IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

In re Petition To Adopt Changes to Rules of Professional Conduct on Lawyer Advertising
No. M2012-01129-SC-RL1-RL

COMMENTS OF PUBLIC CITIZEN LITIGATION GROUP

Public Citizen Litigation Group ("PCLG") respectfully submits these comments on the proposed amendments to the rules governing lawyer solicitation and advertising. PCLG is concerned that several proposed amendments would violate the First Amendment, the dormant Commerce Clause, and the Privileges and Immunities Clause of the U.S. Constitution. We urge the Court to reject the proposals to modify the rules. Existing Rules of Professional Conduct are sufficient to vindicate state interests in protecting consumers from false and misleading advertisements.

Interest of Public Citizen Litigation Group

PCLG is the litigation arm of Public Citizen, a nonprofit public-interest advocacy organization located in Washington, D.C., with approximately 300,000 members and supporters nationwide. Public Citizen appears before Congress, federal agencies, and the courts to advocate for freedom of expression, consumer protections, access to the courts, and open government, among other things.

As an organization devoted to advocating in the interest 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, Inc.*, 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 also successfully argued *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), challenging a decision of the Ohio Supreme Court to discipline a lawyer for advertisements informing women about his legal services in connection with Dalkon Shield litigation. More recently, PCLG litigated First Amendment challenges to attorney advertising restrictions in *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010); *Harrell v. Florida Bar*, 608 F.3d 1241 (11th Cir. 2010); and *Public Citizen Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011).

PCLG's support for free speech in the commercial context is based in part on the recognition that truthful commercial speech enhances competition and enables consumers to receive 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." 425 U.S. at 763. PCLG is particularly interested in the right to engage in truthful advertising of legal services because commercial speech in this context not only encourages beneficial competition for those 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).

For the reasons outlined below, the proposed amendments are not justified 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. Additionally, the proposed ban on advertising by lawyers without an office in Tennessee would violate the dormant Commerce Clause and the Privileges and Immunities Clause.

Analysis

Before the Court are two separate proposals for rule changes, one proposed by the Tennessee Association for Justice ("TAJ") and the other by an individual board member of that organization, Matthew C. Hardin. These comments identify problematic aspects with both proposals, each of which will be referenced by the name of its proponent (TAJ or Hardin) and proposed rule section. Both proposals contain sections that run afoul of the First Amendment. One aspect of the TAJ proposal also violates the dormant Commerce Clause and the Privileges and Immunities Clause.

I. First Amendment

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, 383-84 (1977). Both the TAJ and Hardin proposals would create new restrictions on commercial speech that would unconstitutionally limit lawyers' rights to communicate truthful information to consumers.

Under the current Rules of Professional Conduct, an attorney is prohibited from making a "false or misleading communication" about his or her services. Rule 7.1. This prohibition is defined to include a communication containing a "material misrepresentation of fact or law" and a communication that omits a fact whose inclusion is necessary to avoid creating a statement that is materially misleading. *Id.*

The Hardin and TAJ proposals would dramatically expand the restrictions on the content of attorney advertising, in at least four respects:

(1) by restricting who may appear and speak in advertisements, *see* TAJ R. 7.1(1)(D) (prohibiting advertisements in which an actor or model portrays a client); Hardin R. 7.1(c)(1)(K) (same); Hardin R. 7.7(b)(1)(D) (same); Hardin 7.1(c)(14) (prohibiting the use of the voice or image of any celebrity); Hardin 7.7(b)(1)(B) (prohibiting the use of "any spokesperson's voice or image that is recognizable to the public");

(2) by restricting what sounds may be used in advertisements, *see* Hardin R. 7.7(b)(1)(C) (prohibiting "any background sound other than instrumental music");

(3) by barring specific types of statements in advertisements, *see* Hardin R. 7.1(c)(2) (prohibiting "statements describing or characterizing the quality of the lawyer's services"); Hardin R. 7.1(c)(1)(I) (barring comparisons of the lawyer's services to other lawyer's services, "unless the comparison can be factually substantiated"); Hardin R. 7.1(c)(1)(F) (barring references to past results); and

(4) by imposing vague and overbroad restrictions on attorney advertisements that reach beyond speech that is false or misleading, *see* TAJ R. 7.1(2) (prohibiting "manipulative" portrayals or descriptions); Hardin R. 7.1(c)(3) (same); Hardin 7.1(c)(15) (same); Hardin R. 7.7(b)(1)(A) (same).

