

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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JAMES L. ALEXANDER; ALEXANDER & CATALANO LLC;
PUBLIC CITIZEN, INC.,

Plaintiffs,

vs.

2007-CV-117

DIANA MAXFIELD KEARSE, in her official
capacity as Chief Counsel for the Grievance
Committee for the Second and Eleventh
Judicial Districts, et al.,

Defendants.

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Transcript of Motion Argument held on
April 13, 2007, at the James Hanley Federal
Building, 100 South Clinton Street, Syracuse,
New York, the HONORABLE FREDERICK J. SCULLIN, JR.,
Senior Judge, Presiding.

A P P E A R A N C E S

For Plaintiffs: PUBLIC CITIZEN LITIGATION GROUP
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Washington, D.C. 20009
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1 (Open Court, 11:10 a.m.)

2 THE COURT: Which order are we hearing the
3 motions here first?

4 THE CLERK: I have Alexander & Catalano first.

5 THE COURT: All right.

6 THE CLERK: Court now calls James L.
7 Alexander, Alexander & Catalano, Public Citizen, versus Diana
8 Maxfield Kearse, et al., it's 07-CV-117, appearances for the
9 record, please. Appearances for the record.

10 MR. BECK: My name is Greg Beck, your Honor, I
11 represent the plaintiffs. I'm here with my co-counsel Brian
12 Wolfman, and my client James Alexander is also here at
13 counsel table.

14 THE COURT: Good morning, thank you,
15 gentlemen.

16 MR. MacRAE: Your Honor, Patrick MacRae,
17 New York State Attorney General's office for the defendants
18 herein.

19 THE COURT: Thank you, Mr. MacRae. Is that
20 why we have so many lawyers here today? I assume it is.
21 Anyway, interesting lawsuit. Let me ask first of all -- I'm
22 sorry, Mr. Wolfman?

23 MR. BECK: I'll be arguing today, your Honor.
24 Mr. Beck.

25 THE COURT: All right, Mr. Beck. You

1 represent both Alexander & Catalano and the Public Citizen,
2 Inc.?

3 MR. BECK: That's correct, your Honor, we
4 represent all the plaintiffs.

5 THE COURT: But you're a not-for-profit
6 organization, is that correct?

7 MR. BECK: Public Citizen is a not-for-profit
8 corporation, that's right.

9 THE COURT: All right. There's not a problem
10 with that? I've never seen that before where a
11 not-for-profit organization represents individuals as well.

12 MR. BECK: I don't -- I'm not aware of any
13 problem. We've certainly, we have a litigation group within
14 Public Citizen, we do a fair number of cases in federal and
15 state court.

16 THE COURT: Are you retained by outside people
17 to do work for them as well?

18 MR. BECK: Yes, definitely, your Honor. We
19 have -- we're a 10-attorney nonprofit law firm which is part
20 of the Public Citizen umbrella organization. Public Citizen
21 litigation.

22 THE COURT: Mr. Alexander, you're a member of
23 this group here, citizen group?

24 MR. ALEXANDER: No, I'm not a member as yet.

25 THE COURT: You're not?

1 MR. ALEXANDER: No, but having found out the
2 good works they do, we do intend to join.

3 THE COURT: You may want to join after the
4 lawsuit because otherwise you may have a problem representing
5 Mr. Alexander, if he's a member. For standing purposes.

6 MR. BECK: Well, your Honor, we're asserting
7 different bases for standing as for different parts of the
8 lawsuit, but we can bring a suit on behalf of our members in
9 New York and that's the basis of Public Citizen standing in
10 the case, which I think is separate from the standing that
11 Alexander & Catalano and James Alexander bring to the case,
12 which is as individual attorneys who are directly affected by
13 that.

14 The Supreme Court in *Virginia Board of*
15 *Pharmacy* and in subsequent cases has made it clear that the
16 main purpose of the commercial free speech doctrine is to
17 protect consumers in their ability to access information, and
18 in fact in the *Virginia Board of Pharmacy* case itself, the
19 plaintiffs were a consumer group, they were consumer groups,
20 not individual pharmacists and the first holding of the court
21 in that case was that those consumer groups had standing to
22 bring an action, a First Amendment action on behalf of their
23 members in the state.

