These events do not represent small risks or are without consequence. The possibility of patient's stopping their life saving medications in response to a television advertisement is real.

In 2015 I obtained and published (2) data in the peer reviewed literature that I obtained from Medwatch (the government reporting agency that collects clinical adverse event data). From this I reported on 28 reports of patients who had stopped their rivaroxaban after viewing legal advertising.

Table Summary of clinical outcomes following abrupt rivaroxaban termination as reported to Medwatch

Case	Age	Sex	Anticoagulant indication	Consequence of stopping anticoagulant	Event reported
1	NR	F	NVAF	TIA/possible stroke	September 2014
2	80	F	NVAF	DVT of arm	November 2014
3	80	M	NR	Stroke	December 2014
4	NR	M	NVAF	Stroke	January 2015
5	NR	NR	NR	Stroke	January 2015
6	80	F	NVAF	Stroke	March 2015
7	NR	M	NR	Stroke	March 2015
8	55	M	NVAF	Cardiac thrombosis	April 2015
9	NR	NR	NR	Stroke	April 2015
10	NR	M	VTE	Cerebral and lower limb thrombosis	April 2015
11	60	M	NVAF	Stroke	April 2015
12	NR	NR	NR	Stroke in 2 patients	May 2015
13	NR	F	NVAF	DVT	June 2015
14	NR	F	VTE	Pulmonary embolism	June 2015
15	45	M	VTE	Death due to pulmonary embolism	June 2015
16	90	M	NVAF	Stroke	June 2015
17	NR	NR	NR	Stroke in 3 patients	June 2015
18	NR	NR	NR	Thrombosis	June 2015
19	69	F	NVAF	TIA	July 2015
20	NR	F	NVAF	Stroke	August 2015
21	NR	NR	NVAF	Stroke	September 2015
22	NR	F	NVAF	Death following stroke	September 2015
23	NR	M	VTE	Thrombosis	September 2015
24	NR	NR	NR	Stroke	October 2015
25	NR	M	AF	Stroke	November 2015
26	70	M	NR	Stroke	November 2015
27	90	M	AF	Cardiomyopathy/TIA	December 2015
28	NR	M	AF	Stroke	December 2015

AF = atrial fibrillation; DVT = deep vein thrombosis; NR = not reported; NVAF = nonvalvular atrial fibrillation; TIA = transient ischemic attack; VTE = venous thromboembolism.

These numbers are daunting, harmful, and preventable. In total, there were 24 strokes/TIA (transient ischemic attacks; a stroke that is not permanent), 8 blood clots in the extremities or heart, and 2 deaths. These are the patients who announced they were stopping their rivaroxaban because of the class action litigation advertisement. How many other's stopped after seeing the 1-800-Bad-Drug advertisement, didn't tell anybody they were stopping their drug, and only to later be found dead or unable to talk after their stroke? These are only the documented cases and represent just the tip of the iceberg of pathology. It is reasonable to assume that the number of unreported cases is 100 times, or more, larger.

It is estimated that a drug company must spend a billion dollars to develop a drug, prove it is safe and effective, and pass FDA scrutiny before they obtain the ability to legally advertise

Chairman King, Ranking Member Cohen, and Members of the Subcommittee, it is my pleasure to testify today to relate my experience with patients who have discontinued medicine I or my colleagues have proscribed because they were frightened by legal advertising.

I have been an emergency physician for over 29 years and I have studied emergency medicine cardiology for over 20 years. Although I have over 500 publications, am author of number of books, and have been a long time teacher of emergency cardiology, I still practice emergency medicine at Ben Taub General Hospital, located in the middle of Houston, Texas.

It was earlier this year, in that Emergency Department, where the extent and harm of the ongoing class action suit against rivaroxaban became apparent to me.

It was a Saturday morning, about 9am when I went to see a 66 year old woman who was complaining of chest discomfort. As is necessary, because this type of patient can suffer a precipitous and sometimes fatal decompensation, an electrocardiogram was immediately performed. It showed that she had a rapid and irregular heart rate known as atrial fibrillation.

For an emergency physician, there are 2 challenges that must be immediately dealt with when a patient has atrial fibrillation:

1) if the heart rate is excessively rapid, it must be slowed with medication, and

2) if the blood must be anticoagulated (i.e., thinned), as atrial fibrillation may throw blood clots around the body and cause a stroke.

My patient's heart rate was about 90, so nothing was necessary for its control. This meant I needed to determine if she needed an anticoagulation.

Stroke risk determination is a straightforward analysis. By asking a few very simple questions, the probability of a patient with atrial fibrillation having a stroke in the next year can be measured by the very well accepted CHADSVASC score (https://www.mdcalc.com/cha2ds2-vasc-score-atrial-fibrillation-stroke-risk).

The risk stroke must then be considered against the risk of bleeding from an anticoagulant. Rivaroxaban, the subject of a class action lawsuit, has been evaluated in more than 57,000 patients and found to have a risk of bleeding resulting in death to be 0.09/100 patient years of use.

Thus, my patient, being 66 years old, female, with a history of high blood pressure and diabetes, has a 4.8% (~1 in 20) risk of having a stroke within the next year that would leave her debilitated, unable to speak, wearing diapers in a nursing home for the rest of her markedly shortened life, vs taking a pill every day with a risk of a fatal bleed from anticoagulation of 0.0009 per year. To summarize, this patient had a 4.8 annual stroke risk, vs. 0.0009 annual fatal bleeding risk. In medicine, we call this a "no-brainer" and pick the lower of the risks.

Chairman Goodlatte, Ranking Member Cohen, and Members of the Subcommittee,

Thank you for the opportunity to provide written testimony today on behalf of our 20,000 members and the millions of cardiovascular patients across the country. Mended Hearts is the largest peer to peer support organization in the United States. We provide support and education to over 200,000 patients each year through our network of volunteers in over 460 hospitals. Medication adherence and health literacy continue to be a priority for our organization. It is estimated that over half of patients who are prescribed medication by their physician will not take it correctly and it is known that poor medication adherence increases medical expenditures $100 billion annually.

We find that patients discontinue medicine for a variety of reasons, but one reason is that they discontinue the medication, they have been prescribed, because they were frightened by legal advertising and do not understand the serious implications of stopping their prescribed medication. In a recent report, the American Medical Association (AMA) found that patients were more likely to discontinue the use of prescribed FDA approved pharmaceuticals after seeing television advertisements that "emphasize side effects while ignoring the benefits or the fact that the medication is FDA approved."

Mended Hearts supports Chairman Goodlatte and the committee and urge the committee to examine the ethical dilemma of these dangerous advertisements. When a patient is in care and critical decisions are being made that are affecting long term outcomes, physicians and health care providers should be the primary team that make these decisions. Undermining the patient trust of these professionals is dangerous. Patient safety should be the priority in these regulations to assure that patients are given correct information and can make informed decisions as a member of their care team. It is important to assure that they are protected against television and radio ads that are designed to scare patients. Patients should always be encouraged to talk with their doctor and make decisions regarding their care within that framework. These advertisements dismiss the physician/patient relationship and undermine the physician's ability to prescribe medications that are saving lives.

We urge the committee to regulate the content of these advertisements and to make patient safety in this process a priority. Thank you again for your time and consideration to this matter.

