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BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES HOUSE OF REPRESENTATIVES

**June 23, 2017**

**Hearing on Examining Ethical Responsibilities Regarding Attorney Advertising**

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

Thank you very much for inviting me to discuss with you my views on lawyers' ethical duties when advertising the availability of their legal services. I will be speaking in my individual capacity today and not as an official representative of any organizations.

I am honored to provide you with my perspective on how the current system of state advertising regulation protects consumers from "false and misleading" lawyer advertising, and provides consumers with accurate information about their legal rights, and the availability of legal services. For the past 24 years I have practiced law exclusively as an ethics lawyer, advising over 1500 law firms on professional responsibility matters, including advertising. I am the immediate past president of the Association of Professional Responsibility Lawyers ("APRL"), which is a national organization of lawyers, judges, professors, and in-house counsel who advise other lawyers on legal ethics matters. APRL recently made recommendations to the American Bar Association ("ABA") to update the ABA Model Rules of Professional Conduct on lawyer advertising.<sup>1</sup>

I appreciate the Committee's consideration of the concerns raised by the American Medical Association and Chairman Goodlatte in your March 7, 2017 letter to the American Bar Association and state lawyer regulatory offices, about apparent incidents of patients discontinuing prescription medications after viewing lawyer advertisements that disclose risks associated with those medications. My remarks will provide the Committee with information about: 1) how states currently regulate lawyer advertising; 2) what are the Constitutional limits on regulating commercial speech of lawyers; and 3) why additional regulation – by states or others – is not necessary.

In brief, further regulation of lawyer advertising will not prevent misunderstanding by a few members of the public about advertisements that are neither false nor misleading. I agree with many of those who responded to Chairman Goodlatte's letter who confirmed that the existing rules regulating lawyer advertising are sufficient to protect the public from false and misleading claims.

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<sup>1</sup> Attached are the 2015 and 2016 Advertising Reports of APRL. The Reports include the survey information compiled from 34 U.S. jurisdictions regarding who files bar grievances about lawyer advertising, the advertising standards bar regulators actually enforce, and the fact that consumers of legal services – the public – rarely if ever complain about being confused by lawyer advertisements.

In all of my years advising law firms about their ethical obligations in advertising, including ten years as the State Bar of Arizona Director of Lawyer Ethics, I have never once heard of a consumer complaining to a state lawyer regulation office that they were misled by a lawyer advertisement about a pharmaceutical.

### **State Regulation of Lawyer Advertising**

All U.S. jurisdictions have rules of professional conduct (“Rules”) that regulate lawyers’ ethical conduct, including lawyer advertising. Every jurisdiction has a Rule that prohibits lawyer advertising that is “false or misleading.” The vast majority of U.S. jurisdictions model their lawyer advertising Rules on the ABA’s Model Rules of Professional Conduct.

When a state lawyer regulation office receives a complaint about a lawyer advertisement, the regulators review the advertising to determine if the communication is “false or misleading.” If the advertisement is found to violate the Rule, that lawyer could be subject to disciplinary sanctions in that state.

In 2015 APRL surveyed all state lawyer regulation agencies, regarding lawyer advertising complaints. The vast majority of the 34 responding jurisdictions confirmed that virtually all of the complaints they received about lawyer advertising *were from other lawyers, not consumers*. This observation by regulators is contrary to the fact that consumers are *not* hesitant to complain about perceived lawyer misconduct, as data from the ABA Survey on Lawyer Discipline Systems evidences.<sup>2</sup>

### **First Amendment Protection for Certain Commercial Speech**

Next week will mark the 40<sup>th</sup> anniversary of the United States Supreme Court decision *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) in which the Court held that lawyer advertising is commercial speech, protected by the First Amendment. Indeed the Court confirmed that lawyer advertising benefits consumers by providing information about the availability of legal services. The Court noted that factually accurate advertising could make legal services more accessible to the general public and improve the overall administration of justice. The Court rejected the “highly paternalistic” approach that the state must protect citizens from advertising because the advertising potentially could manipulate them, and concluded that barring lawyer advertising only “serves to inhibit the free flow of commercial information and to keep the public in ignorance.” *Id. at 365*.

The Supreme Court further explained in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) that government restraints on commercial speech (which includes lawyer advertising) should be narrowly tailored to advance a substantial government interest.

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<sup>2</sup>[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2015\\_sold\\_chart1a.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2015_sold_chart1a.authcheckdam.pdf)

Additionally, the Federal Trade Commission (“FTC”) noted in several letters to state bars, “The FTC believes that while false and misleading advertising by lawyers should be prohibited, imposing overly broad restrictions that prevent the communication of truthful and non-misleading information that some consumers value is likely to inhibit competition and frustrate informed consumer choice.”<sup>3</sup> Overly broad constraints on commercial speech can be anti-competitive and may even have the effect of raising fees charged to consumers by reducing information about which lawyers are available to provide similar legal services.

### **More Regulation of Lawyer Advertising Is Not Necessary**

Requiring additional disclaimers in lawyer advertising will not address the Chairman’s concerns about apparent instances of patients ceasing to take their medications without consulting with their physicians. Imposing more government regulations on factually accurate lawyer advertising is not needed to “protect” the public, and may have the unintended effect of reducing competition and increasing legal fees to consumers. It would seem incumbent upon medical professionals to advise their patients *not* to stop their medications without consulting them first.

The current regulations on lawyer advertising prohibit “false and misleading” communications and provide sufficient protection for consumers, without unreasonably restricting the dissemination of factually accurate information to the public. If doctors, consumers, or others are concerned about a specific lawyer advertisement, they should report that advertisement to the appropriate state lawyer regulation office for review and investigation, including the lawyer advertising that purportedly caused the incidents referenced in Chairman Goodlatte’s March 7, 2017 letter.

Thank you for inviting me to present this information to the Subcommittee. I look forward to your questions.

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<sup>3</sup> See Federal Trade Commission March 23, 2007 Letter to Florida Bar Association at p. 2 (<https://www.ftc.gov/policy/policy-actions/advocacy-filings/2007/03/ftc-staff-comment-florida-bar-concerning-proposed> )