24 THE COURT: Well, we're going to jump right
25 into the standing issue then, which is part of your

1 cross-motion, Mr. MacRae, and I think it's probably
2 appropriate we deal with your cross-motion before we discuss
3 the substance of the motion by the plaintiff here for
4 preliminary injunction. The standing issue that I brought up
5 and that Mr. Beck is addressing here is somewhat of a
6 problem. You've pointed out here in your argument that you
7 do not feel that the organization has standing to
8 represent -- to take part in this lawsuit.

9 MR. MacRAE: That's correct, your Honor. The
10 fundamental basis for the state's position or for the
11 defendant's position with regard to the standing issue is
12 that -- I should back up just a moment, your Honor, and say
13 that in -- I have received counsel's reply to my papers and
14 as one of the exhibits they attached an affidavit of someone
15 who had indicated that all corporate fees had been paid by
16 Public Citizen so having no -- nothing to refute that, I
17 really don't have any basis for arguing further on that
18 point.

19 However, the entity itself argues that it has
20 standing in this case because of a potential for harm to the
21 organization and yet all it has as a connection to New York
22 State by its own acknowledgment is the presence of some
23 members who happen to join an out-of-state organization by
24 having paid a certain annual fee to the organization to
25 support its mission which its websites indicate are largely

1 focused on legislative matters and things of that sort at the
2 federal level. The -- there is no indication that it has any
3 presence in New York, it says that it -- that if these, if
4 this injunction is not granted, that it would have a
5 potential risk of harm in the event that it should seek to
6 represent some of its members on a pro bono basis in
7 New York, but there's no indication that it -- at least
8 there's no allegation in the papers that it has or even has
9 any intention to actually do so.

10 That being the case, your Honor, it, it's --
11 what they're really relying on then is just simply the mere
12 transmission of website information that can be received in
13 New York. And as the Court is aware, I'm sure, do a website
14 search and you get, you can get things from jurisdictions far
15 removed from wherever you may live.

16 THE COURT: Well, I don't know what criteria
17 you're referring to, what case would hold that that's
18 necessary, Mr. MacRae, but I will point out that as the
19 defendants have, or plaintiffs have identified, there is a
20 leading case here, dealing with standing, association
21 standing, *United Food & Commercial Workers*, which they cite
22 in their reply papers, and that case is Supreme Court 1996,
23 made it clear that an association has standing to sue on
24 behalf of its members when a member would have standing, the
25 interests to be protected are germane to the association's

1 purpose, and neither the claim nor the relief requested
2 require the participation of its members. That's why I was
3 getting to that point, Mr. Beck, about Mr. Alexander, whether
4 he's a member or not. But you only argue the association
5 standing in your papers.

6 MR. BECK: That's right, your Honor, we're
7 solely asserting at least at this point that our standing
8 comes from our members in New York.

9 THE COURT: And that's the criteria they need
10 to meet, Mr. MacRae.

11 MR. MacRAE: The problem that I see with that,
12 though, your Honor, is that there's no indication that the
13 members have any interest in this action. There's -- there's
14 a representation that merely because there are members in
15 New York State, that gives them standing. But in reality,
16 there's no indication that those members are in any fashion
17 affected by or influenced by whatever the outcome of this
18 case may be.

19 THE COURT: Well, the papers seem to indicate
20 that they are, there are First Amendment issues are involved
21 and there are members here in New York State.

22 MR. MacRAE: Only, however, if Public Citizen
23 were to, were to proceed, were to actually practice in
24 New York. It says that, in its papers, it says it only is a
25 potential impact in the event that if it should seek to -- I

1 can't think of the word.

2 THE COURT: So you're saying that the
3 interests to be protected are not germane to the
4 association's purpose, is that what you're saying?

5 MR. MacRAE: That's correct.

6 THE COURT: All right. Mr. Beck, as to that
7 point?

8 MR. BECK: Well, your Honor, as a preliminary
9 matter I should just point out there's been no challenge to
10 the standing of Alexander & Catalano and James Alexander.

11 THE COURT: That's true. I'm not addressing
12 their position at this point, talking about the organization.

13 MR. BECK: I just wanted to set that part
14 aside. And as you correctly identified, your Honor, the
15 pressing *United Food & Commercial Workers* does not include
16 any requirement of the sort that the state seeks to impose,
17 that members have some sort of leadership role in the
18 organization, that's simply not an element of the test. And
19 multiple other cases hold that members have standing, that
20 organizations have standing on behalf of their members.
21 Another case you could look at is *Havens Realty v. Coleman*,
22 455 U.S. 363 which holds that an organization may assert
23 claims on behalf of its members when its members suffer an
24 injury, as a result of the challenged regulation.

