

**IN THE UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

MICHAEL J. LEIZERMAN
c/o Freeman Mathis & Gary LLP.
65 East State Street, Suite 2550
Columbus, OH 43215,

Plaintiff,

vs.

PATRICIA WISE,
in her official capacity as the Chair of the
Ohio Board of Professional Conduct
65 South Front Street, 5th Floor
Columbus, OH 43215

And

HON. D. CHRIS COOK,
in his official capacity as Vice-Chair of the
Ohio Board of Professional Conduct
65 South Front Street, 5th Floor
Columbus, OH 43215

And

RICHARD DOVE,
in his official capacity as director of the Ohio
Board of Professional Conduct
65 South Front Street, 5th Floor
Columbus, OH 43215

Defendants

) CASE NO.:

)

) JUDGE:

)

) **COMPLAINT AND JURY DEMAND**

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

Introduction

1. This is a civil rights case brought pursuant to 42 U.S.C. §1983 and §1988 seeking to vindicate the rights of Ohio attorneys whose right to freedom of speech has been and will continue to be violated by the Ohio Board of Professional Conduct's interpretation and application of the Ohio Rules of Professional Conduct. The Ohio Rules of Professional Conduct impose unconstitutional restrictions upon Ohio attorney's commercial speech. These restrictions do not advance any substantial state interest and, even if such a substantial state interest did exist, the restrictions are much more extensive than necessary to serve that interest. An injunction must issue to protect the on-going violations of the First Amendment rights of Ohio attorneys.

Jurisdiction and Venue

2. This Honorable Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 as this case is brought pursuant to 42 U.S.C. §1983 and §1988 to redress and prevent violations of the First Amendment right of Plaintiff and all Ohio attorneys to engage in commercial speech.

3. Venue is appropriate in this Honorable Court pursuant to 28 U.S.C. §1391 because one or more of the named defendants reside in this district and a substantial part of the events giving rise to the claim occurred within this venue.

Parties

4. Plaintiff Michael Leizerman is an Ohio resident and an attorney licensed to practice law in the State of Ohio.

5. Defendant Patricia Wise is a resident of the State of Ohio and is sued in her official capacity as the Chair of the Ohio Board of Professional Conduct.

6. Defendant Hon. D. Chris Cook is a resident of the State of Ohio and is sued in his official capacity as the Vice-chair of the Ohio Board of Professional Conduct.

7. Defendant Richard A. Dove is a resident of the State of Ohio and is sued in his official capacity the Director of the Ohio Board of Professional Conduct.

Factual Background

Rules and Procedure Governing the Practice of Law in Ohio

8. Article IV, Section 2 of the Ohio Constitution grants the Ohio Supreme Court with exclusive jurisdiction regarding admission to the practice of law, discipline of persons admitted to the practice of law and all other matters pertaining to the practice of law.

9. As part of its exercise of the power conferred by the Ohio Constitution, the Ohio Supreme Court has promulgated the Supreme Court Rules of the Government of the Bar of Ohio.

10. Rule IV, Section 1 of the Supreme Court Rules of the Government of the Bar of Ohio provides that the Ohio Rules of Professional Conduct, effective February 1, 2007, as amended, shall be binding upon all persons admitted to practice law in Ohio.

11. Gov. Bar. R. IV, Section 1 further provides that willful violation of the Rules of Professional Conduct shall be punished by reprimand, suspension, disbarment, or probation.

12. Gov. Bar. R. Rule V, Section 1 creates a Board of Professional Conduct of the Supreme Court (the “Board”).

13. Pursuant to Gov. Bar. R. V, Section 2, except as otherwise provided “all grievances involving alleged misconduct by judicial officers or attorneys, proceedings with regard to the alleged mental illness, alcohol or other drug abuse, or disorder of a judicial officer or attorney, proceedings for the discipline of judicial officers, attorneys, persons under suspension or on

probation and proceedings for the reinstatement to the practice of law shall be brought, conducted and disposed of in accordance with the provisions of the rule.”

14. The Board has authority to receive evidence, preserve the record, make findings and submit recommendations concerning complaints of misconduct that are alleged to have been committed by an attorney.

15. The Board also has authority to issue nonbinding advisory opinions in response to prospective or hypothetical questions directed to the Board regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Rules of Professional Conduct, the code of Judicial Conduct, or the Attorney’s Oath of Office.

16. The Supreme Court Rules for the Government of the Bar of Ohio has also created the Commission on Certification of Attorneys as Specialists (the “Commission”).

17. The Commission has the authority to approve and regulate organizations that certify attorneys practicing in Ohio as specialists.

18. The Commission has approved four organizations to certify attorneys practicing in Ohio as specialists: the National Board of Trial Advocacy (“NBTA”), the American Board of Certification, Nation Elder Law Foundation and the Ohio State Bar Association.

