

Findings and Recommendations of the LSBA Rules of Professional Conduct Committee
Re: New Lawyer Advertising Rules and Constitutional Challenges Raised

April 15, 2009

Following adoption by the Supreme Court of Louisiana of new Rules of Professional Conduct pertaining to lawyer advertising and solicitation (Order dated June 26, 2008), two separate lawsuits have been filed and are currently pending in the United States District Court for the Eastern District of Louisiana, challenging certain portions of those new Rules on constitutional grounds (hereinafter referred to, respectively, as “*Public Citizen, et al. v. LADB*” and “*Wolfe v. LADB*”). Additionally, the Louisiana State Bar Association commissioned an “Opinions and Perceptions Study regarding Attorney Advertising”, which was conducted by Survey Communications, Inc. (“SCI”) in three (3) separate phases [telephone interviews, web-based interviews and focus groups, respectively] during December 2008 and January 2009.

The Committee has now been requested by the Supreme Court of Louisiana, in a letter from Chief Justice Kimball dated March 11, 2009, to review several of the new Rules that have been challenged on constitutional grounds and report back to the Court no later than May 1, 2009. Prior to meeting to review the challenged Rules, the Chair of the Committee requested and, in keeping with that request, the following materials were circulated to and reviewed in advance by members of the Committee: 1) a copy of the original Complaint filed in each of the federal lawsuits; 2) a copy of suggested language for rule modifications proposed informally by counsel for plaintiffs in the *Public Citizen* lawsuit (letter dated January 28, 2009); 3) a copy of the written research findings from the “Opinions and Perceptions Study regarding Attorney Advertising” conducted by SCI (hereinafter referred to as the “LSBA Research Findings”); 4) a copy of full-length digital video recordings for each of the three “focus groups” conducted by SCI as “Phase 3” of the “Opinions and Perceptions” study; 5) a copy of a written survey for use by the Committee compiled by LSBA staff using materials produced by the ABA Center for Professional Responsibility regarding comparisons between attorney advertising guidelines for other states (i.e., comparing the then-proposed Louisiana Rules to those of other states); 6) a

copy of a written memorandum dated May 23, 2007 prepared by Stanley, Flanagan & Reuter, LLC regarding “Constitutionality of Proposed Rule Changes”; and 7) a copy of a recent *per curiam* decision by the Supreme Court of Florida (dated February 27, 2009) regarding amendments to Rule 4-7.6 of the Rules Regulating the Florida Bar (Computer-accessed Communications) proposed by the Florida Bar.

Respectfully, the Committee remains of the strong opinion and continues to believe that the new Rules, as recommended by the LSBA and adopted by the Court, are necessary, appropriate and balance the constitutional right of lawyers to truthfully advertise legal services with the need to improve the existing rules in order to preserve and strengthen the ethics and integrity of the legal profession, to protect the public from false, misleading and/or deceptive forms of lawyer advertising, and to prevent erosion of and positively foster the public’s confidence and trust in the judicial system.

I. Re: **Wolfe v. LADB**

The Committee met on Friday, March 13, 2009 at the LSBA Bar Center to consider the new lawyer advertising Rules (currently set to become effective on October 1, 2009) and constitutional challenges raised by Wolfe v. LADB. The meeting was called to order at 9:00 a.m. with the following attendance: Present/Participating – Richard C. Stanley, Chair; Val P. Exnicios; Sam N. Gregorio (by teleconference); Clare F. Jupiter; Leslie J. Schiff (by teleconference); Joseph L. Shea, Jr.; Edward Walters, Jr. (by teleconference); Lauren A. McHugh, Supreme Court Liaison; Cheri Cotogno Grodsky, LSBA Associate Executive Director for Professional Programs; Richard P. Lemmler, Jr., LSBA Ethics Counsel; and Eric K. Barefield, LSBA Assistant Ethics Counsel; Not Present/Not Participating – Shaun G. Clarke; Harry S. Hardin, III; Paul J. Hebert; Christine Lipsey; William M. Ross; Marta-Ann Schnabel; and Charles B. Plattsmier, Disciplinary Liaison. The meeting was concluded and adjourned at approximately 11:39 a.m.