25 THE COURT: Well, Mr. MacRae's attacking one,

1 the one criteria they are attacking is whether or not your
2 interests is germane to the purpose of the organization, you
3 argue that it is.

4 MR. BECK: And as we explain in our brief,
5 your Honor, Public Citizen is an organization devoted to free
6 speech and consumer rights issues. We've been involved in
7 attorney advertising and commercial free speech issues since
8 the *Virginia Board of Pharmacy* case in 1976 which we, in
9 which we represented the consumer rights groups in that case,
10 and we've consistently advocated on behalf of consumers'
11 rights to receive commercial information that may be of
12 interest to them.

13 And I just want to make clear that we're not
14 simply, I think the defense is confusing the idea that Public
15 Citizen is directly impacted by advertising in the state
16 against with -- with the Public Citizen's interest in
17 protecting its members' rights to receive information, and
18 we're not just saying that we want to advertise in the state,
19 we're saying that our members have a right to receive
20 advertising from any lawyer and it could be a lawyer down the
21 road, not necessarily Alexander & Catalano, not Public
22 Citizen, but some other lawyer who needs to distribute
23 commercial information to consumers, and that's the kind of
24 situation that *Virginia Board of Pharmacy* deals with,
25 which -- in which consumers are actually cut off from

1 information that they have interest in and that's the sole
2 basis of standing that we're asserting at this point.

3 THE COURT: And I think you summed it up, it's
4 the need for your consumers, association members, consumers
5 to receive information about the availability and quality of
6 legal services.

7 MR. BECK: That's correct, your Honor.

8 THE COURT: Now as to the participation or
9 need for participation by any member of your association,
10 your position is there is no need for it?

11 MR. BECK: No, your Honor, there's no members
12 of the organization who've been involved in the litigation
13 directly and there will be no need for that.

14 THE COURT: Let me skip back now, kind of
15 jumped over a couple other points that the defense
16 cross-motion had brought forward. Whether or not there are
17 proper parties involved here.

18 MR. BECK: Well, your Honor, I think that the
19 defendant's brief pretty much sums up the important role that
20 chief counsels play in the important role process.

21 THE COURT: Let me just ask Mr. MacRae then,
22 isn't it true, Mr. MacRae, that the chief attorney may
23 investigate, do investigation of complaints of attorney
24 misconduct, given the fact they're involved with some degree
25 of enforcement and decision making with respect to the

1 enforcement, doesn't that satisfy *Ex Parte Young* requirement
2 that they have some connection with the enforcement of the
3 act and be a properly named party?

4 MR. MacRAE: Your Honor, the chief counsel
5 serve only as a functionary of the committees which are
6 empowered only through the appellate divisions. The chief
7 counsel do not investigate except on the receipt of
8 complaints or information provided to them. They do not have
9 any independent power or authority to act except in the
10 capacity given to them by the committee which receives its
11 authority from the appellate divisions.

12 THE COURT: But they are involved with some
13 enforcement by virtue of their office.

14 MR. MacRAE: Well, they are, I don't know that
15 that's actually an accurate description of it, your Honor.
16 The committee --

17 THE COURT: Well, the duties do include
18 initiating investigations.

19 MR. MacRAE: Yes.

20 THE COURT: They do include making
21 recommendation concerning whether a complaint proceeds to a
22 formal disciplinary proceeding.

23 MR. MacRAE: Correct.

24 THE COURT: The duties they have, the officer
25 has, as such, aren't they acting as enforcement officers?

1 MR. MacRAE: They, only -- they're only able
2 to enforce if given that authority to do so by the committee.

3 THE COURT: But that's their job, I understand
4 that, but their job is to do that.

5 MR. MacRAE: Yes.

6 THE COURT: Regardless of what source they
7 have for that authority, whether it be statutory, whether it
8 be committee decision, their job is to enforce.

9 MR. MacRAE: That's -- well --

10 THE COURT: Doesn't that satisfy *Ex Parte*
11 *Young*?

12 MR. MacRAE: Well, your Honor, no, I don't
13 believe so, because I think if, we need to step back and look
14 at what enforcement is. To enforce the disciplinary rules is
15 an act of enforcement rather than just simply the
16 presentation of information from which an enforcement can be
17 undertaken. I believe that in the use of the -- of the
18 disciplinary rules, it's the appellate division that
19 actually -- that actually enforces. The counsel will
20 investigate the allegations and they will make
21 recommendations to the committee which then can either accept
22 or reject, essentially, accept or reject those
23 recommendations. If they accept them, then counsel is given
24 the responsibility to move forward and present the results of
25 their investigation to the appellate division from which a --

1 the more formal disciplinary process can be -- can unfold.
2 But the counsel have no independent authority to act on their
3 own, and yet the appellate division and committee has an
4 independent responsibility to proceed with enforcements
5 regardless of their -- of their chief counsel.

