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

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| PUBLIC CITIZEN, INC., *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>LOUISIANA ATTORNEY DISCIPLINARY BOARD, *et al.*;<br><br>Defendants. | Civil Action No. 08-4451 |

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**


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On December 1, 2008, sweeping new restrictions on the content of lawyer advertisements will go into effect in Louisiana. The restrictions will limit competition in the lawyer services market by prohibiting lawyers from communicating truthful and relevant information about themselves to the public. The new rules will also restrict a wide range of common advertising content, such as testimonials, actors, reenactments, dramatizations, and other stock advertising techniques that are essential to effective advertising and that have no reasonable possibility of misleading consumers. As amended, the rules go far beyond the rules of almost every other state and are so extreme that, if they were applied equally to other industries, they would prohibit most advertisements currently running on television and in many other forms of media.

Despite longstanding Supreme Court precedent holding that the First Amendment prohibits state restrictions on commercial speech absent evidence that the restrictions are necessary and effective to further a substantial state interest, *see, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), the Louisiana Supreme Court adopted the amendments without even articulating the interests that the rules are supposed to serve, much less relying on evidence that the rules are necessary and effective to serve that interest. Indeed, the Court adopted the rules more than a year after a federal district court reviewing the constitutionality of New York's recent advertising amendments—on which many of Louisiana's rules are based—declared them unconstitutional on the ground that evidence in support of the amendments was "notably lacking." *Alexander v. Cahill*, No. 07-cv-117, 2007 WL 2120024, at *6, 8 (N.D.N.Y. July 23, 2007), *appeal docketed*, No. 07-3677 (2d Cir. Aug. 27, 2007). Moreover, the rules are so broad and so vague that they cannot give adequate guidance to lawyers and disciplinary authorities trying to interpret them and will inevitably lead to a broad chilling effect on commercial speech. Plaintiffs are entitled to a preliminary injunction against the rules on the grounds that they violate

the First and Fourteenth Amendments to the United States Constitution.

## BACKGROUND

### I. Louisiana's Restrictions on Lawyer Advertising

Lawyer advertising in Louisiana is governed by Part 7 of the Louisiana Rules of Professional Conduct. Until the December 1, 2008, effective date of the amendments challenged here, the rules prohibit lawyer advertising if it is "false, misleading or deceptive." La. Rules of Prof'l Conduct R. 7.1(a). Following the American Bar Association's Model Rules of Professional Conduct, the rules do not impose specific restrictions on the types of factual information or stylistic elements that lawyers may include in their ads, except that lawyers are required to attach disclosures or disclaimers in some situations, including when an advertisement contains "an endorsement by a celebrity or public figure" or the "visual portrayal of a client by a nonclient." *Id.* R. 7.1(a)(vi), (vii); *see* ABA Model Rules of Prof'l Conduct R. 7.1. As far as plaintiffs are aware, the state has no evidence, in the form of complaints, disciplinary records, empirical studies, consumer surveys, or anything else, that the current rules have been ineffective at protecting consumers from false and misleading lawyer ads. *See* Bart Decl. ¶ 13.

The process that gave rise to the amendments at issue here began in 2006, when the Louisiana legislature 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." Sen. Con. Res. 113, 2006 Leg., 32nd Reg. Sess. (La. 2006) ("Concurrent Resolution") (Beck Decl. Exh. 1). 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." *Id.* To avoid legislative intervention, 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. *Id.*

In response to the resolution, the Louisiana Supreme Court sought input from the Louisiana State Bar Association ("LSBA") about possible amendments to the rules. *See* Minutes, LSBA Rules Comm., Sept. 21, 2006 ("Sept. 21 Minutes") (Beck Decl. Exh. 2), at 1. The LSBA's standing Rules of Professional Conduct Committee ("Rules Committee") quickly met and put together a series of proposed amendments taken mostly verbatim from advertising rules in New York and Florida. *Id.* at 1-4; Minutes, LSBA Rules Comm., Sept. 26, 2006 (Beck Decl. Exh. 3), at 1, 4. Without considering any evidence, the committee proposed new prohibitions on "portrayal of a client by a nonclient," "portrayal of a judge," "reenactment of any events or scenes or pictures that are not actual or authentic," use of "a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter," and use of "any spokesperson's voice or image that is recognizable to the public in the community where the advertisement appears." *Compare* Rules Comm., Proposed Amendments, Oct. 24, 2006 ("First Rules Comm. Proposal") (Beck Decl. Exh. 4), R. 7.2(b)(1)(F), (G), (J); *id.* R. 7.5(b)(1)(B), *with* N.Y. State Unified Court Sys., Proposed Amendments to Rules Governing Lawyer Advertising, June 2006 (Beck Decl. Exh. 6), § 1200.6(d)(3), (4), (6), (8). The committee also voted to recommend, again without any consideration of evidence, rules against advertisements that contain a "testimonial" or a "reference to past successes or results obtained," or that "promise[] results." *Compare* First Rules Comm. Proposal, *supra*, R. 7.2(b)(1)(B), (E), *with* Fla. Rules of Prof'l Conduct R. 4-7.2(c)(1)(F), (J). Finally, the committee's proposal provided that "a non-lawyer spokesperson speaking on behalf of the lawyer or law firm" may be included in television or radio advertising only "as long as the spokesperson's voice or image is not recognizable to the public in the

community where the advertisement appears" and the spokesperson "provide[s] a spoken disclosure identifying the spokesperson as a spokesperson and disclosing that the spokesperson is not a lawyer." *Compare* First Rules Comm. Proposal, *supra*, R. 7.5(b)(2)(C), *with* Fla. Rules of Prof'l Conduct R. 4-7.5(b)(2)(B). Together, the proposed amendments radically changed the focus of Louisiana's advertising rules from a prohibition on false and misleading advertisements to regulation of stock advertising devices that are not misleading or otherwise harmful to consumers.

After the proposed rules had already been formulated, the Rules Committee held a series of "public hearings," which were not advertised to the general public. *See* Tr. of Public Hearing, Lafayette, Nov. 8, 2006, at 2-3, 103-04 (Beck Decl. Exh. 9). The hearings were essentially question-and-answer sessions for lawyers who would be affected by the amended rules. *See id*; Bart Decl. ¶ 14; Tr. of Public Hearing, Baton Rouge, Nov. 2, 2006 (Beck Decl. Exh. 8); Tr. of Public Hearing, New Orleans, Nov. 9, 2006 (Beck Decl. Exh. 10); Tr. of Public Hearing, Shreveport, Nov. 16, 2006 (Beck Decl. Exh. 11). No testimony or other evidence was developed that the advertising content targeted by the amendments was harmful to consumers or that prohibiting them was necessary to serve any articulable state interest.

The committee also solicited written comments about the amendments. *See* Rules Comm., Comments to the Rules of Prof'l Conduct (Beck Decl. Exh. 12). The lawyers submitting comments in support of the amendments generally stated their belief that lawyer advertising is unprofessional or in poor taste, but did not submit any evidence backing up this belief, demonstrating consumer confusion, or showing any other legitimate need for the rules. *See id.* The majority of commenters objected to the rules as unnecessary, overbroad, or unconstitutional. *See id.* Among these, comments by the staff of the Federal Trade Commission advised that the

rules may hurt consumers by inhibiting competition, frustrating consumer choice, and ultimately increasing prices while decreasing quality of service. *See* Letter from FTC Staff to Richard Lemmler (Mar. 14, 2007) (Beck Decl. Exh. 13), at 2. Plaintiffs Public Citizen, Inc., Morris Bart, and William N. Gee, III, also submitted comments opposing the amendments on the ground that they served no useful purpose and would constitute an unconstitutional restriction on commercial speech. *See* Public Citizen Litigation Group, Comments on the Proposed Rules, June 5, 2007 (Beck Decl. Exh. 16); Letter from Morris Bart to Richard Lemmler (Nov. 22, 2006) (Bart Decl. Exh. 1); Letter from William N. Gee, III, to Richard Lemmler (Mar. 2, 2007) (Gee Decl. Exh. 1).

