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CHAD CONLEY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

CHAD CONLEY Plaintiff, vs. DAVE JONES in his capacity as Commissioner Of the California Department of Insurance Defendant,	Case No.: BC630383 PLAINTIFF'S OPENING TRIAL BRIEF Trial Date: November 30, 2017 Time: 9:00 a.m. Dept: 39 Judge: Hon. Elizabeth R. Feffer

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TABLE OF CONTENTS

INTRODUCTION 6
QUESTIONS PRESENTED 7
STATEMENT OF THE FACTS 7
ARGUMENT 8
I. THE PROVISIONS OF 10 CCR § 2071 ARE VOID BECAUSE THEY EXCEED THE AUTHORITY OF THE INSURANCE COMMISSIONER 8
II. 10 CCR § 2071 IS UNCONSTITUTIONAL AS AN IMPERMISSIBLE PRIOR RESTRAINT OF FREE SPEECH UNDER THE UNITED STATES CONSTITUTION .. 13
a. A Bail Agents Right To Suggest Or Refer Attorneys Should Not Be Limited Because They Are Licensed By The State 16
b. 10 CCR § 2071 Violates The California Constitution' Free Speech Provision Which Provides a Positive Right to "Freely Speak" on "All Subjects" 17
c. 10 CCR § 2071 Is A Violation of Pure Speech But Would Also Be Invalid If Found To Be Commercial Free Speech 18
CONCLUSION 22

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island, (1996) 517 U.S. 484 ..... 15, 20

Ashcroft v. American Civil Liberties Union (2002) 535 U.S. 564 ..... 13, 14

Association of California Ins. Companies v. Jones (2017) 2 Cal.5th 376 13

Bates v. Arizona, (1977) 433 U.S. 350 16

Board of Trustees of the State University of New York et al. S.V.N.Y. v. Fox et al. (1989) 492 U.S. 469 21

Bolger v. *Youngs Drug Products Corp.*, (1983) 463 U. S. 60 13

Brown v. Entertainment Merchants Assn. (2011) 564 U.S. __, __ [180 L.Ed.2d 708, 720, 131 S.Ct. 2729 14

California Chamber Of Commerce v State Air Resources Bd. (2017) 10 Cal.App.5th 604 9

Citizens United v. FEC (2010) 130 S. Ct. 876 15

Florida Bar v. Went for It, Inc. (1995) 515 U.S. 618 ..... 14, 16, 21

Harte-Hanks Communications, Inc. v. *Connaughton,* (1989) 491 U. S. 657 13

Holder v. Humanitarian Law Project, (2010) 130 S. Ct. 2705 17

Kasky v. Nike, Inc. (2002) 27 Cal.4th 939 ..... 18, 19

Mercury Casualty Company v. Dave Jones (2017) 8 Cal.App.5th 561 19

Morning Star Co. v. Board of Equalization (2011) 201 Cal.App.4th 737 9

NAACP v. Button, (1963) 371 U.S. 415 16

New York Times Co. v. Sullivan, (1964) 376 U.S. 254 17

People v. Dolezal (2013) 221 Cal.App.4th 167 ..... 13, 14, 16, 21

Police Dept. of Chicago v. *Mosley,* 408 U. S. 92 13

Sorrell v. IMS Health Inc., (2011) 131 S. Ct. 2653 ..... 17, 19

The Superior Court Of San Diego County v. Kevin J. Kinsella (2016) 1 Cal.App.5th 984 ..... 19, 20

Thomas v. Collins, (1945) 323 U.S. 516 16

United States v. Alvarez (2012) 567 U.S. __, [183 L.Ed.2d 574, 132 S.Ct. 2537] 14

Va. Pharmacy Bd. v. Va. Consumer Council, (1976) 425 U.S. 748 22

Western States Petroleum Assn. v. Board of Equalization (2013) 57 Cal.4th 401 8

Ysursa v. Pocatello Educ. Assn. (2009) 555 U.S. 353 [172 L.Ed.2d 770, 129 S.Ct. 1093] 14

