

NEW YORK STATE TRIAL LAWYERS ASSOCIATION, INC.

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Mr. Michael Colodner, Counsel
Office of Court Administration
25 Beaver Street
New York, N.Y. 10004

Dear Mr. Colodner:

Thank you very much for giving us the opportunity to express our serious concerns about several of the proposed amendments to the rules governing lawyer advertising drafted by the Presiding Justices of the Appellate Division. As our immediate past president wrote in a letter published in the *New York Law Journal* when the proposed rules were first published, we welcome all efforts to enhance the dignity and integrity of the profession. Indeed, the New York State Trial Lawyers Association is unique among bar groups in having initiated curbs on attorney advertising after the 9/11 tragedy. We also made a special effort to gauge the impact of the proposed rules on the public and on our clients when we convened a day-long symposium on Wednesday, August 2, 2006, devoted to studious examination of the proposals. The panel included leaders of civic and community organizations, academic experts, and elected officials, as well as attorneys with various views on attorney advertising. That experience, as well as careful review of and reflection on the proposed rules,¹ has enabled us to offer several detailed recommendations based on our consideration of the client's best interests.

DR. 7-11. Barring communications from attorneys for thirty days subsequent to an incident potentially giving rise to personal injury or wrongful death claims exposes victims to exploitative offers by insurers and corporations without giving them the opportunity to be warned that they may be giving up important rights. It is unlikely that another government regulator will "level the playing field." Therefore, this proposed rule would almost certainly cheat injured citizens of important rights to compensation for damages suffered. A better approach would seek legislative action to impose the same waiting period on plaintiff attorneys and potential defendants alike.²

¹ Subsequent footnotes will provide relevant testimony from that symposium in support of the textual point in question. Citations will be to the transcript of the symposium ("Transcript"). Electronic copies are available upon request).

~ Transcript, page 89, Columbia Law School Adjunct Professor Carol Zeigler: ... it's bad policy... [90].. .the insurance companies are not worrying about the emotional fragility and perhaps... moderately impaired decision-making capabilities of... victims, or families of victims, during this [91] period of time. * * * [100, Mr. William Hornsby, of the American Bar Association:]... the 30-day rule... is, if not unique, at least uncommon among our regulation of commercial speech... it prohibits communication to the vast majority of accident victims who do not have serious emotional trauma that they must overcome. The great majority of them are soft tissue... they lack the trauma that someone has when they have loss of a loved one, a loss of a spouse or a child or a parent. [101] And...

DR 2-101. This lengthy rule attempts to impose standards of taste and dignity, as well as honesty and integrity, on attorney advertising. We wish that it were possible to impose higher standards of taste and dignity by rule, but such efforts inevitably produce subjective if not discriminatory enforcement. We believe, however, that useful rules could succeed in curbing advertising that combines elements of deception with offensive content, and we suggest such rules below.

One subdivision, (d)(6), prohibits the portrayal of other than "actual or authentic" clients, events, scenes, pictures, or persons. But an advertisement explaining that an ordinary person can sustain serious injuries when subjected to conditions portrayed by a stunt specialist can honestly communicate useful information to the public. The rule should be amended merely to require an acknowledgement that the portrayal is fictitious.³

We understand the concern that another subsection, (d)(8), attempts to address with respect to monikers such as "heavy hitters" or "the hammer." But how are disciplinary committees to make principled distinctions between such monikers and "best lawyer" or traditional puffery? Phrases such as "premier medical malpractice firm" and "leading personal injury firm" are examples that are not and cannot be prohibited. Reasonable people will differ as to whether examples in one category tend to imply "an ability to obtain results" (the standard set forth in the rule) more than examples in another category. Indeed, some language at first glance appears to avoid self-praise, like "our firm limits its practice to representing people in the evaluation, preparation, settlement and trial of serious personal injury and wrongful death suits." But that language may suggest "an ability to obtain results" even more than examples in either previous category. Imposing an obligation on disciplinary committees to determine which advertisements violate this subsection invites subjective and discriminatory results.⁴

It is not feasible to require both the written and the oral versions of the disclaimer in (f)(3), particularly in conjunction with the statement required in (g). A 14-to-16 second audio disclaimer superimposed on a visual disclaimer destroys the value of the television commercial.⁵

this rule is under inclusive because it assumes that after 30 days, you're recovered from that grief. And nothing could be further from the truth. [Ms. Bertha Lewis, founder and president of ACORN, a national neighborhood-citizen-activist organization, 103:]... If you're not going to ban insurance companies for 30 days... you know, what's good for the goose is good for the gander... And it also seems to me, to be depriving, at least my constituents, of having access to the best service and also the sort of discrimination in that they are being barred from any kind of help all together... [New York State Senator John Sampson, 106:]... who are you actually trying to protect? Are you trying to protect the consumer, are you trying to protect the image of the - of the institution, or basically are you trying to control the market?

³ Transcript, 133: MALE SPEAKER (AUDIENCE): To follow up... on... testimonials, again, where was the harm shown? ... just like the use of actors in certain situations, where was the harm proven that this was a problem, that it had to be wholesale banned? PROFESSOR [Z]IEGLER: I don't think there is any - problem. I think - I think the reason these are specifically prohibited is because it's effective. * * * [Mr. Paul Shanahan, Rochester attorney, 147:]... I don't think it's bad to have a courtroom depicted... I think Tony's [Anthony DiNitto, Rochester attorney] firm actually has an ad where... there's actually sitting in the jury box and he has the lawyer talking to him. I don't think there's anything wrong with that, if in fact the lawyer actually does [try] cases and goes into... the courtrooms. It's not misleading in the least that he's addressing a jury...

⁴ Transcript, Mr. Paul Shanahan, Rochester attorney, 123: "Oh, you know, John Smith's running for State Assembly. He's a lawyer, let's look at all his ads and see if we can find anything." You know, I have a real problem with that. * * * [220] MR. HORNSBY: You may not have a motto that - that implies the ability to obtain results. Let me read a couple and ask you if you agree that it... violates that standard. "Making exceptional client services an everyday practice." Does that violate that standard? Nobody believes it does. Okay. How-how about "Smart in your world." Does that imply the ability to ... obtain results? Nobody believes it does. Okay. How about "Lawyers you'll swear by, not at." Does that violate that rule? PROFESSOR [Z]IEGLER: Yes.

⁵ Transcript, President Awad, 135: Could you comment at all, Rich... about the number of disclaimers that the... rule seems to require of a 30 second television ad, and... if they are in fact followed, is there any value in having a television ad? * * * [136] * * * MR. [RICHARD JACHETTT, CEPAC Corporation, media advertising consultant]:

Although presented as a mere regulatory requirement, the rule in fact effectuates a policy eliminating television advertising by attorneys. Prominent display of the written disclaimer should suffice.

The drafters no doubt intended rules (h) and (o), regarding labeling and filing, to apply only to traditional advertisements. In fact, the requirements would apply to practically any communication from an attorney or law firm, thus imposing an insupportable burden.⁶

Regulators have found that it is virtually impossible to regulate the Internet in the manner that subsections (i), (k), and (o)(l) would require, given the scope of the Internet. Further, since law firms often update their web sites on a daily basis, (o)(l) could require a new filing with the attorney disciplinary committees every day.⁷ We suggest, as a replacement for the rules as they apply to Internet advertising, that at the time an equity member of a law firm completes his or her bi-annual re-registration with OCA, he or she be required to include a certification that the firm web site complies with the existing disciplinary rules regarding deceitful or misleading advertising, along with a copy of the firm's internet advertising or web site on the date of the filing. Such requirements would implicitly acknowledge the general reliability of the New York bar: when given an opportunity to correct a problem, our colleagues will generally do so.

Subsection (t)(l) is rendered obsolete by Chapter 635 of the Laws of 2006; indeed, the present DR 5-103 needs to be conformed to the new statute.