After reviewing the allegations raised in Plaintiffs' original Complaint, the Committee respectfully submits the following findings and recommendations:

1) FINDING: As currently written, the Committee did not intend for entries in a "blog" [**blog**] (a contraction of the term *weblog*) is generally defined as a type of website, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video] to be governed by these new Rules unless the lawyer is advertising on a "blog" for the lawyer's own pecuniary gain.

- RECOMMENDATION – New Rule 7.6(d) could be amended (underlined portion denotes proposed amended language) to read:

*“(d) **Advertisements.** All computer-accessed communications concerning a lawyer’s or law firm’s services, other than those subject to subdivisions (b) and (c) of this Rule, are subject to the requirements of Rule 7.2 when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”*

2) FINDING: Even if a lawyer is advertising on a "blog" by conveying information about the lawyer, the lawyer's services or a law firm's services, if the lawyer stays within the "safe harbors" of "permissible content" defined by new Rule 7.2(b)—or if the advertisement/communication is otherwise exempt under new Rule 7.8—the lawyer will not be required to file the advertisement/communication or pay any filing fee for an evaluation of the exempt advertisement/communication, i.e., the advertisement will be exempt from the filing and evaluation requirements of new Rule 7.7.

3) FINDING: Regarding the example of an on-line advertisement cited in Paragraph 22 of the Plaintiffs' Complaint:

Wolfe Law Group
Louisiana Construction Lawyer
Disputes, Contracts, Liens
<http://www.wolfelaw.com>

the Committee believes there is enough space available to include the information required by new Rule 7.2(a). The Committee also believes that, if the lawyer amends the advertisement in question to comply with new Rule 7.2(a), there would be nothing there that would require the lawyer to file the advertisement with the Committee for evaluation under Rule 7.7, i.e., it would be exempt from filing under new Rule 7.8.

- 4) FINDING: With regard to the allegations of Paragraph 23 of the Plaintiffs' Complaint concerning "junk-mail filters", any alleged "junk-mail filters" are not controlled by the Committee, the Rules or the LSBA; nor are the Committee, the Rules or the LSBA responsible for the use of any such "junk-mail filters". It is further noted that new Rule 7.6(c)(3) [requiring the subject line of an unsolicited e-mail communication sent directly or indirectly to a prospective client for the purpose of obtaining professional employment to state "LEGAL ADVERTISEMENT"] simply embodies what has long been required by the old/current Rule 7.3(b)(iii)(B) [*"...in the case of an electronic mail communication, the subject line of the communication states that 'This is an advertisement for legal services'..."*].

- 5) FINDING: New Rule 7.2(c)(11) does not prohibit one lawyer from appearing on another lawyer's website. The Committee believes the intent of new Rule 7.2(c)(11) relates to whether or not a significant motive for the lawyer's communication is the lawyer's pecuniary gain, as also noted above in our recommendation to amend new Rule 7.6(d). If the lawyer's appearance and communication on another lawyer's website is not significantly motivated by the lawyer's pecuniary gain, the Committee did not intend for new Rule 7.2(c)(11) to apply. On the other hand, if the lawyer's appearance and communication on another lawyer's website is significantly motivated by the lawyer's pecuniary gain, we believe new Rule 7.2(c)(11) would be triggered and the lawyer must bear the cost of the advertisement.