The current ban on attorney advertising that contains false or misleading communications addresses the state's legitimate interest in protecting consumers. The proposed rules extend further than necessary to protect that interest by adding a litany of restrictions that would 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 thus to impede competition in the market for legal services.

A state ordinarily may ban commercial speech only if it is false, deceptive, or misleading. *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994); *Peel v. Att'y 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*, 512 U.S. at 142; *accord Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Importantly, a state's assertion that speech is misleading is not enough to justify banning it. *Ibanez*, 512 U.S. 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.* (citation and internal quotation

marks omitted). The Supreme Court has rigorously and skeptically scrutinized (and, for the most part, rejected) claims by bar authorities that particular forms of attorney advertising are misleading. *See, e.g.*, *id.* at 143-49; *Peel*, 496 U.S. at 101-10; *Zauderer*, 471 U.S. at 639-49; *In re RMJ*, 455 U.S. 191, 203-07 (1982); *Bates*, 433 U.S. at 381-82.

The proposed rules would prohibit a variety of specific advertising techniques that are unlikely to mislead any consumers, such as the use of actors, models, and celebrity spokespeople, *see* TAJ R. 7.1(1)(D); Hardin R. 7.1(c)(1)(K); Hardin R. 7.7(b)(1)(D); Hardin 7.1(c)(14); Hardin 7.7(b)(1)(B), and the use of sounds other than instrumental music, *see* Hardin R. 7.7(b)(1)(C). The common thread among these proposed provisions is that they target basic techniques of effective advertisements. There is nothing actually or inherently misleading, however, about these techniques. Consumers are accustomed to seeing and hearing actors, celebrities, dramatized scenes, and sound effects in commercials, and are unlikely to make the assumption that everyone and everything they see in a commercial is literally real. An actor's portrayal of a generic client in a depiction of a consultation is not likely to fool any consumers into believing that actual events occurred exactly as depicted. 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." 471 U.S. at 649. Similarly, if consumers saw Harrison Ford endorsing a law firm in the persona of the movie character "Indiana Jones," they would be capable of understanding that Ford is a paid celebrity endorser. Particularly strange is the assumption that consumers would be misled by the use of a sound other than background music, such as a car horn or a gavel. The proposals do not

explain how the playing of a sound in an advertisement can render the advertisement false or misleading.

Restrictions on commercial speech cannot be upheld on the basis of "little more than unsupported assertions" without "evidence or authority of any kind." *Id.* 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. Here, neither TAJ nor Hardin has submitted evidence that supports the conclusion that the prohibited practices are misleading or that the broad restrictions in the proposed amendments are an effective means of combating any misleading practices there may be. *See Harrell v. Florida Bar*, ___ F. Supp. 2d ___, 2011 WL 9754086, at *16 (M.D. Fla. Sept. 30, 2011) (striking down as factually unsupported a Florida attorney advertising rule prohibiting the use of background sounds). Nor have the proponents of the new rules offered evidence that whatever misleading advertising exists could not be remedied in a less restrictive manner, such as by requiring a disclaimer in certain circumstances instead of prohibiting certain types of advertising entirely. *See 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 also may be presented in a way that is not deceptive."); *see generally Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (requiring restrictions on commercial speech to be no more extensive than necessary to serve the government interest). For instance, a less restrictive rule would permit the use of actors and sounds in a television advertisement with the simple word "DRAMATIZATION" on the screen, rather than prohibiting such content entirely.

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. Rhode Island*, 517 U.S. 484, 503 (1996) (citation and internal quotation marks omitted). 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. 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 proposed restrictions on advertising 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; to ban celebrities; or to restrict the use of sounds other than instrumental music (such as crowd noise or the buzzer that ends a basketball game).