6 THE COURT: Mr. Beck, do you wish to reply on
7 that?

8 MR. BECK: Well, your Honor, I think the
9 defense is just confusing the concepts of enforcement and
10 adjudication. For example, if a plaintiff wanted to enjoin
11 an unconstitutional law, federal law, they would sue the
12 prosecutor, not you, your Honor, the judge, who would be
13 ultimately responsible for making the decision.

14 THE COURT: Isn't it true when a complaint
15 comes in, that the officer would have the authority to
16 initiate an investigation?

17 MR. MacRAE: I'm sorry, your Honor?

18 THE COURT: Without going before the appellate
19 division, the officer would have the authority to initiate
20 the investigation, the chief attorney?

21 MR. MacRAE: Chief attorney would have the
22 authority to undertake an investigation if --

23 THE COURT: When a complaint comes in, the
24 chief attorney has the authority to undertake an
25 investigation, yes?

1 MR. MacRAE: I believe that it first goes to
2 the committee for an evaluation to determine whether or not
3 there would be a basis to undertake an investigation.

4 THE COURT: How can they tell if it's a mere
5 complaint without the investigation? I think you may be
6 misunderstanding the role of the chief attorney there. My
7 understanding is, correct me if I'm wrong, that when the
8 complaints come in, his office initiates investigations, as
9 Mr. Beck says, and then you have the result of that
10 investigation going before the appellate division, am I wrong
11 about that?

12 MR. MacRAE: Let me just take for just a
13 second, your Honor, I think I just need to -- a little
14 clarification on what -- on a fine point of that.

15 THE COURT: I thought, in fact I thought you
16 conceded to that in your papers, it was the duty of the chief
17 attorney to initiate investigations.

18 MR. BECK: Your Honor, I think I understand
19 how the process works if you don't mind if I jump in.

20 THE COURT: All right, what's your view of it?

21 MR. BECK: From my understanding of the
22 regulations, the defendants cite the chief attorney is the
23 one that receives the complaints in the first instance,
24 initiates an investigation and if the attorney believes that
25 there's cause to bring charges, then brings the charge in

1 front of the disciplinary committee and at that point
2 recommends an outcome. That's how the process --

3 THE COURT: That's how I understand it to be.

4 MR. MacRAE: That's correct.

5 THE COURT: It doesn't go initially to the
6 appellate division.

7 MR. MacRAE: That is correct, your Honor.

8 THE COURT: So I think we have satisfaction
9 notwithstanding your arguments that the *Ex Parte Young*
10 doctrine does apply, that the criteria has been met. So I'm
11 going to deny your motion on that grounds and also on the
12 standing grounds.

13 Now with respect to right to sue, you suggest,
14 Mr. MacRae, that the Public Citizen is prohibited by the
15 New York State Business Law, but I think now that you've
16 received some reply on that matter, that section of law
17 doesn't, you're referring to 1312(a), does not apply, does
18 it?

19 MR. MacRAE: That's correct, your Honor.

20 THE COURT: All right. So we don't have any
21 issue there.

22 And lastly, in your cross-motion, you ask the
23 Court to consider abstaining from deciding the issue until
24 New York State has had an opportunity to review and decide
25 the matter, and I think you're referring to the *Burford*

1 abstention doctrine, are you not?

2 MR. MacRAE: Yes, your Honor.

3 THE COURT: All right. And on that, as the
4 court makes quite clear, is appropriate in cases "involving
5 complex issues of state law for which the state has
6 specialized knowledge and a centralized system for judicial
7 review." That's not the case here, though, is it?

8 MR. MacRAE: I believe it is, your Honor. In
9 this case we have rules of attorney conduct that are
10 extensive and broad, and there is a very thorough and
11 complete system in place for the application of those rules,
12 and it consists, as we've indicated, the initiating with
13 the -- or beginning with the investigation, determination as
14 to whether anything was done improperly, at that point it can
15 then be, it can be resolved either at the committee level, if
16 not at that point, then it would go to the appellate division
17 and from the appellate division it would go directly to the
18 New York State Court of Appeals for final resolution.