Sincerely,

Andrea Baer
Director of Patient Advocacy
Mended Hearts

Chairman, Ranking Member, and Members of the Subcommittee, it is my pleasure to testify today to relate my experience with patients who have discontinued medication because they were frightened by legal advertising.

I am an atrial fibrillation patient. My organization, StopAfib.org/American Foundation for Women's Health, educates and supports people living with atrial fibrillation (afib), which is an irregular heartbeat that can lead to strokes. Afib largely affects seniors.

Afib-related strokes are preventable through taking anticoagulant medications. According to the American Heart Association and StopAfib.org's MyAFibExperience website:

- *35% of patients with AFib go on to have a stroke if untreated. (5%/year)*
- *Oral anticoagulation reduces stroke risks by as much as 60%.*
- *Many patients who should be receiving anticoagulation therapy are not. Thus, many patients are living with unnecessarily high stroke risks.*

Unfortunately, legal advertising frightens many patients into believing that they will bleed to death if they continue taking their anticoagulants, even though research shows that the risk of having a stroke greatly outweighs the risk of having a bleed. In fact, according to the American Heart Association and StopAfib.org's MyAFibExperience website:

> *"...estimates suggest that most patients with atrial fibrillation would need to fall nearly 300 times each year before the risk of a bleed or ICH [intracranial hemorrhage] would outweigh the benefits of stroke risk reduction using anticoagulation therapy."*[1]

This legal advertising frightens many afib patients into stopping their anticoagulant medications without telling their doctors and often leads to having a stroke. Many more patients are frightened by this advertising to the point of refusing to even consider a prescription for anticoagulant medication, or refusing to fill their prescription, in spite of the urging of their doctors to take an anticoagulant to prevent a stroke. Unfortunately, many of these people go on to have a stroke.

As someone focused on wiping out afib-related strokes, I feel that these fear tactics used by legal firms should not be allowed to continue because of the impact that they have on this highly-vulnerable senior population.

Thank you for your consideration of this matter.

[1] "AFib and Stroke Risks", American Heart Association and StopAfib.org, MyAFibExperience, https://myafibexperience.org/professionals/stroke-risks

As a physician, I am concerned that patients may be misled to stop taking prescribed medications and risk life-threatening consequences. Unfortunately, the FDA response to my inquiry makes it clear that multiple patients have died after discontinuing medication, and many others suffered a stroke.

The FDA response to my inquiry is attached for review. Thank you again for your attention to this important patient safety issue.

Sincerely,

Andy Harris, M.D.
Member of Congress

Xarelto (rivaroxaban) (19 reports)

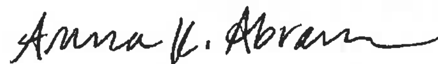
- Three reports referencing individual patients did not mention any subsequent adverse events.
- Two reports referenced more than one patient. One of these reports referred to "multiple" patients and did not report any subsequent adverse event. The other report referred to three patients with subsequent stroke.
- Two reports indicated that patients died after discontinuing Xarelto. One patient died following stroke and the other report did not mention any specific adverse event leading up to death.
- The 12 remaining reports referenced individual patients and noted the following adverse events: stroke (8), transient ischemic attack (TIA) (1), deep vein thrombosis (DVT) of the arm (1), intracardiac thrombus (1), cerebral and foot thrombosis (1).

The source of the advertisement for the remaining 39 of 61 reports is unclear. For example, 13 of these 39 reports included mention of the term "bad drug" advertisement and 26 reports included mention of nonspecific terms such as "television ads" or "commercials". Among these 39 reports, three patients died after discontinuing Xarelto (rivaroxaban). One patient died following pulmonary embolism and 2 patients died following strokes.

Your letter also requested an assessment of the authority of FDA to regulate the legal advertisements, specifically mentioning FDA-approved drugs, with which you are concerned. Pursuant to section 502(n) of the Federal Food, Drug, and Cosmetic Act (FD&C Act), (21 USC 352(n)) and FDA regulations at 21 CFR Part 202, a prescription drug marketed in the United States is misbranded unless advertisements issued by the "manufacturer, packer, or distributor thereof" meet specific requirements, including that they contain accurate information about the drug, addressing both risks and benefits, and that the advertising is truthful, balanced, and not misleading. The legal advertisements you refer to are disseminated by lawyers seeking clients for legal services, and are not advertising for the drug itself issued by a manufacturer or other party responsible for marketing the drug within the scope of section 502(n), FD&C Act.

Thank you, again, for contacting us concerning this matter.

Sincerely,



Anna K. Abram
Deputy Commissioner for Policy, Planning,
Legislation, and Analysis

D7. And, thinking a little about your political attitudes... Do you consider yourself to be... **(ROTATE TOP TO BOTTOM, BOTTOM TO TOP)**

CORE	DRUG	
34%	***37%***	***TOTAL CONSERVATIVE***
28%	***27%***	***TOTAL LIBERAL***
12%	13%	VERY CONSERVATIVE
22%	24%	SOMEWHAT CONSERVATIVE
38%	36%	MODERATE
16%	15%	SOMEWHAT LIBERAL
12%	12%	VERY LIBERAL

D8. And for statistical purposes only...what is your total annual household income?

CORE	DRUG	
9%	5%	UNDER $20,000
16%	14%	$20,000-$39,999
15%	15%	$40,000-$59,999
19%	17%	$60,000-$79,999
13%	12%	$80,000 - $99,999
28%	37%	$100,000 or more

ALLOW TO COMPLETE WITHOUT RESPONSE ON D8

D1. In what year were you born? ______________

CORE	DRUG	
8%	1%	18 to 24
16%	12%	25 to 34
21%	14%	35 to 44
18%	24%	45 to 54
20%	28%	55 to 64
17%	21%	65 and over

D2. What is your gender?

CORE	DRUG	
47%	46%	Male
53%	54%	Female

ALLOW RESPONDENT TO CONTINUE WITHOUT RESPONDING

D3. Other than being an American, what is your main ethnic or racial heritage?

CORE	DRUG	
12%	8%	African American or Black
74%	85%	White
10%	4%	Hispanic or Latino American
2%	1%	Asian American
1%	1%	American Indian/ Alaskan Native
1%	1%	Other/Combination

D4. Since we have been talking about it, does anyone in your household work in health care, such as a doctor's office, hospital, or clinic that treats patients?

