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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

DRIGGS, BILLS & DAY, P.C., a
Professional Corporation, d/b/a “THE
ADVOCATES,” and MATTHEW W.
DRIGGS, an individual,

Plaintiffs,

vs.

UTAH STATE BAR, a Utah Nonprofit
Corporation, JOHN R. LUND, H. DICKSON
BURTON, HERM OLSEN, JOHN W.
BRADLEY, S. GRACE ACOSTA, MARK
O. MORRIS, KATE CONYERS, HEATHER
FARNSWORTH, MICHELLE MUMFORD,
CARA TANGARO, HEATHER THEUET,
LIISA HANCOCK, KRISTIN WOODS,
STEVEN R. BURT AND MARY KAY
GRIFFIN, in their capacity as members of the
Utah State Bar Board of Commissioners,

Defendants.

VERIFIED COMPLAINT

Civil No.: 2:17-cv-00893-EJF

Magistrate Judge: Evelyn J. Furse

Plaintiffs Driggs, Bills & Day, P.C. d/b/a “The Advocates,” and Matthew W. Driggs (collectively, “Plaintiffs”), by and through counsel, hereby claim and allege against defendants the Utah State Bar and its Commissioners (“Utah Bar” or “Defendants”), as follows:

NATURE OF THE ACTION

Plaintiffs advertise their legal services by way of live and sometimes pre-recorded interviews including statements of lawyers of the firm, radio personalities and others occurring and read during the course of regular programming of certain radio broadcasts, and during regular programming breaks (collectively, “Live Ads”). Based on obiter dicta contained in an opinion issued November 12, 2014 by the Utah Bar’s Ethics Advisory Opinion Committee, the Utah Bar Office of Professional Conduct (“OPC”) has interpreted and applied Rule 7.2 of the Utah Rules of Professional Conduct to proscribe Plaintiffs’ Live Ads. With respect and gratitude for the Utah Bar and its Commissioners’ service to the members of the Bar, and with deference to their discretion, Plaintiffs courteously bring this Complaint seeking this Court’s interpretation and declaration of the parties’ rights and obligations under the First Amendment’s protection of commercial speech and other implicated constitutional protections. Plaintiffs fully intend to abide by the Utah Rules of Professional Conduct as well as the high ethical standards they have set for themselves. While they believe that their Live Ads at issue in this Complaint are protected speech and fall within the Rules, Plaintiffs will yield to the courts’ final decision, regardless of the outcome.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Driggs, Bills & Day, P.C. d/b/a “The Advocates”, is a Utah Professional Corporation (“The Advocates”).

2. The Advocates is a personal injury firm with its principal place of business in Salt Lake County, Utah, whose business model relies heavily on advertising. The majority of The Advocates’ work involves helping clients navigate the pitfalls and paperwork that often accompanies insurance claims.

3. Plaintiff Matthew W. Driggs (“Driggs”) is a resident of Salt Lake County, Utah, an attorney licensed to practice in the state of Utah, a member in good standing of the Utah State Bar, and the founding partner of The Advocates. Driggs has been practicing law in Utah for over twenty years.

4. Defendant the Utah Bar is a Utah non-profit corporation with its principal place of business in Salt Lake County, Utah, delegated with the task of enforcing the Utah Supreme Court Rules of Professional Practice, including the Rules of Professional Conduct.

5. Defendants John R. Lund, H. Dickson Burton, Herm Olsen, John W. Bradley, S. Grace Acosta, Mark O. Morris, Kate Conyers, Heather Farnsworth, Michelle Mumford, Cara Tangaro, Heather Theuet, Liisa Hancock, Kristin Woods, Steven R. Burt and Mary Kay Griffin are individuals residing, on information and belief, in Salt Lake County, with the exceptions of Herm Olsen who resides in Cache County, John W. Bradley, who resides in Weber County, Liisa Hancock who resides in Utah County, and Kristin Woods who resides in Washington County, Utah (“Commissioners”).

6. The Commissioners are, on information and belief, the governing authority of the Utah State Bar.

7. Plaintiffs file this action pursuant to 42 U.S.C. § 1983 to protect rights secured by the First and Fourteenth Amendments to the United States and Article I, Sections 1 and 15 of the Utah Constitution.

8. This action raises questions under the Constitution of the United States and 42 U.S.C. § 1983 and, thus, jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1343.