We recommend at least three additional rules to address some of the worst examples of current attorney advertising. Viewers are led to believe that law firms featured in commercials include skilled and experienced attorneys who will in fact try their cases, when in certain instances those attorneys and law firms never have any intention of doing so, but merely "broker" the cases out to other firms. While some may take issue with traditional brokering, where a referring attorney may receive one-third of the contingency fee for very little legal work, at least the community ties and networking capability of the referring attorney come into play. Far worse is "wholesale" brokering by attorneys who advertise for cases, and systematically refer them, for profit, to other attorneys who actually engage in all the stages of litigation. Other than in mass tort cases, where local experience and knowledge may not be relevant, this deceptive practice should be prohibited.

Another variety of misleading attorney advertising implies that the attorney will obtain "windfall" verdicts for clients. The rules should require that advertisements including verdict amounts must clearly indicate the difference between that amount and clients' actual recoveries.

We strongly urge not only enforcement, but also outreach by the disciplinary committees to OCA itself and/or other State agencies for the resources needed to address what may be the most extraordinarily offensive variety of client solicitation. They must undertake the investigative efforts necessary to identify and prosecute those attorneys and hospital employees

These regulations would... if you look at them on the surface and in the context of what you're currently doing, would seem to make producing a 30 second [137] spot that anyone would look at, impossible.

⁶ Transcript, Mr. Paul Shanahan, 120: One of the things I - I really don't like is this pre-filing, the idea that you have to keep filing with the - the Grievance Committee. All over - so I change my address on my website, does that mean I have to print it out, save it for three years and send it? If I change my phone number, you know? All these little things that you do or these little things that you — you forget about, you forget to file i t... [12 2]... This is a tremendous amount of information that's going to be - and I mean, I guess it'll be the Postal Recovery Act of 2006, at the end of the year, [if] it goes through.

⁷ Transcript, Mr. Hornsby, 115: And this is exactly why the American Bar Association, as part of Ethics 2000, eliminated the retention requirement. Not only do you no longer have an obligation to retain the website information, but also the print ads, and - and the video and so forth.

who are responsible for inserting "runners" into hospitals to solicit clients at their bedsides. Currently, the "don't ask, don't tell" approach effectively encourages wrongdoers. Our membership believes that hospitals are in a unique position to stop this practice and that it is in the best interests of their patients to do so.

For further study, we suggest that the Presiding Justices consider imposing a due diligence requirement on attorneys to assure that cases were not generated improperly during a hospitalization or medical treatment by a hospital employee, medical assistant, a runner, or an attorney or an agent of an attorney.

In addition, OCA should seek a budget increase for the purpose of strengthening enforcement of the existing disciplinary rules prohibiting deceitful and misleading advertising - an increase that NYSTLA would strongly support. Some of the money should be used to pursue out-of-state law firms, not licensed in New York, who broker the cases they attract from New York plaintiffs to some in-state law firms. The disciplinary committees should seek to identify such firms, and refer cases against them for unlicensed practice to the Attorney General's office.⁹

Finally, we suggest that appropriate advertising-related issues be included as a new component of the CLE ethics requirement. We question the wisdom of an across-the-board draconian response to abuses by a few attorneys. Most attorneys want to uphold the dignity and integrity of the profession. Instruction and guidance will enable them to do so.

Once again, we thank you for the opportunity to submit these comments, and look forward to your response.

Sincerely,

JOSEPH P. AWAD, President
New York State Trial Lawyers Association

Transcript, Professor Ziegler, 92:1 agree that there should be no in-person solicitation in hospitals. I wish those rules were enforced. * * * [State Senator Sampson, 106:] And, you know, we talk about the in-person solicitation, well it's being circumvented because when you have doctors, when you have nurses, and when you have runners going into these hospitals giving you these cards or giving family members cards of attorneys who are practicing, you know, are we in essence doing what this 30-day ban wants us to do?

Transcript, Mr. Awad, 195: Some... talked about enforcing the rules against out-of-state attorneys. What's the experience been? ... when I go on the Internet I now see attorneys from all over the country advertising, not for mass tort, which sometimes could be thought of to be different., .when there's a particular drug or medical device. But they're advertising to citizens in... Riverhead as well as in Brooklyn... they're going to represent them in medical malpractice cases or other cases in local jurisdiction with local rules and they're not even licensed here in the State of New York.