PUBLIC CITIZEN LITIGATION GROUP
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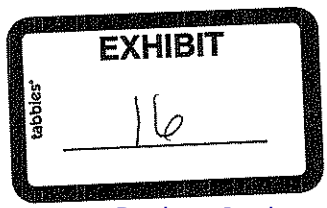
Comments of Public Citizen Litigation Group
on the Proposed Amendments to Rules Governing Lawyer Advertising

June 5, 2007

Public Citizen Litigation Group ("PCLG") is filing these comments on the proposed amendments to the rules governing lawyer solicitation and advertising drafted by the Rules of Professional Conduct Committee. Like specific provisions of the current rules, the proposed amendments would prohibit the communication of truthful, non-misleading information about legal services to Louisiana consumers. PCLG believes the amendments would violate the First Amendment of the U.S. Constitution. Therefore, we urge that the Proposed Rule 7.2(b)(1)(B) and (d)-(J) and Rule 7.1(a)(v)-(vii) be withdrawn, and that the state instead rely on enforcement of existing Rule 7.1(a) to vindicate its legitimate interest in protecting consumers from false and misleading advertisements. We also urge that the Proposed Rule 7.4(a) governing attorney solicitation be withdrawn, and that current Rule 7.4 be modified to place a reasonable temporal limitation on any restriction of in-person and telephone solicitation.

Interest of Public Citizen Litigation Group

PCLG is a nonprofit public interest organization located in Washington, D.C. It is a division of Public Citizen, a nonprofit advocacy organization with approximately 100,000 members nationwide, 375 of whom live in Louisiana. PCLG has represented clients domiciled in Louisiana before federal courts. Moreover, Public Citizen has an interest in protecting its



Louisiana members, who would be deprived of information about their legal rights and available legal services under the proposed amendments.

As an organization devoted to defending the rights of consumers, Public Citizen has frequently opposed false and misleading advertising, while at the same time defending the First Amendment right of speakers to engage in truthful, non-misleading commercial speech. Among other cases, PCLG attorneys argued and won *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), in which the Supreme Court for the first time recognized a First Amendment right to commercial speech, and *Edenfield v. Fane*, 507 U.S. 761 (1993), in which the Supreme Court struck down a ban on in-person solicitation by certified public accountants. PCLG's support for free speech in the commercial context is based in part on the recognition that truthful commercial speech enhances competition and ensures that consumers will be provided with information that may be useful to them—such as information on pricing and alternative products and services. As the Supreme Court noted in *Virginia State Board of Pharmacy*, a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

PCLG is particularly interested in the right to engage in truthful legal advertising because commercial speech in this context not only encourages beneficial competition in the marketplace for legal services, but can also educate consumers about their rights, inform them when they may have a legal claim, and enhance their access to the legal system. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646-47 (1985). In the past, PCLG has commented on proposed revisions to lawyer advertising rules and litigated cases where these rules have

unjustifiably restricted the right to commercial free speech. In *Zauderer*, PCLG successfully challenged the decision of the Ohio Supreme Court to discipline a lawyer for taking out ads informing women about his legal services in connection with Dalkon Shield litigation. *Id.* Public Citizen was among the plaintiffs who successfully challenged Mississippi's restrictive advertising rules in *Schwartz v. Welch*, 890 F. Supp. 565 (S.D. Miss. 1995). Most recently, PCLG filed suit to enjoin enforcement of New York's new attorney advertising rules that, like Louisiana's proposed rules, place unconstitutional limitations on lawyers' right to disseminate truthful, non-misleading advertisements. PCLG has also challenged other anticompetitive bar rules that harm consumers. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (PCLG attorneys successfully argued that a bar's minimum fee schedule violated the Sherman Act).

PCLG has significant experience with the subject matter of the proposed amendments. For the reasons outlined below, we believe that the amendments are not motivated by a state interest substantial enough to warrant broad restrictions on commercial speech, and they therefore would likely face a successful First Amendment challenge if adopted.

Analysis

The proposed rules violate the First Amendment because they propose restrictions on commercial speech that is neither false nor misleading. Attorney advertising and solicitation are forms of commercial speech that are protected by the First Amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). The Supreme Court has repeatedly held that excessive restrictions on commercial speech violate the Constitution and cannot be enforced. PCLG believes that the proposed rules would both create new and reinforce existing restrictions on

commercial speech that unconstitutionally limit lawyers' rights to communicate truthful information to consumers.

First, the proposed rules would impose new and unjustified restrictions on the content of attorney advertising. Under the current rules, attorney advertising is prohibited from containing "false, misleading or deceptive communication." Rule 7.1(a). Among other restrictions, advertising violates this rule if it compares a lawyer's services with another's unless the comparison can be factually substantiated, 7.1(a)(v), contains an endorsement by a public figure without disclosing that the endorser is not a client or is being paid, 7.1(a)(vi), or fails to disclose that a non-client or non-lawyer portrays a client or lawyer, 7.1(a)(vii). The proposed rules would extend the restrictions much further. Under the proposed rules, attorneys cannot refer to past successes, Proposed Rule 7.2(b)(1)(D), cannot "promise results," 7.2(b)(1)(E), cannot compare their services with other attorneys unless the comparison can be factually substantiated, 7.2(b)(1)(G), cannot include a portrayal of a client by a non-client or reenact scenes that are not "actual or authentic," 7.2(b)(1)(H), cannot portray a judge, a jury, a lawyer by a non-lawyer, or a firm as a fictionalized entity, 7.2(b)(1)(J), cannot create advertising that resembles a legal pleading, notice, or contract, 7.2(b)(1)(K), and cannot use a nickname, motto, or moniker. 7.2(b)(1)(L).