9. All parties reside in Utah and a substantial part of the events giving rise to this case occurred in Utah.

10. Venue is proper in this court under 28 U.S.C. § 1391(b).

GENERAL ALLEGATIONS

A. Plaintiffs' Operations and Live Ads

11. Plaintiff Driggs started The Advocates with a vision of creating a team of caring, understanding, and client-centered individuals focused on the needs of the clients they serve.

12. Driggs and The Advocates have been successful in achieving this goal. Attorneys and staff at The Advocates not only navigate their clients through the legal issues surrounding car accidents and other injuries, they also return normalcy to their clients' lives in a myriad of ways, such as providing rides to the airport or soccer practice or arranging for car repairs.

13. Plaintiffs' business model is a unique alternative to other personal injury firms.

14. Advertising plays a critical role in informing the public of available options when selecting an attorney and what the differences are in legal representation, better equipping the public to make an informed decision.

15. Advertising is vital to Plaintiffs' small personal injury firm.

16. Plaintiffs are most helpful to their clients when they resolve the clients' legal needs and get them back on their feet as quickly as possible. However, The Advocates' commitment to efficiently resolving its clients' disputes creates an ongoing need for a constant stream of new clients in order to stay busy and stay in business.

17. Many of Plaintiffs' clients come through referrals or word of mouth, but a significant percentage learns about Plaintiffs through advertising, including through radio Live Ads.

18. As part of their advertising efforts, and in compliance with Rules 7.1 and 7.2 of the Utah Rules of Professional Conduct, Plaintiffs purchase radio time at the same rates charged any other advertiser.

19. Each month, several of Plaintiffs' new clients first learn about Plaintiffs' firm and unique services through a radio advertisement.

20. As with television, there are "primetime" advertising slots and opportunities on the radio. These include Live Ads during certain hours of the day, during or as part of a scheduled program, as close as possible to the regular program, or read by a radio personality.

21. These Live Ads are more effective than advertisements during a commercial break because the audience is typically larger and/or more attentive.

22. Radio personalities read similar ads for only a limited number of companies. These advertising opportunities are based on seniority. There is a list of companies waiting for the opportunity to have their advertisements read by a particular radio personality in a particular spot. The length of the waiting list varies by station and radio personality.

23. If an advertiser discontinues using a radio personality and designated spot and then later wishes to reengage him or her in that slot, the company must start at the end of the line and wait the slot becomes available again.

24. Given the demand for such spots, in some cases, Plaintiffs waited a long time for the opportunity to have their advertisement read by a radio personality at a desired time.

25. Plaintiffs' Live Ads are centered on their client-focus business model.

26. Some of the Live Ads involve Driggs listing some of The Advocates' unique qualities.

27. Some Live Ads consist of a radio personality reading a script highlighting those qualities.

28. Other Live Ads consist of the radio personality asking Driggs how The Advocates is different from other law firms.

29. All of The Advocates' Live Ads convey truthful facts, in an honest, straightforward way.

30. None of the Live Ads are false, misleading, deceptive, or overreaching.

31. The Live Ads do not create unjustified or unreasonable expectations.

32. The Live Ads comply with all requirements of the Utah Rules of Professional Conduct.

33. The Live Ads are very successful.

B. Advisory Opinion 14-04

34. The Utah State Bar has an Ethics Advisory Opinion Committee (the "EAOC") that addresses questions and issues opinions related to the Utah Rules of Professional Conduct.

35. The OPC is charged with enforcing the Utah Rules of Professional Conduct.

36. Under the blanket authority of the Bar and at the direction of its Commissioners, the OPC enforces the Rules of Professional Conduct by engaging in disciplinary proceedings against attorneys.

37. On information and belief, OPC informally vets complaints within the office, investigates those it determines are meritorious, then certifies those matters to an informal administrative procedure before an Ethics and Discipline Committee, which may result in filing a formal complaint in state court, creating a public record.

38. The Utah Bar at the direction of its Commissioners retains all records related to an informal complaint for seven years, even if the complaint was terminated or the Utah Bar decided not to prosecute.

39. Although informal proceedings typically are confidential, information regarding the matter may be disclosed by the Utah Bar if certain conditions are met.

40. The Utah Bar keeps a permanent record of discipline and disability matters.

41. On information and belief, an attorney seeking admission in some jurisdictions must report pending and prior disciplinary matters, even if the attorney is found to have violated no ethical rule.