Following the hearings and receipt of written comments, the Rules Committee adopted only one material change relevant to the rules challenged here: a new prohibition on "portrayal of a . . . jury." Rules Committee, Proposed Amendments, Mar. 21, 2007 (Beck Decl. Exh. 5), R. 7.2(c)(1)(J). The Rules Committee did not explain the basis for this prohibition, which has never been adopted by any other state. The committee then approved a resolution proposing that the LSBA House of Delegates recommend the new rules to the Louisiana Supreme Court. *See* Resolution, Rules Committee, Mar. 23, 2007 ("Rules Comm. Resolution") (Beck Decl. Exh. 17). The resolution gave no explanation or evidence supporting a need for any of the rules and did not respond to the concerns raised by commenters that the amendments were unconstitutional and harmful to consumers. Nevertheless, the House of Delegates voted on June 7, 2007, to accept the Rules Committee's proposal and recommend that the proposed rules be incorporated into the Rules of Professional Conduct. *See* Minutes, LSBA House of Delegates, June 7, 2007 ("House of Delegates Minutes") (Beck Decl. Exh. 18).

On July 3, 2008, the Louisiana Supreme Court adopted the rules recommended by the LSBA, characterizing them in a press release as "comprehensive amendments" to the advertising

rules. *See* Press Release, Louisiana Supreme Court (July 3, 2008) ("Press Release") (Beck Decl. Exh. 19). The Court's only explanation of the purpose of the amendments was the "need to improve the existing rules in order to protect the public from unethical forms of lawyer advertising." *Id.* Although the Court did not publicly acknowledge it, all the New York rules on which the Louisiana amendments were based had by that time either been abandoned or declared unconstitutional on the ground that they were not supported by any evidence. *See* N.Y. State Unified Court Sys., Amendments to Rules Governing Lawyer Advertising, Jan. 2007 (Beck Decl. Exh. 7), § 1200.6; *Alexander*, 2007 WL 2120024.[1]

## II. Plaintiffs

Plaintiff Public Citizen, Inc. is a national, nonprofit public interest organization with approximately 70,000 members nationwide, including approximately 250 in Louisiana. Berwager Decl. ¶ 2. As an organization devoted to defending the First Amendment and the rights of consumers, Public Citizen has an interest in ensuring that its members are not restricted from receiving communications regarding their legal rights and the availability of legal services. Wolfman Decl. ¶¶ 2-3. Public Citizen is particularly interested in the availability of truthful legal advertising because speech in that 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 claim, and enhance their access to the legal system. *Id*. ¶ 3. The state's restrictions on lawyer advertising injure Public Citizen's Louisiana members, who are consumers of legal services, by preventing them from receiving information that they have an interest in receiving. *Id.* ¶ 4.

[1] All references to the amended rules are to the final version of the amendments adopted by the Louisiana Supreme Court on July 3, 2007, attached to this memorandum as Exhibit 1. A side-by-side comparison of the pre- and post-amendment rules, as prepared by the LSBA, is attached as Exhibit 2.

Plaintiff Morris Bart is a practicing lawyer in New Orleans and owner of the firm Morris Bart, L.L.C. Bart Decl. ¶ 1. Plaintiff William Gee, III, is a lawyer practicing in Lafayette and owner of the law offices of William N. Gee, III, Ltd. Gee Decl. ¶¶ 1-3. Both Bart and Gee advertise their services to the public through broadcast media, print advertisements, and the Internet in ways that will be prohibited after the advertising amendments become effective on December 1, 2008. Bart Decl. ¶¶ 2-12; Gee Decl. ¶¶ 3-10. Both use testimonials and references to past successes, actors playing clients, reenactments, scenes, and mottos that could be construed as "impl[ying] an ability to obtain results in a matter." Bart Decl. ¶¶ 5, 6-10, 12-14; Gee Decl. ¶¶ 3, 5-10. In addition, Bart's television commercials frequently contain testimonials of actual clients about the quality of representation in their cases, and Gee's advertisements include the spokesperson 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.* Bart Decl. ¶ 7; Gee Decl. ¶ 4. Absent an injunction, plaintiffs will be forced to abandon these ads and develop new ones at great expense, losing in the process the public recognition that their current advertising campaigns have developed over time. Bart Decl. ¶¶ 4-12; Gee Decl. ¶¶ 4-9.

## III. Defendants

Defendants are the Louisiana Attorney Disciplinary Board ("LADB"), the state agency responsible for investigating, prosecuting, and adjudicating violations of the advertising provisions of the Louisiana Rules of Professional Conduct, as well as the board's chair and chief disciplinary counsel (in their official capacities), who are primarily responsible for supervising and carrying out the board's disciplinary functions. *See* Rules of the La. Supreme Court R. XIX, sections 2, 4. Plaintiffs seek a preliminary injunction prohibiting defendants from enforcing the challenged rules until the constitutionality of the rules can be finally determined.

## ARGUMENT

To establish entitlement to a preliminary injunction, a plaintiff must show

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

*Speaks v. Kruse*, 445 F.3d 396, 399-400 (5th Cir. 2006) (internal quotation omitted).

Plaintiffs satisfy each of these standards here. First, the likelihood of success on the merits is strong because the state has no evidence of the need for its rules, as is required to support a restriction on commercial speech. *See Edenfield*, 507 U.S. at 770-71. Indeed, some of the rules on which Louisiana based its amendments have already been declared unconstitutional on the ground that the evidence supporting them is "notably lacking." *Alexander*, 2007 WL 2120024, at *6, 8. Second, an injunction is necessary to prevent irreparable harm to plaintiffs' free speech rights, to avoid the tremendous costs of developing new advertisements that comply with the rules, and to prevent the loss of public recognition and goodwill that would be caused by forcing plaintiffs to abandon their current slogans and advertising campaigns. Third, a preliminary injunction will not seriously harm the state's interests because the forms of advertising prohibited by the amendments were allowed in Louisiana for many years, and the state has no evidence that the public suffered any harm during that time. And finally, given the strength of the interest in free speech and the lack of a legitimate government interest, the threatened injury to plaintiffs necessarily outweighs any damage defendants would suffer if the injunction were granted.

### I. The Challenged Rules Unconstitutionally Restrict the Content of Commercial Speech.

Lawyer advertising is a form of speech protected by the First Amendment. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). As the Supreme Court has explained, society has a strong

interest in freedom of commercial speech: "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

To justify a restriction on commercial speech, a state must demonstrate—with actual evidence—"that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield* at 507 U.S. at 770-71; *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 168 (5th Cir. 2007) ("It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it."). Unless the advertising restricted is provably false or misleading, the state must satisfy the three-part test first set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). "First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'" *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (internal quotation omitted). The Supreme Court has described the state's burden under *Central Hudson* as a "heavy" one. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996). The Court has repeatedly subjected state justifications for blanket restrictions on particular forms of lawyer advertising to rigorous and skeptical scrutiny and has, for the most part, rejected those claims. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136 (1994); *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office*

*of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re RMJ*, 455 U.S. 191 (1982); *Bates*, 433 U.S. 350.

Louisiana cannot satisfy its heavy burden under the *Central Hudson* test. The state adopted the rules not to protect consumers from false and misleading advertisements, but to regulate speech that it considers to be undignified or in bad taste—an interest the Supreme Court has held insufficient to justify restrictions on commercial speech. Moreover, the Louisiana Supreme Court adopted its amendments without the support of any evidence that they are either necessary or effective to satisfy any other state interest. Finally, the rules are vastly overbroad, prohibiting all use of certain forms of advertising content even though this content is regularly used in ways that are not misleading or even undignified, and even though the state did not consider whether its purposes could be achieved in a way that imposes a lesser burden on speech.