In addition to prohibiting specific advertising techniques such as dramatization and sound effects, the proposed rules go so far as to single out for proscription particular categories of ideas: specifically, statements that describe the quality of the lawyer's services, *see* Hardin R. 7.1(c)(2), statements that compare the lawyer's services to other lawyer's services "unless the comparison can be factually substantiated," *see* Hardin R. 7.1(c)(1)(I), and references to a lawyer's past successes or results, *see* Hardin R. 7.1(c)(1)(F). A wide range of truthful and non-misleading advertising would be completely forbidden by these rules, including normal, everyday statements of opinion that pervade the advertising in myriad fields (such as the statement "We offer quality services by experienced professionals"). The proposed rules would prevent a lawyer from making an entirely truthful statement about her experience, such as "I have obtained monetary recovery for over a hundred individuals injured by faulty products." The

Fifth Circuit recently struck down an attorney advertising restriction of this type. *See Public Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 221-22 (5th Cir. 2011) ("It is well established that the inclusion of verifiable facts in attorney advertisements is protected by the First Amendment."). Neither TAJ nor Hardin has offered any evidence that truthful statements about an attorney's past successes are likely to mislead consumers. In fact, an attorney's past record is a factor that potential clients might reasonably wish to consider in choosing an attorney, and the state may not presume consumers will use this information irrationally. *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."); *see also Bates,* 433 U.S. at 374-75 (rejecting arguments that "the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information").

The proposed rule prohibiting advertising that compares an attorneys' services with those offered by competitors "unless the comparison can be factually substantiated," Hardin Rule 7.1(c)(1)(I), would bar generic puffery that would mislead no one. The kinds of comparisons that are most often featured in advertisements are usually not susceptible to factual substantiation. A firm will not be able to prove that "No one fights harder for our clients than we do," but there is no evidence to suggest that such statements mislead consumers.

Other provisions of the proposed rules are likely to chill speech because they are vague. *See, e.g., NAACP v. Button*, 371 U.S. 415, 432-33 (1963) (explaining "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application"). Provisions of both proposals prohibit, for instance,

"manipulative" content. TAJ R. 7.1(2); Hardin R. 7.1(c)(3); Hardin 7.1(c)(15); Hardin R. 7.7(b)(1)(A). But that subjective term is nowhere defined and by itself gives no meaningful guidance to attorneys regarding what types of statements and depictions would be permitted. Some attorneys might believe an advertisement is "manipulative" if it contains an element of deceit. Others might find an advertisement featuring a true but tragic story of a client to be "manipulative" because it appeals to the viewer's emotions. And still others might argue all advertising is in some general sense "manipulative" because it attempts to "manipulate" consumers into choosing a particular provider of legal services. Attorneys subject to the proposed rules will face a constitutionally unacceptable dilemma: either comply with the narrowest interpretation of the rules or risk the possibility of professional discipline. Under these circumstances, many lawyers will have no choice but to forgo speech in close cases — a result the First Amendment forbids. *See Button*, 371 U.S. at 433 ("The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (citations omitted)). Moreover, the vagueness of the rules raises the risk of arbitrary and discriminatory enforcement. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). Notably, a federal court struck down Florida attorney advertising rules that relied on the subjective term "manipulative." *Harrell v. Florida Bar*, ___ F. Supp. 2d ___, 2011 WL 9754086, at *9 (M.D. Fla. Sept. 30, 2011) ("[T]he term "manipulative" is so vague that it fails to adequately put members of the Bar on notice of what types of advertisements are prohibited.").

In sum, the proposed rules would prohibit or unreasonably burden a wide range of speech without any evidence that such speech misleads consumers. Instead of helping consumers, the

proposed rules would stifle legitimate competition by making it more difficult for consumers to comparison-shop. The rules would also restrict channels of communications by which consumers may learn of their legal rights and how to protect them. Because the proposed rules are inconsistent with the First Amendment, PCLG urges the Court to reject them.

II. Dormant Commerce Clause and Privileges and Immunities Clause

In addition to the First Amendment flaws with both the Hardin and TAJ proposals, TAJ's proposed ban on advertising by out-of-state attorneys, TAJ R. 7.2(1), is unconstitutional under the "negative" or "dormant" aspect of the Commerce Clause and under the Privileges and Immunities Clause — two doctrines that prevent a state from discriminating against out-of-state individuals and businesses.

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although the Clause is an affirmative grant of power to Congress, it has "long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). Dormant Commerce Clause jurisprudence "is driven by concern about economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008) (citation and internal quotation marks omitted).

