Responsive Law
The Consumer's Voice in the Legal System

Comment:

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

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Comment to the

Supreme Court of Tennessee at Nashville

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Consumers for a Responsive Legal System ("Responsive Law") appreciates the opportunity to provide the following comment in response to the request for public comments on the Petitions To Adopt Changes To Rules Of Professional Conduct On Lawyer Advertising ("Petitions") filed by the Tennessee Association for Justice ("TAJ") and attorney Matthew C. Hardin ("Hardin"). Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to the people.

We urge the Court to reject the Petitions. The proposed rules contained in the Petitions impose broad, unjustified, and largely inexplicable restrictions on lawyer advertising. These restrictions would affirmatively harm consumers by precluding lawyers from effectively communicating, and denying consumers essential information concerning legal representation.

Content Restrictions

Both proposals appear to be based on the assumption that the average Tennessean is particularly stupid. According to the petitioners, the Tennessee public is a mass of gullible, unthinking dupes, willing to believe anything they see on TV, and easily manipulated by loud noises and scary pictures. TAJ's hypothetical "potential client" is ludicrously naïve. An ad that "stretches the bounds of reality" distracts and confuses him. An actor or model playing a client "inherently" deceives him. "Sensationalistic and dramatic visuals" overwhelm his power of reason. Hardin's imaginary "viewer/reader" is also mislead by "recognizable" voices and "ambulance sirens." It should hardly need to be said that these caricatures bear no resemblance to the actual people of Tennessee.

The broadest prohibitions in the proposed rules involve "false, misleading, or deceptive" content. On its face, this appears

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unproblematic: deceptive attorney advertising undoubtedly harms consumers, just as any deceptive advertising does. It is for this reason, however, that deceptive attorney advertising is *already* prohibited by the Tennessee Rules of Professional Conduct. Deceptive advertising of any sort is also illegal under both Tennessee and federal law. The proposed definition of "misleading and deceptive," however, not only goes well beyond current ethical and legal standards, it goes well beyond the bounds of common sense. TAJ describes its proposed prohibition on "false and misleading" content as encompassing "advertisements which may not appear to be false or misleading on their face, but have *tendencies to distract the viewer* from what they are seeing."[1] Hardin uses precisely the same language to describe "deceptive."[2] Both petitioners provide the particular example of an ad that includes "space aliens or talking dogs assisting clients." Neither petitioner indicates if "space aliens" or "talking dogs" have been an especial problem in Tennessee. Rather, they appear to solely rely on the conclusory, and highly insulting, assertion that the average Tennessean cannot help but be fatally distracted by the mere sight of imaginary creatures. Accordingly, it is not immediately clear why the petitioners are not similarly lobbying to have the Pillsbury Dough-Boy and Cheerios Honey-Bee banned from Tennessee television. Surely the petitioners cannot support advertising that "impairs" consumers' "ability to objectively decide" on breakfast food.

Contrary to the bizarre assertions of the petitioners, legal consumers are not being injured by "space aliens" or "talking dogs." What is injuring them in attorney advertising is the *absence* of essential information – essential information that, to a significant extent, petitioners' proposals would further restrict. The same Tennesseans who can choose their cereal notwithstanding the "distract[ion]" of a talking bumble-bee can intelligently choose their attorney notwithstanding ordinary advertising gimmicks with which they are intimately familiar. When someone needs a lawyer, he needs to know who is available, how they can help him, and what it will cost him. It makes very little difference if he learns that information from a talking alien, a talking dog, or a talking magical unicorn.

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[1] TAJ Petition at 3, describing TAJ Proposed Rule 7.1(1)(B).

[2] Hardin Petition at 10, describing Hardin Proposed Rule 7.1(c)(1)(E).

The proposed rules do helpfully provide a list of *permissible* illustrations. This list, in its entirety, consists of: the American and Tennessee flags, American eagle, Statue of Liberty, scales of justice, a courthouse, column, diploma, gavel, "traditional renditions of Lady Justice," "an unadorned set of law books," and attorney photographs "against a plain, single-colored background or unadorned set of law books."[3] These particular illustrations were evidently selected because they "either stand for justice or are effectively neutral in terms of persuasion."[4] Even if "neutral[ity] in terms of persuasion" were particularly desirable in advertising, it not at all clear why unadorned law books are any more "neutral" than *adorned* law books, or indeed than a "space alien," "talking dog," or talking magical unicorn.

In addition to talking animals and adorned law books, the proposed rules prohibit "any background sound other than instrumental music" on radio or television.[5] Other sounds evidently "serve *only to mislead* the viewer."[6] Hardin's petition provides illuminating example of such inherently misleading sounds: "honking horns . . . and ringing cash registers."[7] Presumably sound-effects that "serve only to mislead" in lawyer advertising also "serve only to mislead" other commercial advertising. Accordingly, the consumers of Tennessee are currently suffering from a deluge of misleading advertising, in the form of "honking horns" in car commercials, not to mention the frequent and insidious use of *non*-instrumental music. The contention that Tennesseans are misled by horns, cash-registers, and singing voices would be laughably absurd if were not so insulting to the consumers of this state.

Other common advertising practices prohibited by these proposed rules include "any actor/model portraying a client"[8] and use of a celebrity or spokesperson whose image or voice is "recognizable to the public."[9] The sole justification given for the former prohibition is

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[3] Hardin Proposed Rule 7.1(b)(1)(L).

[4] Hardin Petition at 8.

[5] Hardin Proposed Rule 7.7(b)(1)(C)

[6] Hardin Petition at 15 (emphasis added).

[7] *Id.*

[8] Hardin Proposed Rules 7.1(c)(1)(K), 7.7(b)(1)(D); TAJ Proposed Rule 7.1(1)(D).

[9] Hardin Proposed Rules 7.1(c)(3)(14), 7.7(b)(1)(B).

the unsupported assertion that "[m]ost people will view these types of advertisements and believe people are getting large amounts of money without substantial injuries or permanent harms."[10] The sole justification for the latter is that the "star quality" of a recognizable voice or image would overwhelm consumers' capacity to choose a lawyer.[11] Again, the petitioners appear to be operating on the assumption that Tennesseans are the most gullible and least savvy consumers on the planet.

Information Restrictions

The expansive prohibitions in the proposed rules are by no means limited to sounds and pictures. Substantively, any "statements describing or characterizing the *quality of the lawyer's services*" are also categorically forbidden.[12] Statements of opinion and other "unverifiable" claims are also barred by the proposed rules' ban on "unsubstantiated" statements.[13] Such claims – e.g., "John Smith, Esq. is a very nice man" – evidently "undermine the image of the legal profession."[14] Unverifiable comparisons with other lawyers – e.g., "Bob Smith, Esq. is an even nicer man than John Smith, Esq. – are evidently akin to political "mudslinging," and are therefore singled out for special prohibition.[15] In defense of this blanket prohibition, petitioner asserts that statements on the quality of lawyers' services "are *likely* to be unsubstantiated and have the *potential* to effectuate unreasonable expectations."[16] No explanation is given for why describing quality of services is particularly "likely" to be unsubstantiated; nor is there any elaboration on precisely what "unreasonable expectations" such statements will potentially "effectuate." Indeed, if anything, it is actually this proposed rule that would "effectuate unreasonable expectations." Precluding consumers from learning about a lawyer's services denies them the basic information necessary to form *reasonable* expectations.

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[10] Hardin Petition at 12.

[11] *Id.* at 14.

[12] Hardin Proposed Rule 7.1(c)(2), emphasis added.

[13] Hardin Petition at 10, describing Hardin Proposed Rule 7.1(c)(1)(D); TAJ Petition at 4, describing TAJ Proposed Rule 7.1(1)(C).

[14] *Id.*

[15] *Id.* at 11, describing Hardin Proposed Rule 7.1(c)(1)(I).

[16] *Id.* at 12 (emphasis added).

The proposed rules further restrict consumers' access to information by specifically forbidding any "reference to past successes or results."[17] This prohibition would preclude an astonishingly wide array of non-misleading advertising. For example, a lawyer would be subject to disciplinary sanctions for uttering the *truthful* statement "I've won two hundred defective construction cases, and gotten my clients money in each one." It is wholly absurd to propose that this kind of accurate, factual information would not be relevant to a prospective client considering a case involving defective construction. The proposed rules do contain a limited exception for referencing past results on websites and in email communications.[18] Even then, however, referencing past results is only permitted if the lawyer obtains "written permission" from each former client involved, and describes the case "in a manner to accurately reflect the injuries and damages incurred."[19] Accordingly, our hypothetical defective construction litigator could only state on her website that she had "won two hundred defective construction cases" if she first obtained written permission from all two hundred plaintiffs *and* sufficiently described the "injuries and damages incurred" in each case. The imposition of this ludicrous burden means that, realistically, she is precluded from referencing her past results in any medium. Oddly enough, the proposed rules do, cryptically and with absolutely no explanation, permit lawyers to state their "role in changing/establishing law/law rules of state via case law or otherwise."[20] It is unclear how a lawyer can advertise his past of changing the law "via case law" without referencing his past results or successes, and the petitioner makes no attempt to explain this inconsistency.

In addition to the wide array of prohibited content, certain content is expressly permitted. Specifically, fourteen instances are "presumed to be permissible."[21] This list, however, is not only grossly underinclusive, but wholly unsupportable. No justification is given for why these, and only these, fourteen are presumptively permissible. Moreover, the list appears to have been largely

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[17] Hardin Proposed Rule 7.1(c)(1)(F).

[18] Hardin Proposed Rule 7.9(d).

[19] *Id.*

[20] Hardin Proposed Rule 7.1(b)(1)(N).

[21] Hardin Proposed Rule 7.1(b)(1).

compiled at a whim. Illustrative examples include "parking arrangements"[22]; "common salutary language such as, 'best wishes,'"[23]; and "punctuation and common typographical marks."[24] Absent this last paragraph, a lawyer who dared to include a comma in his advertising would apparently be doing so at his peril. Lawyers will doubtlessly be reassured that they can provide parking information, wish potential clients well, and employ semicolons without fear of disciplinary proceedings.

The proposed rules' various and sundry prohibitions, taken together with the list of "permissible" content, would limit the information available to consumers to dates of bar admissions, former positions, years of experience, number of attorneys, licensed jurisdictions, legal field(s), other "technical or professional" licenses, foreign language ability, and public or military service.[25] In justifying the ban on recognizable voices, the petitioner expresses the concern that consumers might select attorneys "based on the recognized spokesperson *instead of an attorney's legal skills, diligence, and reputation*."[26] The proposed rules then proceed to expressly prohibit any statement pertaining to skills, diligence, or reputation.

Other Restrictions

The proposed rules expressly and unapologetically prohibit *any* advertising by non-Tennessee lawyers.[27] This prohibition extends to any lawyer who lacks a "bona fide office" in the state. A lawyer licensed to practice in Tennessee, who sees clients from Tennessee, and primarily works in Tennessee would nonetheless be absolutely barred from advertising in Tennessee if his office were just across the river in West Memphis. In justifying this absurd result, the petitioners candidly, and somewhat refreshingly, admit an intent to "prevent[] out-of-state attorneys from taking business out of Tennessee" and from "limit[ing] the client base of Tennessee

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[22] Hardin Proposed Rule 7.1(b)(1)(A).

[23] Hardin Proposed Rule 7.1(b)(1)(J).

[24] Hardin Proposed Rule 7.1(b)(1)(K).

[25] Hardin Proposed Rules 7.1(b)(1)(B)-(F).

[26] Hardin Petition at 15, describing Hardin Proposed Rule 7.7(b)(1)(B), (emphasis added).

[27] Hardin Proposed Rule 7.0(c); TAJ Proposed Rule 7.2(1).

attorneys."[28] Although the petitioners' commercial interest in securing their market share is unsurprising, it has no place in a rule of professional conduct.

The proposed rules would also impose a "pre-filing" requirement – which the petitioner is careful to distinguish from a "pre-clearance" requirement – for all lawyer advertising.[29] This would require that every radio and television advertisement to be filed with the Board of Professional Responsibility.[30] The former, less expansive, filing requirement was deleted at the urging of the Tennessee Bar Association, the Board of Professional Responsibility, and the Disciplinary Counsel for the Board.[31] In addition to filing the ad itself, lawyers would be compelled to file a statement "listing all media" in which it will appear, its "anticipated frequency of use" in each medium, and the "anticipated time period" in which it will be used.[32] Just in case these practical burdens were not sufficiently onerous, the proposed rule also imposes a fee of $150 for each timely filed ad, and $250 for each filing deemed late.[33] The filing fees are also, apparently arbitrarily, mandated to increase by 3% each year; the current inflation rate is only 1.6%. As noted by the very Board that would be charged with administering it, this system would be "burdensome, time consuming and costly to enforce."[34]

On behalf of the users of the legal system, we urge the Court to reject the Petitions.

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[28] Hardin Petition at 5; TAJ Petition at 5.

[29] Hardin Petition at 31.

[30] Hardin Proposed Rule 7.8(a)(1).

[31] Comment of Tennessee Bar Association at 8 n. 12.

[32] Hardin Proposed Rule 7.8(b)(6).

[33] Hardin Proposed Rule 7.8(b)(7)

[34] Comment of the Board of Professional Responsibility at 2.