### A. The Amendments Are Not Supported by Any Legitimate State Interest.

"Unlike rational-basis review, the *Central Hudson* standard does not permit [a court] to supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 507 U.S. at 768. Therefore, only the purpose on which the state specifically relies in support of its rules is relevant here. *See Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403, 410 (5th Cir. 2007) (holding that, as a starting point, the state "must at least articulate regulatory objectives to be served"). Neither the LSBA Rules Committee nor the House of Delegates, however, gave any indication of the purpose motivating their approval of the amendments. *See* Rules Comm. Resolution, *supra*; House of Delegates Minutes, *supra*. As far as is apparent from these proceedings, the LSBA selected the rules without having any reason for doing so.

As for the Louisiana Supreme Court, which adopted the LSBA's recommendation, the only indication of motivating purpose is a press release stating that the Court adopted the amendments "to improve the existing rules in order to protect the public from unethical forms of

lawyer advertising." *See* Press Release, *supra*. That explanation, however, is circular. The Court does not explain *why* the prohibited forms of advertising should be considered unethical or how they harm consumers.

Although the Louisiana Supreme Court did not coherently explain the motivation behind the amendments, it did allude to that motivation when it noted in its press release that the amendments were "precipitated" by the legislature's 2006 concurrent resolution on lawyer advertising. *Id.*; *see also* Sept. 21 Minutes, *supra*, at 1 (discussing the role of the resolution in the amendment process). The resolution asserted 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" and called upon the Louisiana Supreme Court to establish a committee "to address ethical concerns posed by lawyer advertising and to present a more positive message to the citizens of this state." *See* Concurrent Resolution, *supra*. In other words, the Louisiana Supreme Court took up the amendments based on the legislature's view that lawyer advertising makes lawyers look bad. That this was the real purpose of the amendments is confirmed by the fact that the chosen rules are mostly verbatim copies of rules from New York and Florida, both of which openly relied on lawyer dignity as a motivation for their adoption of those rules.[2]

Lawyer dignity is not a sufficient basis to justify the restriction of commercial speech.

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[2] *See* Press Release, New York State Unified Court System, June 15, 2006 (Beck Decl. Exh. 20) (stating that the proposed New York amendments would "ensur[e] that the image of the legal profession is maintained at the highest possible level"); Fla. Rules of Prof'l Conduct R. 4-7.5, cmt. (stating that the purpose of Florida's rules is to prevent "the creation of incorrect public perceptions or assumptions about the manner in which our legal system works, and to promote the public's confidence in the legal profession and this country's system of justice"); *see also Fla. Bar v. Pape*, 918 So. 2d 240, 246-47 (Fla. 2005) (holding that enforcement of Florida's advertising rules "is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system").

The state in *Bates* advanced this same justification for its restrictions on lawyer advertising, arguing that such advertising would hurt the profession by "undermin[ing] the attorney's sense of dignity and self-worth." 433 U.S. at 368. The Court rejected the state's concern as a sufficient basis for restricting speech, finding the "postulated connection between advertising and the erosion of true professionalism to be severely strained." *Id.* Since then, the Court has reaffirmed the principle that lawyers have a First Amendment right to advertise even if the advertisements are "embarrassing or offensive" to some members of the public or "beneath [the] dignity" of some members of the bar. *Zauderer*, 471 U.S. at 647-48. Here, the state's attempt to prohibit advertising in an attempt to change the way the public "perceive[s]" lawyers and to "present a more positive message" is no more than an effort to manipulate public opinion by suppressing speech. No justification for speech restrictions is more offensive to the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").[3]

**B. The State Has No Evidence that the Amendments Are Necessary or Effective.**

Even if the state did have a valid interest in protecting the dignity of lawyers, it has no evidence that lawyer advertising in general, or the targeted forms of advertising in particular, have a negative impact on the image of lawyers. *See Edenfield*, 507 U.S. at 770 ("That the

[3] *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) ("[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.") (internal quotation omitted); *RMJ*, 455 U.S. at 205-06 (holding unconstitutional a prohibition on commercial speech that was "at least bad taste," but where the state had no evidence it harmed consumers); *Va. State Bd. of Pharmacy*, 425 U.S. at 765 ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."); *Ficker v. Curran*, 119 F.3d 1150, 1154 (4th Cir. 1997) ("[T]he Supreme Court forbids us from banning speech merely because some subset of the public or the bar finds it embarrassing, offensive, or undignified.").

[state's] asserted interests are substantial in the abstract does not mean . . . that its blanket prohibition . . . serves them."). As the Supreme Court wrote in *Bates*, other professions such as bankers and engineers advertise (often using methods similar to those used by lawyers), "and yet these professions are not regarded as undignified." 433 U.S. at 369-70. Indeed, almost all advertisements in other industries use at least one of the techniques prohibited by the amendments, and most of them are done tastefully. *See* infra Part I.C.1. Improving public opinion of a product or service is, after all, one of the main motivations for advertising, and lawyers are not likely to invest in advertisements that ruin their reputations and drive away consumers. If anything, "stylish" ads, of the sort that consumers are used to seeing on television, are likely to give consumers a better impression of lawyers than the bland "talking heads" ads of the sort required by restrictive rules like Louisiana's. *See* William E. Hornsby, Jr., Regulating *Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 Geo. J. Legal Ethics 325, 350-56 (1996) (reviewing an American Bar Association Study).[4]

The state has no evidence, in the form of disciplinary records, studies, surveys, or empirical research of any kind, suggesting that Louisiana's chosen restrictions target false or misleading communications or advance any other legitimate state interest. *See* Bart Decl. ¶ 13. Rather than drafting its amendments based on demonstrated needs, the Rules Committee selected the new rules *first* and only then made an effort to develop a record to support them. Moreover, the committee took the language for the amendments from rules in New York and Florida, perhaps assuming that those states had already done the work necessary to satisfy the *Central Hudson* test. If that was the state's assumption, however, it was incorrect. Those rules were not

[4] Banks, for example, use a variety of actors, scenes, trade names, and mottos that would be prohibited if Louisiana's lawyer advertising rules were applied equally to them. *See, e.g.*, http://www.youtube.com/watch?v=bQbFcjJwWN4 (Citibank commercial).

only adopted, as already explained, on the basis of illegitimate dignity interests, but also lacked any supporting evidentiary record. *See Alexander*, 2007 WL 2120024, at *6 (noting the lack of evidence in support of the New York rules); Petition, App. D at G-2, *In re Amendments to the Rules Regulating the Fla. Bar*, No. SC05-2194 (Fla. 2007) (Beck Decl. Exh. 21) ("Fla. Task Force Report") (dissenting task force member noting that Florida's 2004 task force, which adopted the rule against ads that "promise[] results," "made no effort to obtain empirical evidence . . . to support acceptance or rejection of any proposed changes").

To be sure, it is possible that some of the prohibited advertising devices could, in particular cases, be used in a misleading way, as could nearly *any* advertising device. Even the English language can be misused in ways that are deceptive or misleading, but that does not justify a ban on English in advertisements. The Supreme Court has repeatedly held that the mere *potential* for misuse does not justify restricting whole categories of commercial speech. *Zauderer*, 471 U.S. at 644-47. In *Zauderer*, for example, the state enacted broad prophylactic rules against the use of illustrations in advertisements, claiming that such illustrations have the potential to mislead the uninformed public. *Id.* at 644-45. The Supreme Court rejected this justification, holding that a state cannot ban commercial speech simply because it can be abused in individual cases. *Id.* "[T]he free flow of commercial information," the Court wrote, "is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Id.* at 646. Thus, even if there were a risk that the devices prohibited by the amendments could be misused—and there is no reason to believe the risk as to this content is any worse than the risk as to any other kind of advertisement—the state still could not prohibit them as long as there are

situations where lawyers could use them in a non-misleading manner.[5]

In addition to these general problems, each of the individual amendments is flawed for additional reasons.

### 1. The Prohibitions on Testimonials and References to Past Results

Amended Rule 7.2(c)(1)(D) prohibits advertisements that "contain[] a reference or testimonial to past successes or results obtained" except when the information is requested by a client. The rule would allow the state to punish lawyers for communicating even truthful facts about the outcome of their cases.