Statutes

California Insurance Code § 1800 9

California Insurance Code § 1801 9

California Insurance Code § 1802 9

California Insurance Code § 1802.5 9

California Insurance Code § 1803 9

California Insurance Code § 1806 9

California Insurance Code § 1807 9

California Insurance Code § 1810(b) 9

California Insurance Code § 1812 ..... 5, 8

California Insurance Code § 1814 7

Government Code section 11342.2 7

Government Code section 11350 7

Regulations

10 CCR § 2054.5 ..... 7, 8

10 CCR § 2071 ..... passim

10 CCR § 2072 10

10 CCR § 2079 10

10 CCR 2079.1 20

10 CCR § 2079.5 10

State Bar Rule 1-320 ..... 18, 19

Constitutional Provisions

Cal. Const., art. I, § 2, subd. (a) 16

U.S. Const. Amend. I ..... passim

INTRODUCTION

Plaintiff, Chad Conley, brings this action for a declaratory judgment that the Commissioner exceeded his statutory authority and acted inconsistently with the California and United States Constitutions in adopting California Code of Regulations, Title 10, Chapter 5, Subchapter 1, Article 2, Section 2071 ("10 CCR § 2071"). This section prohibits bail licensees from directly or indirectly referring or recommending attorneys to arrestees or persons purporting to act on behalf of arrestees. Suggesting or recommending attorneys is an effective way to ensure that those facing criminal charges are represented by competent attorneys who can help clients navigate the myriad obstacles associated with the criminal justice system.

The Insurance Commissioner has the authority pursuant to Insurance Code section 1812 to "make reasonable rules necessary, advisable, or convenient for the administration and enforcement of the provisions of this chapter [California Insurance Code sections 1800 through 1822]." However, nothing in California Insurance Code sections 1800 through 1822 relate to referrals or relations *vis a vis* attorney and bail agents, and 10 CCR § 2071 is therefore an *ultra vires* regulation. Furthermore, since 10 CCR § 2071 prevents a bail licensee from directly or even *indireclty* suggesting attorneys, it denies the licensee his or her right to speech as guaranteed by the California and United States Constitutions.

Accordingly, Plaintiff asks this court to declare 10 CCR § 2071 invalid because: (1) Cal. Ins. Code § 1812 confers the Commissioner only with authority to "make reasonable rules necessary, advisable, or convenient for the administration and enforcement of the provisions of this chapter" of the California Insurance Code, and Cal. Ins. Code §'s 1800 through 1822 have nothing at all to do with attorney referrals and/or relations *vis a vis* bail licensees and attorneys; and (2) 10 CCR § 2071is an impermissible abridgment of Plaintiff' right to speech as guaranteed by the California and United

States Constitutions. Plaintiff now seeks declaratory relief from the court to remedy this regulatory overreach and unjustified infringement on constitutionally protected rights.

QUESTIONS PRESENTED

1. Is the conduct prohibited by 10 CCR §2071 outside the scope of the Insurance Commissioner's regulatory authority and thus invalid where the enabling statute does not contain any mention or inference to the prohibited conduct?

2. Is 10 CCR §2071, which prohibits bail agents from either directly or indirectly recommending or referring attorneys to arrestees, an unconstitutional abridgment to the right to free speech guaranteed under the First Amendment of the United States and/or California Constitutions?

STATEMENT OF THE FACTS

Plaintiff, Chad Conley ("Conley"), is a licensed bail agent (CA Bail License # 1845390) under the California Insurance Code.

The California Department of Insurance ("DOI") is an executive agency of the State of California responsible for enforcing California law and regulations regarding bail licensees. As part of its regulatory responsibilities, the DOI is charged with ensuring that bail licensees comply with the California Code of Regulations and the California Insurance Code, and for prosecuting violations.

10 CCR § 2071 was adopted in its present form on August 17, 1977, under Ruling No. 219, and File No. RH 182. At that time, the Insurance Commissioner made the following finding: "Per proceedings in accordance with the provisions of the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5), and pursuant to authority vested by Section 1812 of the California Insurance Code, and to implement, interpret or make specific Sections 1800 through 1822 of the California Insurance Code, the Insurance Commissioner adopts and repeals Sections in Title 10 of the California Insurance Code: Adopts new Article 2, Subchapter 1, Chapter 5, Sections

2053 through 2104, inclusive." (See Exhibit "A" Administrative Record, attached to Plaintiff's Verified Complaint.)

10 CCR § 2071 provides as follows: "No bail licensee shall in any matter, directly or indirectly, suggest the name or recommend any attorney to any arrestee or person purporting to act for or represent an arrestee." In addition, 10 CCR § 2054.5 defines an arrestee as "...any person actually detained or subject to detention in custody whose release may lawfully be effected by bail."

Insurance Code section 1814 makes violations of any insurance code or regulation a criminal offense that can be charged as either a felony or misdemeanor.

ARGUMENT

I. THE PROVISIONS OF 10 CCR § 2071 ARE VOID BECAUSE THEY EXCEED THE AUTHORITY OF THE INSURANCE COMMISSIONER

Government Code section 11350 allows an interested person to challenge the validity of a regulation in a declaratory relief action. "Once the regulation is adopted, " [a]ny interested person may obtain a judicial declaration as to [its] validity ... by bringing an action for declaratory relief in the superior court...." (Gov. Code, § 11350, subd. (a).) " *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 426. The standard of review for determining the validity of the regulation is established by Government Code section 11342.2.