CORE	DRUG	
11%	***16%***	***TOTAL YES***
6%	10%	Yes, self
4%	5%	Yes, someone in my household
1%	1%	Yes, both
89%	84%	No

ASK ALL:
Please read each statement and indicate whether you **(ROTATE)** strongly agree, somewhat agree, somewhat disagree, or strongly disagree with each one. **(RANDOMIZE Q40-43)**

RANKED BY % TOTAL AGREE

	STRONGLY AGREE	SOMEWHAT AGREE	NEITHER AGREE NOR DISAGREE	SOMEWHAT DISAGREE	STRONGLY DISAGREE
42. Some people might stop taking their medication after seeing this ad.	32%	49%	13%	4%	2%
	81%			***6%***	
40. This ad helps people by alerting them to potential medical side effects.	22%	42%	24%	7%	5%
	64%			***12%***	
41. This ad exaggerates the dangers because lawyers are interested in making more money on the lawsuit.	23%	36%	28%	10%	3%
	59%			***13%***	
43. This type of information about medications in ads like this should be regulated by the government.	23%	30%	28%	8%	11%
	53%			***19%***	

IF Q36B:3-4 ASK WITH THE SAME SCALE AND HEADER AS ABOVE

	Definitely Yes		Probably Yes	Probably No		Definitely No
bx.	Reduce the amount of the medication you take to be less than what your physician prescribed					
CORE	1%		8%	60%		31%
		9%			***91%***	
DRUG	2%		7%	52%		39%
		9%			***91%***	

SHOW VIDEO (TWO VIEWS MAXIMUM) AND Q37-43 AMONG THOSE WITH AFFECTED MEDICAL CONDITION CATEGORIES FOR EACH VIDEO. THE AD NUMBERS CORRESPOND WITH THE QUESTION NUMBERS. QUALIFYING CONDITIONS ARE PUNCHES :1-2 ON Q9-22

DRUG OVERSAMPLE DATA ONLY Q37-43

Now switching to something a little different, I would like you to watch the following video. Following the video there will be a few questions so please watch carefully.

NEW PAGE:

37. How effective was this ad in raising concerns about this particular medicine? Was it...

79% ***TOTAL EFFECTIVE***
21% ***TOTAL NOT EFFECTIVE***

29% Very effective
50% Somewhat effective
16% Not very effective
5% Not effective at all

---

38. How concerned are you about that medicine having seen that?

56% ***TOTAL CONCERNED***
44% ***TOTAL NOT CONCERNED***

17% Very concerned
39% Somewhat concerned
31% Not too concerned
13% Not at all concerned

(ASK Q33 IF Q32A-I:2-3)

33. Now, more specifically, have you seen an advertisement by a law firm, indicating they were suing the manufacturer of a medication you were taking over that particular medication in the last year?

SKIP BASE:

CORE	DRUG	
6%	11%	Yes
94%	89%	No

TOTAL BASE:

CORE	DRUG	
2%	2%	Yes
34%	19%	No

(ASK Q34 IF Q33:1)

34. In the space below, please describe the advertisement you saw, including the name of the medication or what condition it is used to treat.

SEE VERBATIM RESPONSES

---

35. How concerned would you be if you were taking a medication, prescribed by your doctor, and saw an advertisement by a law firm indicating they were suing the manufacturer over the medication you were taking?

CORE	DRUG	
84%	***86%***	***TOTAL CONCERNED***
16%	***14%***	***TOTAL NOT CONCERNED***
51%	44%	Very concerned
33%	42%	Concerned, but not very concerned
11%	11%	Not very concerned
5%	3%	Not at all concerned

ASK Q29 IF Q28:1

29. Which of the following is the best description of what happened? Did you **(RANDOMIZE :1-3)**...

SKIP BASE:

CORE	DRUG	
35%	39%	Completely stop taking the medication
19%	17%	Not refill your prescription
		or
43%	39%	Decline the medication and never start it
3%	5%	Other **(SPECIFY)**

TOTAL BASE:

CORE	DRUG	
6%	8%	Completely stop taking the medication
3%	4%	Not refill your prescription
		or
7%	9%	Decline the medication and never start it
1%	1%	Other **(SPECIFY)**

---

30. As you may know, law firms sometimes run advertisements alerting the public to the fact that they are suing a pharmaceutical company over a specific medication. Have you seen or heard any advertisements like these in the last year?

CORE	DRUG	
72%	80%	Yes
28%	20%	No

ASK Q31 IF Q30:1

31. Can you recall the name of the medication, medication type, or condition the medication was supposed to treat? If so, please record that here.

SEE VERBATIM RESPONSES

---

20. Zoloft or its generic, which is called sertraline

CORE	3%	3%	3%	2%	89%
	6%		***5%***		
DRUG	16%	12%	3%	4%	66%
	28%		***7%***		

Please indicate below whether you agree or disagree with the following statements.

	STRONGLY AGREE	SOMEWHAT AGREE	NEITHER AGREE NOR DISAGREE	SOMEWHAT DISAGREE	STRONGLY DISAGREE

23. FDA (Food and Drug Administration) regulations ensure the safety of prescription medicines.

CORE	25%	47%	16%	8%	4%
	72%			***12%***	
DRUG	29%	46%	15%	8%	2%
	75%			***10%***	

24. I trust my doctor to inform me of the risks and benefits of any medication he or she prescribes.

CORE	36%	39%	15%	7%	3%
	75%			***10%***	
DRUG	40%	42%	9%	8%	1%
	82%			***9%***	

---

25. Thinking about the last time you visited a pharmacy to pick up a prescription, did an employee speak with you about your prescription medicine, that is when or how to take the medication or its potential side effects?

CORE	DRUG	
52%	***53%***	***TOTAL YES***
32%	35%	Yes, the pharmacist
13%	13%	Yes, the pharmacy technician
7%	5%	Yes, someone, but not sure of their position
48%	47%	No one

ASK ALL:
For each of the following, please indicate whether you or someone in your household have taken any of the following prescription medications, and in what time frame. **(THOSE WHO ANSWER "I'M TAKING" OR "I'VE TAKEN IN PAST" IN Q9-20 WILL SEE AD) (ALLOW RESPONDENTS TO CLICK NEXT WITHOUT SELECTING A PUNCH)**

RESPONDENTS WILL BE ALLOWED TO SEE ONLY ONE AD. IF RESPONDENT ANSWERS "I AM TAKING" OR "I'VE TAKEN" FOR MORE THAN ONE DRUG, SHOW THE DRUG ANSWERED AS "I AM TAKING." IF RESPONDENT ANSWERS "I AM TAKING" FOR MORE THAN ONE DRUG, SHOW THE ONE AD THAT IS HIGHER ON THE PROVIDED LIST.

	I'm taking/ taken last year		I've taken in past/more than a year ago	Household taking/taken last year		Household taken in past/more than a year ago	No one taking/ taken in the past
9.	Actos or its generic, which is called pioglitazone						
CORE	1%		1%	1%		*	97%
		2%			***1%***		
DRUG	5%		4%	1%		1%	89%
		9%			***2%***		
10.	Avandia or its generic, which is called rosiglitazone						
CORE	*		1%	1%		*	98%
		1%			***1%***		
DRUG	1%		3%	1%		2%	93%
		4%			***3%***		
11.	Crestor or its generic, which is called rosuvastatin						
CORE	2%		1%	2%		2%	93%
		3%			***4%***		
DRUG	15%		5%	4%		2%	75%
		19%			***6%***		
12.	Granuflo or Naturalyte						
CORE	*		*	*		1%	98%
		*****			***1%***		
DRUG	*		1%	1%		2%	96%
		1%			***3%***		

5. How often are you supposed to take any medicine, according to the instructions from your doctor or pharmacist?

SKIP BASE:

CORE	DRUG	
28%	30%	More than once a day
69%	67%	Once a day
1%	2%	2-6 times a week
1%	*	Once a week
-	-	Less than once a week
1%	1%	As needed for symptoms

TOTAL BASE:

CORE	DRUG	
15%	25%	More than once a day
37%	56%	Once a day
1%	1%	2-6 times a week
*	*	Once a week
-	-	Less than once a week
1%	1%	As needed for symptoms

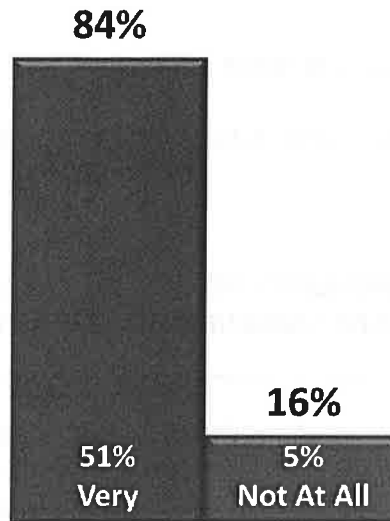
In this survey, we are collecting general health data about respondents to allow us to segment this data efficiently. Please be assured that your responses will only be reported in aggregate and will NOT be identified individually.