The proposed rules would also reinforce and extend the broad restrictions Louisiana already places on attorney solicitation. Under the current rules, attorneys are prohibited from soliciting prospective clients "in person, by person to person verbal telephone contact or through others acting at his request or on his behalf[.]" Rule 7.3(a). The current rule bans in-person and telephone solicitation indefinitely. The proposed rule extends the indefinite ban on solicitation to

communication with prospective clients via telegraph and facsimile, Proposed Rule 7.4(a), and prohibits written solicitation within thirty days of an accident or disaster when the solicitation concerns an action for personal injury or wrongful death. *Id.* 7.4(b)(1)(A).

It is unlikely that even the current rules governing attorney advertising and solicitation would withstand constitutional scrutiny. The proposed rules extend both forms of restrictions even farther. The Committee should take this opportunity to reject the proposed rules and revise its rules in a manner consistent with the First Amendment.

I. The Proposed Restrictions on Lawyer Advertising Are Unconstitutional.

The current ban on attorney advertising that contains false, deceptive, or misleading material misrepresentations of fact fully vindicates the state's legitimate interest in protecting consumers. Rule 7.1(a). The current rules extend farther than necessary to protect that interest, however, and will be even more constitutionally suspect if the proposed rules are adopted. The proposed rules add a litany of restrictions that neither benefit consumers nor advance any legitimate state goal. Indeed, the amendments appear to be intended less to prevent fraud than to prohibit the most effective forms of lawyer advertising and to impede competition for legal services.

A state ordinarily may only ban commercial speech if it is actually or inherently false. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990). "Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994). Importantly, a state's assertion that speech is misleading

is not enough to justify banning it. *Id.* at 146. Rather, the state must meet its burden of "demonstrat[ing] that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Id.* (quotation omitted). The Supreme Court has repeatedly subjected claims by bar authorities that particular forms of attorney advertising are misleading to rigorous and skeptical scrutiny, and has, for the most part, rejected those claims. *See, e.g., id.* at 143-45; *Peel*, 496 U.S. at 101-10; *Zauderer*, 471 U.S. at 639-49; *In re RMJ*, 455 U.S. 191, 203 (1982); *Bates*, 433 U.S. at 381-82.

The proposed amendments would prohibit a variety of common advertising techniques that are unlikely to mislead any consumers. The rules would bar using courtrooms or courthouses as props and using actors to portray clients and judges. Proposed Rule 7.2(b)(1)(I)-(J). They continue to prohibit the use of non-lawyer actors to portray lawyers and the use of non-lawyers or celebrity spokespeople—although, without explanation, this rule would not prohibit a lawyer from hiring an actor or celebrity spokesperson who also happens to be a lawyer. Proposed Rule 7.2(b)(1)(J).[1] The rules would also forbid the use of "a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter." Proposed Rule 7.2(b)(1)(L). Moreover, the rules would prohibit "reenactment of any events or scenes or pictures or persons that are not actual or authentic," a provision that appears to be targeted at dramatizations such as the staging of a generic car accident scene to illustrate the sort of services provided by a firm. Proposed Rule 7.2(b)(1)(I).[2]

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[1] The rules also prohibit "the portrayal of a law firm as a fictitious entity," but it is not clear what this provision is intended to mean or the harm it is intended to prevent. Proposed Rule 7.2(b)(1)(J).

[2] This provision is ambiguous, however, because it is unclear whether the rule is targeted only at fictional events (which is suggested by the words "not actual or authentic"), or whether it

The common thread among both the current restrictions and the proposed additions is that they appear to be targeted at basic techniques used in effective advertisements. There is nothing actually or inherently misleading, however, about any of these techniques. Consumers are accustomed to the notion that actors, mottos, and dramatized scenes appear in commercials, and are unlikely to make the assumption that everyone and everything they see in a commercial is literally real. Depictions of a generic attorney or judge in a courtroom scene, or a generic client in a depiction of a car accident, are not likely to fool any consumers into believing that actual events occurred exactly as depicted; nor could this belief, even if it were held, possibly be material to the consumer's decision about whether to hire the attorney. Indeed, the Supreme Court observed in *Zauderer* that "because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising." *Zauderer*, 471 U.S. at 648-49. Similarly, if consumers saw Andy Griffith endorsing a law firm as the TV character "Matlock," they would be capable of understanding that Griffith is a paid celebrity endorser.

Moreover, we are not aware of any evidence that would support the conclusion that the prohibited practices are misleading or that the broad restrictions in the proposed amendments are an effective means of attacking any problems they may pose. Restrictions on commercial speech cannot be upheld on the basis of "little more than unsupported assertions" without "evidence or

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is instead meant to prohibit reenactment of events that actually occurred (which would explain the use of the word "reenactment"). Most likely, the rule was intended to cover either case, but this is not apparent from the rule's plain language.

authority of any kind." *Zauderer*, 471 U.S. at 648. Rather, the state must be prepared to "back up its alleged concern" that particular statements "would mislead rather than inform." *Ibanez*, 512 U.S. at 147. Nor is there any evidence that the targeted forms of communication could not be remedied without prohibiting the speech entirely, such as by requiring a disclaimer in certain cases. *In re RMJ*, 455 U.S. at 203 ("[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may be presented in a way that is not deceptive.").

The Supreme Court has emphasized that the First Amendment generally does not tolerate restrictions on commercial speech that are premised "on the offensive assumption that the public will respond irrationally to the truth." *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 503 (1996). The Court has also "reject[ed] the paternalistic assumption" that consumers of legal services "are no more discriminating than the audience for children's television." *Peel*, 496 U.S. at 105. Indeed, a state's general distaste for lawyer advertisements does not allow it to restrict truthful, non-misleading advertising to any greater extent than it can restrict similar advertising in other industries. *Zauderer*, 471 U.S. at 646-47 ("Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are [] equally unacceptable as applied to [attorney] advertising."). Yet, the restrictions on advertising under both the current rules and the proposed amendments would be unthinkable in other fields of commerce. For example, a state could never justify regulating advertisements for athletic shoes to prohibit the use of actors to play athletes, referees, or spectators; the depiction of sports stadiums, tracks, or fields; the dramatization of sporting events; the use of celebrities; or the use of mottos that imply effectiveness (for example, "Be like Mike").

For many of the same reasons that PCLG objects to Proposed Rule 7.2, PCLG has sued the New York disciplinary authorities to enjoin enforcement of that state's new advertising regulations. *See Alexander v. Cahill*, No. 5:07-CV-117 (N.D.N.Y.). As initially proposed, New York's rules on advertising were more restrictive of constitutionally protected speech than the rules proposed here.[3] After Public Citizen filed comments, the Disciplinary Committee adopted rules that placed many of the same restrictions on attorney advertising that are currently before this Committee in the proposed rules. PCLG has sought an injunction to prevent the rules from being enforced because it believes that even after revision, the New York rules threaten to unconstitutionally infringe on attorneys' First Amendment right to engage in commercial speech and unnecessarily deprive New York consumers of information about legal services.

In addition to advertising techniques such as dramatization, both the current and proposed rules impose additional requirements on a wide range of speech that would satisfactorily cover most statements about a lawyer's abilities and past successes. For example the rules prohibit advertising that compares an attorneys' services with those offered by competitors "unless the comparison can be factually substantiated." Rule 7.1(a)(v), Proposed Rule 7.2(b)(1)(G). The kinds of comparisons that are most often featured in advertisement, however, are not susceptible to factual substantiation. An attorney will not be able to prove that he or she works harder for or fights harder on behalf of clients, for example, but there is no evidence to suggest that these statements would be likely to mislead consumers.

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[3] New York's proposed rules placed restrictions on advertising by attorneys who were not motivated by pecuniary gain and placed extremely onerous restrictions on websites maintained by attorneys. Following submission of PCLG's comments, New York limited the application of some of its rules to commercial speech and rejected the most troubling aspects of its restrictions on web-based advertising.

The proposed rules extend the restrictions in the current rules by prohibiting attorney advertising that contains references to past successes or results obtained, as well as statements that "promise results." Proposed Rule 7.2(b)(1)(D)-(E). We know of no proof that truthful statements about an attorneys' past successes or puffery about future results are particularly likely to mislead consumers. On the contrary, consumers are unlikely to make the entirely irrational conclusion that an attorney's success in one case would necessarily lead to success in a different, unrelated case. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) ("We have [] rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."). Even if, theoretically, consumers were misled by this sort of advertising, they would be set straight as soon as they consulted with attorneys regarding the merits of their individual claims. Attorneys who advertise for clients, particularly those who represent their clients on a contingency basis, have no incentive to trick consumers into pursuing legal claims that have no reasonable probability of succeeding in court, and there is no evidence that this sort of trickery is in fact occurring.

In short, the proposed rules would prohibit or unreasonably burden a wide range of speech for which there is no evidence of any risk that consumers would be misled. Instead of helping consumers, the proposed rules would serve only to stifle legitimate competition, making it more difficult for consumers to learn of their rights and ultimately making legal services more expensive for everyone. PCLG urges the Committee to reject the proposed rules and to take this opportunity to remove those restrictions on attorney advertising that do not actually protect consumers.

II. The Existing and Proposed Restrictions on Solicitation Unconstitutionally Restrict Commercial Speech.

The proposed rules also restrict the means by which and circumstances in which attorneys can solicit prospective clients with whom they have no pre-existing relationship. *See* Proposed Rule 7.4. Presumably, the ban is intended to protect Louisiana citizens' privacy, especially in the aftermath of trauma, and to protect citizens from fraud or overreaching by attorneys. The rule proposes two classes of restrictions: (1) a thirty-day ban on written communication after an accident or disaster, *see* Proposed Rule 7.4(b)(1)(A); and (2) a total ban on in-person or telephone communication, *see id.* 7.4(a). Even assuming that the temporal limitation on written solicitation would survive constitutional scrutiny, the total ban on in-person and telephone solicitation would not.[4]

The Supreme Court has held that the communication of truthful, non-deceptive information to solicit clients is protected by the First Amendment. *See Edenfield*, 507 U.S. at 765 ("Whatever ambiguities may exist at the margins of the category of commercial speech, it is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply." (citations omitted)); *United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."). Limits on commercial speech must be narrowly drawn to serve a substantial state interest to survive First Amendment scrutiny. *Edenfield*, 507 U.S. at 767; *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980); *see also DeSalvo v. State*, 624 So.2d 897, 900 (La.

[4] Although the Supreme Court upheld Florida's thirty-day restriction on written solicitations, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995), we are not aware of any evidence demonstrating the need for a similar restriction in Louisiana.

1993). To determine whether a restriction on commercial speech is constitutional, the Committee should consider whether Louisiana has a substantial interest in the restriction, whether the restriction directly and materially advances that interest, and whether the restriction is narrowly drawn. *Central Hudson*, 447 U.S. at 564-65.

Both the current and the proposed rules go much further than necessary to advance legitimate state interests. First, both bans purport to be indefinite: "[A] lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior lawyer-client relationship, in person, [or] by person to person verbal telephone contact." Proposed Rule 7.4(a). *See also* current Rule 7.3. Presumably, the total ban is designed to protect Louisiana citizens from speech that may invade their privacy, especially after a traumatic accident or event. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995). Assuming that the state has demonstrated such an interest, that interest would be equally well-served by a ban on in-person and telephone solicitation for a finite period of time after an accident or traumatic event, similar to the limited restriction on written solicitation in Proposed Rule 7.4(b)(1)(A). A limited temporal restriction may serve the state's interest in protecting accident victims' privacy without infringing as much on the constitutional right to speak and to receive speech. *Went For It*, 515 U.S. at 633 (holding that a "brief 30-day ban" on written solicitation is constitutional); *compare Revo v. Disciplinary Bd.*, 106 F.3d 929, 935-36 (10th Cir. 1997) (total ban on mail solicitation of accident victims not reasonably tailored to support a substantial state interest).

PCLG's belief that an indefinite ban on in-person and telephone solicitation is constitutionally suspect is buttressed by *Speaks v. Kruse*, 445 F.3d 396 (5th Cir. 2006), in which

the Fifth Circuit struck down a similar Louisiana statute that restricted the rights of health-care providers to solicit clients. The restriction at issue in *Speaks* prohibited health-care providers from soliciting patients and potential patients who might be "vulnerable to undue influence." *Id.* at 398 (quoting La. Rev. Stat. Ann. § 37:1743). Like the proposed rule here, the restriction in *Speaks* could be read as banning solicitation indefinitely, rather than banning solicitation for a limited period of time when patients are the most vulnerable, such as immediately after an accident. The Fifth Circuit struck down the statute because it was not narrowly tailored to the state's interest in protecting its citizens from solicitation after a traumatic event; the court emphasized that the state's interest in protecting its citizens from overreaching would be equally well-served by restricting solicitation for a *finite period of time*. *Id.* ("It is this chilling uncertainty that supports the use of a bright line time-out period reflecting the State's judgment of when the risk of undue influence is too great."); *see also Bailey v. Morales*, 190 F.3d 320, 324 (5th Cir. 1999) ("[S]uch a broad ban *lacking a time limit* does not directly and materially advance the State's admittedly important interests because it sweeps too many extraneous activities within its purview." (emphasis added)). Both the current rule and the proposed rule suffer the same fatal defect as the restriction in *Speaks*—an unlimited ban on solicitation—and would thus likely be struck down for the same reasons.[5]

There is no reason to believe that the unlimited ban on in-person and verbal solicitation by attorneys will be upheld in light of *Speaks*. Rather than adopting an unconstitutional restriction, PCLG urges the Committee to adopt a rule that limits in-person and telephone

[5] The rules also extend the ban on in-person and telephone solicitations to faxes and telegraphs. Proposed Rule 7.4(a). Assuming attorneys actually use these forms of communication for solicitations, it is hard to believe that they would have an undue influence on potential clients.

solicitation for some reasonable finite period of time (such as thirty days) after specific traumatic events. *See Speaks*, 445 F.3d at 401 (praising the use of a "bright line time-out period" in restrictions on solicitation to limit speech when "the risk of undue influence is too great"); *Bailey*, 190 F.3d at 324. To protect this constitutionally protected speech, the Committee should tailor restrictions on solicitation to protect only those citizens who are truly in need of the state's protection.

Second, the unlimited ban on in-person and telephone solicitation is not narrowly tailored because it will inevitably chill speech in a wide range of cases even when there is little risk that the recipient of solicitation will be vulnerable to fraud or overreaching. Under the rule, an attorney who serves corporate clients will be banned from offering services to the representatives of businesses, even though those businesses are not likely to be susceptible to manipulation or persuasion. *Edenfield*, 507 U.S. at 771 (no evidence that sophisticated businesses would be overly susceptible to solicitation by CPAs). Similarly, the ban would preclude a real estate attorney from contacting borrowers who have been victimized by banks known to have engaged in illegal mortgage lending practices, even though such individuals would not be inherently more susceptible to manipulation than anyone else. There is simply no reason to believe that these kinds of solicitations would increase the likelihood of harm to Louisiana citizens, or that a total ban on such solicitation will alleviate any harm. *See Edenfield*, 507 U.S. at 771 (striking down restriction on in-person solicitation of business clients by CPA because there was no evidence that solicitation "creates the dangers of fraud, overreaching, or compromised independence that the [State] claims to fear"). Like the restrictions in *Edenfield, Speaks*, and *Bailey*, a restriction

that bans in-person and telephone solicitation by attorneys, no matter who the prospective clients may be, does not survive constitutional scrutiny.

Finally, the total ban on in-person and verbal solicitation is not narrowly tailored to protect Louisiana citizens from fraudulent or deceptive speech, because the restriction "sweeps too many extraneous activities within its purview." *Bailey*, 190 F.3d at 324. The restriction's overbreadth is highlighted by the proposed restriction on written communication, Proposed Rule 7.4(a)(1)(D), which contains a temporal restriction as well as a ban on "false, misleading or deceptive" communication. PCLG urges the Committee to address its concerns about fraudulent or deceptive in-person and telephone solicitation in a similar manner, by proscribing false, deceptive, or misleading communications. Given the availability of a narrow rule that will protect Louisiana citizens from fraudulent or deceptive speech without running afoul of the First Amendment, the Committee should reject Proposed Rule 7.4(a) and should modify the current rule governing solicitation. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) ("[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.").

Nothing in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) suggests that the proposed total ban on in-person and telephone solicitation would be constitutional. The conduct at issue in *Ohralik* was significantly different from the conduct the proposed rules seek to regulate; Ohralik did not merely engage in in-person solicitation, but rather repeatedly solicited an eighteen-year-old woman who had recently been in a serious car accident. *Id.* at 449. The solicitation took place in her hospital room, while the woman was in traction. *Id.* at 450.

Ohralik secretly recorded conversations with the woman's family and her co-passenger, and disregarded attempts by those prospective clients and their families to sever any communication or representation. *Id.* at 450-52.

Ohralik did not hold that total bans on solicitation, as a general matter, are constitutionally permissible, but rather stands for the limited proposition that Ohralik's specific conduct was not entitled to constitutional protection. *Ohralik*, 436 U.S. at 463 n.20 ("[A]ppellant does not rely on the overbreadth doctrine under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him. On the contrary, appellant maintains that DR 2-103(A) and 2-104(A) could not constitutionally be applied to him." (citations omitted)). Because Ohralick did not challenge the solicitation on ban on its face, the Court's holding in *Ohralik* cannot be read as sanctioning any ban on in-person solicitation, let alone a complete ban of the kind proposed here. *See Edenfield*, 507 U.S. at 765 (*Ohralik* did not hold that all personal solicitation is without First Amendment Protection).[6] Given the myriad of ways that Louisiana could protect its citizens from the kind of conduct described in *Ohralik* without prohibiting all in-person and telephone solicitation, the Committee need not and should not rely on a total ban to achieve that end. *See Discovery Network, Inc.*, 507 U.S. at 417 n.13 (noting that the availability of obvious less-burdensome alternatives to a restriction on commercial speech is central to determining whether the restriction is narrowly tailored).

[6] Furthermore, as the Fifth Circuit has noted, *Ohralik* was decided before the Supreme Court's holding in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), which requires that a restriction on commercial speech be narrowly tailored to the State's interest. *See Speaks v. Kruse*, 445 F.3d 396, 401 (5th Cir. 2006).

Conclusion

The rules in their current form are an unconstitutional curtailment of both commercial and noncommercial speech. Given that the rules are not narrowly tailored to address legitimate state interests, the rules appear to be motivated by a basic discomfort with attorney advertising and solicitation. The Supreme Court has squarely held that discomfort is not a legitimate basis on which to adopt rules regulating attorney advertising. *See Zauderer*, 471 U.S. at 647-48. We urge that the Proposed Rule 7.2(b)(1)(B) and (d)-(J) and Rule 7.1(a)(v)-(vii) be withdrawn, and that the state instead rely on enforcement of Rule 7.1(a)(i)-(iv) to vindicate its legitimate interest in protecting consumers. We also urge that the Proposed Rule 7.4(a) governing attorney solicitation be withdrawn, and that current Rule 7.3 be modified to place a reasonable temporal limitation on any restriction to in-person and telephone solicitation.

RESOLUTION PROPOSED BY THE
RULES OF PROFESSIONAL CONDUCT COMMITTEE
OF THE LOUISIANA STATE BAR ASSOCIATION

WHEREAS, the LSBA Ethics 2000 Committee, in its final report to the LSBA House of Delegates in January of 2003, submitted no recommendations for modification of the Louisiana Rules of Professional Conduct concerning lawyer advertising in Louisiana ("Article 7 – Information About Legal Services"); and

WHEREAS, the LSBA Rules of Professional Conduct Committee (the "Committee") was subsequently established, appointed and has been charged, as part of its mission, to monitor and evaluate developments in legal ethics and, when appropriate, to recommend changes to the Louisiana Rules of Professional Conduct; and

WHEREAS, the Committee formed a Subcommittee to re-examine, research, study and consider changes to the rules concerning lawyer advertising in Louisiana: the Ethics Advisory Service/Lawyer Advertising Advisory Subcommittee on Article 7 of the Louisiana Rules of Professional Conduct (the "Subcommittee"); and

WHEREAS, the Committee and its Subcommittee are comprised of LSBA members from all geographic areas of the state and practice groups; and

WHEREAS, the LSBA House of Delegates considered and approved Special Rules of Debate at the 2006 Annual meeting which are attached as "Exhibit A"; and

WHEREAS, the Committee, through its open process, sought, received and acted upon viewpoints from throughout the legal community and from the public at large; and

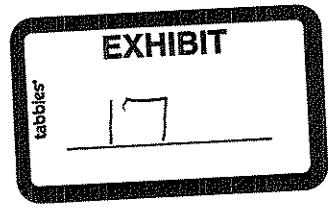
WHEREAS, the Committee held four public hearings around the state in Shreveport, Baton Rouge, New Orleans and Lafayette; and

WHEREAS, the Committee distributed information about the Committee's work on the LSBA web-site; and

WHEREAS, the Committee solicited and received numerous written and oral comments from LSBA members and from others; and

WHEREAS, the LSBA House of Delegates was furnished with the Committee's recommendations at the House of Delegates meeting in January 2007; and

WHEREAS, the Louisiana Supreme Court's Committee to Study Attorney Advertising recommended two changes to the proposal which have been ratified by the Committee; and



WHEREAS, The Louisiana Supreme Court's Committee to Study Attorney Advertising has recommended that the advertising proposal be allowed to proceed, as amended, to consideration by the House of Delegates; and

WHEREAS, the Committee recommends that the attached recommendations labeled "Exhibit B" be adopted.

NOW THEREFORE BE IT RESOLVED THAT the LSBA House of Delegates approve the attached recommendations of the LSBA Rules of Professional Conduct Committee and that those recommendations be submitted to the Court for its consideration.

Respectfully submitted,

LSBA Rules of Professional Conduct Committee

Richard C. Stanley, Chair
Dane S. Ciolino
Shaun Gerard Clarke
Stephen Guy deLaup
E. Phelps Gay
Sam N. Gregorio
Harry S. Hardin, III
Clare F. Jupiter
Christine Lipsey
William M. Ross
Leslie J. Schiff
Joseph L. Shea, Jr.
Edward J. Walters, Jr.
Timothy F. Averill, Supreme Court Liaison
Charles B. Plattsmier, Disciplinary Liaison

This 23rd day of March, 2007.

MINUTES OF THE HOUSE OF DELEGATES
OF THE LOUISIANA STATE BAR ASSOCIATION
June 7, 2007

The House of Delegates was convened at 11:20 a.m. on Friday, June 7, 2007, in the Baytowne Conference Center at the Sandestin Golf and Beach Resort in Sandestin, Florida.

I. Certification of Quorum by the Secretary.

After reviewing the delegate check-in roster, Secretary E. Wade Shows determined that a quorum was present. A copy of the attendance roster is attached as an addendum to these Minutes. President Marta-Ann Schnabel declared the meeting to be in session.

II. Recognition of Deceased Members of the House of Delegates.

No members of the House of Delegates were reported deceased.

III. Reports of Standing Committees of the House.

No oral reports were given; all reports that were in writing were submitted.

IV. Reports of Officers, Board of Governors, Standing Committees and Sections of the Louisiana State Bar Association.

No oral reports were given; all reports that were in writing were submitted.

V. Reports of Special Committees of the Louisiana State Bar Association.

No oral reports were given; all reports that were in writing were submitted.

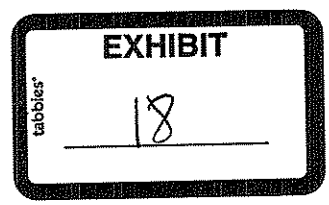
VI. Other Reports.

1. Louisiana Board of Legal Specialization
   No verbal report was given. A written report was distributed with the meeting materials.

VII. Old Business.

1. Consideration of corrections to the minutes of the June 12, 2003 Meeting of the House of Delegates.

   The following motion was made:



"BE IT RESOLVED, that the Minutes of the June 12, 2003 meeting of the House of Delegates be amended so that the last line of Item 11 reads, "of which is attached, be adopted.", and the last line of Item 12 reads, "regard to multijurisdictional practice, a copy of which is attached, be adopted."

The motion was seconded and adopted unanimously.

2. Ratification and adoption of the Resolution to increase member dues as passed in the January 2007 House of Delegates meeting.

The following motion was made by W. Jay Luneau:

"BE IT RESOLVED, that the House of Delegates ratify and adopt the Resolution to increase member dues as passed in the January 2007 House of Delegates meeting.

The motion was seconded and adopted unanimously.

VIII. Consideration of Approval of the Minutes of the January 20, 2007 Meeting of the House of Delegates.

The following motion was made:

"BE IT RESOLVED, that the minutes of the January 20, 2007 meeting of the House of Delegates are approved."

The motion was seconded and unanimously approved.

IX. New Business.

1. Election of a member from the House of Delegates to serve on the Budget Committee.

The following motion was made by Jack K. Whitehead, Jr.:

"BE IT RESOLVED, that Daniel A. Cavell of the 17th Judicial District serve as a member from the House of Delegates to serve on the Budget Committee."

The motion was seconded and Mr. Cavell was elected by acclamation.

2. **Election of three (3) members of the House of Delegates to the Special Advisory Committee to Authorize the President to Speak on Behalf of the Association. This committee was created by a resolution adopted by the House on November 13, 1971. The committee is composed of the president, president-elect, secretary, chair of the Public Information Committee, and three (3) members designated from the membership of the House of Delegates by the House of Delegates.**

   The following motion was made by E. Wade Shows:

   "BE IT RESOLVED, that Paul R. Baier of the Bill of Rights Section serve as a member of the Special Advisory Committee to Authorize the President to Speak on Behalf of the Association."

   The motion was seconded.

   The following motion was made by Mickey S. deLaup:

   "BE IT RESOLVED, that Robert A. Kutcher of the 24th Judicial District serve as a member of the Special Advisory Committee to Authorize the President to Speak on Behalf of the Association."

   The motion was seconded.

   The following motion was made by Val P. Exnicios:

   "BE IT RESOLVED, that Paula Adams Ates of the Civil Law and Litigation Section serve as a member of the Special Advisory Committee to Authorize the President to Speak on Behalf of the Association."

   The motion was seconded. There being no further nominations, Paul R. Baier of the Bill of Rights Section, Robert A. Kutcher of the 24th Judicial District and Paula Adams Ates of the Civil Law and Litigation Section were declared elected as members of the Special Advisory Committee to Authorize the President to Speak on Behalf of the Association.

3. **Election of a member of the Louisiana State Bar Association to serve ex-officio as a member of the Board of Directors of the Louisiana Bar Foundation for a three-year term. This individual must be a Fellow of the Louisiana Bar Foundation.**

The following motion was made by John Swift:

"BE IT RESOLVED, that James C. Gulotta, Jr. of Orleans Parish serve as an ex-officio member of the Board of Directors of the Louisiana Bar Foundation for a three-year term."

The motion was seconded and Mr. Gulotta was elected by acclamation.