Although neither the Louisiana Supreme Court nor the LSBA have articulated any justification for this rule, the state may attempt to argue that testimonials and references to results are misleading because consumers will irrationally conclude that a lawyer's success in past cases will necessarily lead to the same result in the future. Even setting aside the fact that the state has no evidence to support this contention, it would still be an insufficient justification to uphold a restriction on commercial speech. The Supreme Court has uniformly rejected state attempts to restrict advertising based on the "fear that people would make bad decisions if given truthful information." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). As the Supreme Court stated in *Virginia Board of Pharmacy*, in rejecting a blanket ban on drug prices:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests, if only they are well enough informed, and that the best means to that end is to open the channels of communication rather

[5] *See also Ibanez*, 512 U.S. at 146 (holding that courts "cannot allow rote invocation of the words 'potentially misleading' to supplant the [state's] burden"); *Peel*, 496 U.S. at 111 (plurality opinion) ("[C]oncern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment"); *Shapero*, 486 U.S. at 476 (holding that the potential "for isolated abuses or mistakes does not justify a total ban"); *RMJ*, 455 U.S. at 203 (holding that a state "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").

> than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

425 U.S. at 765.[6]

In *RMJ*, for example, the Court struck down a restriction preventing a lawyer from truthfully advertising that he was a member of the U.S. Supreme Court Bar. 455 U.S. 191. Because admission to the Supreme Court Bar requires no special qualifications and is available to any lawyer licensed by a state bar for more than three years, the Court noted that the claim was "relatively uninformative" and "could be misleading to the general public unfamiliar with the requirements of admission." *Id.* at 205. Nevertheless, the Court held the restriction unconstitutional because it found "nothing in the record to indicate that the inclusion of this information was misleading." *Id.* at 205-06. Similarly, the Supreme Court in *Peel* held that a state violated the First Amendment by disciplining a lawyer for stating on his letterhead that he was certified as a civil trial specialist by the National Board of Trial Advocacy. 496 U.S. 91. The Court rejected the state's assumption that the "average consumer" would be confused and unable to understand the value of such a certification. *Id.* at 105-06 & 106 n.13.

In any case, Louisiana has no evidence to demonstrate that consumers are likely to reach an irrational conclusion after hearing about an attorney's past results. Consumers in Louisiana are bombarded every day by testimonials for a wide range of products and services and therefore have considerable experience making judgments about how persuasive, credible, and useful

[6] *See also 44 Liquormart*, 517 U.S. at 516 (Stevens, J., concurring) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."); *Bates*, 433 U.S. at 375 (rejecting the restriction of attorney advertising on the assumption 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"); *Allstate Ins. Co.*, 495 F.3d at 167 ("Attempting to control the outcome of the consumer decisions . . . by restricting lawful commercial speech is not an appropriate way to advance a state interest in protecting consumers.").

particular commercial testimonials may be. There is no reason to believe consumers will be any less capable of making judgments concerning testimonials about lawyers. Indeed, although Louisiana has allowed testimonials and references to past results regarding lawyers for many years, as forty-eight other states continue to do, there is no evidence that consumers have ever been misled.[7]

The prohibition on advertising past results not only rests on an "underestimation of the public," *Bates*, 433 U.S. at 375, it prevents consumers from learning one of the facts most relevant to their choice of a lawyer. Most rational consumers would prefer to hire a lawyer who has experience in the area of law at issue and who has successfully litigated similar cases in the past. Most consumers would also be interested to know whether past clients of the lawyer are satisfied with the lawyer's work. Under the state's prohibition on testimonials, however, a consumer would not be able to distinguish an advertisement by a lawyer who has never won a case and whose clients have consistently been disappointed by his performance from one by a lawyer who has successfully litigated dozens of cases and whose clients are satisfied with the quality of his work. In this way, the state deprives consumers of the ability to make a choice based on all the relevant information. *See Pruett*, 499 F.3d at 415 n.35 ("The benefits attending commercial speech flow not just to the speaker, for increased consumer knowledge about any product aids consumer choice and increases competition."); *Allstate Ins. Co.*, 495 F.3d at 167 (holding unconstitutional a statute prohibiting insurance companies from recommending auto shops in which they own an interest, and recognizing that "[c]onsumers benefit from more, rather

[7] The ABA's model rules do not restrict references to past results. ABA Model Rules of Prof'l Conduct R. 7.1. Six states allow such references if accompanied by a disclaimer. *See* Mo. Rules of Prof'l Conduct R. 4-7.1(c); N.M. Rules of Prof'l Conduct R. 16-701(A)(4); N.Y. Code of Prof'l Resp. DR 2-101(e); S.D. Rules of Prof'l Conduct R. 7.1(c)(4); Tex. Disciplinary Rules of Prof'l Conduct R. 7.02(a)(2); Va. Rules of Prof'l Conduct R. 7.2(a)(3). Only Florida prohibits them completely. Fla. Rules of Prof'l Conduct R. 4-7.2(c)(1)(F).

than less, information") (internal quotation omitted); *see also* Bart Decl. ¶ 7; Gee Decl. ¶ 6.

Louisiana's largest and most respected law firms routinely advertise their past results, yet nobody would accuse these firms of engaging in unethical or misleading advertising. Jones Walker, for example, distributes an advertising brochure titled "Solutions," containing "success stories" that "describe Jones Walker's role in finding winning solutions for [its] clients facing difficult environmental issues." Brochure, Jones Walker Envt'l & Toxic Tort Practice Group at 1, 2, *available at* http://www.joneswalker.com/assets/attachments/environmental_brochure_version_20.pdf ("Jones Walker Brochure") (Beck Decl. Exh. 22). The brochure features cases where Jones Walker prevailed in court or reached successful settlements, including specific cases where it cleared the way for property development, obtained dismissal of a criminal indictment, and, in a class action, "substantially reduce[d] the potential class size . . . saving the client untold costs in defending numerous dubious actions." *Id.* at 3, 4, 9, 11. Similarly, Stone Pigman ran an advertisement in *Forbes* stating that the firm had won "precedent-setting court decisions involving class actions and federal removal jurisdiction." Advertisement, *Businesses Rely on Stone Pigman When Venturing South*, *available* at http://www.stonepigman.com/pdf/SPadvertorial.pdf (Beck Decl. Exh. 23). The ad specifically mentions a case where the firm "won for R.J. Reynolds a reversal of the trial court's order certifying a nationwide class of nicotine-addicted plaintiffs," and another case where it "won reversal in the appellate court" on behalf of pizza company Papa John's. *Id.* It goes on to claim that the firm's lawyers have "compiled an equally impressive record of success in handling business transactions for their clients," listing specific examples of its successes in this area. *Id.* Though none of these statements are misleading, all would be prohibited by the amended rules.

Finally, any claim that the rule against past results is targeted at misleading

communications is fatally undermined by the rule's exception for communications to potential clients who have requested information about the lawyer. *See* Rule 7.9(b). Because the rules classify websites as "information provided upon request," this exception allows lawyers to post their past successes on their online biographies and their firms' home pages. Rule 7.6(b)(3). If the state really considered statements about past results to be misleading, this exception would make no sense. Consumers increasingly depend on the Internet to look for goods and services, and there is no logical reason why they would likely be misled when looking up a lawyer on the Internet but not when looking up the same lawyer in the yellow pages. Indeed, by exempting information provided upon request, the rules would leave consumers exposed to this information at the times when they are actively looking for legal services, and thus most potentially susceptible to being misled by advertising that is genuinely deceptive.