2. Within the last year or two, have you been treated for one of the following conditions? Please check any that apply to you.

CORE	DRUG	
15%	29%	Anxiety
11%	31%	Depression
11%	24%	GERD or acid reflux
9%	18%	Diabetes
4%	8%	Menopause
3%	5%	Obsessive-Compulsive Disorder
2%	6%	Atrial fibrillation
2%	7%	Low testosterone
2%	4%	Post-Traumatic Stress Disorder
1%	2%	Deep vein thrombosis or pulmonary embolism (blood clot in the leg or lungs)
1%	1%	Kidney failure or dialysis
1%	1%	Premenstrual Dysphoric Disorder
1%	1%	Stroke
63%	-	None of these

manufacturer over the medication" they were taking. Concern is just slightly higher among those taking one of the twelve targeted medicines with lawsuit advertising being run about them (86 percent say they would be concerned).

Concern about taking a prescription medicine
if saw a law firm's ad about suing that medication manufacturer



- **A majority of Americans take a prescription medicine daily.** While we only asked specifically about twelve prescription medicines, we saw significant use of some medicine on a daily basis. Even when excluding birth control among women, a majority of all Americans (54 percent) indicate taking a medicine daily. Nine percent indicate having cut back or stopped taking medicine without telling their doctor if they felt worse or experienced side effects.

- **One-in-four people who see an actual trial lawyer ad regarding a medicine they currently take say they would immediately stop taking the medicine without consulting their doctor.** Respondents who take one of twelve medicines that are subjects of potential lawsuits for which lawyers have advertised saw one of those ads regarding their actual medicine. Over three-quarters (79 percent) who see the ads call them "effective" in raising concerns about the medication.

8. How often do formal advertising complaints alleging violations of the advertising rules other than false or misleading communications result in disciplinary sanctions (including diversion and probation)?

- Frequently ________
- Rarely ________
- Almost never ________

9. Are there any reported decisions involving or including violations of advertising regulations in which there is a finding of actual consumer or client harm or actual confusion?

- Yes ________
  (please list names, years, and type of harm/confusion)
- No ________

10. In those circumstances where discipline has been imposed, did the violation involve conduct that was partly or entirely based upon dishonesty, fraud, deceit or misrepresentation, whether by affirmative statement or concealment? (see ABA Model Rule 8.4(c))

- Yes ________
  (please explain, including what state of mind requirement was applied)
- No ________

11. Have there been any formal discipline cases finding consumer or client harm or confusion that *did not* violate Rule 8.4(c)?

- Yes ________
  (please explain what rule was violated and what harm was identified)
- No ________

Thank you for responding by November 25, 2014

Please address your responses to:

Mark L. Tuft, Chair
APRL Regulation of Lawyer Advertising Committee
201 California Street, 17th Floor
San Francisco, CA 94111
mtuft@cwclaw.com

ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

2014 ADVERTISING REGULATION SURVEY

1. Who are the predominant complainants in lawyer advertising charges?

- Other lawyers ___________
- Consumers ___________
- Judges ___________
- Public officials ___________
- Anonymous ___________

2. How often do you receive complaints about lawyer advertising?

- Frequently ___________
- Rarely ___________
- Almost never ___________

3. How do you typically handle complaints about lawyer advertising where there is a potential advertising rule violation?

- Informally (e.g., call or letter requesting changes) ___________
- Formal investigation ___________
- Diversion ___________
- Peer Review ___________
- Dismissal with advertising language ___________
- Warning letter ___________
- Not at all addressed ___________

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October 17, 2014

Re: <u>**Regulation of Lawyer Advertising**</u>

Dear Bar Counsel:

I am writing to you on behalf of the Committee on the Regulation of Lawyer Advertising created by the Association of Professional Responsibility Lawyers ("APRL"). As you may know, APRL is a national organization of lawyers and law professors specializing in the field of legal ethics and professional responsibility. APRL's committee is currently studying the enforcement of lawyer advertising regulations by bar regulators particularly in reference to the use of technology and electronic media. As you will note from the list below, our committee includes both APRL and non-APRL members.

Courts imposing lawyer discipline typically assert that the purpose of lawyer discipline is not to punish the lawyer but to protect the public. On the assumption that this is also the purpose behind discipline for violation of rules regulating advertising and marketing of lawyer services, the Committee would appreciate it if you could respond to the attached brief survey.

Please also indicate whether there have been any consumer surveys in your jurisdiction regarding lawyer advertising and, if so, whether you can provide us with the results of those surveys.

Thank you for responding to our request. We would appreciate receiving your response by email or letter in the next thirty days. If you have any questions or would prefer instead to discuss these matters over the phone, please let me know so that I can arrange a time and date for a call.

I look forward to hearing from you.

Very truly yours,

Mark L. Tuft
Chair, APRL Committee on the
Regulation of Lawyer Advertising

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

No changes

or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Rule 7.3 Solicitation of Clients

No changes

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Comments *(Comments 1 and 3 were moved to MR 7.1 Comments)*

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

Rule 7.2 Advertising

~~(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.~~

~~(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may~~

~~(1) pay the reasonable costs of advertisements or communications permitted by this Rule;~~

~~(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;~~

~~(3) pay for a law practice in accordance with Rule 1.17; and~~

~~(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if~~

~~(i) the reciprocal referral agreement is not exclusive, and~~

~~(ii) the client is informed of the existence and nature of the agreement.~~

~~(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.~~

Comments *(Comments 1, 2, and 3 moved to MR 7.1 Comments)*

~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

~~[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.~~

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to~~

APRL Proposed Changes to the
ABA Model Rules of Professional Conduct - 2015

[REDLINE VERSION]

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. 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.