> Government Code section 11342.2 provides the general standard of review for determining the validity of administrative regulations. That section states that "[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably necessary to effectuate the purpose of the statute."
>
> Under the first prong of this standard, the judiciary

> independently reviews the administrative regulation for consistency with controlling law. ... In short, the question is whether the regulation is within the scope of the authority conferred; if it is not, it is void. This is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency.
>
> By contrast, the second prong of this standard, reasonable necessity, generally does implicate the agency's expertise; therefore, it receives a much more deferential standard of review. The question is whether the agency's action was arbitrary, capricious, or without reasonable or rational basis.'" (*Morning Star Co. v. Board of Equalization* (2011) 201 Cal.App.4th 737, 744-745 [135 Cal.Rptr.3d 457] (*Morning Star*).) *California Chamber Of Commerce v, State Air Resources Board* (2017) 10 Cal.App.5th 604

Insurance Code section 1812 defines the scope of the Insurance Commissioner's power to promulgate regulations regarding bail agents. That section provides "[t]he commissioner may make reasonable rules necessary, advisable, or convenient for the administration and enforcement of the provisions of this chapter." This provision is included in Chapter 7 of the Insurance Code, which contains sections 1800 through 1823. When adopting the regulations that include 10 CCR § 2071 the regulatory history lists the statutory basis for the regulations as Insurance Codes 1800-1822.

> Per proceedings in accordance with provisions of the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5) and pursuant to the authority vested by Section 1812 of the California Insurance Code, and to implement, interpret, or make specific Sections 1800 through 1822 of the California Insurance Code, the Insurance Commissioner adopts and repeals sections in Title 10 of the California Administrative Code:
>
> Adopts new Article 2, Subchapter 1, Chapter 5, Sections 2053 through 2104, inclusive.

(See *Exhibit "A" Administrative Record, attached to Plaintiff's Verified Complaint.*)

The text of 10 CCR § 2071 provides:

> No bail licensee shall in any matter, directly or indirectly, suggest the name of or recommend any attorney to any arrestee or person purporting to act for or represent an arrestee.

The regulations also define the term arrestee as used in these regulations.

> **10 CCR §2054.5**. "Arrestee" Defined. As used in this article "arrestee"

> means any person actually detained or subject to detention in custody whose release may lawfully be effected by bail.

The Legislature's grant of authority to the Insurance Commissioner to promulgate regulations for bail agents is limited to Insurance Code sections 1800-1822. These code sections do not provide the Commissioner with power to regulate the recommendation or suggestion of attorneys. Insurance Code section 1800 establishes the necessity for a bail license, and requires that such license be obtained to solicit, negotiate, or transact bail. Subsection 1800(b) further defines solicitation. Under California Insurance Code § 1801, there are three types of bail licenses: the bail agent's license under Insurance Code § 1802, a bail permitee's license under Insurance Code § 1802.5, and the bail solicitor's license under California Insurance Code § 1803. The bail agent's license permits the holder to solicit, negotiate, and effect undertakings of bail on behalf of any admitted surety. Further, California Insurance Code § 1810(b) permits a license to be held by a corporation. .

California Insurance Code § 1802.5 requires that a bail agent's license shall not be issued "unless and until there is filed with the commissioner a bond having an admitted surety insurer as surety thereon in the penal sum of five thousand dollars ($5,000), conditioned upon the proper application and disposal of all moneys collected or received by the bail permittee, his or her solicitors licensed pursuant to his or her appointment, and his or her employees, in favor of the people of the State of California."

California Insurance Code § 1806 gives the Commissioner authority to "suspend, revoke or refuse to issue a license" if it appears that "the holder of such permit is not a fit and proper person to be permitted to continue to hold or receive such license." Further, under California Insurance Code § 1807 the commissioner may "suspend or revoke any bail license for any cause for which he could deny such license."

While the California Insurance Code grants the commissioner powers to regulate bail agents generally, California Code of Regulations, Title 10, Chapter 5, Subchapter 1, Article 2 limits certain specific conduct of bail licensees. For instance, 10 CCR § 2072 prevents payment[s] or receiving of payment[s] on behalf of arrestees from or to attorneys; while 10 CCR § 2079 and § 2079.5 prohibit improper bail licensee solicitations.

None of these statutes involve a bail agent's or arrestee's relationship with an attorney. Nowhere else in these codes are the words attorney, counsel, lawyer or similar words even mentioned. These statutes do not discuss, identify, or reference any problems that could occur if a bail agent recommends or even "indirectly" "suggests" an attorney to an arrestee or his or her representatives. At its most basic level, 10 CCR § 2071 prohibits a bail agent from providing, even in response to a direct inquiry, information or opinions about attorneys. There is no evidence or discussion in the regulatory history that explains what "evil" this regulation is designed to prohibit. Prohibiting bail agents from uttering their opinions or recommendations about attorneys to arrestees has not been identified by the Legislature as an area of concern to be regulated by the Insurance Commissioner.