42. The commencement and prosecution of a disciplinary action places a black mark and stigma on the attorney's reputation, even if the attorney is determined to have done no wrong. This becomes particularly acute when the Utah Bar files a formal complaint in state court.

43. Even if an attorney's name is cleared by a ruling of the Utah Supreme Court, there remains a permanent record causing a permanent stigma on the attorney's name and reputation.

44. Disciplinary proceedings involve high costs, disruption to an attorney's life and family, and disruption to the attorney's and firm's business while the disciplinary matter is being investigated and defended.

45. The Utah Bar's EAOC is tasked with responding to requests for advisory opinions on legal ethics.

46. The Advisory Committee is made up volunteer members of the Utah Bar. The President of the Bar appoints the Committee Chair and a member of the judiciary. The

remaining members are selected by a committee comprised of the Bar President, Bar Commissioner, and Committee Chair.

47. As the name suggests, the advisory opinions contain the opinions of the members of the EAOC.

48. “No court is bound by an ethics opinion’s interpretation of the Utah Rules of Professional Conduct.”¹

49. On information and belief, advisory opinions are not binding, cannot change the actual meaning of a rule, and are not circulated to the members of the Utah Bar or Utah Supreme Court for vetting and approval.

50. On November 12, 2014, the EAOC issued Ethics Advisory Opinion no. 14-04 (“Opinion 14-04”), in which it answered the question: “What are the ethical limits to participating in attorney rating systems, especially those that identify ‘the Best Lawyer’ or ‘Super Lawyer’?” A copy of Opinion no. 14-04 is attached as Exhibit A.

51. The substance of the discussion and analysis of is focused on considering the above charging question. *See generally Id.*

52. Ultimately, Opinion 14-04 cites the prohibition on false and misleading communications, explores attorney rating systems, and explores how to prevent these systems from being false or misleading. *Id.*

53. Paragraph 13 opines that it is a violation of Rule 7.2 to pay money to be listed as a “best” lawyer or trade votes with other attorneys. *Id.*

¹ Rules Governing the Ethics Advisory Opinion Committee, ¶ V, available at <http://silk.utahbar.org/opc/bar-committee-ethics-advisory-opinions/eaoc-rules-of-governance/>

54. Without referring to a factual or legal basis and without any discussion, the final sentence of Paragraph 13 states, in obiter dicta, “a lawyer who pays a celebrity or public figure to recommend the lawyer violates Rule 7.2.” *Id.* at ¶ 13.

55. Opinion 14-04 does not define “celebrity or public figure” or “recommend.” *Id.*

56. Two members of the Opinion Committee wrote a dissent addressing problems with this out of place portion of the opinion. The dissent noted that, under Opinion 14-04, an attorney is **not** prohibited from having a celebrity appear in an advertisement and say, “Let me tell you about Firm” *See* Exhibit A, Dissent at ¶ 3.

C. The Utah State Bar’s Investigation and Threatened Discipline

57. On or about November 16, 2016, Driggs received a letter from OPC informing him that OPC had opened an investigation into The Advocates’ advertising practices.

58. Specifically, the letter indicated that Utah Bar’s OPC was concerned with “the content of radio advertisements that are read on air by disc jockeys on various Utah radio stations.”

59. The letter opined that Opinion 14-04 “prohibits lawyers from using celebrity endorsements to advertise their services.”

60. The OPC asked for a response, which Driggs provided on or about December 8, 2016.

61. In his response, Driggs indicated that he wanted to work with the Utah Bar and was willing to instruct radio personalities to avoid certain words or phrases such as “I recommend.” The Utah Bar, its Commission, and its OPC did not respond to this offer.

62. Since that time, OPC has been in contact with Driggs and his counsel regarding the matter, twice requesting and receiving supplemental authority and analysis from Driggs.

63. All submissions to and offers to accommodate the Utah Bar, its Commissioners and the OPC have been rejected without written or other formal comment.

64. On July 25, 2017, OPC informed Plaintiffs that it had considered Plaintiffs' position and that it intended to certify the matter to the Ethics and Discipline Committee, commencing disciplinary proceedings against Driggs based on the radio Live Ads where a radio personality reads an advertisement.

65. Driggs and The Advocates depend on their reputation of being ethical, hardworking attorneys.

66. Disciplinary proceedings would immediately and permanently damage Driggs' and The Advocates' reputations by implying that they had acted in an unethical manner.

