S T A T E O F T E N N E S S E E
OFFICE OF THE
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Opinion No. 08-98

Attorneys' Advertising of DUI Defense Services

QUESTION

If enacted, would SB 3439, as amended by Amendment No. 2, be vulnerable to a constitutional challenge?

OPINION

SB 3439, as amended by Amendment No. 2, is vulnerable to constitutional attack on the ground that it violates the separation of powers doctrine. The Tennessee Supreme Court has the inherent constitutional authority to regulate the courts and the attorneys who practice before them. Amendment No. 2 improperly attempts to exercise powers properly belonging to the Supreme Court. By its terms, the Amendment conflicts with and purports to supersede contrary rules of the Supreme Court relating to attorney advertising.

Amendment No. 2 also raises significant First Amendment concerns. As drafted, Amendment No. 2 seeks to preclude attorneys from conveying information of substantial interest to persons who have been charged with DUI offenses, including the attorneys' relative expertise in handling DUI defense cases and their rates for providing those services. Amendment No. 2 does not appear designed to advance a substantial state interest and likely would not survive the intermediate level of scrutiny applicable in commercial speech cases.

ANALYSIS

If enacted, SB 3439 would create a DUI offender registry within the Tennessee Bureau of Investigation. Amendment No. 2 to that bill would circumscribe the rights of practicing attorneys to advertise their services in DUI cases. The Amendment provides that

> [n]otwithstanding any other provision of law or rule of court to the contrary, no attorney shall advertise that such attorney specializes in the defense of DUI cases, that such attorney offers a discounted fee for DUI defense, that the attorney guarantees or implies a certain

> result in the case, or that the attorney has any more expertise in the defense of DUI cases than any other licensed attorney.

The Tennessee Supreme Court has the inherent constitutional authority to regulate the courts and the attorneys who practice therein. *See Belmont v. Board of Law Examiners*, 511 S.W.2d 461, 463-64 (Tenn. 1974). This authority derives from Article II, Sections 1 and 2, of the Tennessee Constitution, which divides the powers of government into the legislative, executive, and judicial branches, and Article VI, Section 1, which "vests the judicial power of this state in the Supreme Court and inferior courts." *Newton v. Cox*, 878 S.W.2d 105, 111 (Tenn. 1974). This judicial power includes the Supreme Court's authority to promulgate rules governing the practice of law and, specifically, Supreme Court Rule 8, which establishes the Rules of Professional Conduct applicable to attorneys practicing in the courts of this state. *See id*.

Where a "legislative enactment is in direct conflict with and totally abrogates the Court's authority with regard to the practice of law, the statute is unconstitutional." *Id*. On the other hand, when the statute is merely "supplemental to and in aid of" a disciplinary rule, the statute may be viewed as a legitimate "exercise of the legislature's police powers" that does not violate the separation of powers principle. In *Belmont v. Board of Law Examiners*, for example, the Court struck down legislation that would have prohibited the board of law examiners from limiting the number of times that a person could take the bar examination. *Belmont*, 511 S.W.2d at 464. In contrast, in *Newton v. Cox*, the Court upheld a statute that limited contingent fee awards to attorneys representing clients in malpractice actions. *Newton*, 878 S.W.2d at 112.

Currently, attorney advertising is governed by Rules 7.1 through 7.6 of the Rules of Professional Conduct. Rule 7.2 specifically permits attorneys to advertise their "professional services or seek referrals through public media," including telephone and legal directories, newspapers, magazines, radio, television, billboards, and the Internet. Tenn. Sup. Ct. R. 8, RPC 7.2. According to Rule 7.2's comments, this rule "permits public dissemination of information concerning a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements." RPC 7.2 comment 3. Rule 7.4 permits attorneys to advertise that they practice in a particular field of law. RPC 7.4. Moreover, attorneys may advertise that they are specialists in a particular field of law if they have been so certified by the Tennessee Commission on Continuing Legal Education and Specialization. *See* RPC 7.4(d). The Commission, which is an agency of the Tennessee Supreme Court, currently certifies attorneys as specialists in fourteen areas of the law, including "DUI Defense Specialist."