Comments

[1] This Rule governs all communications about a lawyer's services~~, including advertising permitted by Rule 7.2~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional conduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching. *[from MR 7.2 Comments]*

[6] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[7] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. *[from MR 7.2 Comments]*

Areas of Expertise/Specialization

[8] A lawyer may indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services. A lawyer may state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification. *[from MR 7.4 Comments]*

Firm Names

[9] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. *[from MR 7.5 Comments]*

[10] Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. *[from MR 7.5 Comments]*

Rule 7.2 Advertising

Comments (*Comments 1, 2, and 3 moved to MR 7.1 Comments)*

ATTACHMENT 2

LYNDA C. SHELY

Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to lawyers and law firms. She also assists lawyers in responding to initial Bar charges, performs law office risk management reviews, trains law firm staff in ethics requirements, and advises on a variety of ethics topics including ancillary business ventures, conflicts of interest, fees and billing requirements, trust account procedures, multi-jurisdictional practice requirements, and ethics requirements for law firm advertising/marketing. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona for ten years. Before she moved to Arizona, Ms. Shely was an intellectual property associate with Morgan, Lewis & Bockius in Washington, DC.

Ms. Shely received her B.A. from Franklin & Marshall College in Lancaster, Pennsylvania and her J.D. from Catholic University in Washington, DC. She was selected as the State Bar of Arizona Member of the Year in 2007 and has received other awards from the State Bar for her contributions to Law Related Education and Outstanding Leadership in Continuing Legal Education. She also received the Scottsdale Bar Association's 2010 Award of Excellence. Ms. Shely is a former chair of the ABA Standing Committee on Client Protection and a past member of the ABA's Professionalism Committee and Center for Professional Responsibility Conference Planning Committee. She is the President-Elect of the Association of Professional Responsibility Lawyers and also serves on several State Bar of Arizona Committees. Ms. Shely was the 2008-2009 president of the Scottsdale Bar Association. She has also been an adjunct professor at all three Arizona law schools, teaching professional responsibility.

JAMES COYLE

Jim Coyle is Attorney Regulation Counsel for the Colorado Supreme Court. In that capacity, Mr. Coyle assists the Supreme Court with regulating the practice of law in Colorado, including attorney admissions, registration, discipline, disability, diversion, mandatory continuing legal and judicial education, unauthorized practice and inventory counsel functions. Mr. Coyle's office also acts as counsel for the Attorneys Fund for Client Protection and the Commission on Judicial Discipline. Mr. Coyle is an active member of the American and Colorado Bar Associations, National Conference of Bar Examiners, National Organization of Bar Counsel, ABA Center for Professional Responsibility, National Client Protection Organization, National Continuing Legal Education Regulators Association, Association of Judicial Discipline Counsel and ABA Commission on Lawyer Assistance Programs.

BRUCE E. H. JOHNSON

Bruce E. H. Johnson is a partner in the Seattle office of Davis Wright Tremaine LLP. A member of the Washington State and California Bars, Mr. Johnson's litigation practice focuses on internet, media, and professional liability defense. He also regularly advises lawyers, law firms, and legal departments on legal ethics, professional responsibility, and malpractice matters. He has defended many lawsuits involving social media websites, including *Browne v. Avvo, Inc.*, which held that lawyer evaluations and ratings are statements of opinion absolutely protected by the First Amendment. One of the leading national authorities on First Amendment commercial speech protections, Mr. Johnson is the co-author (with Steven G. Brody) of the Practising Law Institute treatise Advertising and Commercial Speech: A First Amendment Guide.

ARTHUR J. LACHMAN

Arthur J. Lachman practices in Seattle, Washington, focusing on legal ethics, professional liability, and law firm risk management issues. A 1989 graduate of the University of Washington School of Law, he clerked on the Ninth Circuit Court of Appeals, has practiced as a commercial litigation attorney, and has taught civil litigation and ethics subjects at both Puget Sound area law schools. Mr. Lachman has served as president of the Association of Professional Responsibility Lawyers and chair of the ABA Center for Professional Responsibility's National Conference Planning Committee. He is co-author of *The Law of Lawyering in Washington*, published by the Washington State Bar Association, and served as chair of the WSBA Rules of Professional Conduct Committee from 2008 to 2010. Mr. Lachman has also served as chair of the Ethics/Loss Prevention Committee and Director of Professional Development at Graham & Dunn in Seattle. He holds bachelors and graduate degrees in accounting from the University of Illinois at Urbana-Champaign.

MARK L. TUFT

Mark L. Tuft is a partner with Cooper, White & Cooper LLP in San Francisco. He serves as counsel to lawyers and law firms on professional responsibility, professional liability, law firm mergers and dissolutions, and State Bar disciplinary matters. Mr. Tuft is certified by the State Bar of California as a specialist in legal malpractice law. His practice includes legal malpractice defense, media law, and defense of individuals and businesses in civil and criminal matters. He also serves as an arbitrator, mediator, and special master in lawyer-client and law firm disputes. Mr. Tuft is a co-author of The California Practice Guide on Professional Responsibility (The Rutter Group, a division of Thomson Reuters). Mr. Tuft obtained his J.D. degree with honors from Hastings College of the Law in 1968. He also received an LL.M. degree with highest honors from George Washington University in 1972.

Mr. Tuft is a member of the California State Bar Commission on the Revision of the Rules of Professional Conduct and a former chair of the California State Bar Committee on Professional Responsibility and Conduct. Mr. Tuft is a member of the ABA Center on Professional Responsibility and is a member of the Center's Policy Implementation Committee and Editorial Board. Mr. Tuft is a past president of the Association of Professional Responsibility Lawyers. He has taught courses on legal ethics as an adjunct professor at the University of San Francisco School of Law and is a frequent lecturer and writer on professional responsibility. Mr. Tuft has received several teaching and bar association awards for his work in legal education.

GEORGE R. CLARK

George R. Clark is a solo practitioner in Washington, D.C. who represents lawyers, law firms, and their clients. With more than thirty years of experience in professional responsibility matters (over twenty of them as inside ethics partner at a 1000 lawyer firm), he advises law firms and lawyers on the full range of ethics and practice issues, including conflicts and disqualification. A trial lawyer for over thirty years, he frequently consults on litigation-related ethics matters. Mr. Clark also serves as an expert witness, and lectures regularly on ethics issues. Additionally, he often advises clients on their dealings with their lawyers, and acts for lawyers in discipline and admission matters.

Mr. Clark is past chair (2009-2012) of the District of Columbia Bar Rules of Professional Conduct Review Committee. He has been selected for inclusion in 2012 through 2015 Washington DC Super Lawyers. He is a 1969 graduate of the University of Notre Dame (B.S. Physics), earned his J.D. from the University of Illinois College of Law (1972), and began his legal career as law clerk to the late Judge William B. Jones of the U.S. District Court in Washington. He is a member of the Center for Professional Responsibility and the Business Law Section (Firm Counsel Connection and Professional Responsibility Committee) of the American Bar Association and Treasurer of the Association of Professional Responsibility Lawyers. He and his wife Mary live in Washington, D.C., where he was chair of the Committee of 100 on the Federal City (2009-2012) and three time past president of the Federation of Citizens Associations of DC.

There will be circumstances in which diversion of a complaint is inappropriate and the machinery of formal discipline should be invoked. This will be true, for example, in situations involving apparent coercion, duress, harassment, or criminal or fraudulent conduct involving a risk of demonstrable harm. This also will include lawyers who have been notified of actual or apparent non-compliance, and who either fail to respond or continue to violate the cited rules. That there will be infrequent cases deserving of more serious consideration and a further expenditure of disciplinary resources does not justify treating all cases that way. This is especially true where, as here, experience shows that the vast majority of cases neither need nor require such efforts.