- 6) FINDING: With regard to the Plaintiffs’ allegations/prayer for relief in Paragraph 51(a)(vi) of the Complaint, the Committee believes that if a lawyer is not advertising, the filing and evaluation requirements detailed in new Rule 7.7 are not intended to apply.
- If the lawyer is advertising, the lawyer’s use of only “safe harbor” “permissible content”, as detailed in new Rule 7.2(b), or, if one or more of the other exemptions listed within new Rule 7.8 is/are applicable, the advertisement would be exempt from the filing and evaluation otherwise required by new Rule 7.7.
 - Furthermore, if the advertisement must be filed pursuant to new Rule 7.7, we note that there is no requirement of an advance filing—new Rule 7.7(c) permits filing “...*prior to or concurrent with the lawyer’s first dissemination of the advertisement or unsolicited written communication...*” [emphasis added].

Finally, we note that if an advertisement must be filed for evaluation under new Rule 7.7, one filing and evaluation of compliance would thereafter suffice for multiple/continued dissemination(s) of the same advertisement.

II. Re: Public Citizen, et al., v. LADB

The Committee met on Friday, March 20, 2009 at the LSBA Bar Center to consider the new lawyer advertising Rules (currently set to become effective on October 1, 2009) and constitutional challenges raised by Public Citizen, et al., v. LADB. The meeting was called to order at 12:00 noon with the following attendance: Present/Participating – Richard C. Stanley, Chair; Val P. Exnicios; Sam N. Gregorio (by teleconference); Harry S. Hardin, III; Paul J. Hebert; Clare F. Jupiter; Christine Lipsey; Leslie J. Schiff (by teleconference); Joseph L. Shea, Jr.; Edward Walters, Jr.; Lauren A. McHugh, Supreme Court Liaison; Charles B. Plattsmier, Disciplinary Liaison; Richard P. Lemmler, Jr., LSBA Ethics Counsel; and Eric K. Barefield, LSBA Assistant Ethics Counsel; Not Present/Not Participating – Shaun G. Clarke; William M.

Ross; and Marta-Ann Schnabel. The meeting was concluded and adjourned at approximately 3:22 p.m.

After reviewing the allegations raised in Plaintiffs' original Complaint, as well as the written "Research Findings" of the "Opinions & Perceptions Study regarding Attorney Advertising" produced by SCI Research for the LSBA during December 2008-January 2009 (hereinafter referred to as the "LSBA Research Findings"), the Committee respectfully submits the following findings and recommendations:

- 1) FINDING: The Committee finds the conduct prohibited by new Rule 7.2(c)(1)(D) [*"...reference or testimonial to past successes or results obtained..."*] is inherently misleading and that a disclaimer would not be able to cure or prevent the conduct from misleading and/or deceiving the public, as it would be nearly impossible to offer/provide enough facts and details to adequately disclaim a past result or success. The Committee also finds the Rule, as written, to be narrowly-tailored to address the harm in question and to achieve the desired objective of protecting the public from false, misleading and/or deceptive advertising.

The Committee notes that pages 18-19 of the LSBA Research Findings support that position, as eighty-three (83%) percent of the public interviewed and sixty (60%) percent of LSBA members interviewed indicated that they "disagreed" with the statement that "client testimonials in lawyer advertisements are completely truthful", while seventy-two (72%) percent of LSBA members interviewed "agreed" with the statement that "client testimonials imply that the endorsed attorney can obtain a positive result without regard to facts or law". It should also be noted that page 10 of the LSBA Research Findings indicates that forty (40%) percent of the public interviewed would rate lawyers in Louisiana as "dishonest" and only nineteen (19%) percent would rate lawyers in Louisiana as "honest". Page 12 of the LSBA Research Findings indicates that sixty-one (61%) percent of the public interviewed believe that lawyer advertising in Louisiana is "less truthful" than advertisements for other

businesses and, on page 13, forty-five (45%) percent of the public interviewed believed the use of disclaimers in lawyer advertising was “less truthful” than the use of disclaimers in advertising for other businesses.