Given that there is no reason to believe that past results are more misleading in the yellow pages, in the newspaper, or on television than they are on a website, it is notable that defendant LADB includes information about past results on its *own* website. The Board's site states that Board Chair Dennis W. Hennen served as counsel in a class action that settled for $85 million, and that member Christopher H. Riviere "has successfully represented numerous Fortune 500 companies." *See* http://www.ladb.org/board_member_profiles.asp. The LADB (which is responsible for enforcing the rules against false and misleading ads) would never tolerate these statements if there were even a *risk* that consumers would be misled.[8]

[8] Most large law firms also list past results on their websites and will be allowed to continue this practice under the amendments. Jones Walker's site, for example, claims that its "clients [have] recognized [its] consistent excellence in areas such as client focus, anticipating client needs, and understanding each client's business." http://www.joneswalker.com/about.html. The firm also claims a "long track record of successfully protecting [its] clients' interests," asserting that it is "often able to persuade plaintiffs to dismiss lawsuits without payment" and has "successfully defended a broad spectrum of claims." http://www.joneswalker.com/practices-

### 2. The Prohibitions on Commonplace Advertising Content

In addition to the prohibition on testimonials, the amendments target a variety of stock advertising devices that are pervasive in modern advertising and harmless to consumers. Rule 7.2(c)(1)(I) prohibits the "reenactment of any events or scenes or pictures that are not actual or authentic," a provision that appears to be targeted at fictional vignettes and dramatizations, such as a generic car accident scene to illustrate that a firm does accident cases. The rule also targets the use of actors by prohibiting advertisements that "include[] a portrayal of a client by a non-client," while Rule 7.2(c)(1)(J) prohibits advertisements that "include[] the portrayal of a judge or a jury." Other provisions prohibit or restrict the use of spokespeople in lawyer advertisements on television and radio. Of these, Rule 7.5(b)(1)(C) 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 Rule 7.5(b)(2)(C) regulates the use of spokespeople who are neither celebrities nor lawyers, providing that these spokespeople must "provide a spoken disclosure identifying the spokesperson as a spokesperson and disclosing that the spokesperson is not a lawyer."[9]

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2.html; http://www.joneswalker.com/practices-22.html. In class actions, the firm claims to have "been successful in aggressively removing cases to federal court," "succeeded in limiting discovery to class issues only," and "ultimately defeated certification" in various cases. http://www.joneswalker.com/practices-2.html. Moreover, the state's counsel in this case, Phillip A. Wittmann, has an online biography listing cases where he obtained a "favorable settlement," won dismissal under Federal Rule of Civil Procedure 12, and successfully argued for class decertification on appeal. http://www.stonepigman.com/attorneys/phillip_a_wittmann.html. His biography further claims that one toxic-tort trial "resulted in several zero awards and generally favorable defense verdicts." *Id.*

[9] Unlike the other challenged amendments, Rule 7.5(b)(2)(C) requires that lawyers include a disclosure in their advertisements rather than banning the targeted speech entirely. That difference, however, does not relieve the state of its burden under *Central Hudson*. "Even partial restrictions on commercial speech must be supported by a showing of some identifiable harm." *Mason v. Fla. Bar*, 208 F.3d 952, 958 (11th Cir. 2000). Thus, the Supreme Court in *Ibanez* struck down a disclaimer requirement where the state failed to prove any real risk to consumers, 512 U.S. 136, as did the Eleventh Circuit in *Mason*. 208 F.3d at 958. Here, the rules' requirement

The common thread among these provisions is that they prohibit harmless techniques frequently used by lawyers and others in effective advertising. Consumers are accustomed to the notion that scenes, actors, and spokespeople appear in commercials, and it defies common sense to assert that they would be misled by these devices. *See* Letter from FTC Staff to the N.Y. Office of Court Admin. (Sept. 14, 2006) (Beck Decl. Exh. 15) (concluding that the New York rules on which Louisiana's amendments are based "are unlikely to hoodwink unsuspecting consumers, because consumers are usually familiar with them"); *see also Grievance Comm. v. Trantolo*, 470 A.2d 228, 234 (Conn. 1984) (holding that lawyer advertisements depicting humorous fictional scenes were informative and neither false nor misleading). For example, most law firm websites (including the websites of plaintiffs' firms) have stock photographs showing scenes of lawyers in law firm settings or illustrating the firm's areas of practice, such as generic factory or maritime scenes. Bart Decl. ¶ 8; Gee Decl. ¶ 7. Reasonable consumers would not think that these scenes depict actual clients or events related to a firm's cases, but, even if a consumer *did* hold such a belief, it would not be material to that consumer's selection of an attorney. The Supreme Court has refused to credit "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 (plurality opinion).[10]

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of a *spoken* disclaimer will substantially cut into the time available during fifteen- and thirty-second television and radio ads. Bart Decl. ¶ 9; Gee Decl. ¶ 8. In the absence of proof that imposition of this burden is necessary to protect consumers, the rule is unconstitutional.

[10] Most law firms include various scenes on their websites and in their brochures to illustrate the firm's cases, such as an image of a construction site to illustrate a case involving commercial property development. *See* Jones Walker Brochure, *supra*. Stone Pigman's website includes a variety of generic office scenes as well as scenes showing men in hardhats, a drug manufacturing plant, a television control room, power cables, stock traders, and a boat. *See* http://www.stonepigman.com/practice/index.html (click on practice areas). Although it is possible that some of these scenes represent actual lawyers and clients of the firm, no rational consumer would care whether or not that is the case. The images are not included to document

Apparently, Louisiana's only basis for these amendments is the identical rules proposed in New York. However, New York subsequently withdrew all the proposed rules adopted by Florida except for the prohibition on the "portrayal of a judge," which a federal court later held unconstitutional because the state could not prove that the rule was necessary. *Alexander*, 2007 WL 2120024, at *8. Louisiana's decision to nevertheless adopt the rules puts it in the small minority of states with the most restrictive advertising rules in the country. Louisiana is now one of only six states with a complete ban on celebrity spokespeople in lawyer ads,[11] one of only three states with complete bans on dramatizations,[12] one of only two states prohibiting actors playing clients,[13] and the *only* state to prohibit portrayals of judges and juries. Louisiana has no

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actual events, but to serve the same purpose as dramatizations in television advertisements: to draw attention, to make the advertisement visually pleasing, and to efficiently communicate with the viewer using representative images (such as a construction site to represent a firm's work with development companies or a boat to illustrate a firm's maritime practice).

[11] **Celebrity Spokespeople.** Other than Louisiana, only Florida and Pennsylvania specifically prohibit celebrity endorsements. Fla. Rules of Prof'l Conduct R. 4-7.5(b)(1)(B); Pa. Rules of Prof'l Conduct R. 7.2(d). Three other states prohibit endorsements of any kind. Ark. Rules of Prof'l Conduct R. 7.1(d); Ind. Rules of Prof'l Conduct R. 7.2(d)(3); Wyo. Rules of Prof'l Conduct. R. 7.2(h). Eight states, plus Louisiana's pre-amendment rules, allow endorsements when accompanied by a disclosure or disclaimer. Cal. Rules of Prof'l Conduct R. 1-400(E)(2), standard 2; La. Rules of Prof'l Conduct R. 7.1(a)(vi); Mo. Rules of Prof'l Conduct R. 4-7.1(h); N.Y. Code of Prof'l Resp. DR 2-101(c)(2); Or. Rules of Prof'l Conduct R. 7.1(a)(6); R.I. Rules of Prof'l Conduct R. 7.1(b); S.D. Rules of Prof'l Conduct R. 7.1(c)(12)-(14); Va. Rules of Prof'l Conduct R. 7.2(a)(1); Wis. Rules of Prof'l Conduct SCR 20:7.1(a)(4).

[12] **Dramatizations.** Two states impose complete bans on dramatizations. Ark. Rules of Prof'l Conduct R. 7.2(e); Wyo. Rules of Prof'l Conduct R. 7.2(h). Eight others allow dramatizations if accompanied by a disclosure. Cal. Rules of Prof'l Conduct R. 1-400, standard 13; Mo. Rules of Prof'l Conduct R. 4-7.1(i); N.Y. Code of Prof'l Resp. DR 2-101(c)(4); N.C. Rules of Prof'l Conduct R. 7.1(b); Or. Rules of Prof'l Conduct R. 7.1(a)(10); Pa. Rules of Prof'l Conduct R. 7.2(f); R.I. Rules of Prof'l Conduct R. 7.1(c); S.D. Rules of Prof'l Conduct R. 7.1(c)(15).