State regulators should consider a non-disciplinary framework for regulating lawyer advertising in which a lawyer is given notice that a complaint has been made about his or her advertising, including identification of the problem or non-compliance, and an opportunity to remedy the matter or offer an explanation. If the lawyer remedies the problem or provides a sufficient explanation supporting his or her advertising, the matter can be closed. These complaints can be handled on an informal basis without referral of the complaint into the disciplinary system. With rare exceptions, lawyers that are given fair notice of non-compliance will remedy the matter and the file can be closed. If a satisfactory correction and/or explanation of the materials is not received, the complaint should be processed as a standard disciplinary complaint. For five years, the Virginia State Bar has used a non-disciplinary process of this nature for handling lawyer advertising complaints. Formal lawyer advertising complaints received by bar counsel or the intake department of the disciplinary system are referred to Ethics Counsel's office for informal non-disciplinary disposition. Absent extraordinary factors, formal discipline based on RPC violations relating to advertising and marketing materials is limited to situations involving lawyers who continue to violate the RPCs even after being placed on notice of their violations and the need to stop them; situations involving criminal conduct, fraudulent conduct or material and demonstrable harm to identified persons; or situations involving coercion, duress or harassment. Complaints of that nature are processed as standard disciplinary complaints, as the alleged conduct will likely involve the application of Rule 8.4(c). Virginia's model is an example of one that may be refined and adopted by the ABA and state bar associations across the country.

IX. Conclusion

It is long past time for rationality and uniformity to be brought to the regulation of lawyer advertising. The Committee recommends that the ABA Model Rules governing communications about legal services be consolidated into a single disciplinary rule that simply prohibits false or misleading statements. Adopting this approach to advertising regulation, combined with reasonable uniform enforcement policies and protocols by state disciplinary authorities, is in the Committee's view the best way to ensure honest communication by lawyers while at the same time promoting the widest possible access by the public to legal services.

advertising rules, the inconsistencies of the current regulatory scheme, and the practical challenges posed by evolving technologies.

Although *Central Hudson* and its progeny affirm the validity of the state's interest in protecting the public and the trustworthiness of the legal system by regulating deceptive and misleading advertising, the opinions also highlight the constitutional concerns when regulations contain restrictions without adequate evidence of a nexus to harm. Restrictions that are subject to inconsistent and subjective interpretation also raise constitutional concerns.

The Committee's proposed revisions to and deletions from ABA Model Rules of Professional Conduct 7.1, 7.2, 7.4, and 7.5, and their comments, set forth in Attachment 2, reflect a policy determination that the ABA should recommend that states adopt uniform regulatory rules for lawyer communications regarding legal services (outside the context of in-person solicitation) founded upon the constitutional limitation set forth in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), and its progeny prohibiting "false and misleading" communications.

Supreme Court authority has left open the possibility that additional limited restrictions on lawyer communications regarding legal services, including advertising and marketing, may pass muster under the First Amendment. However, empirical data about enforcement of and compliance with the existing patchwork of state lawyer advertising regulations shows that the organized bar can better uphold the integrity of the profession with less restrictive rules. These rules will still promote access to justice: which in the modern age includes the dissemination of accurate information about the availability of professional legal services.

The ABA Model Rules in this area also need to reflect the fact that in an age of web-based and electronic communication, jurisdictional differences in regulatory standards simply are impractical and unworkable. Adopting a regulatory line of refraining from "false and misleading" lawyer communications is consistent with the prohibition in Rule 8.4(c), which prohibits lawyers from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," as well as with consumer protection statutory principles prohibiting unfair and deceptive acts and practices enacted in the vast majority of U.S. jurisdictions, as well as under federal law.

A simple "false or misleading" standard for lawyer communications about legal services best balances the important interests of access to justice, protection of the public and clients, integrity of the legal profession, and the uniform regulation of lawyer conduct.

The legitimate public policy considerations discussed above support removing the general prohibition against "giving anything of value to a person for recommending the lawyer's services" contained in Rule 7.2(b). Legitimate professional responsibility concerns regarding referral fees and the division of fees are adequately dealt with in other rules, including Rule 1.5(e) and Rule 5.4.

Specifically, the Committee proposes that the language in Rule 7.1 be retained, and that Rules 7.2, 7.4, and 7.5, and their comments, be deleted in their entirety.[174] The Committee proposes revising the comments to Rule 7.1 to reflect the language and principles contained in Rules 7.2. 7.4, and 7.5, which provide guidance on the general "false and misleading" standard in Rule 7.1. The incorporation into the comments to Rule 7.1 of

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[174] As discussed above, APRL's committee deferred consideration of the rules on solicitation thus APRL has not addressed nor is it recommending any changes to Rules 7.3 and 7.6.

and uncertainty.[170] For example, each state has different labeling, disclosure, record-keeping and filing requirements, and the rules "vary greatly as to what materials and information need to be retained, and in what form."[171] The lack of predictability on how a particular bar regulator will view a given advertisement is an increasingly difficult problem for lawyers and law firms. This lack of predictability is further compounded by inconsistent and selective enforcement and constantly evolving state bar policy and ethics advisory opinions as a result of new technologies.

VI. The Committee's Survey

In 2014, the Committee sent questionnaires to fifty-one U.S. lawyer regulation offices requesting information regarding the enforcement of advertising rules in their jurisdiction.[172] With the assistance of James Coyle, the Committee's liaison from NOBC, thirty-six of fifty-one jurisdictions responded to the survey. The responses confirm that:

- Complaints about lawyer advertising are rare;
- People who complain about lawyer advertising are predominantly other lawyers and not consumers;
- Most complaints are handled informally, even where there is a provable advertising rule violation;
- Few states engage in active monitoring of lawyer advertisements; and
- Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c).

In response to the question, "Who are the predominant complainants in lawyer advertising charges," 78% responded that it was other lawyers and only 3% responded that is was consumers.

In regard to how often complaints about lawyer advertising are received: 56% responded, "rarely," 17% responded, "almost never," and 8% responded, "frequently."

The majority of the responding jurisdictions reported that complaints about lawyer advertising that involve a potential advertising rule violation are handled informally, such as through a call or letter requesting changes. Where complaints about lawyer advertising involve a provable advertising rule violation, the majority are still handled informally, in some cases with warning letters, diversion, dismissal of formal charges, changes in advertising language, and other dispositions. Only 17% of the jurisdictions responding reported that they actively monitor lawyer advertisements.

In response to the question – "How often do formal advertising complaints alleging false or misleading communications result in disciplinary sanctions, including diversion and probation?" – 50% responded, "rarely," 36% responded, "almost never," and 6% responded, "frequently."

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[170] Backer, *supra* note 10.

[171] J.T. Westermeier, *Ethics and the Internet,* 17 GEO. J. LEGAL ETHICS 267, 282 (2004).

[172] Attachment 3 is the Committee's questionnaire to state regulators.

offices when various states considered amending their advertising regulations that the FTC perceived could restrict consumer access to factually accurate information that might be useful in making an informed decision about hiring a lawyer. For example, the FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may not only reduce competition and violate federal antitrust laws, but also restrict truthful information about legal services.[158]

Restrictions on accurate information about legal service, imposed by competing law firms that function as part of the regulatory governing body, restrain trade and hinders the public's access to useful information.[159]

Not all "state actions" are immune from antitrust laws such as the Sherman Act and FTC Act. If the state action has a significant impact on interstate commerce, it will be subject to Sherman Act scrutiny and will be immune from antitrust compliance only if the action protects a sovereign right. Moreover, when a non-sovereign actor comprised of market participants, such as a unified Bar with quasi-governmental functions, engages in anticompetitive conduct, its actions will be immune from antitrust laws *only if* (1) there is a clearly articulated and affirmative state policy (i.e., the state has to anticipate anticompetitive result as necessary consequence of policy goal); and (2) there is active state supervision of the actor.[160] "Active" state supervision of a non-sovereign actor requires that (a) the state supervisor must actually review the anticompetitive decision (not just the policies and procedures used to come to the decision); (b) the state supervisor must have the ability to veto the decision as inconsistent with state policy goals; and (c) the state supervisor cannot be an active market participant.[161]

Thus, state lawyer regulation offices that impose restraints on truthful lawyer advertising restrain competition, hinder the public's access to useful accurate information about legal services, and may run afoul of antitrust laws.The recent U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. F.T.C.* is illustrative.[162] The Supreme Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anticompetitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that the Board was not actively supervised by a state entity because a controlling number of the Board members who were decision makers were "active market participants" (i.e., dentists) and there was no state entity supervision of the decisions of the non-sovereign board.[163] Many lawyer regulatory entities are carefully monitoring the application of this precedent as the same analysis could be applied to lawyer disciplinary authorities – especially if it appears that the lawyers making decisions on "permissible" lawyer advertising are competitors and there are no clearly articulated objective criteria to determine if the advertising of their competitors violates the Rules of Professional Conduct.

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[158] ABA Center for Professional Responsibility, *FTC Letters Regarding Lawyer Advertising* (2015), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html.

[159] *Id.*

[160] F.T.C. v. Phoebe Putney Health System, Inc., 133 S. Ct. 1003, 1010 (2013) (quoting California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)).

[161] North Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct. 1101, 1116 (2015).

[162] 135 S. Ct. 1101 (2015).

[163] *Id.* at 1117.

these skills or areas of expertise?" Additionally, LinkedIn permits endorsements and recommendations, but does not allow for the addition of disclaimers to statements that many state bars would no doubt consider to be testimonials—another issue that is far from resolved.[146]

There is a lack of empirical research showing a correlation between the proliferation of regulation and consumer harm. For example, the Florida Bar's survey of Floridians' attitude toward the increased regulation of attorney advertising found that while 22% of the respondents felt that advertisements for professional services were misleading, 22% also believed such advertisements were accurate.[147] Moreover, whereas about 25% of the respondents indicated that after seeing attorney advertising on television and the Internet, their view of the Florida court system had changed, more than 50% of the respondents indicated that their view had not changed, and 10% of the respondents even reported that their view had *improved*.[148] Thus, the survey results fail to show a real harm to the public, as is required to restrict commercial speech.[149]

Additionally, the data collected in 1997 by a Task Force convened by the Florida State Bar revealed that consumers wanted *more* "useful" and "factual" information to help them choose an attorney and the supporting survey results explained that large majorities of consumers were interested in attorney "qualifications," "experience," "competence," and "professional record (i.e. wins/losses)." The supporting survey results also showed that negative attitudes about legal system and lawyers consistently declined over the relevant period, despite the increase in quantity and breadth of attorney advertising. For example, "the number of people who strongly agreed that lawyer advertisements 'play more on people's emotions and feelings than on logic and thoughtfulness' was down from 56% to 43%; the number of people who felt that attorney advertisements 'encouraged people with little or no injury to take legal action' was down from 55% to 35%, and those who thought advertisements increased the propensity to engage in frivolous lawsuits was down from 55% to 35%; those who believed that attorney advertisements were at least somewhat truthful and honest increased from 51% to 69%; and those who strongly agreed that attorney advertisements lessened the respect for the fairness and integrity of the legal process was cut nearly in half, from 32% to 17%."[150]

The jurisdictional differences are more likely to inhibit the spread of important legal information and create barriers to competition than to inform or protect consumers. Rampant dissimilarity exists among state rules that seek to regulate potentially misleading communications or specific content such as past results, listing lawyer specialties, including endorsements and testimonials and use of symbols, dramatizations, rankings, slogans, and even background music (sometimes referred to as "attention getting techniques"). For example, Arkansas, Nevada, Pennsylvania, South Carolina and Wyoming have prohibitions against the use of testimonials and endorsements.[151] Other states allow the use of testimonials and endorsements with appropriate

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[146] *See, e.g.*, *Ethical Obligations for Attorneys Using Social Media*, *supra* note 143.

[147] Jacobowitz & Hethcoat, *supra* note 34, at 77.

[148] *Id.* (emphasis added).

[149] *Id.*

[150] Rubenstein v. Fla. Bar, No. 14-CIV-20786, 2014 WL 6979574, at *26, n. 6 (S.D. Fla. Dec. 14, 2014) (discussing The Florida Bar Joint Presidential Advertising Task Force, *Final Report & Recommendations* (May 1997)).

[151] Am. Bar Ass'n, *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, at 9 (May 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rules_differences_update.authcheckdam.pdf.

declaratory relief, civil penalties, attorney's fees and discipline for violations.[130] Other California statutes and rules provide additional regulation of lawyer advertising.[131]

As in California,[132] the trend in many states has been toward greater micromanagement of on-line advertising to ensure technical compliance with traditional rules. For instance, Model Rule 7.2(c)'s requirement that all advertising contain an "office address" causes more confusion than clarity when lawyers practice through "virtual" offices that do not have a "bricks and mortar" location. By requiring a physical office address, regulations may inadvertently cause more confusion to consumers who then travel to that physical address only to find a post office box or executive suite where the advertising lawyer receives his/her mail.

Another example of over-regulation is the Florida Bar's adoption of new attorney advertising rules in May 2013 that specifically apply to *all* forms of communication in any print or electronic forum.[133] Whereas lawyer websites, blogs, and social media sites such as LinkedIn, Facebook, and Twitter were previously exempt from the rules as "information provided upon request,"[134] social media advertising is now subject to the advertising regulations.[135] The Florida Supreme Court issued an opinion approving the revised rules, but the dissenting opinions questioned whether applying the rules to websites was an "improvement" to the regulatory scheme. Justice Pariente rejected what she categorized as a "one-size-fits-all approach," and explained, "I would exempt websites and information upon request from advertising restrictions, and I question whether the entire revamped approach to regulating traditional forms of advertising is a beneficial change."[136] Similarly, Justice Canady expressed that he found the new rules "unduly restrictive" and explained, "I am particularly concerned about the impact of the application of the advertising rules to lawyer websites."[137] Nonetheless, the Florida Bar embraced and continues to embrace the application of the rules to a panoply of communication mediums and specifically requires disclaimers and disclosures in all advertisements where testimonials and past results are used.

In addition to increased regulation, some states issued ethics opinions that apply existing rules to social media, attorney blogs, and other Internet communications.[138] While these opinions may be technically correct, they often pose impractical obligations on lawyers and can deter lawyers from making communications that are not fraudulent or deceptive.