In assessing challenges under the dormant Commerce Clause, courts begin by asking whether "a state statute directly regulates or discriminates against interstate commerce," or whether "its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *accord Int'l Dairy*

Foods Ass'n v. Boggs, 622 F.3d 628, 644 (6th Cir. 2010). State laws that discriminate against interstate commerce in these ways are "generally struck down . . . without further inquiry." *Brown-Forman Distillers*, 476 U.S. at 579. A discriminatory law is saved only if the state can show that it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Ore. Waste Sys.*, 511 U.S. at 101. The "State's burden of justification is so heavy that facial discrimination by itself may be a fatal defect." *Id.* (citation and internal quotation marks omitted); *see also Davis*, 553 U.S. at 338 (discriminatory laws are "virtually *per se* invalid" (citation and internal quotation marks omitted)).

Of particular relevance here, the Supreme Court struck down under the dormant Commerce Clause a New York law requiring out-of-state wineries to open an in-state "branch office and warehouse" in order to ship their product directly to consumers. *Granholm v. Heald*, 544 U.S. 460, 474-75 (2005). The Court held that the law discriminated against out-of-state wineries, in part because "the expense of establishing a bricks-and-mortar distribution operation . . . is prohibitive." *Id.* at 475.

Like the "branch office" requirement the Court struck down in *Granholm*, the proposed requirement that lawyers advertising in Tennessee maintain a "bona fide office" in the state, TAJ R. 7.2(1), unconstitutionally discriminates against interstate commerce.[1] On its face, the proposed rule would allow lawyers with offices in Tennessee to advertise legal services, but would prohibit advertising by lawyers whose offices are located outside the state. TAJ R. 7.2(1) ("Individual lawyers or lawyers for firms which do not have a bona fide office in the State of Tennessee may not advertise here."). The restrictive effect of such a rule is not merely theoretical. For instance, a Google search for attorneys in the Memphis suburb of Southaven,

[1] There is no question that advertising constitutes commerce. *See Head v. N.M. Bd. of Examiners in Optometry*, 374 U.S. 424, 427-28 (1963).

Mississippi, readily identifies a number of attorneys who are licensed in Tennessee as well as Mississippi. TAJ's rule would prohibit Tennessee-licensed attorneys with a multi-state practice that includes Tennessee cases from advertising in Tennessee because their offices happen to be across the state line. The rule "thus deprives out-of-state businesses of access to a local market," *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 399 (1994), and therefore is exactly the kind of "geographic distinction . . . patently discriminat[ing] against interstate commerce," *Ore. Waste Sys.*, 511 U.S. at 100, that the dormant Commerce Clause is designed to prevent. *See Granholm*, 544 U.S. at 472 ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.").

TAJ's proffered justifications for the rule do not satisfy the "strictest scrutiny" to which discriminatory laws are subject. *Ore. Waste Sys.*, 511 U.S. at 101 (citation and internal quotation marks omitted). TAJ defends the rule on two grounds: (1) the rule "prevents out-of-state attorneys from taking business out of Tennessee" and (2) out-of-state advertising "creates difficulties in bar oversight as to whether or not Tennessee citizens are being treated in an ethical manner by out of state attorneys." TAJ Supp. Pet. 5.

The first rationale is not a legitimate goal under the dormant Commerce Clause; on the contrary, "[t]he central rationale for the rule against discrimination is to *prohibit* state or municipal laws whose object is local economic protectionism[.]" *C & A Carbone*, 511 U.S. at 390 (emphasis added); *see also Int'l Dairy Foods Ass'n*, 622 F.3d at 644 ("Economic protectionism is the core concern of the dormant commerce clause[.]" (citation and internal quotation marks omitted)). The competitive threat that TAJ fears, *see* TAJ Supp. Pet. 5 ("Out-of-state attorneys practicing here limit the client base of Tennessee attorneys."), is one that the Constitution requires Tennessee to tolerate. *See Granholm*, 544 U.S. at 472 ("States may not

enact laws that burden out-of-state [businesses] simply to give a competitive advantage to in-state businesses.").