[13] **Actors playing clients.** Texas is the only other state with a blanket ban on actors playing clients. Tex. Disciplinary Rules of Prof'l Conduct R. 7.02(a)(7). Eight other states, plus Louisiana's pre-amendment rules, allow actors to play clients when the advertisement discloses that fact. Ark. Rules of Prof'l Conduct R. 7.2(e); La. Rules of Prof'l Conduct 7.1(a)(vii); Mo. Rules of Prof'l Conduct R. 4-7.1(i); Nev. Rules of Prof'l Conduct. R. 7.2(b); N.Y. Code of Prof'l Resp. DR 2-101(c)(4); Or. Rules of Prof'l Conduct R. 7.1(a)(8); Pa. Rules of Prof'l Conduct R.

evidence that the vast majority of states have been unable to protect their consumers without prohibiting these stock advertising devices.

Moreover, none of the targeted forms of advertising are prohibited by FTC regulations regarding deceptive and misleading advertising. 15 U.S.C. § 45(a)(2). To the contrary, the FTC staff's comments on the proposed Louisiana rules note that banning dramatizations of scenes and other content prohibited by the rules "unnecessarily restrict[s] truthful advertising and may adversely affect prices paid and services received by consumers." *See* Letter from FTC Staff to Richard Lemmler, *supra*, at 2-3; *see also* Letter from FTC Staff to S. Guy deLaup (Aug. 10, 2007) (Beck Decl. Exh. 14). Lawyers who are successful in the established market for legal services have little incentive to aggressively advertise because they can rely on name recognition and word of mouth to bring in clients. New firms, however, can only compete for clients if they can reach consumers through advertising. *See Ficker*, 119 F.3d at 1153 (noting that restrictions on advertising act "as a barrier to professional entry" and thereby "skew[] the market . . . in favor of established attorneys who are already known by word of mouth"); *see also Bates*, 433 U.S. at 377-78. When advertising restrictions make it more difficult for new firms to gain consumers' attention, established firms face less competition for their clients and thus have less incentive to price competitively. Letter from FTC Staff to Richard Lemmler, *supra*, at 2 n.7 (summarizing research demonstrating that restrictions on advertising raise the price of legal services).

The state may attempt to argue that the prohibited forms of advertising are uninformative and of no use to consumers. That argument, however, is not a valid justification for banning commercial speech. Although the state may consider particular content to be "of slight worth," it is for "the speaker and the audience, not the government, [to] assess the value of the information

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7.2(g); Va. Rules of Prof'l Conduct R. 7.2(a)(2); Wyo. Rules of Prof'l Conduct R. 7.2(f).

presented." *Edenfield*, 507 U.S. at 767. In *Bates*, the state bar argued that attorney advertising could be prohibited because of its potential to "highlight irrelevant factors" in the selection of a lawyer. 433 U.S. at 372. The Court rejected the state's asserted interest, noting that it "assumes the public is not sophisticated enough to realize the limits of advertising." *Id.* at 374-75. Similarly, the Court in *Shapero v. Kentucky Bar Association* rejected the state's effort to ban an attorney solicitation designed to "catch the recipient's attention." 486 U.S. at 479. The state in *Shapero* argued that the solicitation "stat[ed] no affirmative or objective fact," constituted "pure salesman puffery," and was an "enticement for the unsophisticated, which committed [the lawyer] to nothing." *Id.* at 478 (internal quotation marks omitted). The Court, however, held that the state could not limit lawyer advertising to "a bland statement of purely objective facts," holding that "so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those [forms] least likely to [gain the attention of] the recipient." *Id.* at 479; *see also Bates*, 433 U.S. at 376 (holding that the state could not limit advertising to a "laundry list" of generic information because "an advertising diet limited to such spartan fare would provide scant nourishment").

Even if it were true that attorney advertising contained no useful information for consumers, the marketplace would solve the problem without the need for government intervention. Consumers would be unlikely to respond to advertising that contained no information, and advertisers would therefore have no reason to use it. *See Central Hudson*, 447 U.S. at 557 ("Most businesses . . . are unlikely to underwrite promotional advertising that is of no interest or use to consumers."). For this reason, the Supreme Court in *Central Huds*on held that even advertising by a monopoly was subject to First Amendment protection, rejecting the state's

argument that such advertising "convey[ed] little useful information" and "could not improve the decisionmaking of consumers." 447 U.S. at 566-67.[14]

In any case, the restricted forms of content do in fact serve "important communicative functions," including "attract[ing] the attention of the audience to the advertiser's message" and, often, "impart[ing] information directly." *Zauderer*, 471 U.S. at 647; *see* Bart Decl. ¶¶ 8, 9-11; Gee Decl. ¶¶ 7-9. Advertising devices like dramatizations can be used to attract viewer interest, to give emphasis, to communicate ideas in an easy-to-understand form, and to make information more memorable. *See* Letter from FTC Staff to the N.Y. Office of Court Admin., *supra* (noting that dramatizations and other "common methods of advertising" that "make . . . messages memorable" can "be an effective way of reaching consumers who do not know how legal terminology corresponds to their experiences and problems," and can therefore be "useful to consumers in identifying suitable providers of legal services"). They can also make lawyers more approachable by humanizing them in the eyes of consumers who may otherwise view them as intimidating and inaccessible.

Moreover, lawyer advertisements must compete in a marketplace of ideas where rival messages for other goods and services will inevitably use the sorts of techniques prohibited by the rules. Lawyers will have a difficult time getting their messages heard when they have to compete with other commercial advertising that is not similarly restricted. *See In re Felmeister & Isaacs*, 518 A.2d 188, 193 (N.J. 1986) (noting that few consumers would pay attention to attorney advertising if it were "restricted to a factual recitation . . . of the need for legal services,

[14] *See also Va. State Bd. of Pharmacy*, 425 U.S. at 765 ("[N]o line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."); *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 96-97 (2d Cir. 1998) (holding that a beer label depicting a frog making an obscene gesture, even if it conveyed little information, at least served the purpose of proposing a commercial transaction and was thus protected speech); *Alexander*, 2007 WL 2120024, at *4.

the qualifications of the attorney, and the prices offered," and that "[b]ecause of that, attorneys might not compete: they simply would not advertise"). *Zauderer* provides one example of the importance of attention-getting techniques. The Supreme Court there held unconstitutional a rule against illustrations that prohibited an attorney from including an image of an intra-uterine device in his advertisements. *Zauderer*. 471 U.S. at 648. The ads that included the image attracted more than two hundred inquiries and led to 106 lawsuits, while a version of the ad that omitted the image attracted no clients. *The Supreme Court, 1984 Term*, 99 Harv. L. Rev. 193, 198-99 (1985).

**3. The Prohibitions on Trade Names and Slogans**

Two amended rules prohibit the use of certain trade names, mottos and slogans. First, Rule 7.2(c)(1)(E) prohibits advertisements that "promise[] results." If this rule were limited to cases where a lawyer makes a literal promise of a particular result that is beyond that lawyer's ability to guarantee (for example, "I promise that you will win at trial," when the outcome at trial is uncertain), it would be unobjectionable. The rule, however, is taken from an identical rule in Florida, which applies the rule even to statements that are inherently subjective and unprovable, such as "Don't let an incident like this one ruin your life," "Don't allow the American dream to turn into a nightmare," and "Attorneys Righting Wrongs." Florida Bar, Relevant Decisions by the Standing Committee on Advertising, Second Harrell Decl. Exh. 12, *Harrell v. Fla. Bar*, No. 08-cv-015 (M.D. Fla. Sept. 15, 2008) (No. 29, Attach. 1) ("Relevant Decisions") (Beck Decl. Exh. 26), at 21, 28, 36. The other rule, Rule 7.2(c)(1)(L), prohibits advertisements that "utiliz[e] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter." This restriction is even broader than the rule against promising results because nearly any positive statement about a lawyer or firm could be read to imply an ability to achieve results. In other states, similar rules have been applied to prohibit lawyers from using the

slogan "the Heavy Hitters" and from truthfully stating that they were included in "Super Lawyers" magazine. *See* N.J. Ethics Op. 39 ("When a potential client reads such advertising and considers hiring a 'super' attorney, or the 'best' attorney, the superlative designation induces the client to feel that the results that can be achieved by this attorney are likely to surpass those that can be achieved by a mere 'ordinary' attorney."); *Alexander*, 2007 WL 2120024.

