've gotten $300,000," "I have gotten $60,000," "I have gotten $1 million." Those are past results. They have not said they are not going to prosecute that. So the Fifth Circuit says Your Honor should presume prosecution absent compelling interest to the contrary.

THE COURT: That is the purpose of the rules.

MR. GARNER: Right. Why did they promulgate rules if they are not going to enforce them? Then the bar is wasting our time and energy.

THE COURT: I wouldn't comment about Louisiana politics.

MR. GARNER: Mr. Wittmann loves Florida cases, so I will go to a Florida case.

THE COURT: That's because that's where he keeps his boat.

MR. GARNER: *Edenfield v. Fane*, 507 U.S. 761 (1993), where an accountant --

THE COURT: Is that a district court or --

MR. GARNER: That's Scalia's Court.

THE COURT: Oh, it's a Florida case that went up? Okay.

MR. GARNER: It's a Florida case that went all the way up. In that case, the Court acknowledged the plaintiff had not engaged -- *had not engaged* -- in the prohibited forms of

commercial speech but alleged that but for the prohibition he would have done so, and the Court found a justiciable controversy.

Here, Mr. Bart and others are engaging in things that are facially prohibited by the rule, so I respectfully submit, under the Fifth Circuit and Supreme Court jurisprudence, you need to assume they promulgated the rules for a reason: To prosecute. Absent compelling evidence to the contrary -- they don't have it -- we win standing, I think. I think that's dead on.

Mr. Bart's affidavit says he spent many millions of dollars to come up with "One Call, That's All." He also advertises past results, and they don't limit past results. They just say "past results." I'll be Phil Wittmann being Jim Garner. All they had to say --

THE COURT: I'm confused now.

MR. GARNER: I know. I don't think you need these rules, and I said it. We do have standing to sue the defendants. They enforce the rules. That goes back to *ex parte Young*. You sue the people who enforce the rules. We maybe could have sued other people, but you sue the enforcer. You don't have to go all the way back in the chain.

Mr. Plattsmier -- and that letter to Harvey Lewis is in the record -- says, "We haven't had any problems," because only lawyers complain. This is about a

bunch of lawyers complaining about market share, which I think you can glean from the public hearings because Your Honor reads the public hearings, or your law clerk reads the public hearings.

THE COURT: Watch yourself.

MR. GARNER: You will note that, first of all, they gave CLE credit for lawyers to attend. It was a bunch of lawyers asking questions. There was no what I, Jim Garner, would humbly submit is the type of rigorous analysis to define a state interest, to find a problem, to then go solve it.

THE COURT: Well, there was a heck of a lot more than in *Cahill*, though. I think you have to grant that.

MR. GARNER: I think there was a lot more of nothingness, though. We have a bunch of transcripts, yes. We have a bunch of transcripts of a bunch of lawyers --

THE COURT: But was it limited to lawyers or were other --

MR. GARNER: It was not limited to lawyers, but if Your Honor reads the transcripts -- it was a bunch of lawyers, essentially. You don't have somebody saying, "Look, I was misled by Mr. Bart's past results ad. Let me tell you, Mr. Lemmler and Mr. Plattsmier, how I was misled," and the bar goes, "Oh, there's a real discernible injury here, and let's go solve it." It's a bunch of lawyers asking questions, trying to understand how to protect their market share. That doesn't get

you over the constitutional hurdle.

THE COURT: You're not accusing the bar association of bad faith in --

MR. GARNER: Absolutely not. Like I said, I think everybody is here in good faith. I think there was a political issue -- which is in the record because that's how all of this came up -- and people are trying to deal with political issues. The problem is, in this context, that violates the Constitution, the way it was done. So unless you have any more questions, I will sit down.

THE COURT: No.

Mr. Wittmann, do you want a brief response?

MR. WITTMANN: Just very briefly, Your Honor. First of all, the cases that Mr. Garner were citing to you, *Edenfield* and these other cases, I think mainly didn't deal with commercial speech. Those were cases dealing with noncommercial speech, primarily.

As to only lawyers complaining, these meetings that were held were open to the public. A careful study was made by the committee, and they did the analysis that was not done in the New York case. Frankly, I don't know what else the committee could have done in order to craft rules that would be acceptable to regulate lawyer advertising than what was done. Thank you, Your Honor.

THE COURT: Thank you all. I want to thank both

sides. I want to thank you for the professionalism with which you conducted yourself. Maybe I'll, if I don't violate the Constitution, put out a commercial complimenting both sides.

I will take all of your comments and your papers very seriously. This is a very important case. I will get an opinion out for the litigants and for the public just as soon as is possible. I promise not to delay.

MR. GARNER: Thank you, Your Honor.

THE COURT: Thank you. Court is adjourned. Thank you very much.

THE DEPUTY CLERK: All rise.

(WHEREUPON the Court was in recess.)

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CERTIFICATE

I, Toni Doyle Tusa, CCR, FCRR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter