

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

PUBLIC CITIZEN, INC., *et al.*,

Plaintiffs,

v.

LOUISIANA ATTORNEY DISCIPLINARY
BOARD, *et al.*,

Defendants.

Civil Action No. 08-4451

SEC. F (JUDGE FELDMAN)

MAG. 2 (MAG. JUDGE WILKINSON)

PLAINTIFFS' STATEMENT OF UNCONTESTED FACTS

1. The Louisiana Supreme Court has exclusive jurisdiction over lawyer discipline proceedings in Louisiana. It is also responsible for adopting the Louisiana Rules of Professional Conduct, which govern the conduct of lawyers in the state.

2. Part 7 of the rules governs communications regarding a lawyer's services, including advertising and solicitation. Lawyers who violate the rules are subject to various forms of discipline, including admonition, reprimand, probation, suspension, or permanent disbarment.

3. The state has received very few or no consumer complaints regarding lawyer advertising and has disciplined very few or no lawyers for running false or misleading ads. Most or all complaints regarding lawyer advertising have come from other lawyers.

THE ADVERTISING AMENDMENTS

4. In 2006, the Louisiana State Senate adopted a concurrent resolution stating that “the manner in which some members of the Louisiana State Bar Association are advertising their services in this state has become undignified and poses a threat to the way lawyers are perceived in this state.” The resolution noted that the legislature was considering passage of Senate Bill No. 617, which would establish a committee “to address ethical concerns posed by lawyer advertising and to present a more positive message to the citizens of this state.” The resolution called on the Chief Justice of the Louisiana Supreme Court to establish a committee to study lawyer advertising and to recommend changes to the advertising rules by March 1, 2007.

5. In response to the resolution, the Louisiana Supreme Court created the Committee to Study Attorney Advertising (“Supreme Court Committee”). Members of the committee included Justice Catherine D. Kimball, who chaired the committee, Senator Rob Marionneaux, the sponsor of the joint resolution, Rick Stanley, Chair of the Louisiana State Bar Association’s Rules of Professional Conduct Committee (“LSBA Committee”), and defendant Charles B. Plattsmier. Several other members were personal-injury lawyers in competition with lawyers, including plaintiff Bart, that advertise on television.

6. In addition, the LSBA referred the issue of amending the rules to the LSBA Committee. Between September 21, 2006 and October 6, 2006, the LSBA Committee met four times, assembling a series of proposed amendments based largely on rules in Florida and proposed rules in New York.

7. Among other things, the LSBA Committee adopted from the proposed New York rules new prohibitions against

- a. “portrayal of a client by a nonclient,”

- b. “portrayal of a judge,”
- c. “reenactment of any events or scenes or pictures . . . that are not actual or authentic,”
- d. use of “a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter,” and
- e. use of “any spokesperson’s voice or image that is recognizable to the public in the community where the advertisement appears.”

8. The committee also voted to adopt several prohibitions taken in whole or substantial part from Florida’s lawyer advertising rules. These included prohibitions on advertisements that

- a. “contain[] a reference or testimonial to past successes or results obtained,”
- b. “promise[] results,” or
- c. “compare[] the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated.”

9. Florida has applied its rule against “promises of results” to prohibit statements in lawyer advertisements such as “attorneys righting wrongs,” “people make mistakes, I help fix them,” “don’t let an incident like this one ruin your life,” “get your defense off on the right foot quickly,” “let us take care of you,” “get peace of mind,” “we’ll steer you in the right direction,” and the law firm name “Freedom Law.”

10. The Supreme Court Committee met again on October 23, 2006, to consider the proposed amendments and voted to approve the LSBA’s proposed rules.

11. Between October 30 and November 9, 2006, the LSBA Committee held public hearings in Shreveport, Baton Rouge, Lafayette, and New Orleans. The committee also solicited written comments.

12. The hearings were not advertised to the public. No evidence or testimony was taken. The only members of the public who attended the hearings or submitted comments were lawyers or marketers for lawyers.

13. The Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, and Bureau of Economics submitted comments to the rules. Plaintiffs Public Citizen, Inc., Morris Bart, and William Gee III also submitted comments opposing the amendments on the ground that they would constitute an unconstitutional restriction on commercial speech.

14. Following the hearings and receipt of written comments, the LSBA Committee adopted only one material change relevant to the rules challenged here: a new prohibition on "portrayal of a . . . jury." The committee then approved a resolution proposing that the LSBA House of Delegates recommend the new rules to the Louisiana Supreme Court.

15. On January 4, 2007, New York adopted amendments to its advertising rules that differed from the proposed amendments on which many of Louisiana's proposed rules were based. The final New York rules did not include the proposed prohibitions against "portrayal of a client by a nonclient," "reenactment of any events or scenes or pictures . . . that are not actual or authentic," or use of "any spokesperson's voice or image that is recognizable to the public." Instead, the New York rules imposed no restrictions on spokespeople and allowed the use of fictionalized scenes and actors as long as the advertising lawyer included certain disclosures. The New York rules retained the earlier prohibitions on "portrayal of a judge" and use of "a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter."

16. On March 23, 2007, the LSBA Committee voted to recommend approval of the proposed rules to the LSBA House of Delegates. The rules as recommended included the rules that were proposed but not adopted by New York.

17. On June 7, 2007, the LSBA House of Delegates voted to recommend to the Louisiana Supreme Court that the proposed rules be adopted. The House of Delegates rejected proposed amendments that would have deleted or narrowed many of the restrictions challenged here.

18. On July 3, 2008, the Louisiana Supreme Court adopted the rules recommended by the LSBA.

DEFENDANTS

19. Defendant Louisiana Attorney Disciplinary Board is the state agency responsible for administering lawyer discipline in the state. The Board investigates, prosecutes, and adjudicates all claims regarding alleged violations of the Louisiana Rules of Professional Conduct, including lawyer advertising provisions, and makes recommendations to the Louisiana Supreme Court regarding lawyer discipline.

20. Defendant Billy R. Pesnell is Chair of the Louisiana Attorney Disciplinary Board. His duties include overall management of the Board's disciplinary work.

21. Defendant Charles B. Plattsmier is Chief Disciplinary Counsel for the Louisiana Attorney Disciplinary Board's Office of Disciplinary Counsel. As such, he is primarily responsible for the prosecution of violations of the Louisiana Rules of Professional Conduct. Plattsmier's duties include screening complaints against lawyers for disciplinary violations, filing or dismissing charges, preparing recommendations for discipline, investigation and prosecution of violations, and supervision of disciplinary staff.

PLAINTIFFS

22. Plaintiff Morris Bart is a resident of New Orleans and owner of the law firm Morris Bart, L.L.C. Bart was admitted to the Louisiana Bar in 1978 and continues to actively practice law in the state. Bart has substantial trial experience in state and federal court.

23. Plaintiff Morris Bart, L.L.C. is a law firm based in New Orleans, Louisiana, founded more than twenty-five years ago by plaintiff Morris Bart. The firm now has more than twenty-five lawyers actively practicing law in offices throughout the state. The firm advertises its representation of personal injury clients in broadcast and print media and on a website at <http://www.morrisbart.com/>. The firm's website includes videos of some of the firm's television commercials. Plaintiffs Morris Bart and Morris Bart, L.L.C. are collectively referred to here as "Bart."

24. In recent years, Bart has developed an advertising campaign centered around the slogan "One Call, That's All." The firm spent tens of thousands of dollars developing advertising for the campaign. After years of development and millions of dollars in advertising, the campaign has gradually attained a high level of brand recognition and has been successful at bringing clients to the firm.

25. Plaintiff William Gee, III is a resident of Lafayette, Louisiana and the owner of the law office William N. Gee, III, Ltd. Gee was admitted to the Louisiana Bar in 1984 and since then has actively practiced law in the state. He represents clients in a wide variety of personal injury cases, most of which involve maritime accidents. Gee has substantial trial experience in state and federal court.

26. Plaintiff William N. Gee, III, Ltd. is a Lafayette, Louisiana law firm founded and owned by plaintiff William N. Gee, III. The firm communicates its services to the public through broadcast media, print advertisements, and other public media. The firm also operates a

website at <http://www.williamgee.com/>. Plaintiffs William Gee III and William N. Gee, III, Ltd. are collectively referred to here as “Gee.”

27. Plaintiff Public Citizen, Inc. is a nonprofit, public interest organization with approximately 65,000 members nationwide, including approximately 250 in Louisiana. Public Citizen’s Louisiana members are consumers of legal services. Public Citizen has an interest in ensuring that its members are not injured by restrictions that deprive them of communications regarding the availability of legal services.

28. Public Citizen’s mission includes defending the First Amendment rights of consumers. Public Citizen has advocated for the right of consumers to receive commercial advertising and solicitations, and has litigated several of the leading cases on the subject.

29. Plaintiffs Bart and Gee have a reasonable fear that their ads will subject them to discipline under amended Rule 7.2(c)(1)(D), which prohibits advertisements that “contain[] a reference or testimonial to past successes or results obtained.” Plaintiffs frequently run advertisements with references to past successes and results, including past verdicts on behalf of clients. Many of these references are stated in the form of client testimonials, but many others are not. Many of Bart’s television commercials contain testimonials of actual clients about the quality of representation in their cases. Gee’s advertisements report the amount of recovery in particular cases and state that he “has recovered many millions of dollars for his clients.” Both Bart and Gee include information about results in past cases on their websites, and this information is generally not reported in the form of client testimonials.

30. Plaintiffs Bart and Gee have a reasonable fear that they will face discipline for their advertisements under amended Rule 7.2(c)(1)(E), which prohibits advertisements that “promise[] results,” and amended Rule Rule 7.2(c)(1)(L), which prohibits advertisements that

“utiliz[e] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter.”

- a. Many of Bart’s advertisements include the motto “One Call, That’s All,” and his website includes the motto “One Click, That’s It.” Many of his advertisements also include the statement “I’ll work hard to get you all the money you deserve.” Bart advertises his selection as a “Super Lawyer” by the Super Lawyers magazine.
- b. Most of Gee’s advertisements include the motto “Tell them you mean business.” His advertisements also include statements like “you need an experienced maritime attorney who can get the job done” and “get the benefits you deserve.”

31. Plaintiffs Bart and Gee have a reasonable fear that they will face discipline under amended Rule 7.2(c)(1)(I), which prohibits advertisements that “include[] a portrayal of a client by a non-client” or the “reenactment of any events or scenes or pictures that are not actual or authentic,” and amended Rule 7.2(c)(1)(J), which prohibits advertisements that “include[] the portrayal of a judge or a jury.” Plaintiffs use advertising that includes actors, reenactments, and scenes that would be prohibited by the amended rules. Bart’s advertisements include reenactments of scenes such as car accidents. Bart also uses fictional vignettes, including generic accident and hospital scenes, and his website includes pictures of accident scenes and an oil rig. Gee’s advertisements include a fictional vignette of insurance adjusters eating lunch as they hear about the lawsuit by an injured offshore worker, and his website also includes an image of an oil rig, as well as several images of boats that were not involved in cases Gee has handled.

32. Plaintiffs Bart and Gee have a reasonable fear that they will face discipline under amended Rule 7.5(b)(1)(C), which bans the use of celebrity spokespeople by prohibiting the use

of “any spokesperson’s voice or image that is recognizable to the public in the community where the advertisement appears,” and amended Rule 7.5(b)(2)(C), which provides that spokespeople who are neither celebrities nor lawyers must “provide a spoken disclosure identifying the spokesperson as a spokesperson and disclosing that the spokesperson is not a lawyer.” The plaintiff law firms include statements in their advertising that would violate these rules. Bart’s advertisements include former clients as spokespeople without stating that they are not lawyers. Gee’s advertisements use Robert Vaughn, an actor who is most famous for his role as the spy Napoleon Solo in the 1960’s television series *The Man from U.N.C.L.E.*

33. The plaintiff law firms include disclaimers in their advertisements stating that past successes do not dictate future results. Bart’s television advertisements state that “results vary and depend on the facts of each case.” Gee’s television advertisements include a written disclaimer stating that the “outcome of each case depends on its facts and merits,” and often state verbally that “[e]very case is different.” Both Bart and Gee include the word “dramatization” in their advertisements that contain dramatizations. When actors are involved, Gee’s advertisements state “dramatization[s] by actors.” Gee’s advertisements include the disclaimer: “Robert Vaughn, a non-client, is a paid spokesman for William Gee.”

34. If allowed to take effect, the amended rules would force plaintiffs to pull many of their advertisements off the air and to develop new advertisements at significant expense. As a result, they would lose the benefit of public recognition of their existing slogans, spokespeople, and advertising campaigns. These losses would take years and millions of dollars of investment in a new advertising campaign to correct.

35. It is very expensive to produce advertising, especially television advertising. The rules will force plaintiffs to cut any content that arguably implicates the rules to avoid the cost of

having to re-produce the ads at great expense if state disciplinary counsel deems the content prohibited.

36. Time is valuable in broadcast advertising, especially in fifteen-second or shorter television and radio advertisements. It is very difficult or impossible to make very short television and radio advertisements that include a spoken disclaimer.

37. The rules will make it more difficult for plaintiffs to produce advertisements that attract the attention of consumers.

38. If not prohibited from doing so, Bart and Gee would continue to produce and run advertisements that violate the challenged rules.

39. Lawyer advertisements, including the advertisements of plaintiffs, often contain the lawyer's name, firm's name, or slogan in very large text as an attention-getting device. Requiring lawyers to use disclaimers of that size will force them to create advertisements that are ugly and ineffective and will reduce the amount of useful information that the ads can convey to consumers. It will also make it impossible to run many advertisements, including relatively small ads where space is at a premium.

40. The clientele of plaintiff law firms is made up largely of minorities and low-income individuals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on July 14, 2009, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record who have registered to receive electronic service, and I effected service upon all other counsel of record via United States Mail, postage prepaid and properly addressed.

/s/ James M. Garner _____

JAMES M. GARNER