67. The Utah Bar, its Commissioners and the OPC have no evidence demonstrating that Plaintiffs' Live Ads are misleading, confusing, or otherwise harmful to consumers.

68. The Utah Bar, its Commissioners and the OPC have no evidence that a script, advertisement, or interview read by a radio personality is misleading, confusing, or otherwise harmful to consumers.

69. Reasonable consumers understand that the Advocates' Live Ads portray the advertised product or service in a positive light and may contain opinion or puffery.

70. The Utah Bar, its Commissioners and the OPC have no evidence showing that consumers are misled, confused, or otherwise harmed by the common advertising practice of having a radio personality read an advertisement.

71. Opinion 14-04 is vague and does not provide fair notice. Few people know the names of radio personalities and even fewer would consider them "celebrities," as that term is commonly understood.

72. The OPC, ostensibly at the direction of the Utah Bar and its Commissioners, has threatened to take immediate action to discipline Driggs and force Plaintiffs to discontinue the Advocates' radio Live Ads.

73. As noted above, Plaintiffs currently occupy a prime position with several radio stations.

74. If Plaintiffs are required to stop the radio Live Ads, even for a limited time, they will lose their seniority and the opportunity to have a particular radio personality read the advertisement in the desired time slot.

75. Even if Plaintiffs are later allowed to run the Live Ads, they will be required to start at the back of the line and may have to wait years to recover all their current radio spots.

76. A significant portion of Plaintiffs' new clients are a result of members of the public learning about Plaintiffs' unique services through radio Live Ads read by a radio personality that air during prime advertising spots.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

77. Plaintiffs incorporate all allegations as if fully contained herein.

78. Plaintiffs' legal practice and ability to make a living depends on continuous advertising to inform the public of their unique services.

79. Radio advertising is vital to Plaintiffs' business practice.

80. Plaintiffs pay for Live Ads that convey truthful facts, in an honest, straightforward way.

81. Plaintiffs have paid, and currently pay, for advertising at standard rates. They plan in the future to pay for advertising at standard rates that will or may involve having a radio personality read a script, ask Driggs a question, or otherwise describe Driggs' services.

82. None of the Live Ads have been, are, or will be false, misleading, confusing, deceptive, or overreaching.

83. Plaintiffs' past, present, and contemplated future Live Ads do not violate any Rule of Professional Conduct.

84. Plaintiffs' Live Ads are protected speech under the First Amendment of the U.S. Constitution and Article I, Sections 1 and 15 of the Utah Constitution.

85. The Utah Bar under the authority and oversight of its Commissioners, through the OPC, has opened an investigation and has informed Plaintiffs that it is going to certify the matter to the Ethics and Discipline Committee, commencing a disciplinary action against Plaintiffs for engaging in protected speech and to force Plaintiffs to cease their Live Ads.

86. The Defendants assert that Rule 7.2 bans Live Ads read by radio personalities.

87. The Defendants have no evidence that Live Ads read by radio personalities are inherently misleading, confusing or harmful to the public.

88. The Defendants have no evidence that Plaintiffs' Live Ads are misleading, confusing, or harmful to the public.

89. The Defendants did not respond when Driggs indicated a willingness to have radio personalities avoid certain terms or phrases.

90. The Defendants have no evidence that a ban on Live Ads read by radio personalities materially advances the interest of preventing misleading, confusing, or harmful Live Ads.

91. The Defendants have no evidence that they cannot prevent misleading, confusing, or harmful Live Ads in a way that is less restrictive than an outright ban.

92. The Defendants' restriction violates Plaintiffs' rights under the First Amendment of the U.S. Constitution and Article I, Sections 1 and 15 of the Utah Constitution.

93. In addition, the Defendants' investigation and threatened disciplinary action chills Plaintiffs' speech by causing them to hold back updated Live Ads for fear of discipline by the Utah Bar.

94. The Defendants' interpretation of Rule 7.2 would force Plaintiffs to pull many of their Live Ads off the air, causing them to lose their prime advertising spots (potentially for years), and develop new Live Ads at a significant expense.

95. Plaintiffs' Live Ads serve the important function of informing a larger audience of consumers regarding the services that are available through The Advocates.