Moreover, the scope of 10 CCR § 2071 does not limit the purpose of an attorney "suggestion." Many arrestees and their representatives have legal needs beyond the alleged crime. Under the terms of 10 CCR § 2071 a bail agent cannot recommend an attorney for family law, immigration, personal injury, bankruptcy, professional licensing or other matters collateral to the bail transaction. There is not even a whiff of authority for the Insurance Commissioner to regulate a bail agent's recommendation of any attorney unrelated to, or merely tangentially related to the bail transaction.

10 CCR § 2071 is also unlimited in its scope based on the relationship of the arrestee to the bail agent. This regulation prevents a bail agent from recommending an attorney for a spouse, child, parent, or sibling. This probation would even prevent a bail licensee from suggesting an attorney for an employee or business partner, even where the bail agents own conduct might be at issue. Where a bail agent is related to or married to an attorney the agent's mere name might be an "indirect suggestion" of an attorney. The enabling statutes of Insurance Code sections 1800 through 1822 are completely devoid of any references that could influence the choice of attorney in such intimate relationships.

10 CCR § 2071 prohibits the transmission of all communications about attorneys regardless of the forum. Having the bail agent or attorney comment on each other's Facebook, Yelp, LinkedIn or other social media sites could be construed as an "indirect" "suggestion" of an attorney. Even an act as innocuous as being neighbors in an office building could run afoul of this regulation.

The Commissioner's powers to establish regulations are strictly limited. "The commissioner, of course, has no power to vary or enlarge the terms of an enabling statute (*Knudsen Creamery Co. v. Brock* (1951) 37 Cal.2d 485, 492--493), or to issue regulations which conflict with this or any other statute. (*Rosas v. Montgomery* (1970) 10 Cal.App.3d 77, 92, 88 Cal.Rptr. 907.)" *Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651

> It is the function of the Legislature to declare a policy and fix the primary standard. To promote the purposes of the legislation and carry it into effect, the authorized administrative or ministerial officer may "fill up the details" by prescribing administrative rules and regulations (*First Industrial Loan Co. v. Daugherty*, 26 Cal.2d 545, 549), but as so empowered, he may not "vary or enlarge the terms or conditions of [the] legislative enactment" (*Boone v. Kingsbury,* 206 Cal. 148, 161; also Whitcomb Hotel, Inc. v. California Emp. Com., 24 Cal.2d 753, 757 [155 A.L.R. 405]) or "compel that to be done which lies without the scope of the statute." (*First Industrial Loan Co. v. Daugherty*, supra, p. 550.)

Knudsen Creamery Co. v. Brock (1951) 37 Cal.2d 485, 492—493

The enactment of 10 CCR § 2071 was a quasi-legislative act. The Commissioner's power to create such laws are based on the legislature delegating a portion of its power to the agency.

> Quasi-legislative rules represent "an authentic form of substantive lawmaking" in which the Legislature has delegated to the agency a portion of its lawmaking power. (*Yamaha*, *supra*, 19 Cal.4th at p. 10; see *Western States*, *supra*, 57 Cal.4th at pp. 414-415.) Because such rules "have the dignity of statutes," a court's review of their validity is narrow: " If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end." (*Yamaha*, at pp. 10-11.)

Association of California Ins. Companies v. Jones (2017) 2 Cal.5th 376

Therefore, since there is no statutory basis for restricting bail agents communication to arrestees or their representatives, the promulgation of 10 CCR § 2071 was beyond the scope of the Commissioner's power and void.

II. 10 CCR § 2071 IS UNCONSTITUTIONAL AS AN IMPERMISSIBLE PRIOR RESTRAINT OF FREE SPEECH UNDER THE UNITED STATES CONSTITUTION

The First Amendment of the United States Constitution states that "Congress shall make no law ... abridging the freedom of speech." This provision embodies "[o]ur profound national commitment to the free exchange of ideas." *Harte-Hanks Communications, Inc.* v. *Connaughton,* (1989) 491 U. S. 657, 686. "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Bolger* v. *Youngs Drug Products Corp.,* (1983) 463 U. S. 60, 65 (quoting *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 95 (1972))." *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.