4. **Resolution from Art, Entertainment and Sports Law Section regarding motion picture tax credits.**

The following motion was made by Michele LeBlanc:

"BE IT RESOLVED, that the resolution from Art, Entertainment and Sports Law Section regarding motion picture tax credits, a copy of which is attached, be tabled."

The motion was seconded and adopted unanimously.

5. **Resolution from Solo and Small Firm Section to amend the Section's Bylaws.**

The following motion was made by Faun Fenderson:

"BE IT RESOLVED, that the resolution from Solo and Small Firm Section to amend the Section's Bylaws, a copy of which is attached, be adopted."

The motion was seconded and adopted unanimously.

6. **Resolution from Public Utilities Section to amend the Section's Bylaws.**

The following motion was made by David L. Guerry:

"BE IT RESOLVED, that the House of Delegates unanimously consent to suspend its rules of order to allow discussion of a resolution not on the agenda."

The motion was seconded and adopted unanimously.

The following motion was made by David L. Guerry:

"BE IT RESOLVED, that the resolution from Public Utilities Section to amend the Section's bylaws, a copy of which is attached, be adopted."

The motion was seconded and adopted unanimously.

7. **Resolution from John J. Lee, Jr., Delegate from the 24th Judicial District, to allow a member in good standing to run for the House of Delegates from either the Judicial District wherein he resides or where his law office is located.**

The following motion was made by John J. Lee:

"BE IT RESOLVED, that the Resolution from John J. Lee, Jr., Delegate from the 24th Judicial District, to allow a member in good standing to run for the House of Delegates from either the Judicial District wherein he resides or where his law office is located, a copy of which is attached, be adopted."

The motion was seconded. Mr. Whitehead then made the following motion:

"BE IT RESOLVED, that the resolution from John J. Lee, Jr., Delegate from the 24th Judicial District, to allow a member in good standing to run for the House of Delegates from either the Judicial District wherein the resides or where his law office is located, a copy of which is attached, be tabled and referred to the Bar Governance Committee."

The motion was seconded and adopted.

8. **Resolution from Bar Governance Committee amending House of Delegates Rules of Procedure regarding the number of duly elected members required to constitute a quorum.**

The following motion was made by Larry Feldman, Jr.:

"BE IT RESOLVED, that the resolution from Bar Governance Committee amending House of Delegates Rules of Procedure regarding the number of duly elected members required to constitute a quorum, a copy of which is attached, be adopted."

The motion was seconded and a vote taken. The motion was defeated.

9. **Resolution from Marquis de Lafayette Committee to recognize and honor Marie Joseph Paul Yves Roche Gilbert du Motier, the Marquis de Lafayette.**

The following motion was made by Frank X. Neuner, Jr.:

"BE IT RESOLVED, that the resolution from Marquis de Lafayette Committee to recognize and honor Marie Joseph Paul Yves Roche Gilbert du Motier, the Marquis de Lafayette, a copy of which is attached, be adopted."

The motion was seconded and adopted unanimously.

10. **Resolution from Rules of Professional Conduct Committee to modify the Louisiana Rules of Professional Conduct concerning lawyer advertising in Louisiana.**

The following motion was made by Larry Shea:

"BE IT RESOLVED, that the resolution from Rules of Professional Conduct Committee to modify the Louisiana Rules of Professional Conduct concerning lawyer advertising in Louisiana, a copy of which is attached, be adopted."

The motion was seconded and discussion followed. The chair then called upon Elizabeth A. Alston to present her resolution to amend the resolution submitted by the Rules of Professional Conduct Committee.

11. **Resolution from Elizabeth A. Alston to amend the resolution from Rules of Professional Conduct Committee to modify the Louisiana Rules of Professional Conduct concerning lawyer advertising.**

The following motion was made by Elizabeth A. Alston:

"BE IT RESOLVED, that the resolution from Elizabeth A. Alston to amend the resolution from Rules of Professional Conduct Committee to modify the Louisiana Rules of Professional Conduct concerning lawyer advertising, a copy of which is attached, be adopted."

The motion was seconded. The chair then ruled that the resolution would be discussed in subparts such that each Rule of Professional Conduct proposed to be amended by the resolution would be considered separately.

Ms. Alston then made the following motion:

"BE IT RESOLVED, that the amendment to delete Rules 7.7 and 7.8 of the resolution to modify the Louisiana Rules of Professional Conduct concerning lawyer advertising be adopted."

The motion was seconded and a vote taken. The motion was defeated. Ms. Alston then made the following motion:

"BE IT RESOLVED, that the proposed amendments to Rule 7.2 of the resolution to modify the Louisiana Rules of Professional Conduct concerning lawyer advertising be adopted."

The motion was seconded and a vote taken. The motion was defeated. Ms. Alston then made the following motion:

"BE IT RESOLVED, that the proposed amendments to Rule 7.4 of the resolution to modify the Rules of Professional Conduct concerning lawyer advertising be adopted."

The motion was seconded and a vote taken. The motion was defeated. Ms. Alston then made the following motion:

"BE IT RESOLVED, that the proposed amendments to Rule 7.5 of the resolution to modify the Rules of Professional Conduct concerning lawyer advertising be adopted."

The motion was seconded and a vote taken. The motion was defeated. Ms. Alston then made the following motion:

"BE IT RESOLVED, that the proposed amendments to Rule 7.9 of the resolution to modify the Rules of Professional Conduct concerning lawyer advertising be adopted."

The motion was seconded and a vote taken. The motion was defeated.

The chair then declared the resolution proposing amendments, in all of its subparts, defeated.

The chair then opened the floor to discussion of the original resolution submitted by the Rules of Professional Conduct Committee. A vote was taken and the motion was adopted.