- RECOMMENDATION – The Committee overwhelmingly recommends no change to new Rule 7.2(c)(1)(D) as currently written. One member dissents, indicating a belief that the conduct in question is not inherently misleading.
- 2) FINDING: The Committee finds the conduct prohibited by new Rule 7.2(c)(1)(E) [“...*promises results*...”] is inherently misleading and that a disclaimer would not be able to cure or prevent the conduct from misleading and/or deceiving the public. Moreover, the Committee finds that the Rule, as written, is not vague or ambiguous, as it does not prohibit promises in general but only prohibits promises of results. The Committee finds the Rule, as written, to be narrowly-tailored to address the harm in question and to achieve the desired objective of protecting the public from false, misleading and/or deceptive advertising. Finally, the Committee is unaware of any instance where this Rule has been applied to prohibit the conduct in the examples cited by Plaintiffs.

The Committee notes that page 14 of the LSBA Research Findings indicates that, with regard to the series of statements from Louisiana lawyer advertisements that were recognized by the public interviewed, eighty (80%) percent of the public interviewed believed the lawyer ads that contained the statements recognized “disagree[d]” that the ads raised their confidence in Louisiana courts, while seventy-eight (78%) percent of LSBA members interviewed “disagree[d]” that the public’s confidence in Louisiana courts is raised by the lawyer advertisements that were recognized. Moreover, the Committee notes that, on page 15 of the LSBA Research Findings, seventy-six (76%) percent of the public interviewed “disagree[d]” that the lawyer advertisements in question raise their opinion of Louisiana lawyers. Finally, the Committee notes that page 17 of the LSBA Research Findings indicates that

sixty-one (61%) percent of the public interviewed “agree[d]” that the statements in the advertisements that were recognized promised that the lawyer will achieve a positive result.

- RECOMMENDATION – The Committee unanimously recommends no change to new Rule 7.2(c)(1)(E) as currently written.
- 3) FINDING: The Committee finds the conduct prohibited by the first part of new Rule 7.2(c)(1)(I) [“...*includes the portrayal of a client by a non-client...*”] is potentially misleading and that, while the Rule, as written, is narrowly-tailored to address the harm in question and to achieve the desired objective of protecting the public from false, misleading and/or deceptive advertising, a disclaimer would also work to prevent the conduct from misleading and/or deceiving the public.

The Committee notes that page 12 of the LSBA Research Findings indicates that a significant majority of LSBA members interviewed [eighty-two (82%) percent] and of the public interviewed [seventy-three (73%) percent] have seen or heard a disclaimer used in a print, television or radio advertisement but page 13 indicates that fifty-eight (58%) percent of LSBA members interviewed and forty-one (41%) percent of the public interviewed indicated that they generally are not able to clearly read, hear or understand disclaimers in advertising. Moreover, forty-five (45%) percent of the public interviewed thought that the use of disclaimers in lawyer advertising was “less truthful” than the use of disclaimers in advertising for other businesses. The Committee notes that page 19 of the LSBA Research Findings indicates that fifty-nine (59%) percent of the public interviewed and sixty-three (63%) percent of the LSBA members interviewed “disagree[d]” with the statement that they can always tell if a testimonial in a lawyer advertisement is made by a client and not by an actor.

The Committee further notes comments from the “focus groups” contained in the LSBA Research Findings pertaining to whether disclaimers are a positive or negative

thing (given that every person in the focus groups had seen or heard a disclaimer used in an advertisement):

- “...The print is very small and usually you don’t have time to read them ...” (page 23);
- “...it’s almost like they’re showing you the big pretty picture, but they tell you all the bad stuff at the bottom...” (page 23);
- “...That’s what I mean by negative. It gives you a positive image, but when you read the fine line you get wiped out...” (page 23);
- “...when I see a disclaimer, to me that commercial is telling me: I’m advertising this product, but what you see is not necessarily what you receive...” (page 23).