As with the other amendments, these rules would prohibit practices widespread among law firms, most of which use some sort of trade name or slogan that would at least arguably be prohibited by the new rules. For example, Jones Walker uses the mottos "Progress in Motion" and "The solution exists, look to Jones Walker to help you find it," both of which arguably "impl[y] an ability to obtain results."[15] These mottos would also likely run afoul of the rule against "promis[ing] results," as would the firm's claims that it "focus[es] on achieving the best results in the most efficient manner," "has the appropriate attorney for any court or jury demographic," can "deliver the best possible legal representation given any crisis, market condition, or specific situation," has "ability to bring a matter to a quick resolution" and can present issues for a "successful appeal."[16]

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[15] *See* http://www.joneswalker.com/ (cycling image on home page); Jones Walker Brochure, *supra*, at 2. Many other law firm mottos in Louisiana would also likely be prohibited under this rule, including: "Out in Front." Adams & Reese, http://www.adamsandreese.com/. "Precise. Aggressive. Relentless." Galloway, Johnson, http://www.gjtbs.com/. "Insight and experience." Lemle & Kelleher, http://www.lemle.com/. "Preserve, Pioneer." McGlinchy Stafford, http://www.mcglinchey.com/. "The right firm. The right lawyers," and "Smart enough to map out the right course. Focused enough to lead the way to safe passage. Tough enough to go the distance." Phelps Dunbar, Brochure at 2, 9, *available at* http://www.phelpsdunbar.com/pages/images_subpages/content.pdf (Beck Decl. Exh. 24). "We earned our reputation. And we like living up to it." Stone Pigman, http://www.stonepigman.com/. In addition, law firms and individual lawyers often claim recognition by various publications such as "Super Lawyers" and "Best Lawyers in America."

[16] *See* http://www.joneswalker.com/about.html; http://www.joneswalker.com/practices-22.html. Similarly, Adams and Reese's website states that it "solve[s] problems and get[s] results," http://www.adamsandreese.com/about_the_firm/about.html, and its brochures states:

The state once again has no evidence suggesting that these kinds of statements are likely to mislead consumers. Louisiana is one of only two states to prohibit each of these forms of advertising content, and there is no evidence that the rules of other states have been insufficient to protect those states' interests.[17] Indeed, New York's identical rule against mottos and trade names was declared unconstitutional for lack of supporting evidence. *Alexander*, 2007 WL 2120024, at *6, and the prohibition on promising results was derived from a 2004 Florida task force report that itself lacked any evidentiary support. *See* Fla. Task Force Report, *supra*, at G-2. As one member of the Florida task force explained, "the Task Force relied almost exclusively upon the unsupported opinions of the individual Task Force members." *Id.*

On the other hand, courts have repeatedly recognized that advertising is not misleading to consumers just because it contains "exaggerated, blustering, and boasting statements upon which no reasonable buyer would be justified in relying" or "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion." *Pizza Hut, Inc. v. Papa John's Int'l*, 227 F.3d 489, 496 (5th Cir. 2000) (holding that Pizza Hut's slogan "Better Ingredients. Better Pizza" was not actionable as false

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"When it comes to a solution, we're sure of it." Adams and Reese, Brochure at 2, *available at* http://www.adamsandreese.com/pdf/ARFirmBrochure0108.pdf (Beck Decl. Exh. 25). Galloway, Johnson claims to have an "aggressive approach" that "gives clients the ability to resolve cases more quickly." http://www.gjtbs.com/productsLiability.html. McGlinchy Stafford's website states that it "manage[s] . . . claims efficiently" and "minimize[s] [its] clients' exposure." http://www.mcglinchey.com/firmgroupDetail.asp?id=4095. Stone Pigman claims that it will "deliver[] superior client service in the form of expert counsel and zealous representation" and will "respond creatively and effectively to clients' needs." http://www.stonepigman.com/firm/; http://www.stonepigman.com/practice/business/corporate.html. The firm also claims that its legal teams can "solve[] their clients' most difficult problems," "handle the most difficult cases," and "efficiently handle business transactions of any size, complexity or context." *Id.*; http://www.stonepigman.com/practice/; http://www.stonepigman.com/firm/philosophy.html.

[17] Fla. Rules of Prof'l Conduct R. 4-7.2(c)(1)(G) (deeming an advertisement misleading if it "promises results"); S.C. Rules of Prof'l Conduct R. 7.1(e) (deeming a statement misleading if it "contains a nickname, moniker, or trade name that implies an ability to obtain results in a matter").

advertising); *see also Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004) (holding that the motto "America's Favorite Pasta" was unverifiable but neither false nor misleading); *see also Mason*, 208 F.3d at 955-56 (rejecting Florida's contention that truthfully claiming to have received the "highest rating" from Martindale-Hubbell would "mislead the unsophisticated public"). As the Fifth Circuit has recognized, if routine puffery and statements of quality were considered misleading, "the advertising industry would have to be liquidated in short order." *Pizza Hut,* 227 F.3d at 499 (internal quotation marks omitted).

### C. The Rules Are Not Narrowly Drawn.

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson*, 535 U. S. at 373. The state here, however, appears to have adopted its chosen regulations without any attempt to tailor them to any legitimate state interest or any consideration of readily available alternatives.

#### 1. The Rules Are Not Tailored to the Purported Harm.

To survive the final prong of the *Central Hudson* test, a restriction on allegedly deceptive speech must not be "broader than reasonably necessary to prevent the [targeted] deception." *RMJ*, 455 U.S. at 203. Louisiana's amendments, however, sweep in advertising that is not likely to harm any consumer, or, for that matter, even to be distasteful to them. As already noted, the advertising of many firms in Louisiana would violate the amended rules, though nobody would contend that these firms are undignified or engaged in false advertising. Moreover, the rules are so broad that, if applied to other industries, they would exclude nearly every advertisement currently running on television and in many other forms of media. They would prohibit, for example, a Life cereal advertisement that includes the catchphrase "He likes it! Hey Mikey!" (a testimonial or reference to past results), a depiction of children eating cereal at a breakfast table (either a "scene" or "reenactment"), and the use of actors to play the children (the cereal

industry's equivalent of Louisiana's rule against "portrayal of a client by a non-client"). *See* http://www.youtube.com/ watch?v=vYEXzx-TINc ("Mikey" ad). They would also prohibit such famous slogans as "try it, you'll like it" (Alka-Seltzer), "it takes a licking and keeps on ticking" (Timex), "good to the last drop" (Maxwell House), and "it keeps going and going" (Duracell) either because they are "motto[s] that state[] or impl[y] the ability to achieve results" or because they impermissibly "promis[e] results." And the rules would prohibit celebrity spokespeople such as Tiger Woods (Nike), Wilfred Brimley (Quaker Oats), and Bill Cosby (Jell-O).

In any other industry, restrictions on such harmless ads would be unthinkable. The result should be no different for lawyers. As the Supreme Court has explained, "[p]rophylactic restraints that would be unacceptable as applied to commercial advertising generally are . . . equally unacceptable as applied to [lawyer] advertising." *Zauderer* 471 U.S. at 647. To the contrary, as the Supreme Court observed in *Zauderer*, "[b]ecause 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." *Id.* at 648-49.

Some of the amendments are also poorly tailored for other reasons. As already noted, the rule against testimonials and references to past results allows a lawyer to post this information on the Internet, where it is considered "information provided upon request," even though there is no indication that the information would be less likely to mislead consumers in that context. The distinction between these forms of media is especially questionable given that many lawyers, including plaintiff Morris Bart, post their television commercials on their websites, making the content in these cases indistinguishable. Bart Decl. ¶ 2. Similarly, the rules regulating the use of

spokespeople are undermined by their limitation to television and radio advertising. If consumers were somehow misled by the use of celebrity spokespeople, there is no reason to believe they would be less misled by a celebrity in a newspaper than by one appearing on television. *See Bad Frog Brewery*, 134 F.3d at 99-100 (holding that a state does not materially advance its interests under Central Hudson if it "authorize[s] only one component of its regulatory machinery to attack a narrow manifestation of a perceived problem").