The second proffered justification — protecting citizens from unethical attorney practices — is a legitimate purpose, but TAJ provides no evidence that attorneys working from out-of-state offices are likely to engage in unethical conduct that would be beyond the reach of state professional conduct rules or state law. *Cf. Granholm*, 544 U.S. at 490 (rejecting states' justification for discriminatory laws where the states "provid[ed] little evidence" of the problem the laws purported to address). Attorneys who are licensed to practice law in Tennessee (or practicing in the state on a pro hac vice basis) but who maintain their offices elsewhere are subject to bar discipline just like attorneys with offices in Tennessee. For those attorneys who attempt to practice in the state without appropriate authorization, a state statute already prohibits the unauthorized practice of law. *See* Tenn. Code. Ann § 23-3-103(a). TAJ does not present any evidence that state authorities are having difficulty combating such unauthorized practice so as to justify the proposed protectionist measure. TAJ's asserted justifications thus cannot overcome the "heavy" burden of justification on state laws that discriminate against interstate commerce. *Ore. Waste Sys.*, 511 U.S. at 101.[2]

For similar reasons, TAJ's proposed ban on non-resident attorney advertising would be unconstitutional under the Privileges and Immunities Clause, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art IV, § 2. Under this provision, a state may discriminate against individuals from

[2] Even absent discrimination, state laws are invalid if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Davis*, 553 U.S. at 338-39 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Because the proposed rule is facially discriminatory, it is unnecessary to look to this balancing test. In any event, for the reasons described in the text, the proposed rule does not demonstrate any non-protectionist local benefits that could outweigh the burden imposed on out-of-state attorneys.

other states only where "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective" — an analysis that includes consideration of "the availability of less restrictive means." *Sup. Ct. of N.H. v. Piper*, 470 U.S. 275, 284 (1985). One of the privileges protected by the Clause is the ability to practice law. *Id.* at 280-81, 288 (holding that states may not prohibit nonresidents from practicing law); *accord Barnard v. Thorstenn*, 489 U.S. 546, 558-59 (1989); *see also Sup. Ct. of Va. v. Friedman*, 487 U.S. 59, 70 (1988) (striking down state bar regulation that allowed only state residents to be admitted to the bar without taking entrance examination).

The fact that TAJ's proposed rule does not on its face discriminate between residents and non-residents does not save it. *See Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 67 (2003) ("[T]he absence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a Privileges and Immunities] claim."). For example, in *Chalker v. Birmingham & Northwestern Ry. Co.*, 249 U.S. 522 (1919), the Court struck down a state law taxing only construction companies with a "chief office outside of this state." *Id.* at 525. The fact that the statute made no reference to residency or citizenship was not controlling; rather, the Court acknowledged the reality that "the chief office of an individual is commonly in the state of which he is a citizen" and so the law would place discriminatory burdens on out-of-state citizens. *Id.* at 527. Here, as in *Chalker*, TAJ's proposed Tennessee-office requirement would impose discriminatory burdens on non-resident lawyers. A lawyer's "bona fide office" will "commonly [be] in the state of which he is a citizen." *Id.* Just as Tennessee could not prohibit non-resident lawyers from joining its bar, it may not prohibit non-resident lawyers from seeking business through advertising, while allowing resident lawyers that opportunity.

TAJ's justifications for its proposed rule fare no better in the context of the Privileges and Immunities Clause than they do in the context of the dormant Commerce Clause. Economic protectionism is not a "substantial reason" that justifies discrimination against non-resident lawyers. *Piper*, 470 U.S. at 285 n.18. And the Supreme Court in *Piper* already rejected TAJ's other argument — the difficulty of bar supervision of out-of-state lawyers. The Court there found "no reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner." *Id.* at 285-86. And of course "a nonresident lawyer may be disciplined for unethical conduct" when practicing law in Tennessee. *Id.* at 286.

Because the TAJ's proposed prohibition on advertising by non-resident lawyers would violate both the dormant Commerce Clause and the Privileges and Immunities Clause, it should not be adopted by this Court.

Conclusion

The proposed rules, if adopted, would be unconstitutional under the First Amendment, the dormant Commerce Clause, and the Privileges and Immunities Clause. We urge this Court to reject the proposed rules.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon these individuals and organizations by regular U.S. Mail, postage prepaid within seven days of filing with the Court:

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