19. Section 5(A) of Gov.Bar. R. XIV provides:

“A specialist certified under this rule may communicate the fact that the specialist is certified by the certifying organization as a specialist in the field of law involved. A specialist shall not represent, expressly or impliedly, that the specialist is certified by the Ohio Supreme Court or the Commission or by an entity other than the certifying organization. A specialist may represent that the certifying organization is approved by the Commission, but shall not represent that the certifying organization is approved by the Supreme Court.

20. Rule 7.4 of the Ohio Rules of Professional Conduct governs the ability of an attorney to state or imply that a lawyer is a specialist in a particular field of law.

21. Specifically, under Rule 7.4, the lawyer must demonstrate:

- a. The lawyer has been certified a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists; and
- b. The name of the certifying agency is clearly identified in the communication.

22. The Ohio Supreme Court has also established the Commission on Certification of Attorneys as Specialists (the “Commission”). Gov.Bar. R. XIV.

23. The Commission is charged with the duty to approve and regulate organizations that certify lawyers practicing in Ohio as specialists.

24. The Commission has the authority to recommend to the Supreme Court the fields of law subject to specialization designation.

25. Appendix VI of the Supreme Court Rules for the Government of the Bar of Ohio contains a description of the “fields of law subject to specialization designation in Ohio pursuant to recommendations of the Commission on Certification of Attorneys as Specialists.”

26. Notwithstanding Appendix VI, pursuant to Gov.Bar.R. XIV, Section 4, to be certified as a specialist, an attorney must only satisfy two requirements: (A) be registered as active pursuant to Gov.Bar. R. VI and (B) be certified by an organization approved by the Commission.

Plaintiff is Board Certified by the NBTA in Truck Law

27. Plaintiff Michael Leizerman obtained his juris doctorate from the University of Toledo and has been admitted to practice law in the State of Ohio since 1994.

28. Plaintiff is the founder of The Law Firm for Truck Safety, LLP and concentrates his practice on representing plaintiffs in catastrophic injury truck collision cases.

29. Plaintiff has taken thirteen truck and bus cases to trial since 2002.

30. Plaintiff frequently teaches other attorneys how to prosecute trucking cases. He has taught and presented lectures on this subject across the United States.

31. Plaintiff is the author of the treatise *Litigating Truck Accident Cases*, published by West Publishing, which provides a detailed road map to success in cases involving personal injury, death, and/or damages caused by trucks or commercial trailers.

32. Plaintiff frequently teaches and presents lectures regarding trucking cases in continuing legal education courses offered around the United States.

33. Plaintiff has also obtained board certification from the National Board of Trial Advocacy (“NBTA”) in the area of Truck Accident Law.

34. The NBTA is an attorney board certifying agency.

35. The Commission has approved and accredited the NBTA to certify attorneys as specialists.

36. To qualify for board certification by the NBTA, attorneys must have extensive experience in their specialty and meet rigorous objective quality standards.

37. Attorneys certified by the NBTA in Truck Accident Law must:

- a. be in good standing in his of admission,
- b. have spent five years in the practice of Truck Accident Law,
- c. demonstrate substantial involvement relevant to truck accident law, with at least thirty percent of his time spent practicing truck accident law in the three years preceding the filing of the application for board certification,
- d. meet certain educational requirements, including attendance or participation in not less than forty-five hours in programs of continuing education in the

specialty or equivalent participation through teaching courses or seminars in truck accident law or ethics, participation as a panelist, speaker or workshop leader at educational or professional conferences, authorship of books or articles published in professional journals on truck accident law.

- e. undergo a peer review process,
- f. pass a written examination,
- g. submit a legal writing document to demonstrate written advocacy skills, and demonstrate integrity and dedication to the interest of clients

38. Plaintiff received his Board Certification in Truck Accident Law on December 21, 2018.

Plaintiff requests guidance

39. Plaintiff and his law firm compete for legal work with other attorneys throughout Ohio and the rest of the United States.

40. Thus, in an effort to demonstrate his experience and competency, Plaintiff desired to reference his NBTA certification in Truck Accident Law in various print and electronic marketing materials. An example of the marketing materials Plaintiff intended to utilize are attached to this Complaint as Exhibit 1.

41. Rule 7.4 of the Ohio Rules of Professional Conduct requires that in order for an attorney to hold himself out as a specialist he must: (1) The lawyer has been certified a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists; and (2) the name of the certifying agency is clearly identified in the communication.

42. There is no dispute that Plaintiff was certified as a specialist by the NBTA, an organization approved by the Commission and that the marketing materials clearly and

prominently identify the NBTA as the certifying agency. Thus, the requirements of Rule 7.4 of the Ohio Rules of Professional Conduct were satisfied.