19 THE COURT: Well, that may be, but the only
20 issue before this court is the federal claim challenging the
21 constitutionality of the rules under the First Amendment.

22 MR. MacRAE: Yes, and constitutionality is
23 always available as a defense in any of the proceedings
24 before --

25 THE COURT: But that's the only issue before

1 this court, it's not a complex state issue which I need to
2 defer to the state courts for.

3 MR. MacRAE: Well, your Honor, the counsel
4 quoted in his reply papers the *Felmeister* case, and although
5 it did actually support their proposition that the court
6 elected not to abstain under the circumstances that presented
7 which were essentially the same as what we have here where
8 there are rules that have been asserted and, or rules that
9 are being challenged, but there has been no underlying
10 proceeding commenced by the disciplinary committee, and
11 thereby no way to really assess how the disciplinary
12 committees or the appellate division would even interpret
13 these new rules. There was a determination in *Felmeister*
14 that even though they, the Second Circuit, or excuse me, the
15 Third Circuit in that case found that abstention wasn't
16 appropriate, that the case should nonetheless be dismissed on
17 ripeness grounds, and I would suggest to the Court that even
18 if abstention wasn't to be considered here, that on the basis
19 of what counsel for the plaintiffs have submitted, that
20 ripeness is clearly an issue to allow the state courts to
21 assess its own rules and make a determination as to the
22 constitutionality of them.

23 THE COURT: Mr. Beck, as to the ripeness
24 issue, is there a ripeness issue here?

25 MR. BECK: There's not a ripeness issue, your

1 Honor. *Felmeister* discussed ripeness but in that particular
2 case the plaintiff had not identified exactly how his
3 particular ads would violate the regulations and the court
4 was concerned about that, and concerned about how it would
5 adjudge whether the rules would affect that lawyer if the
6 lawyer couldn't explain how his ads were affected by the
7 rules.

8 Since *Felmeister* was decided, there have been
9 two or three Supreme Court cases that have involved similar
10 situations to this, where a professional has sought to
11 advertise but because of a regulation, has refrained from
12 doing so, forced to refrain from doing so and thus was able
13 to bring a 1983 claim in federal court.

14 In particular that happened in the *Went For It*
15 case and *Edenfield* case as well. And you might -- two cases
16 that really discuss this in detail are the *Ficker* case, which
17 is Fourth Circuit case cited in the briefs, where the Court
18 specifically addresses the question of what to do when an
19 attorney sues to enjoin allegedly unconstitutional attorney
20 advertising regulations, but hasn't actually been brought up
21 on disciplinary charges yet. In that case the court held
22 that as long as, this comes from a line of Supreme Court
23 cases including *Steffel v. Thompson*, that if the attorney is
24 forced to refrain from engaging in speech that the attorney
25 otherwise would have engaged in, in that case then a claim

1 will lie, there is standing and the claim is ripe for
2 adjudication. And that --

3 THE COURT: What's the cite on that case?
4 You're supposed to know it off the top of your head, come on.
5 This is just a test, all right, never mind.

6 MR. BECK: I have it right here, your Honor.

7 THE COURT: Never mind.

8 MR. BECK: 119 F.3d 1150, and the *Schwartz v.*
9 *Welch* case also I would draw your attention to which is
10 Southern District of Mississippi which is in our briefs as
11 well and that's 890 F.Supp. 565, it discusses the same issue.
12 There's been innumerable cases where attorneys have brought
13 lawsuits against disciplinary rules.

14 THE COURT: Is there a way to unwind him or
15 once he's wound up, you got to let it run down? I've got
16 your point, thank you, and I think you have the law on your
17 side on this one without going much deeper than this. I
18 don't think the *Burford* abstention applies here, Mr. MacRae,
19 and I'm going to deny your motion on that grounds as well.

20 So with respect to your cross-motion, denied
21 on all four grounds, but that brings us back to the motion
22 for preliminary injunction.

23 First issue I wish to address with you, I
24 don't know if I stated it or not, but for the record, the
25 plaintiffs had requested the Court to grant a preliminary

1 injunction preventing the enforcement of the selected
2 provisions of the New York Disciplinary Rules of New York's
3 Code of Professional Responsibility which took place on --
4 took effect on February 1st, 2007.