There being no further business to discuss, the meeting was adjourned at 12:55 p.m.

Respectfully Submitted by:

_____

E. Wade Shows
Secretary

_____

Date

2008 Press Releases

CONTACT PERSON: VALERIE WILLARD
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(504) 310-2590

JULY 3, 2008 **FOR IMMEDIATE RELEASE**

Chief Justice Pascal F. Calogero, Jr. announced today the Court's adoption of **comprehensive amendments to the Rules of Professional Conduct** pertaining to lawyer advertising. The Rules of Professional Conduct set forth the standards of ethical conduct required of lawyers.

The new rules are the result of a lengthy study conducted by the Louisiana State Bar Association (LSBA), and recommendations to the Court for rule changes that were suggested by the LSBA House of Delegates. The advertising rules were also studied by a Court Committee that was chaired by Justice Catherine D. Kimball. The Court Committee's work was precipitated by a 2006 Senate Concurrent Resolution in which the Court was asked to establish a committee to study attorney advertising. The Court's decision balances the right of lawyers to truthfully advertise legal services with the need to improve the existing rules in order to protect the public from unethical forms of lawyer advertising.

Among the significant changes to the rules are the following:

- The addition of a rule addressing advertisements in the electronic media, including television and radio;

- The addition of a rule addressing computer-accessed communications, including e-mails;

- Amendments to the present rules concerning the type and content of advertising or written communications that are violative of the rules. For example, a lawyer advertising communication would violate the new rules if it "promises results;"

- The addition of a new rule which, while not prohibiting lawyers from running their advertisements, will require lawyers to file copies of their advertisements with a committee of the Bar Association either prior to or concurrently with the first dissemination of the advertisement. The committee will review and evaluate the advertisements for compliance with the advertising rules. Lawyers whose advertisements are found by the committee not to be in compliance with the rules will be informed that dissemination or continued dissemination may result in professional discipline;

EXHIBIT
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• Rule changes clarifying the circumstances in which lawyers may communicate that they are "certified" or an "expert" in a particular field of law; and

• The addition of a rule that will exempt certain advertisements of a more limited nature from the aforementioned review and evaluation process.

The amendments to the Rules of Professional Conduct become effective on December 1, 2008, in order to provide lawyers with sufficient time to evaluate the rule changes and review their advertising practices.

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Louisiana Supreme Court, 400 Royal St., New Orleans, LA 70130
Clerk of Court's Office (504) 310-2300
Judicial Administrator's Office (504) 310-2550
Law Library of Louisiana (504) 310-2400
Email: webmaster@lasc.org

Press Releases back

Communications Office:
David Bookstaver, Director
Mai Yee, Assistant Director
(212) 428-2500

Date: June 15, 2006

www.nycourts.gov

Significant Restrictions on Lawyer Advertising To Be Adopted in New York

Court System to Implement Curbs on Solicitations for Legal Services and Potentially Misleading Advertising

NEW YORK—Sweeping new restrictions on lawyer advertising will be enacted in New York to safeguard consumers from potentially misleading advertising and overly aggressive or inappropriate solicitation for legal services. Revisions to the Lawyer's Code of Professional Conduct were approved for public comment this week by the four Presiding Justices of the Appellate Division: Hon. John T. Buckley, of the Appellate Division, First Department; Hon. A Gail Prudenti, Second Department; Hon. Anthony V. Cardona, Third Department; and Eugene F. Pigott, Jr., Fourth Department.

The proposed amendments include the following:
· A 30-day moratorium on soliciting wrongful death or personal injury clients, protecting families suffering loss from overly aggressive marketing.
· Ban on using testimonials by current clients or paid endorsements.
· Restrictions on using statements likely to create an expectation about results or that compare the lawyer's services with those of other lawyers.
· Expansion of rules to cover computer and Internet-based advertising and solicitation, including restrictions on websites and e-mail, and bans on "pop-up" ads and chat-room solicitation.
· Ban on using nicknames, mottos or trade names that suggest an ability to obtain results.
· Requirement that ads stating "no fee will be charged if no money is recovered" disclose that client will remain liable for other expenses regardless of the case outcome.
· Expansion of rules to cover out-of-state attorneys who solicit legal services in New York.
· Requirement to include disclaimers in certain ads and to label certain communications as "advertisements."
· Ban on fictionalized portrayals of clients, judges and lawyers or re-enactments of events that are not authentic.
· Ban on depicting the use of a courtroom or courthouse.
· Requirements to file all advertisements for legal services, including radio and television ads, with the attorney disciplinary committees for review, and to translate all foreign-language ads into English before filing.

On behalf of the Presiding Justices, Chief Administrative Judge Jonathan Lippman commented, "These new rules will help regulate lawyer advertising so that consumers are protected against inappropriate solicitations or potentially misleading ads, as well as overly aggressive marketing. The amended rules will also benefit the bar by ensuring that the image of the legal profession is maintained at the highest possible level. The Presiding Justices of all four judicial departments feel strongly that these significant new reforms will serve the best interests of the public and the legal community of New York."

The new rules are being adopted as a result of recommendations by both the New York State Bar Association Task Force on Lawyer Advertising and a committee specially appointed by the Administrative Board of the Courts last year to study this area. It is subject to a 90-day comment period by the bar and the public, which ends September 15, 2006. The amendments can be accessed from the court system's website at www.nycourts.gov/rules/proposedamendments.shtml.

Comments on the rules should be sent to:

Michael Colodner, Esq., Counsel
Office of Court Administration
25 Beaver Street
New York, New York 10004