The recent case of *People v. Dolezal* (2013) 221 Cal.App.4th 167, reviewed 10 CCR § 2079.1, which limited the rights of bail agents to solicit clients at the jail, for a violation of a bail agents free

speech rights. The *Dolezal* court found that soliciting clients was commercial speech, subject to narrow time, manner, and place restrictions. Under the standards applied in *Dolezal* and well established First Amendment case law, 10 CCR § 2071 violates the United States' and California's free speech guarantees. The *Dolezal* court framed the Constitutional free speech guidelines as follows:

> Broadly speaking, there are three levels of constitutional scrutiny: strict, intermediate and rational basis. We are directed by the Supreme Court to "engage in 'intermediate' scrutiny of restrictions on commercial speech...." (*Florida Bar v. Went for It, Inc.* (1995) 515 U.S. 618, 623.) Other forms of speech, by contrast, receive far greater constitutional protection. "'[A]s a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." ' " (*Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.) Thus, content-based restrictions on speech and other forms of expression are presumed invalid and are subjected to strict constitutional scrutiny. (*United States v. Alvarez* (2012) 567 U.S. __, __ [183 L.Ed.2d 574, 586, 132 S.Ct. 2537].) Under this demanding standard, it is the government's burden to demonstrate that the regulation at issue "is justified by a compelling government interest and is narrowly drawn to serve that interest. [Citation.] The State must specifically identify an 'actual problem' in need of solving, [citation] and the curtailment of free speech must be actually necessary to the solution...." (*Brown v. Entertainment Merchants Assn.* (2011) 564 U.S. __, __ [180 L.Ed.2d 708, 720, 131 S.Ct. 2729].) At the other end of the constitutional spectrum are government regulations that limit conduct only tangentially related to speech. (*Ysursa v. Pocatello Educ. Assn.* (2009) 555 U.S. 353 [172 L.Ed.2d 770, 129 S.Ct. 1093].) Such regulations are subject to the least restrictive form of scrutiny: rational basis review. Under this deferential standard, "the State need only demonstrate a rational basis to justify" a regulation. (555 U.S. at p. 359 [172 L.Ed.2d at p. 778].)

People v. Dolezal (2013) 221 Cal.App.4th 167, fn 3

The First Amendment is rooted in a view that the American people are capable of seeking out information on a wide variety of topics and of reaching their own conclusions about the merits of that information. 10 CCR § 2071 violates the basic protections of the First Amendment. "When Government seeks to use its full power, including the criminal law, to command where a person may

get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves." *Citizens United v. FEC* (2010) 130 S. Ct. 876, 908. While Justice Kennedy was writing about political speech, his words also apply for the very type of information that bail agents can provide to arrestees about an attorney. Speech can be important to its listeners without being political. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, (1996) 517 U.S. 484, 503. And, importantly, "the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech. *Thompson*, 535 U. S., at 374; see also *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 769-770 (1976)." *Sorrell v. Ims Health Inc.*, (2011) 131 S.Ct. 2653, 22.

10 CCR § 2071 restricts bail agents from speaking to recommend or suggest attorneys to arrestees and their representatives. This is a content-based restriction on expression. Bail agents work in the criminal justice system, and through the course of their business will make observations and develop opinions regarding attorneys. These opinions are valuable as part of a free flow of information regarding the criminal justice system. It is difficult to understand the basis for this restriction. Perhaps the Commissioner intended to prevent bail agents from influencing arrestee's choice of attorney. Such paternalistic motivations are insufficient for the State to prevent a bail agent from communicating an opinion or making a suggestion regarding an attorney. Therefore 10 CCR § 2071 is a restriction on pure speech and is presumed invalid. In order to justify this regulation "it is the government's burden to demonstrate that the regulation at issue "is justified by a compelling government interest and is narrowly drawn to serve that interest. [Citation.] The State must specifically identify an 'actual problem' in need of solving, [citation] and the curtailment of free

speech must be actually necessary to the solution." *People v. Dolezal* (2013) 221 Cal.App.4th 167, FN 3.

The prohibitions on speech established by 10 CCR § 2071 are not justified by any compelling government interest. A bail agent's suggestion of an attorney, or giving their opinion regarding an attorney, even the public defender, or other criminal defense attorney, does not violate any compelling government interest. Under this regulation, bail agents are completely barred from speaking to their own clients, arrestees and their representatives, about an important part of the criminal justice process. 10 CCR § 2071 is not narrowly drawn but intentionally overbroad in its language including words such as "indirect" and "suggest" and applies not only to those in custody but also those "subject to custody." This regulation criminalizes the most benign of communications and associations between members of the criminal justice community. There is no 'actual problem' with bail agents recommending or suggesting attorneys. Defendants have a constructional right to an attorney in their criminal proceedings. Arrestees and their representatives are entitled to receive all information available when either selecting or choosing not to select an attorney.

a. A Bail Agents Right To Suggest Or Refer Attorneys Should Not Be Limited Because They Are Licensed By The State

The government may not restrict the speech of those it regulates merely because it has issued a license to the speaker.

> Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights. See *Thomas v. Collins*, 323 U.S. 516, 531 (1945) ("the rights of free speech and a free press are not confined to any field of human interest"). To the contrary, professional speech may be entitled to "the strongest protection our Constitution has to offer." *Florida Bar v. Went-For-It, Inc.* 515 U.S. 618, 634 (1995). Even commercial speech by professionals is entitled to First Amendment protection. See *Bates v. Arizona*, 433 U.S. 350, 382-83 (1977). Attorneys have rights to speak freely subject only to the government regulating with "narrow specificity."

NAACP v. Button, (1963) 371 U.S. 415, 433, 438-39.

Occupational speech is not conduct, and ordinary First Amendment principles apply to content-based regulation of speech. Therefore, such restrictions are subject to strict scrutiny. Thus, where an occupational-licensing law restricts speech the government must satisfy strict scrutiny. Occupational speech is treated just like any other content based category of speech. Thus laws like 10 CCR § 2071 that prevent a licensee from communicating certain subjects to their clients impose a direct, not incidental, burden on speech based on the content of that speech. *Holder v. Humanitarian Law Project,* (2010) 130 S. Ct. 2705, 2723–24. Such content-based burdens on speech are subject to strict scrutiny.

The restrictions imposed by 10 CCR § 2071 are restrictions on speech, not conduct. "Recommending" or "suggesting" an attorney to an arrestee are acts of expression and communication to the bail agent's clients or potential clients. Content-based restrictions on communications between professionals and their clients are restrictions on pure speech. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *New York Times Co. v. Sullivan,* (1964) 376 U.S. 254, 265-266. As the Court has recognized, "a great deal of vital expression" results from such motives, and this fact does not deprive such speech of First Amendment protection. *Sorrell v. IMS Health Inc.*, (2011) 131 S. Ct. 2653, 2665.

Therefore 10 CCR § 2071 violates the First Amendment, is subject to strict scrutiny and, as discussed above, presumptively invalid and void.

b. 10 CCR § 2071 Violates The California Constitution' Free Speech Provision Which Provides a Positive Right to "Freely Speak" on "All Subjects"

In addition to the protection of the United States Constitution, the California Constitution provides additional protections to free speech by providing for a positive right to "freely speak" on "all subjects." The California Constitution provides that "[e]very person may freely speak, write and

publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).) As recognized in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, "[t]he state Constitution's free speech provision is "at least as broad" as the comparable provision of the federal Constitution's First Amendment." *Id.*, at p. 958 (citations omitted)

10 CCR § 2071 violates the bail agent's rights under the California Constitution by restraining their right to speak on the subject of recommending or suggesting attorneys to arrestees and their representatives. This is a clear violation of the State Constitution' guarantee of free speech. Therefore this regulation, is subject to strict scrutiny and, as discussed above, presumptively invalid and void.

c. 10 CCR § 2071 Is A Violation of Pure Speech But Would Also Be Invalid If Found To Be Commercial Free Speech

10 CCR § 2071 restricts bail agents from making recommendations or suggestion of attorneys to arrestees. This is a restriction against pure speech not commercial speech. Commercial speech is given less constitutional protection than pure speech. However, even if considered commercial speech this regulation would not withstand intermediate scrutiny.

> The next question is whether section 2644.10(f) encompasses only commerce al speech or whether, as the Trades argue, it encompasses both commercial and noncommercial speech. This matters because different levels of scrutiny are implicated depending on whether commercial or noncommercial speech is involved. " '[T]he [federal] Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.' [Citation.] [¶] For noncommercial speech entitled to full First Amendment protection, a content-based regulation is valid under the First Amendment only if it can withstand strict scrutiny, which requires that the regulation be narrowly tailored (that is, the least restrictive means) to promote a compelling government interest. [Citations.] [¶] 'By contrast, regulation of commercial speech based on content is less problematic.' [Citation.] To determine the validity of a content-based regulation of commercial

> speech, the United States Supreme Court has articulated an intermediate-scrutiny test." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952).

Mercury Casualty Company v. Dave Jones (2017) 8 Cal.App.5th 561

The free speech restrictions of 10 CCR § 2071 are not prohibitions against commercial speech because the prohibited statements are not a part of any commercial transaction. Bail agents do not and cannot receive compensation for defendant's retention of an attorney. State Bar Rule 1-320.The mere suggestion of any attorney to an arrestee or their representative is not a statement directed at the transaction of bail. Often defendants obtain criminal attorneys at public expense. The bail agent's opinion about any particular attorney is unrelated to the bail transaction. Additionally, the bail agent's suggestion of an attorney, who may or may not be compensated, is not a message that is primarily commercial in nature.