5 Now generally speaking, the proponent of a
6 preliminary injunction must establish that it will suffer
7 irreparable harm in the absence of an injunction and either a
8 likelihood of success on the merits, or a sufficiently
9 serious question going to the merits to make them a fair
10 ground for litigation and a balance of hardships tipping
11 towards them. However, when a proponent challenges
12 government action taken in the public interest, pursuant to
13 statutory or regulatory scheme, it has to go a little
14 further; in addition to establishing irreparable harm, it
15 must establish that there is in fact a likelihood of success
16 on the merits.

17 Now here in this case, we have something
18 additional as well, if the injunction would alter the status
19 quo rather than maintain it; in other words, if the
20 injunction is an affirmative direction, mandatory direction,
21 rather than prohibitory direction, the proponent must show by
22 a clear and substantial basis there is a likelihood of
23 success on the merits.

24 And gentlemen, I think that's where we are on
25 this case. You wish to be heard on that?

1 MR. BECK: Yes, your Honor.

2 THE COURT: All right, Mr. Beck.

3 MR. BECK: Well, as you observe, your Honor,
4 the key issue in this case is the likelihood of success on
5 the merits. And the state seeking to restrict the
6 fundamental right of freedom of speech faces a very heavy
7 burden. The state in this case has simply failed to carry
8 that burden. In fact the state cannot justify its
9 regulations based precisely on the source of the grounds that
10 the Supreme Court has repeated --

11 THE COURT: Well, before you get to the
12 merits, let's talk about the standard.

13 MR. BECK: Okay.

14 THE COURT: That's what we're talking about, I
15 believe the standard, based upon what you're asking this
16 court to do here, is going to alter the status quo, because
17 you already have, you already have the rules in effect being
18 applied, and secondly, it is more of a requirement that
19 things change and the heightened standard should, it's more
20 prohibitory than mandatory, wouldn't you say?

21 MR. BECK: Yes, your Honor, I'm sorry if I
22 misunderstood your initial question, and yes, we believe it's
23 purely prohibitory, it purely seeks to prohibit enforcement
24 of rules that are already in effect. We're not asking for
25 anything to change, simply for the duration of the

1 litigation, the rule should not be enforced, and that relief
2 is in no way complete and no way requires mandatory action on
3 behalf of any government officials.

4 THE COURT: Well, one thing, it will alter the
5 status quo, but even though it's prohibitory rather than
6 mandatory, would you have to have complete relief if I grant
7 the preliminary injunction, wouldn't it be the same as being
8 successful on the merits?

9 MR. BECK: No, your Honor, because the relief
10 would be purely temporary, it would only be relief for the
11 length of the litigation.

12 THE COURT: But it would be the relief you're
13 asking for.

14 MR. BECK: Temporary complete relief, that's
15 right, but the kind of complete relief that's dealt with in
16 the case, and the line of reasoning that you're talking about
17 is, for example, if a plaintiff brings a complaint to allow a
18 parade that was prohibited by state officials, the parade
19 happens, at that point the plaintiff's gotten all the relief
20 that the plaintiffs, once the case is over, it need not go
21 any further.

22 THE COURT: Similarly here, the advertising
23 would go forward, once the advertising is out there, you
24 can't withdraw it, it's done, it's over, out there.

25 MR. BECK: For the duration of the litigation,

1 but --

2 THE COURT: For whatever ads are able to be
3 received and to be promoted during that period of time, yes.

4 MR. BECK: But your Honor, I respectfully
5 would suggest that I just don't think that that can be
6 characterized as complete relief because that, I mean that's
7 a typical situation in a preliminary injunction.

8 THE COURT: Until and unless it's changed,
9 it's complete relief, right?

10 MR. BECK: Right, and the complete relief
11 looks at, whether what you get in the preliminary injunction
12 is all you're asking for in the case, that's not all we're
13 asking for, we're also asking for permanent injunction and
14 declaratory judgment that the rules are unconstitutional.

15 THE COURT: Mr. MacRae, you want to address
16 that point, whether it's necessary to show it's a permanent
17 injunction, do they have complete relief?

18 MR. MacRAE: Your Honor, as you have pointed
19 out, during the period of the preliminary injunction would be
20 in effect, plaintiffs would have complete relief that's
21 sought in the complaint. The harm that would be affected by
22 that is, has occurred on every time that an ad is put out
23 there, and assuming that there is merely a possibility of
24 success on the merits, there's an equal possibility at least
25 of -- or at least there's -- there is also a possibility of,

1 that the plaintiffs will not be successful on the merits. In
2 which case during that, if the injunction is then
3 subsequently denied and the rules are found to be
4 constitutional, then for the entire period before that
5 decision is made, the public has been continue -- has
6 continued to suffer the insult of the improper advertising.