96. The Defendants' interpretation places an undue and burdensome restriction on speech that reduces the effectiveness of Plaintiffs' Live Ads, chills future advertising, and prohibits the communication of useful and relevant information.

97. The Defendants' interpretation is vague, allows for arbitrary enforcement, and does not provide fair notice, in violation of the Fourteenth Amendment of the U.S. Constitution.

98. The Defendants' interpretation will injure Utah consumers by preventing them from receiving truthful, non-misleading information about their legal rights and available legal services.

99. Plaintiffs' are entitled to a declaratory judgment that the Defendants' prohibition on a lawyer paying the reasonable cost of Live Ads read by a radio personality violates the First Amendment of the U.S. Constitution and Article I, Sections 1 and 15 of the Utah Constitution.

100. Plaintiffs' are entitled to a declaratory judgment that the Defendants' interpretation of Rule 7.2 is vague, and its application of that interpretation as banning Plaintiffs' Live Ads violates the Fourteenth Amendment.

SECOND CLAIM FOR RELIEF
(Preliminary and Permanent Injunction)

101. Plaintiffs incorporate all prior allegations as if fully contained herein.

102. As described above, the Defendants' ban on all the Advocates' Live Ads read by a radio personality violates the First and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 1 and 15 of the Utah Constitution.

103. As described above, the Defendants' conclusion that Rule 7.2 bans all "celebrity" advertising and the Advocates' Live Ads read by radio personalities is unconstitutionally vague.

104. The Defendants opened an investigation and have indicated an intention to bring disciplinary proceedings against Mr. Driggs.

105. Any disciplinary proceedings brought by the Defendants will permanently and irreparably damage Mr. Driggs' reputation, even if the case is later resolved in Driggs' favor or dismissed.

106. If Mr. Driggs and The Advocates are required to remove the radio Live Ads, they may have to wait a very long time before they are able to secure prime radio spots again, even if a court concludes that the Defendants' ban on Live Ads read by radio personalities is unconstitutional.

107. If Plaintiffs are required to remove the Live Ads, it will deprive them of an important method of advertising and result in an immediate decline in business.

108. Enforcement of the Defendants' ban on Live Ads read by radio personalities injures Utah consumers by preventing them from receiving truthful, non-misleading information about their legal rights and available legal services.

109. It is in the public interest to defend First Amendment and other constitutional rights.

110. Protecting truthful commercial speech benefits the public by educating consumers regarding the available services they can choose from.

111. Plaintiffs are entitled to a preliminary and permanent injunction enjoining the Defendants from commencing or in any way pursuing discipline against Plaintiffs based on Live Ads read by a radio personality.

112. Plaintiffs are entitled to a preliminary and permanent injunction enjoining the Defendants from enforcing its ban on Live Ads read by radio personalities and from requiring Plaintiffs to cancel their Live Ads.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request judgment as follows:

1. An Order declaring that the Defendants' ban on the Plaintiffs' Live Ads violates the First Amendment of the U.S. Constitution and Article I, Sections 1 and 15 of the Utah Constitution;
2. A preliminary and permanent injunction enjoining the Defendants from commencing or pursuing discipline against Plaintiffs based on their radio Live Ads;
3. An Order declaring that the Defendants' interpretation of Rule 7.2 is vague and allows for arbitrary and discriminatory enforcement, in violation of the First Amendment and the Due Process Clause of the Fourteenth Amendment;

4. Cost of suit and attorney fees pursuant to 42 U.S.C. § 1988; and
5. Any other relief the Court deems just and equitable.

DATED this 7th day of August, 2017.

KIRTON McCONKIE

By: /s/ Benson L. Hathaway, Jr.
Benson L. Hathaway, Jr.
Analise Q. Wilson
Jackie Bosshardt
*Attorneys for Plaintiffs Driggs Bills &
Day, PC and Matthew Driggs*

Plaintiff's Address:


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Matthew Driggs
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VERIFICATION

Matthew W. Driggs declares and states: I am over twenty-one years of age and verify the attached Verified Complaint. I am one of the plaintiffs in the foregoing action and am familiar with the contents of the foregoing Verified Complaint. The allegations in the Verified Complaint are true as stated to the extent of my knowledge, except as to matters alleged upon information and belief, and as to those matters, I believe the same to be true.

Pursuant to Utah Code § 78B-5-705(1), I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

DATED: August 4, 2017.


/s/ _____
Matthew W. Driggs