> Commercial speech usually involves a "*speaker* [who] is likely to be someone engaged in commerce--that is, generally, the production, distribution, or sale of goods or services--or someone acting on behalf of a person so engaged, and the *intended audience* is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers." *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 at p. 960.) Additionally, "the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker ... made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." (*Id.* at p. 961.)

The Superior Court Of San Diego County v. Kevin J. Kinsella (2016) 1 Cal.App.5th 984, 994.

The restrictions of 10 CCR § 2071 are not aimed at a bail agent's services. The potential that the retention of an unrelated attorney might occur is insufficient to lessen the protection of the bail agent's speech. The bail agent's recommendation of an attorney is not about his own services. Nor can the state burden free speech because it fears that one speaker's opinion will be to "persuasive." *Sorrell v. IMS Health Inc.*, (2011) 131 S. Ct. 2653, 2665. "What matters for

purposes of the commercial versus noncommercial speech analysis is whether the speech at issue is about the speaker's product or service or about a competitor's product or service, whether the speech is intended to induce a commercial transaction, and whether the intended audience includes an actual or potential buyer for the goods or services." *The Superior Court Of San Diego County v. Kevin J. Kinsella* (2016) 1 Cal.App.5th 984, 995.

Even if this restriction is considered commercial speech, it is clearly a content-based ban on speech. Barring all communication between bail agents and arrestees regarding the bail agent's truthful opinions or recommendations of attorneys is unconstitutional. "When a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart, Inc. v. Rhode Island*, (1996) 517 U.S. 484, 501

As discussed above 10 CCR § 2071 is a restriction on pure free speech. The recommendation or suggestion of an attorney to an arrestee is not a part of the bail contract and produces no income for a bail agent. Theoretically recommending an attorney might have an indirect effect on an arrestee or their representative, but attorneys are barred from sharing commissions or fees with bail agents. State Bar Rule 1-320.

At a minimum, the probations of 10 CCR § 2071 encompasses elements of pure speech. There is no commercial interest in many of the scenarios criminalized by 10 CCR § 2071. For example, suggesting an attorney to a bail agents own child after a drug arrest; recommending an immigration attorney to an illegal alien defendant; indirectly suggesting a criminal defense attorney who specializes in the type of crimes alleged; suggesting the defendant apply for a public defender or simply recommending a known attorney due to his reputation and

competence. In none of these examples is the bail agent's speech related to the business of transacting bail.

Even if the restrictions of 10 CCR § 2071 were deemed commercial speech, this regulation would not withstand intermediate scrutiny. The *Dolezal* Court applied an intermediate scrutiny test to a sister regulation, 10 CCR 2079.1 that prohibited bail agents from directly soliciting clients at the jail. Under the same standards the restrictions of 10 CCR § 2071 clearly fail.

Initially, there is no substantial state interest in restricting bail agent recommendations or suggestions of an attorney. Unlike a direct solicitation for a bail bond, there is no economic purpose for a bail agent to recommend an attorney. Arrestees have an interest in obtaining information regarding attorneys in order to protect their constitutionally protected right to counsel. Bail Agents are members of the criminal justice community who will regularly possess information regarding the reputation and competence of attorneys. There is no substantial state interest in restricting bail agents from providing information or opinions about attorneys to arrestees.

The prohibitions of 10 CCR § 2071 are not narrowly tailored. The restrictions are a complete and total gag order on bail agents even "indirectly" "suggesting an attorney.

> The state is not required, pursuant to this intermediate level of constitutional scrutiny, to demonstrate that its regulations adopt the least restrictive means available to serve its substantial interests. (*Florida Bar v. Went For It, Inc., supra,* 515 U.S. at p. 632.) Instead, the First Amendment requires a " ' "fit" between the legislature's ends and the means chosen to accomplish those ends, ' [citation] -- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ' in proportion to the interest served, ' [citation]; that employs not necessarily the least restrictive means but... a means narrowly tailored to achieve the desired objective." (*Board of Trustees of the State University of New York et al. S.V.N.Y. v. Fox et al.* (1989) 492 U.S. 469, 480 [106 L.Ed.2d 388, 109 S.Ct. 3028].)

People v. Dolezal, Supra, 221 Cal.App.4th at p. 173.

The *Dolezal* court was primarily concerned with the protection of arrestees from high pressure or fraudulent sales practices by bail agents if they were allowed to make direct solicitation of bail bonds at a jail. Here, the suggestion of an attorney does not have a similar economic motive that warrants protection of an arrestee. As explained in the *Dolezal* case, bail agents are restricted in how they are able to make contact with arrestees. If, after establishing such contact the arrestee or his representative want the bail agent's opinion about an attorney, the agent should be free to give it.

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Va. Pharmacy Bd. v. Va. Consumer Council, (1976) 425 U.S. 748, 770.