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[130] CAL. BUS. & PROFESSIONS CODE §§6157-6159.2.

[131] *See, e.g.*, CAL. INS. CODE §1871.7 (unlawful solicitation of business), CAL. LABOR CODE §§139.45, 5430-5434 (advertisements with respect to workers' compensation, CAL. PENAL CODE §549 (penalties for certain solicitations and referrals).

[132] *See* Cal. State Bar Formal Interim Op. 12-0006 (discussing the circumstances under which "blogging" is regulated under the attorney advertising rules).

[133] R. REGULATING FLA. BAR 4-7.11(a). This includes but is not limited to "newspapers, magazines, brochures, flyers, television, radio, direct mail, *electronic mail and Internet, including banners, pop-ups, websites, social networking, and video sharing media. Id.* (emphasis added).

[134] *In re Amendments to the Rules Regulating the Fla. Bar – Subchapter 4-7, Lawyer Adver. Rules*, 108 So. 3d 609, 612-13 (2013) (Pariente, J., dissenting). *See also* Hudson, *supra* note 126; *You Cannot Be Serious*, *supra* note 126.

[135] *See, e.g.*, *In re Amendments*, 108 So. 3d at 611, 616 (Appendix).

[136] *Id.* at 612 (Pariente, J., dissenting).

[137] *Id.* at 616 (Canady, J., dissenting).

[138] *See, e.g.*, Cal. State Bar Formal Op. 2012-186 (2012) (characterizing various innocuous Facebook communications as commercial speech subject to California's advertising rules); N.Y. Cnty. Bar Ass'n Formal Op. 748 (2015) (warning lawyers that certain features of LinkedIn present risks of ethics violations); N.C. Formal Op. 2013-10 (2013) (contrasting group lawyer ads and lawyer referral services).

Additionally, in response to innovation and increased competition, lawyers and law firms are engaging in much more sophisticated forms of marketing and advertising, including "advertorials," cooperative lawyer ads, retargeting, search engine optimization, online referral and lead-sharing sites, and "pay-per-click" or "pay-per-deal" arrangements.[121] For example, Google's AdWords (one of Google's advertising services) gives lawyers an opportunity to capitalize on Google's vast market. The Google AdWords process is a highly efficient marketing device where lawyers may choose keywords in creating text advertisements. When an Internet user types these keywords into Google's search engine, the lawyer's advertisement appears in a list of "sponsored links" on the results page.[122]

Lawyers are also increasingly involved, either voluntarily or involuntarily, in online lawyer rating services, such as Avvo.com, Yelp, "Super Lawyers," and "Best Lawyers." These online companies post ratings and reviews of lawyers and offer consumers help in finding lawyers. Avvo.com, for example, posts ratings and reviews for lawyers in every state and offers a free legal Q&A service for finding the right lawyer. Justia.com offers free case law, legal resources, and a "Find a Lawyer" feature. Premium services provide websites, blogging, and on-line marketing to law firms. LegalMatch.com helps users find prescreened lawyers, and offers attorneys leads that match their legal specialty. Pro-se-litigation.com connects self-represented litigants with lawyers who offer unbundled legal services. Upcounsel.com helps businesses connect with lawyers to an on-line bidding service where users post requests for specific work and attorneys respond with quotes for fixed fees or hourly rates.

There is also a growing number of social networking websites for lawyers, including Avvo, JD Oasis, Legal OnRamp, WireLawyer, and Foxwordy. Social networking sites for lawyers typically include discussion boards, private messaging, profiles, connections, document libraries, and ratings. Even further, large law firms frequently use marketers, public relations personnel, and sales forces to develop leads and pursue business opportunities.

V. Other Deficiencies in Current Regulations Warranting Change

In addition to the foregoing, there are other difficulties with the current approach to regulating lawyer advertising that further demonstrate the need for change.

A. Many Current Rules are Outdated

State rules on lawyer advertising are largely based on print and other forms of traditional advertising such as announcements, business cards, mailers, newsletters, yellow pages, billboards, television and radio ads, newspaper advertisements, and listings in Martindale Hubbell or other print directories. Lawyer advertising

[121] The ABA Commission on Ethics 20/20 studied the issue of the use of the Internet in client development in a paper entitled "Issues Paper Concerning Lawyer's Use of Internet Based Client Development Tools" in September 2010. For more information see http://www.americanbar.org/content/dam/aba/migrated/2011_buildethics_2020/clientdevelopment_issuespaper.authcheckdam. LinkedIn is a social media network that is fast becoming an indispensible tool used by legal professionals and those with whom they communicate. As a social networking website, LinkedIn allows people in professional occupations of all kinds to list their work experience and educational background and share that information, or in other words, "connect" with other professionals, in an effort to obtain employment. LinkedIn currently has approximately 300 million users, with a geographical reach of 200 countries and territories, and it continues to grow. A blog is an Internet-based forum that offers opinions or information, sometimes on a particular issue, and is usually freely accessible by anyone with an operating Internet connection. Many lawyers and law firms have taken to blogging to showcase their knowledge, explore legal issues, and voice their perspectives on specific areas of law.

[122] Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835, 838 (2007).

language—would not have been sufficient."[116] Thus, Rubenstein succeeded on the merits of its First Amendment challenge.

The clear direction in which the United States Supreme Court has taken the regulation of commercial speech emphasizes that government must prove that the regulation it is defending does in fact advance an important regulatory interest, refusing to accept mere "common sense" or speculation as a sufficient basis for restrictions on advertising.[117] In other words, the government must present objective evidence to support a ban or restriction on truthful commercial speech and cannot simply ban or restrict speech by fiat grounded in subjective intuition that the advertising is "potentially misleading." For example, in *Florida Bar v. Went For It, Inc.*,[118] the Court went out of its way to compare the empirical evidence presented to support a thirty-day ban on targeted direct mail solicitation of accident victims to the lack of similar data in *Edenfield v. Fane*,[119] in which the Court invalidated a Florida ban on in person solicitation by certified public accountants.

In sum, there is no shortage of cases in which lawyer advertising regulations has failed the *Central Hudson* test, leading the Committee to conclude that attorney advertising regulations are, in many cases, unconstitutional and unsustainable.

IV. The Diverse Forms of Electronic Communication &The Explosion of Social Media

According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet:

- 52% of online adults now use two or more social media sites;
- 71% are on Facebook;
- 70% engage in daily use;
- 56% of all online adults 65 and older use Facebook;
- 23% use Twitter;
- 26% use Instagram;
- 49% engage in daily use;

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[116] *Id.* at *30.

[117] *See, e.g.*, *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 503 (1996) ("Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."); *Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 147 (1994) (striking down requirement of a disclaimer because the state failed "to back up its alleged concern that the [speech] would mislead rather than inform."); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (rejecting state's asserted harm because the state had presented no studies nor even anecdotal evidence to support its position); *Peel v Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) (rejecting a claim that lawyer's truthful claim of specialization certification was potentially misleading for lack of empirical evidence); and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985) (striking down restrictions on attorney advertising where "[t]he State's arguments amount to little more than unsupported assertions.").

[118] 515 U.S. 618 (1994).

[119] 507 U.S. 761 (1993).