The Committee further notes comments from the “focus groups” contained in the LSBA Research Findings pertaining to whether lawyers’ disclaimers are a positive or negative thing [and if negative, does that mean you feel a disclaimer is misleading to you] (given that some persons in the focus groups had seen or heard a disclaimer used in a lawyer’s advertisement):

- “...Yeah, it is [misleading]. If you have reps that say, you got me X or one that said Y, but you didn’t get that—that is misleading...” (page 24);
- “...I think when I see an ad and they’re pumping it up and up and then there is a disclaimer—that takes away from everything they’ve been hyping...” (page 24);
- “...I do think it’s misleading. I think it’s very misleading...” (page 24);
- “...Why can’t they just advertise what they can do? Why do they have to make promises like rainbows and all this? Why can’t they just say: hey, I’m Tom Jones and I can handle divorces, bankruptcies and accident cases? Why can’t they just be up front? Why do they have to have actors?...” (page 24).

The Committee further notes comments from the “focus groups” contained in the LSBA Research Findings pertaining to why lawyers put disclaimers in their ads:

- “...To keep them from being sued. If you’re doing what you’re supposed to do, why do you need a disclaimer?...” (page 24);
- “...ultimately, there are people who will see the disclaimer and still think they’re going to get top dollar for the service...” (page 24).

The Committee further notes comments from the “focus groups” contained in the LSBA Research Findings pertaining to the disclaimers in the lawyer advertisements viewed and recognized:

- “...I saw some disclaimers, but I could not read any...” (page 33);
- “...They put them in as small as possible knowing most of the people they’re trying to catch will not...it’s too small...” (page 33);
- “...And sometimes you can’t understand them either. I don’t know how anyone can read that fast...” (page 33);
- “...My opinion is they really don’t want you to read them, until you say, ‘well you said you could get me’, and they say, ‘oh, no, no, didn’t you see my disclaimer...’” (page 33);
- “...They don’t set a guideline for how big it has to be or how long it has to be on the TV. As long as it’s there, it’s there...” (page 33);
- “...they say it so fast you can’t hear it. It’s bah bah bah bah bah, what was all that? So the disclaimers aren’t clear...” (page 33);
- “...I honestly haven’t seen a disclaimer at the bottom...” (page 33).

The Committee further notes comments from the “focus groups” contained in the LSBA Research Findings pertaining to what one regulation you would suggest if you were standing in front of the committee that makes the rules regarding lawyer advertising:

- “...If you have to put in a disclaimer, make it visible and clear and readable...” (page 35);
 - “...State your record, leave all the drama and the bells and all that out. Don’t say anything that MAKES you put a disclaimer...” (page 35);
 - “...And if you’re required to put a disclaimer, make sure we can read it. If it’s necessary to put in a disclaimer, make it clear, concise and so that we can understand it...” (page 35).
- RECOMMENDATION – The Committee recommends that new Rule 7.2(c)(1)(I) could be revised and amended, in pertinent part, (underlined portion denotes proposed amended language) to read:

“(I) includes the portrayal of a client by a non-client without disclaimer of such, as required by Rule 7.2(c)(10),...”

One member of the Committee dissents, believing the conduct in question is inherently misleading and cannot be cured with a disclaimer. Two members of the Committee dissent in part and concur in part, believing the conduct in question to be inherently misleading but also believing that a disclaimer, as recommended, would adequately work to prevent the conduct in question from misleading and/or deceiving the public.

- RECOMMENDATION – The Committee also recommends that, in keeping with the foregoing recommended amendment to the pertinent portion of new Rule 7.2(c)(1)(I), new Rule 7.2(c)(10) could be revised and amended to include new required disclaimer language as follows (underlined portion denotes proposed amended language):

“Appearance of Required Statements, Disclosures and Disclaimers. Any words or statements required by these Rules to appear in an advertisement or unsolicited written communication must be clearly legible if written or intelligible if spoken aloud.

All disclosures and disclaimers required by these Rules shall be clear and conspicuous. Written disclosures and disclaimers shall use a print size at least as large as the largest print size used in the advertisement or unsolicited written communication, and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and read the disclosure or disclaimer. Spoken disclosures and disclaimers shall be plainly audible and spoken at the same or slower rate of speed as the other spoken content of the advertisement. All disclosures and disclaimers used in advertisements that are televised or displayed electronically shall be both spoken aloud and written legibly.”

- RECOMMENDATION – The Committee also recommends that, in keeping with the foregoing recommended amendment to the pertinent portion of new Rule 7.2(c)(1)(I) and to new Rule 7.2(c)(10), new Rule 7.5(b)(2)(C) should also be amended to incorporate a cross-reference to new Rule 7.2(c)(10), as so amended [please see FINDING #7, below].
- 4) FINDING: The Committee finds the conduct prohibited by the second part of new Rule 7.2(c)(1)(I) [“...or the reenactment of any events or scenes or pictures that are not actual or authentic...”] is potentially misleading and that, while the Rule, as written, is narrowly-tailored to address the harm in question and to achieve the desired objective of protecting the public from false, misleading and/or deceptive advertising, a disclaimer would also work to prevent the conduct from misleading and/or deceiving the public.

The Committee notes that page 22 of the LSBA Research Findings indicates that fifty-nine (59%) percent of the public interviewed “agree[d]” that lawyer advertisements that include scenes of accidents or accident victims lessen their confidence in the integrity of Louisiana lawyers, while seventy-eight (78%) percent of LSBA members interviewed “disagree[d]” with the statement that lawyer advertisements that include scenes of accidents or accident victims raise the public’s opinion of the integrity of Louisiana lawyers. On the other hand, page 21 of the LSBA Research Findings shows that sixty-three (63%) percent of the public interviewed “disagree[d]” that lawyers whose advertisements include scenes of accidents or accident victims have more influence on Louisiana courts than other lawyers but fifty-four (54%) percent of LSBA members interviewed “agree[d]” that lawyer advertisements that include scenes of accidents or accident victims imply to the public that the lawyer advertised can obtain a positive result without regard to the facts or law.

- RECOMMENDATION – The Committee recommends that the second part of new Rule 7.2(c)(1)(I) could be revised and amended, in pertinent part, (underlined portion denotes proposed amended language; ~~struck through~~ language denotes proposed deletions) to read:

“...or the ~~reenactment~~-depiction of any events or scenes or pictures that are not actual or authentic without disclaimer of such, as required by Rule 7.2(c)(10);...”

One member of the Committee abstained.

- 5) FINDING: The Committee finds the conduct prohibited by the challenged portions of new Rule 7.2(c)(1)(J) [*“...includes the portrayal of a judge or jury...”*] is inherently misleading and that a disclaimer would not be able to cure or prevent the conduct from misleading and/or deceiving the public. Moreover, the Committee finds the pertinent portions of this Rule, as written, do not concern simply any general form of

portrayal or the depiction of just any scenes or events but, in this instance, specifically concern depiction and portrayal of the judiciary and juries within our system of justice. The Committee also finds that the conduct in question (i.e., judges appearing in lawyers' advertisements) would, if allowed, essentially portray judges engaged in conduct that would almost certainly be deemed improper and constitute a violation or violation(s) of the Louisiana Code of Judicial Conduct if engaged in by actual judges, thereby calling into question and/or impugning the integrity of the judiciary and the judicial system. The Committee finds the Rule, as written, to be narrowly-tailored to address the harm in question and to achieve the desired objective of protecting the public from false, misleading and/or deceptive advertising.