43. Nonetheless, as “Truck Accident Law” was not included within Appendix VI of recognized areas of specializations, Plaintiff, an attorney with nearly thirty years’ experience and good standing with the Ohio bar, wanted assurances that stating that he is a specialist in Truck Accident Law would not run afoul or violate the Ohio Rules of Professional Conduct and would not subject him to disciplinary action.

44. Consequently, Plaintiff, through counsel, submitted a request to the Board for an Advisory Opinion, asking “May a lawyer state or imply that he or she is a specialist in a particular field of law (Truck Accident Law) when the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists even though the field of law has not yet been recognized in Ohio as a field of law accorded certification.”

45. A true and accurate copy of Plaintiffs’ request for an Advisory Opinion is attached to this Complaint as Exhibit 2.

46. The Board issued its advisory opinion on June 11, 2021.

47. The Board opined that “A lawyer may state or imply that she or he is a specialist in a field of law only if that field of law has been designated as an area of lawyer specialization by the Supreme Court. A communication by a lawyer that he or she is a specialist in a field of law not designated by the Supreme Court is misleading.”

48. Thus, through this advisory opinion, the Board has opined that it would determine that the commercial speech proposed by Plaintiff would cause him to be subject to disciplinary proceedings and disciplinary action.

Claim for Relief: Violation of the First Amendment pursuant to 42 U.S.C. §1983

49. The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech.”

50. The First Amendment is applicable to the states and municipalities through the Fourteenth Amendment.

51. The First Amendment protects commercial speech.

52. The United States Supreme Court has recognized that commercial speech not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. *Central Hudson Gas & Elec. Corp. v. Public Serv. Commission*, 447 U.S. 748, 762 (1976).

53. Plaintiff, through his proposed marketing materials, intends to engage in commercial speech that is protected by the First Amendment.

54. The government can restrict commercial speech that is misleading or related to an unlawful activity because the government interest is strong.

55. Rule 7.4 of the Ohio violates the First Amendment because it is overly restrictive and prohibits an attorney from including truthful information that is neither misleading nor related related to an unlawful activity.

56. Ohio lawyers should be permitted to advertise specialist certifications provided that the advertisement identifies the certifying entity, without regard to whether the certifying entity has been approved by the Supreme Court Commission on Certification of Attorneys as Specialists, provided that the advertisement is not misleading and not related to an unlawful activity.

57. The proposed marketing materials and statements by Plaintiff that he has been board certified by the NBTA as a specialist in Truck Accident Law are not misleading and do not relate to an unlawful activity.

58. The government can also restrict commercial speech if it has a substantial government interest in restricting the speech and the restriction is not more extensive than necessary to serve that interest.

59. The Board has failed to identify any governmental interest in restricting Plaintiff from truthfully stating that he has been certified by the NBTA as a specialist in Truck Accident Law and the complete blanket prohibition upon such speech is clearly more extensive than necessary to serve an interest that the Board may conceivably claim to have in restricting Plaintiff's speech.

60. The Board, though its advisory opinion, has chilled Plaintiff's and all Ohio attorneys' right to freedom of speech as protected by the First Amendment.

61. The Board's restrictions on Plaintiff's commercial speech cannot survive First Amendment scrutiny. There is no evidence that the prohibited speech is misleading or harmful to consumers. The Board has no legitimate interest in prohibiting the speech and its rules does not directly advance- and are far more extensive than necessary to serve any interest it might claim.

Prayer for Relief

Plaintiff requests that this Court:

- A. Declare unconstitutional and enjoin enforcement of Rule 7.4 of the Ohio Rules of Professional Conduct from prohibiting a lawyer from stating or implying that he or she is a specialist in a particular field when the lawyer has been certified as a specialist by

- an accrediting entity, regardless of whether that entity has been approved by Supreme Court Commission on Certification of Attorneys as Specialists.
- B. Declare unconstitutional and enjoin enforcement of Rule 7.4 of the Ohio Rules of Professional Conduct as prohibiting a lawyer from stating or implying that he or she is a specialist in a particular field of law (Truck Accident Law) when the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists even though the field of law has not yet been recognized in Ohio as a field of law accorded certification.
- C. Award the plaintiffs their reasonable costs, expenses and attorney's fees under 42 U.S.C. §1988, and
- D. Grant the plaintiffs all other appropriate relief as this Honorable Court deems equitable and just.

Respectfully submitted,

FREEMAN MATHIS & GARY, LLP

*/s/ Paul-Michael La Fayette*_____

PAUL-MICHAEL LA FAYETTE (0067031)

CARA M. WRIGHT (0084583)

65 East State Street, Suite 2550

Columbus, OH 43215

T: 614-699-2425 | F: 833-330-3669

Paul.LaFayette@fmglaw.com

Cara.Wright@fmglaw.com

Counsel for Plaintiff Michael J. Leizerman