### 2. The State Has Ignored Readily Available Alternatives to Address Its Supposed Interests.

Even when the state interest is compelling, a restriction on speech is invalid if there are less restrictive means available to accomplish the state's goals. *Pruett*, 499 F.3d at 412. Thus, "if the government [can] achieve its interests in a manner that does not restrict speech or that restricts speech less, it must do so." *Thompson*, 535 U. S. at 371. Here, an obvious alternative to enacting Louisiana's new rules would be to enforce its *existing* rules against false and misleading advertisements. Louisiana has not shown that these existing rules are insufficient to protect its citizens from being misled. *See* Bart Decl. ¶¶ 13-14; *Alexander*, 2007 WL 2120024, at *8 (declaring restrictions on attorney advertising unconstitutional where the state had "not given the Court any reason to believe that better enforcement of the then-existing rules on a case-by-case basis . . . would not accomplish the desired results").

Moreover, if the state could show that certain forms of speech are likely to mislead consumers, it could impose disclosure or disclaimer requirements to prevent the risk of consumer confusion instead of prohibiting the speech entirely. *See 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."); *Alexander*, 2007 WL 2120024, at *8. This is the chosen solution of the majority of states that regulate the

forms of advertising addressed by Louisiana's amendments. *See supra* nn. 7, 11, 12, 13. The state here, however, did the *opposite*, replacing existing disclaimer requirements with outright bans on portrayals of clients by non-clients and celebrity spokespeople without any evidence that the disclaimers had been ineffective at protecting consumers. Even more telling, the state deleted former Rule 7.1(b), which provided that, "[i]n determining whether a communication [is false or misleading], the communication shall be considered in its entirety including any qualifying statements or disclaimers contained therein." By removing this provision, the state guaranteed that the rules would be enforced even against advertisements that are not misleading.

As a final alternative to its rules restraining speech, the state could achieve the legislature's goal of promoting a "more positive message" by conducting its own outreach efforts to educate consumers about the practice of law and the role of lawyers in society. A basic tenet of our First Amendment is that allegedly distasteful speech is best dealt with in the marketplace of ideas, through *more* speech aimed at providing a better or more balanced point of view. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). As the Supreme Court wrote in *Bates*, "[i]f the naivete of the public will cause advertising by lawyers to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." 433 U.S. at 375.

## II. The Rules Are Unconstitutionally Vague.

The amended rules are not only unsupported by any legitimate state interest, they are also unconstitutionally vague. Due process prohibits vague regulations for two interrelated reasons: (1) to provide fair notice so that people may avoid unlawful conduct, and (2) to provide standards to authorities to prevent arbitrary and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Kolender v. Lawson*, 461 U.S. 352 (1983). Here, the rules fail to satisfy either of these goals because they give lawyers and disciplinary

authorities no guidance on what sorts of statements "promise[] results" or "impl[y] an ability to obtain results in a matter" under the rules. Rule 7.2(c)(1)(E), (L); *see* Bart Decl. ¶¶ 6, 11.

As previously explained, Florida interprets the rule against promising results to extend to advertisements that are inherently subjective or unprovable. As interpreted by Florida, this rule has led to arbitrary and unpredictable results. To name just a few of many inexplicable outcomes, the state's standing committee on advertising decided that the phrase "People make mistakes, I help fix them" improperly promises results, but that "People make mistakes, I help them" is permissible; the statement "We'll help you get a positive perspective on your case and get your defense off on the right foot quickly" promises results, but "If an accident has put your dreams on hold we are here to help you get back on track" is permissible; the phrase "[Y]our lawyer's knowledge of the law and talents in the courtroom can mean the difference between a criminal conviction and your freedom" promises results, but "The lawyer you choose can help make the difference between a substantial award and a meager settlement" is permissible; and the statement "Hiring an attorney experienced in DUI law is an efficient and effective way to ensure that all possible measures are taken to protect your legal rights" promises results, but "Hiring an attorney experienced in DUI law is an efficient and effective way to protect your legal rights" is permissible. *See* Relevant Decisions, *supra*, 2, 5, 25, 29, 71; Minutes, Bd. of Governors of the Fla. Bar, Apr. 7, 2006, Second Harrell Decl. Exh. 23, *Harrell v. Fla. Bar*, No. 08-cv-015 (M.D. Fla. Sept. 15, 2008) (No. 29, Attach. 1). Because Florida is the only state other than Louisiana to have adopted this rule, Louisiana lawyers have nothing other than these arbitrary decisions for guidance in interpreting the rule as applied to their own ads.

The prohibition on trade names, mottos, and slogans that imply an ability to achieve results has an even greater potential for arbitrary application because it is impossible to predict

what disciplinary authorities will believe is "implied" by a particular ad. There is nothing obviously misleading, for example, about lawyers calling themselves "Heavy Hitters" or "Super Lawyers." Indeed, Florida's attempt to enforce a similar (but somewhat narrower) rule against statements that are "likely to create an unjustified expectation about results the lawyer can achieve" was so riddled with inconsistencies that the state was forced to abandon it entirely. *See* Fla. Task Force Report, *supra*, at 7 (stating that the rule was "unclear and incapable of adequate definition to provide guidance to Bar members").

Even if Louisiana does not enforce these rules as strictly as Florida and other states, the breadth, vagueness, and unpredictability of the rules will inevitably lead to self-censorship on the part of lawyers. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). Because lawyers who violate the rules are subject to discipline, including censure, suspension, or disbarment, they will face an unacceptable dilemma: Either comply with the broadest reading of the rules' language or risk the possibility of professional discipline, including a possible loss of the lawyers' profession and livelihood. Moreover, the rules' vagueness raises the risk of arbitrary and discriminatory enforcement against lawyers who are unpopular with state disciplinary authorities. *See Discovery Network*, 507 U.S. at 423 n.19 (noting the "potential for invidious discrimination of disfavored subjects" in vague regulations). For this independent reason, the amendments are therefore unconstitutional.

## III. The Other Preliminary Injunction Factors Favor Plaintiffs.

Where, as here, plaintiffs can show a likelihood of success on a claim for deprivation of a First Amendment right, the remaining preliminary injunction factors are also satisfied. *See Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338-39 (5th Cir. 1981); *Fla. Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981). Plaintiffs satisfy the irreparable injury

requirement because "loss of First Amendment freedoms, for even minimal periods of time, constitute[s] irreparable injury." *Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). Moreover, complying with the rules will impose on plaintiffs the tremendous costs of developing new advertisements and the loss of public recognition and goodwill associated with their current slogans and advertising campaigns. Bart Decl. ¶¶ 3-11; Gee Decl. ¶¶ 4-9.

In contrast, neither the state nor the public has a legitimate interest in enforcing a statute that is probably unconstitutional. *Ingebretson*, 88 F.3d at 280 (holding that the public interest was not disserved by enjoining an unconstitutional statute); *Fla. Businessmen for Free Enterprise*, 648 F.2d 956 ("The public interest does not support the city's expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional."). The state's interest in enforcement is further reduced given that it has allowed the forms of advertisements that the amendments would prohibit for many years without evidence of public harm, and, in addition, set an effective date five months after the amendments were enacted. Given this voluntary delay, an additional delay to give the Court an opportunity to decide the constitutionality of the rules would not significantly prejudice the state.

Given the strength of the interest in free speech and the lack of a legitimate government interest, the threatened injury to plaintiffs necessarily outweighs any damage defendants would suffer if the injunction were granted. *See Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) (holding that the remaining injunction factors were satisfied where the plaintiff showed a likelihood of success on a First Amendment claim); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338-39 (5th Cir. 1981).

## CONCLUSION

This Court should issue the requested preliminary injunction to prohibit enforcement of the challenged rules until the constitutionality of the rules can be finally determined.

Dated:

Respectfully submitted,

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