On its face, Amendment No. 2 to SB 3439 appears to conflict with and supersede Rules 7.2 and 7.4, which permit lawyers to advertise both the nature and cost of their services in a wide range of media. Amendment No. 2 prohibits attorneys from advertising that they specialize in the defense of DUI cases, that they possess any particular expertise in DUI defense work, or that they offer discounted fees in such cases. The Amendment would preclude attorneys from advertising that they practice exclusively in the area of DUI defense or that they have been certified as a specialist in that

field of law pursuant to Rule 7.4. The Amendment specifically indicates that it supersedes "any other provision of law ***or rule of court*** to the contrary" and, thus, directly supersedes the Supreme Court's authority in this area as expressed in Supreme Court Rule 8. Under these circumstances, this Office is of the opinion that the proposed Amendment would be vulnerable to constitutional attack on the ground that it violates the separation of powers doctrine.

In addition to infringing upon the Supreme Court's authority to regulate attorney conduct, Amendment No. 2 raises significant First Amendment concerns. Commercial speech in general, and attorney advertising in particular, are "accorded a measure of First Amendment protection." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995). In ruling on the constitutionality of statutes or rules that impose restrictions on attorney advertising, the courts employ an intermediate level of scrutiny. *Id*. Of course, the states "may freely regulate commercial speech that concerns unlawful activity or is misleading." *Id*. at 623-24. In regulating other commercial speech, however, the state must satisfy a three-prong test:

> 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.'"

Id. at 624 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-65 (1980)).

Applying the foregoing test, the Tennessee Supreme Court upheld lawyer advertising rules under the former Code of Professional Responsibility that required lawyers advertising their services "in a particular area of law for which certification is available in Tennessee" to disclose in the ad whether they were so certified. *See Walker v. Board of Professional Responsibility*, 38 S.W.3d 540, 545 (Tenn. 2001) (citing former DR 201(C)). In upholding the rule, the Court reasoned that

> [t]he disclaimer rule the Commission [on Continuing Legal Education] advocated and this Court ultimately adopted promotes the Commission's legitimate goal by clearly and succinctly providing the public with information about the certification status of attorneys who advertise their services. This information will help a consumer identify which lawyers may have more experience and education in a particular area of law—knowledge which will help that consumer hire a lawyer to represent his interests. . . . [T]he information required by [the rule] is one piece of information that will assist consumers in making those choices. The required disclaimer is therefore reasonably related to promoting the substantial interest of helping consumers to make informed judgments about which attorneys they should entrust with their legal needs.

Id. at 547-48.

In light of the Court's recognition that consumers have a substantial interest in identifying "which lawyers may have more experience and education in a particular area of law," it is doubtful that the Court would uphold the contrary provisions contained in Amendment No. 2 that would prohibit attorneys from representing that they specialize in the defense of DUI cases or that they have more expertise in the defense of DUI cases than other licensed attorneys.[*] Just as in any other types of cases, DUI defendants have a substantial interest in identifying which lawyers concentrate their practices in the area of DUI defense and which lawyers have been certified as a DUI Defense Specialist by the Commission. In contrast, it is unclear what state interest is being advanced by the language of Amendment No. 2. As drafted, Amendment No. 2 would prevent DUI defendants from obtaining the information that the Supreme Court deemed important in *Walker*. Indeed, DUI defendants have a substantial interest in learning as much as possible about the attorneys who will represent them, such as whether the attorney has significant experience in handling DUI cases, whether the attorney has been certified as a DUI Defense Specialist, and whether the attorney is offering DUI defense services at a competitive rate.

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[*]Under a First Amendment analysis, perhaps the language of Amendment No. 2 which passes muster is the prohibition on guaranteeing or implying a certain result in a case. This language appears to constitute a valid consumer protection provision that does not directly conflict with the Supreme Court's Rules of Professional Conduct. *Cf.* RPC 7.1(b) (prohibiting lawyers from making communications "likely to create an unjustified expectation about results the lawyer can achieve"). However, even this provision attempts to exercise powers properly belonging to the Supreme Court and thus is vulnerable under the separation of powers doctrine.

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