7 And I should point out, your Honor, that
8 what's important to keep in mind here is that this is not a
9 ban on advertising, this is a -- this is merely a restriction
10 in certain forms of advertising. To the best of my
11 knowledge, I'd have to say, your Honor, first that prior to
12 my involvement in this case, I never saw any of these ads
13 that we have on CD before the Court. However --

14 THE COURT: Mr. Alexander, he hasn't seen any
15 of your ads, you better do a little more research, get a few
16 more stations involved here.

17 MR. MacRAE: Have to involve public
18 television, your Honor, but on the other hand, since then I
19 have seen some of their ads which are still on TV since
20 the -- since these rules have gone into effect, obviously
21 they are modified to comply with the new rules. But the fact
22 is that the plaintiff doesn't stand to suffer in the sense
23 that he's not prevented from -- or they're not prevented from
24 advertising, they're not prevented from having their internet
25 websites up and available to the public, but what does happen

1 if there is an injunction placed, put in place, even
2 preliminarily, is that the public is, continues then to be
3 subject, to be bombarded by the advertising that is the
4 subject of these new regulations.

5 THE COURT: All right. Well, I'm not sure,
6 arguably you may have a point on that temporary relief being
7 not quite total relief, Mr. Beck, but I think it's close
8 enough and I still think there is, you're altering the status
9 quo by granting this injunction, so I do think the higher
10 standard does apply, and I'm going to use that higher
11 standard.

12 Having said that, since I don't think,
13 Mr. MacRae, you've really addressed any of these issues in
14 detail because you focused on your cross-motion more than
15 anything else, I think your recommendation that we have a
16 consolidated trial on the merits for the motion is a good
17 one. I think rather than go through this twice, we can have,
18 we can have a trial that will address the needs of both sides
19 as soon as possible. So I'm going to apply the higher
20 standard, irreparable harm, I think both parties realize that
21 First Amendment issues normally meet that standard, but that
22 there must be a clear and substantial showing of likelihood
23 of success on the merits, all right.

24 Now, for a consolidated trial/hearing, how
25 many days do you think you'll need? I know you haven't gone

1 through discovery yet, so can you give me an idea?

2 MR. BECK: Your Honor, first just to clarify,
3 I just want to know if this means that you're denying our
4 motion for preliminary injunction.

5 THE COURT: I'm reserving on it, I'm going to
6 consolidate it.

7 MR. BECK: As far as plaintiffs are concerned,
8 your Honor, it's clear to us that the defendants aren't --
9 don't have any evidence to present and I would, I would
10 request that your Honor ask defendants if they intend to
11 present any evidence. If they do intend to present evidence,
12 then I think it's reasonable to give them some time, but I
13 also think that in the meantime, the preliminary injunction
14 should go into effect to protect my clients' First Amendment
15 rights which is an irreparable harm.

16 THE COURT: I'm sure you do believe that, I
17 have no question you believe that. The ruling of the Court
18 is that I'm going to reserve on the motion and consolidate it
19 with the trial on the merits pursuant to Rule 65(a)(2) of the
20 Federal Rules of Civil Procedure. And as you asked for in
21 the alternative in your papers, I think it's a good
22 suggestion.

23 We need to set a date for it, that's why I'm
24 asking how many days it will be. Mr. MacRae, there is some
25 discovery you have to provide with respect to the basis for

1 some of these findings when you implemented the amended
2 rules, so you'll need to do that.

3 MR. MacRAE: Yes, your Honor, and I would also
4 ask for some discovery from the plaintiffs since they have
5 alleged specific economic damages as a result of the
6 imposition of these rules. So I do believe there is -- there
7 is discovery that would be necessary for the trial of the
8 matter.

9 THE COURT: Well, there's no question about
10 that. Now, you do have a Rule 16 conference at least
11 scheduled I believe with Magistrate Judge Lowe, when is that
12 scheduled for, is it June?

13 MR. MacRAE: I believe it is June, your Honor.

14 THE COURT: 16th or something. I saw it
15 earlier.

16 MR. MacRAE: I didn't bring it with me so I
17 don't know offhand.

18 THE COURT: Could probably expedite that if
19 you wish, might be a good idea, contact Magistrate Judge
20 Lowe.

21 MR. BECK: We would appreciate that, your
22 Honor, because we would like relief as soon as possible.

23 THE COURT: All right. Now, if we look to a
24 trial on the merits here, we're talking two or three days, I
25 wouldn't think any longer than that, it's nonjury.

