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**Comments of Public Citizen Litigation Group
on the Proposed Amendments to Rules Governing Lawyer Advertising**

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 Therefore, we urge that the Proposed Rule 7.2(b)(1)(B) and (d)-(J) and Rule 7.1(a)(v)-(vii) be withdrawn, and that the state instead rely on enforcement of existing Rule 7.1(a) to vindicate its legitimate interest in protecting consumers from false and misleading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 We also urge that the Proposed Rule 7.4(a) governing attorney solicitation be withdrawn, and that current Rule 7.4 be modified to place a reasonable temporal limitation on any restriction of in-person and telephone solicitation.

Interest of Public Citizen Litigation Group

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

I. The Proposed Restrictions on Lawyer Advertising Are Unconstitutional.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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