CONCLUSION

10 CCR § 2071 is void because the Legislature has not confered upon the Insurance Commissioner the authority to regulate bail agent's recomendations of attorneys. 10 CCR § 2071 is a prior restraint on speech based on the content of the speech and is in violation of both the United States and California constitutional protections of free speech. The State does not have the right to restrict valid truthful speech based on the content of that speech. Bail agents have the right to give their opinions about attorneys, and arrestees have the right to hear those opinions. Neither the Legislature or the Commissioner have documented an "evil" to be cured by crimilizing the "sugestion" of an attorney by a bail agent. If such "evil" existed the State could not impose the blanket gag order, enforced with the criminal law, imposed by 10 CCR § 2071. Therefore, 10 CCR § 2071 should be declared invalid as *ultra vires* and in violation of both the United States Constitution and the California Constitution.

Wherefore, it is respectfully requested that this Court issue a judicial declaration that § 10 CCR § 2071 is invalid and may not be implemented, enforced, and specifically for a declaration that:

1. The Commissioner has no authority to regulate attorney referrals as he has done in § 10 CCR § 2071.

2. The Commissioner has no authority to adopt 10 CCR § 2071 in accordinance with provisions of the Administrative Procedure Act (Title 2, Division 3, Part 1, Chapter 3.5, 4, 4.5 and 5 of the Government Code of California), pursuant to authority found in California Insurance Code § 1812.

3. That while California Insurance Code § 1812 confers the Commissioner with authority to "implement, interpret, or make specific Sections 1800 through 1822" of the California Insurance Code, nothing in California Insurance Code §§ 1800 through 1822 relate to referrals or relations *vis a vis* attorney and bail agents.

4. That § 10 CCR § 2071 is an *ultra vires* regulation which violates the California Administrative Procedures Act, which may not be implemented, utilized, or enforced by Defendants.

5. That § 10 CCR § 2071 is inconsistent with the California and United States Constitutions in that the regulation is vague and overbroad, a prior restraint on speech, and it denies bail licensees their right to communicate truthfully to arrestees or those acting on behalf of them.

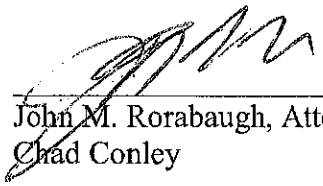
6. That if § 10 CCR § 2071 is valid it is limited to communications with defendants who are in actual custody as 10 CCR § 2054.5 defines an *arrestee* as "...any person actually detained or subject to detention in custody whose release may lawfully be effected by bail."

7. Awarding Plaintiff court costs and reasonable attorneys' fees under 42 U.S.C. § 1988, California Code of Civil Procedure § 1021.5, and any other applicable statute.

8. Awarding such other and further relief as the Court finds just and proper.

WHEREFORE, it is respectfully requested that the court grant this Verified Complaint for Declaratory Relief.

Dated: September 14, 2017



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FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles
STREET ADDRESS: 111 N. Hill Street
MAILING ADDRESS:
CITY AND ZIP CODE: Los Angeles 90012
BRANCH NAME: Stanley Mosk Courthose

PETITIONER/PLAINTIFF: Chad Conley

RESPONDENT/DEFENDANT: David Jones, in his Capacity as Commissioner of Department of Insurance

PROOF OF SERVICE BY FIRST-CLASS MAIL—CIVIL

CASE NUMBER: BC630383

(Do not use this Proof of Service to show service of a Summons and Complaint.)

1. I am over 18 years of age and **not a party to this action.** I am a resident of or employed in the county where the mailing took place.

2. My residence or business address is:
801 Parkcenter Dr., Ste 205 Santa Ana, CA 92705

3. On *(date)*: 09/14/2017 I mailed from *(city and state)*: Santa Ana, CA
the following **documents** *(specify)*:
Opening Trial Brief

☐ The documents are listed in the *Attachment to Proof of Service by First-Class Mail—Civil (Documents Served)* (form POS-030(D)).

4. I served the documents by enclosing them in an envelope and *(check one)*:
   a. ☐ **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid.
   b. ☑ **placing** the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

5. The envelope was addressed and mailed as follows:
   a. **Name** of person served: Laura E. Robbins, Deputy Attorney General
   b. **Address** of person served:
   State of California Department of Justice,
   Office of the Attorney General
   300 S. Spring Street,
   Los Angeles, CA 90013

☐ The name and address of each person to whom I mailed the documents is listed in the *Attachment to Proof of Service by First-Class Mail—Civil (Persons Served)* (POS-030(P)).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 09/14/2017

Crystal Rorabaugh
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

▶ (SIGNATURE OF PERSON COMPLETING THIS FORM)