1 MR. MacRAE: Yeah.

2 THE COURT: Because of injunctive relief.

3 MR. MacRAE: I would think two- or three-day
4 trial, bench trial would be sufficient.

5 MR. BECK: I agree, your Honor.

6 THE COURT: All right. Can we find a date?
7 Our soonest, we looked at this earlier, as I recall our
8 soonest date is going to be in June.

9 THE CLERK: June 18th.

10 THE COURT: June 18th, how does that fit into
11 your schedules?

12 MR. MacRAE: For trial?

13 THE COURT: For trial.

14 MR. BECK: That should be fine, your Honor.

15 THE COURT: All right. We'll have to advance
16 this with discovery with Magistrate Judge Lowe so contact him
17 right away, you contact him right away, advise him what's
18 going on.

19 Let me focus you on what I think is important
20 for the trial on the merits. A lot of it will depend on your
21 discovery. And it really needs to focus on the clear and
22 substantial likelihood of success on the merits, as I said,
23 Mr. MacRae, I don't think the irreparable harm issue is going
24 to be that difficult for the plaintiffs to overcome.

25 I would suggest that you follow the *Central*

1 *Hudson Gas & Electric Corporation* criteria, and that is if
2 the government seeks to regulate speech that is not
3 inherently misleading, although you may suggest that it is,
4 but where it is not inherently misleading or speech that has
5 potential to be presented in either misleading or
6 nondeceptive manner, the government is required to, 1, assert
7 a substantial interest in support of the regulation; 2,
8 demonstrate that the restriction directly and materially
9 advances the interest of the government, public interest; and
10 3, establish that the restriction is narrowly drawn,
11 especially the last two bases. I think we need to focus on
12 that. I think in many respects you already have, but I don't
13 think the defendant has done so as of yet but I think that
14 needs to be done.

15 I would also suggest you maybe break this down
16 into different categories because you have different rules
17 here. Let me suggest this to you. It may be easier for the
18 Court to follow I think for the development in the course of
19 the trial for us to decide the issues if you break it down in
20 these three categories.

21 First, the plaintiffs have challenged rules
22 concerning misleading advertisements. The amendments I think
23 are 22 NYCRR Section 1200.6(c) which prohibits endorsements
24 and testimonials on matters still pending, portrayals of
25 judges, techniques to obtain attention which lack relevancy

1 to selecting counsel, portrayals of lawyers with
2 characteristics unrelated to legal competence, and also the
3 pop-up advertisements. That could be one category, that area
4 there.

5 The second, plaintiffs challenge 30-day
6 blackout rules for contacting injury or wrongful death
7 victims, personal injury or wrongful death victims. That
8 could be a different category because I think they're
9 different issues involved.

10 Third, the plaintiffs challenge the rules as
11 they apply to lawyers whose primary purpose is not pecuniary
12 gain, such as the Public Citizen. I think those are three
13 different categories to be addressed separately, all right?
14 Any questions about this?

15 MR. MacRAE: No, your Honor.

16 THE COURT: Okay.

17 MR. BECK: One moment.

18 THE COURT: All right.

19 (Pause in Proceedings.)

20 MR. BECK: Your Honor, I just wanted to raise
21 one point which is that we suspect that much of the disputed
22 facts, to the extent there are any in this case, the facts I
23 should say will be able to be resolved through stipulations
24 and similar methods and we wanted to bring to your attention
25 the possibility that at some point it might make sense to

1 resolve the case on a summary judgment basis rather than on a
2 trial basis.

3 THE COURT: It may be. I think I need to have
4 more discovery, I need to have more information from the
5 defense side here before I can really make any rulings.

6 MR. BECK: All right, thank you, your Honor.

7 THE COURT: All right. So let's look for that
8 as a trial date. If it can be resolved short of that, fine,
9 but I will make sure both of you contact Magistrate Judge
10 Lowe and we'll let him know today that's forthcoming as soon
11 as he can fit it into his schedule, all right? Thank you,
12 gentlemen. Appreciate your arguments.

13 MR. BECK: Thank you, your Honor.

14 (Court Adjourned, 11:54 a.m.)

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C E R T I F I C A T I O N

I, JODI L. HIBBARD, RPR, CRR, CSR, Official Court Reporter in and for the United States District Court, Northern District of New York, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same, and that the foregoing is a true and correct transcript thereof.

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter