UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Competition
Bureau of Consumer Protection
Bureau of Economics

January 24, 2013

Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Request for Public Comment, Docket No. M2012-01129-SC-RL1-RL

Dear Mr. Catalano:

The staff of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics[1] appreciates this opportunity to provide comments to the Supreme Court of Tennessee ("Court") in response to its request for public comments on proposed amendments to the Tennessee Rules of Professional Conduct relating to attorney advertising. Based on the FTC's expertise in recognizing the adverse effects for consumers and competition of unduly broad restrictions on professional advertising, as well as prior staff comments on attorney advertising, FTC staff respectfully suggests that the Court consider several key competition and consumer protection principles (explained below) in its review of these proposals. Applying those principles, the Court should decline to adopt proposals that are likely to unnecessarily restrict the dissemination of truthful and non-misleading information, thereby limiting information available to consumers shopping for legal services in Tennessee.

I. INTEREST AND EXPERIENCE OF THE FTC

The FTC is charged under the FTC Act with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] Competition is at the core of America's economy, driving businesses to provide the goods and services that consumers desire, and to sell these goods and services at the lowest possible prices. For this reason, the Commission encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal policies. In particular, the Commission seeks to identify and prevent, where possible, business practices and regulations that impede competition without offering countervailing benefits to consumers.[3]

The Commission and its staff have a longstanding interest in the effects on consumers and competition of the regulation of attorney advertising and solicitation.[4] The Commission

consistently has taken the position that, while unfair or deceptive advertising by lawyers should be prohibited, consumers do not benefit from the imposition of overly-broad restrictions that prevent the communication of truthful and non-misleading information that some consumers value. These types of restrictions are likely to inhibit competition, frustrate informed consumer choice, and possibly lead to higher prices and decreased scope of, or access to, services.

II. PROPOSED AMENDMENTS TO THE TENESSEE RULES OF PROFESSIONAL CONDUCT RELATING TO ATTORNEY ADVERTISING

The Tennessee Rules of Professional Conduct currently address communications concerning a lawyer's services. Rule 7.1 prohibits "false or misleading communication about the lawyer or the lawyer's services."[5] Under the current rules, "a communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."[6] The proposed amendments under consideration would change this rule, among others.

- The first set of proposed amendments, offered by the Tennessee Association for Justice ("TAJ"), focuses on revising the rules to expand the definition of false and misleading advertising to include "an actor and/or model play[ing] a client"[7] and any "manipulative" visual or verbal description that is "likely to confuse the viewer."[8]

- In the second proposal, Attorney Matthew C. Hardin suggests changes to most of the rules relating to attorney advertising. As stated in his petition, his proposed changes purportedly would "prevent advertising abuses and encourage attorneys to advertise professionally and respectfully within Tennessee."[9] His proposed changes include lists of permissible and prohibited content that would apply to any form of attorney advertising.

III. COMPETITION AND CONSUMER PROTECTION PRINCIPLES

Based on the FTC's broad expertise regarding the characteristics of unfair or deceptive advertising, as well as prior FTC staff analyses of efforts to restrict attorney advertising, FTC staff respectfully urges the Court to consider the following competition and consumer protection principles as part of its review of the proposals. Each of these principles seeks to promote competition and protect consumers by discouraging unnecessary restrictions on the dissemination of truthful and non-misleading information. These principles are most important when proposed restrictions sweep broadly and may inhibit truthful and non-deceptive advertising; it is in those situations where proponents should bear the high burden of demonstrating that the proposed restrictions target legitimate and well-substantiated problems, and that the proposed restrictions are no broader than necessary to address those concerns.

As explained below, the Court also should consider the potential competitive impact of an advertisement pre-screening and evaluation system that would enable one group of attorneys to limit advertising by their competitors.

- While unfair or deceptive advertising by lawyers should be prohibited, restrictions on advertising should be specifically tailored to prevent deceptive claims and should not unnecessarily restrict the dissemination of truthful and non-misleading information. Imposing overly broad restrictions prevents the communication of truthful and non-misleading information that some consumers may value, which is likely to inhibit competition and frustrate informed consumer choice. Research indicates that overly broad restrictions also may adversely affect the prices consumers pay, as well as the scope and quality of services that they receive.[10]

  Some of the proposed regulations, such as the prohibition on using actors/models (TAJ Petition, Rule 7.1(D)), generally recognizable spokespersons (Hardin Petition, Rule 7.7(b)(1)(B)), and certain background sounds (Hardin Petition, Rule 7.7(b)(1)(C)), do not on their face target deception. Because these common advertising methods are not inherently deceptive, more narrowly tailored rules would better address the concerns underlying the proposed regulations. For example, requiring a clear and prominent disclosure that actors are portraying clients would be a less restrictive way to alleviate any concern about potential deception, in the event the Court decides this is a concern worth addressing.

  Likewise, it is not necessarily deceptive to use a spokesperson who purports to speak in the place of and on behalf of a lawyer or law firm. The risk of deception may increase, however, when that individual is a celebrity who is offering an endorsement. In those cases, requiring the celebrity to express his or her honest opinions, findings, beliefs, or experiences would reduce the risk of deception without unduly restricting the free flow of information.[11]

- Prohibiting any advertisement that is "unsubstantiated in fact" (Hardin Petition, Rule 7.1(c)(1)(D)) may prohibit some useful, non-deceptive claims that are difficult to verify. A substantiation requirement serves consumers by helping ensure that advertising claims are not misleading. However, some representations may concern subjective qualities that are not easy to verify with objective evidence – for example, claims about the quality or dedication of the lawyer.[12] A narrower rule governing claims that mischaracterize or promise particular outcomes might better address the concerns underlying this proposed rule.[13]

- The FTC supports industry self-regulation under certain circumstances. There are risks to consumers and competition, however, when one group of competitors regulates another. By requiring pre-screening and evaluation of most attorney advertisements by a review committee of the Board of Professional Responsibility (in accordance with the criteria as required under Hardin Petition, Rule 7.8), the Court would put some attorneys in a position to limit advertising by their competitors, giving the reviewing attorneys both the incentive and the ability to dampen competition under the guise of protecting consumers. Required pre-screening would also raise the cost of doing business for attorneys, which likely would result in higher prices for attorney services and discourage some truthful and valuable advertising.

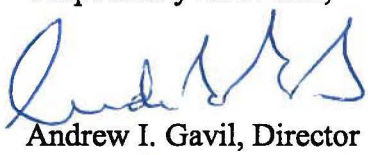
Given the potential burden on competition and consumers, FTC staff recommends that the Court forego the filing and pre-screening components of the Proposed Rules. Instead, the Court should continue to enforce the general prohibition against deceptive and misleading claims through sanctions for violations. If the Court nevertheless believes, based on credible evidence, that pre-screening is necessary to prevent harm to reasonable consumers, the Court should be mindful of the federal and state antitrust laws that would apply to the review committee as a whole and its members individually.[14]

- Both the TAJ Petition and the Hardin Petition propose rules prohibiting advertising in the state of Tennessee by individual lawyers or lawyers for firms without a bona fide office in the state (TAJ Petition, Rule 7.2(1), Hardin Petition, Rule 7.0(c)). A "bona fide office" is defined as "a physical location… where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis" (TAJ Petition at 5). The Tennessee Rules of Professional Conduct do not, however, impose a residency requirement for practicing law in Tennessee. Therefore, this restriction may be overbroad and eliminate competition to provide lawyer services by attorneys who are licensed to practice in the state but do not maintain an office in the state, as well as by attorneys who seek to represent Tennessee residents in national class action lawsuits, to the extent otherwise permitted by applicable Tennessee law. We urge the Court to consider whether prohibiting otherwise permissible advertising by attorneys without a bona fide office in Tennessee is necessary to protect the public.

IV. CONCLUSION

FTC staff believes consumers receive the greatest benefit when reasonable restrictions on advertising are specifically and narrowly tailored to prevent unfair or deceptive claims while preserving competition and ensuring consumer access to truthful and non-misleading information. Rules that unnecessarily restrict the dissemination of truthful and non-misleading information are likely to limit competition and harm consumers of legal services in Tennessee.

Respectfully submitted,



Andrew I. Gavil, Director
Office of Policy Planning

Richard A. Feinstein, Director
Bureau of Competition

Charles A. Harwood, Acting Director
Bureau of Consumer Protection

Howard Shelanski, Director
Bureau of Economics

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[1] This staff letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

[2] Federal Trade Commission Act, 15 U.S.C. § 45.

[3] Specific statutory authority for the FTC's advocacy program is found in Section 6 of the FTC Act, under which Congress authorized the FTC "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce," and "[t]o make public from time to time such portions of the information obtained by it hereunder as are in the public interest." *Id.* § 46(a), (f).

[4] *See, e.g.*, Letter from FTC Staff to the Indiana Supreme Court (May 11, 2007), *available at* http://www.ftc.gov/be/V070010.pdf; Letter from FTC Staff to the Florida Bar (Mar. 23, 2007), *available at* http://www.ftc.gov/be/ V070002.pdf; Letter from FTC Staff to the Rules of Professional Conduct Committee, Louisiana State Bar Association (Mar. 14, 2007), *available at* http://www.ftc.gov/opa/2007/03/fyi07225.htm; Letter from FTC Staff to the Office of Court Administration, Supreme Court of New York (Sept. 14, 2006), *available at* http://www.ftc.gov/os/2006/09/V060020-image.pdf; Letter from FTC Staff to the Professional Ethics Committee for the State Bar of Texas (May 26, 2006), *available at* http://www.ftc.gov/os/*2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf*; Letter from FTC Staff to Committee on Attorney Advertising, Supreme Court of New Jersey (Mar. 1, 2006), *available at* http://www.ftc.gov/be/V060009.pdf; *see also, e.g.,* Letter from FTC Staff to Robert G. Esdale, Clerk of the Alabama Supreme Court (Sept. 30, 2002), *available at* http://www.ftc.gov/be/v020023.pdf. In addition, FTC staff has provided comments on such proposals to, among other entities, the Supreme Court of Mississippi (Jan. 14, 1994); the State Bar of Arizona (Apr. 17, 1990); the Ohio State Bar Association (Nov. 3, 1989); the Florida Bar Board of Governors (July 17, 1989); and the State Bar of Georgia (Mar. 31, 1987). *See also* Submission of the Staff of the

Federal Trade Commission to the American Bar Association Commission on Advertising (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra*).

[5] Tenn. Sup. Ct. R. 8, RPC 7.1.

[6] *Id.*

[7] TAJ Petition, Proposed Rule 7.1(1)(D).

[8] TAJ Petition, Proposed Rule 7.1(2).

[9] Hardin Petition at 1.

[10] *See, e.g.*, Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17,* 8 S. CT. ECON. REV. 265, 293-304 (2000) (discussing the empirical literature on the effect of advertising restrictions in the professions); *In the Matter of Polygram Holdings, Inc, et al*, FTC Dkt. No. 9298 (F.T.C. 2003), at 38 n. 52 (same); Frank H. Stephen & James H. Love, *Regulation of the Legal Professions,* 5860 ENCYCLOPEDIA OF LAW & ECON. 987, 997 (1999), *available at* http://encyclo.findlaw.com/5860book.pdf (concluding that empirical studies demonstrate that restrictions on attorney advertising likely have the effect of raising fees); Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising, 5-6 (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra*).

[11] *See* FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1.

[12] *See* FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

[13] *See* Hardin Petition at 32 (concern that misleading and deceptive advertising poses the threat of "false promises of easy results.").

[14] Due to the risk of anticompetitive behavior, a leading antitrust treatise advocates subjecting any governmental agency comprising members of the profession that it regulates to direct and active governmental supervision. *See* AREEDA & HOVENKAMP, I ANTITRUST LAW ¶227a, at 208 (3rd ed. 2006) ("Without reasonable assurance that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required."). *See also In the Matter of North Carolina State Board of Dental Examiners*, FTC Dkt. 9343 (Comm. Op. Feb. 8, 2011) (federal antitrust laws apply to actions of state dental board comprising mainly practicing dentists), *available at* http://www.ftc.gov/os/adjpro/d9343/110208commopinion.pdf (currently on appeal before the U.S. Court of Appeals for the 4th Cir., No. 12-1172).