The Committee notes that page 20 of the LSBA Research Findings indicates that twenty-seven (27%) percent of the public interviewed "agree[d]" with the statement that "when I see a lawyer advertisement that portrays a judge or a jury, I assume the lawyer being advertised has more influence on Louisiana courts than other lawyers", while fifty (50%) percent of LSBA members interviewed "agree[d]" that lawyer advertisements that portray a judge or jury imply to the public that the lawyer advertised can assert more influence over judges or juries than other lawyers. Moreover, page 20 indicates that seventy-nine (79%) percent of the public interviewed "disagree[d]" with the statement that "lawyer advertisements that portray judges or juries raise my confidence in Louisiana courts", while sixty-eight (68%) percent of LSBA members interviewed "disagree[d]" that lawyer advertisements that portray judges or juries raise the public's confidence in Louisiana courts. Additionally, with respect to lawyer advertisements that contained statements that were recognized, page 16 of the LSBA Research Findings indicates that fifty-nine (59%) percent of the public interviewed indicated that those lawyer advertisements imply that Louisiana courts can be manipulated by the lawyers in the ads. Most telling, page 14 of the LSBA Research Findings indicates that eighty (80%) percent of the public interviewed "disagree[d]" that their confidence in Louisiana courts was

raised by the lawyer advertisements that contained the statements that were recognized.

The Committee further notes comments from the “focus groups” contained in the LSBA Research Findings pertaining to whether the advertisements recognized raised or lowered the participants’ confidence in Louisiana courts:

- “...It lowers it in a way. You’re saying: ‘I can get this through the court system. Like you got a hold on somebody down the river. I don’t care for that sort of thing...’” (page 25);
- “...If any non-experienced attorney could go to court and win that kind of money, then I wouldn’t have confidence in the courts...” (page 25);
- “...It doesn’t raise my confidence, but there’s no way it could lower my confidence. It’s the bottom of the barrel as far as I’m concerned. I would love for something to raise my confidence in LA courts...” (page 25);
- “...It does seem he would manipulate the system more. Lower...” (page 26);
- “...Lowers. I don’t respect that commercial. If they’re going with someone that is that flamboyant and think that’s smart...if the court system is impressed with that flamboyance, I’m not...” (page 31);
- “...He also said, ‘it’s that easy’- he’ll get you what you want, ‘it’s that easy.’ So that would make the courts look lower. If that clown can walk in there and get what you want, that isn’t good for the courts...” (page 31).

The Committee further notes comments from the “focus groups” contained in the LSBA Research Findings pertaining to whether portrayals of judges and juries in the advertisements recognized raised or lowered the participants’ confidence in Louisiana courts:

- “...Lowers it. Makes them seem like their on the take...” (page 34);
- “...Either way [whether it’s a real judge or an actor]. It gives the impression that the judge could be bought by this attorney...” (page 34);

- “...Why is he in this particular lawyer’s ad?...” (page 34);
- “...I don’t think we can [tell if a judge or juror is an actor] because we can’t tell which lawyers are real and not real sometimes, so how’re we supposed to know? Or, you know, how is anyone supposed to know?...” (page 34);
- “...I don’t think courts belong in attorney ads...” (page 34).

The Committee further notes general comments from the “focus groups” contained in the LSBA Research Findings pertaining to the participants’ confidence in Louisiana courts:

- “...I’ve been to court for different things, several things...and I’ve never...I usually always come out smelling good, but I don’t have faith in this court system in Louisiana and I don’t know why. To me, especially here in Caddo parish, it seems like it’s a money gig. Like if you’ve got the money, you get a high-priced lawyer where that lawyer can divide a little bit up among the others involved in this process and make the judge a big smile on his face, then you’re good to go...” (page 35);
- “...Nothing we’ve heard improved our opinion of the courts...” (page 35).
- RECOMMENDATION – The Committee unanimously recommends no change to new Rule 7.2(c)(1)(J) as currently written.

6) FINDING: The Committee finds the conduct prohibited by new Rule 7.2(c)(1)(L) [*“...utilizes a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter...”*] is inherently misleading and that a disclaimer would not be able to cure or prevent the conduct from misleading and/or deceiving the public. The Committee finds the Rule, as written, to be narrowly-tailored to address the harm in question and to achieve the desired objective of protecting the public from false, misleading and/or deceptive advertising.

The Committee notes that page 17 of the LSBA Research Findings indicates that sixty-one (61%) percent of the public interviewed “agree[d]” that the statements in the lawyer advertisements that were recognized promised that the lawyer will achieve a positive result, while seventy-six (76%) percent of the LSBA members interviewed “disagree[d]” that the public is not misled by the lawyer advertisements that contained the statements recognized and, on page 16, seventy-eight (78%) percent of LSBA members interviewed “agree[d]” that the lawyer advertisements that contained the statements that were recognized imply that the lawyers advertised can obtain favorable results without regard to facts or law. Page 10 of the LSBA Research Findings indicates that forty (40%) percent of the public interviewed would rate lawyers in Louisiana as “dishonest”, page 11 indicates that fifty-six (56%) percent of the public interviewed believe lawyer advertising in Louisiana is “misleading” and page 12 indicates that sixty-one (61%) percent of the public interviewed would say that lawyer advertising in Louisiana is “less truthful” than advertisements for other businesses.

- RECOMMENDATION – The Committee unanimously recommends no change to new Rule 7.2(c)(1)(L) as currently written.
- 7) FINDING: The Committee finds the conduct prohibited by new Rule 7.5(b)(1)(C) [*“...(C) any spokesperson’s voice or image that is recognizable to the public in the community where the advertisement appears;...”*] is potentially misleading and that, while the Rule, as written, is narrowly-tailored to address the harm in question and to achieve the desired objective of protecting the public from false, misleading and/or deceptive advertising, a disclaimer—as recommend above [in conjunction with FINDING #3], with respect to the recommended amendment to new Rule 7.2(c)(10)—would also work to prevent the conduct from misleading and/or deceiving the public.

The Committee notes that page 19 of the LSBA Research Findings indicates that fifty-nine (59%) percent of the public interviewed “disagree[d]” with the statement that “I can always tell if a testimonial in a lawyer advertisement is made by a client and not by an actor”, while sixty-three (63%) percent of LSBA members interviewed “disagree[d]” with the same statement. On the other hand, page 21 of the LSBA Research Findings shows that sixty-two (62%) percent of the public interviewed “disagree[d]” that lawyers whose advertisements include endorsements by a celebrity or “well known” person have more influence on Louisiana courts than other lawyers, whereas sixty-two (62%) percent of the LSBA members interviewed “agree[d]” that lawyer advertisements that include endorsements by a celebrity or “well known” person imply to the public that the lawyer advertised can obtain a positive result without regard to facts or law.

- RECOMMENDATION – The Committee recommends that new Rule 7.5(b)(1)(C) could be deleted and repealed.
- RECOMMENDATION – The Committee also recommends that, in keeping with the foregoing recommended deletion/repeal of new Rule 7.5(b)(1)(C), new Rule 7.5(b)(1)(B) could be revised and amended as follows (underlined portion denotes proposed amended language; ~~struck through~~ language denotes proposed deletions):

“(B) lawyers who are not members of the advertising law firm speaking on behalf of the advertising lawyer or law firm; ~~or.~~”

- RECOMMENDATION – The Committee also recommends that, in keeping with the foregoing recommended deletion/repeal of new Rule 7.5(b)(1)(C) and foregoing recommended amendment/revision of new Rule 7.5(b)(1)(B), new Rule 7.5(b)(2)(C) could be revised and amended as follows (underlined portion denotes

proposed amended language; ~~struck through~~ language denotes proposed deletions):

“...(C) a non-lawyer spokesperson speaking on behalf of the lawyer or law firm, as long as ~~the spokesperson is not recognizable to the public in the community where the advertisement appears and that spokesperson shall provide a spoken and written disclosure, as required by Rule 7.2(c)(10), identifying the spokesperson as a spokesperson,~~ ~~and~~ disclosing that the spokesperson is not a lawyer and disclosing that the spokesperson is being paid to be a spokesperson, if paid.”

One member of the Committee dissents, believing the foregoing Rules should not be changed as currently written.

Respectfully Submitted:

Richard C. Stanley, Chair
Rules of Professional Conduct Committee
Louisiana State Bar Association