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Michael Colodner, Esq.
Counsel
Office of Court Administration
25 Beaver Street
New York, New York 10004

Re: Proposed Amendments to Rules
Governing Lawyer Advertising

Dear Mr. Colodner,

As a Manhattan-based lawyer who is also a very active writer and publisher on the topic of the economics of law firms, I am writing to protest the proposed amendments to those provisions of the Disciplinary Rules of the Code of Professional Responsibility governing advertising and solicitation of business by attorneys.

The proposed amendments:

- Instead of protecting buyers of legal services, would serve no purpose other than depriving consumers of useful information—importantly, including truthful, non-misleading communication by attorneys;
- Will protect established law firms from competition by newer, potentially more innovative and cost-effective, rivals in the market; and
- Will effectively render the most important aspects of the Internet unusable for New York attorneys.

My Background & Interest In This Issue

I am the founder and publisher of the widely read online journal "Adam Smith, Esq." (www.AdamSmithEsq.com), focused on the economics, finances, and management of large, sophisticated law firms. The site averages 250,000 page-views per month. I have published, on average since inception of the site nearly three years ago, 22 new articles each month, typically 500–1,000 words apiece. I also write and distribute a monthly e-newsletter with a subscriber base approaching 2,000 individuals.

As noted, I'm a lawyer, admitted to practice in New York and Pennsylvania. I have worked for two large New York law firms as well as in-house at Morgan Stanley/Dean Witter; I was educated at Princeton University (BA *magna cum laude* in economics), at Stanford Law School (JD), and at New York University's Stern School of Business (MBA candidate).

The Difficulties with the Proposed Amendments, Summarized

I cannot emphasize too strongly that the proposed amendments:

- (a) are vastly overbroad;
- (b) would undermine, rather than promote, their ostensible purposes;
- (c) would put New York attorneys at a profound, yet irrational, competitive disadvantage as contrasted with attorneys in any other jurisdiction;
- (d) rest upon a fundamental mis-reading of applicable law as enunciated by the United States Supreme Court, and as such will be subject to immediate, and I would predict successful, challenge if enacted;
- (e) presume that buyers of legal services are best protected by being kept in ignorance; and
- (f) not least, would impose draconian record-keeping and filing requirements sufficient to deprive New York attorneys of any meaningful use of the Internet to communicate.

Their Scope and Burdensomeness

As one respected commentator has aptly summarized the proposed requirements:¹

“Stripped to their essence, the proposed amendments would define the term “advertisement” extremely broadly as any public communication made “by . . . a lawyer . . . about a lawyer.” [Sec. 1200.1\(k\)](#). This definition explicitly includes all forms of communication on the Internet, including websites, email, and instant messaging. [Sec. 1200.1\(m\)](#). There is no requirement that the speech be commercial in nature or related to the lawyer’s practice of law.

“Because this blog contains information about its contributing attorneys, it would fall squarely within the proposed rule’s definition of advertising. If this blog were located in New York, contributing attorneys would therefore be required by the proposed rules to print a hard copy of the blog every time it is modified. [Sec. 1200.6\(n\)](#). They would then have to store the printout for a period of at least a year, and send an additional copy to the New York attorney disciplinary committee for its records. [Sec. 1200.6\(n\) & \(o\)\(iii\)](#). The rules would also require the blog to be branded with the words “Attorney Advertising” and include the names, office addresses, telephone numbers, and lists of licensing jurisdictions of participating attorneys. [Sec. 1200.6\(h\), \(j\) & \(k\)](#). Because the blog does not contain the full name of a lawyer or law firm in its URL, the page would need to list the names of participating attorneys in a font at least as large as the largest font on the page (in this case, the names would need to be in at least a 60-point font to match the large banner title). [Sec. 1200.7\(e\)\(1\)](#). Furthermore, although it surely could not have been intended to reach this broadly, the rule appears to subject any *links* from a website to these onerous restrictions. [Sec. 1200.1\(m\)](#).

¹ Public Citizen’s “Consumer Law & Policy Blog,” Sept. 14, 2006, *This [Site] Is False and Misleading (in New York)*, available at http://pubcit.typepad.com/clpblog/2006/09/this_blog_is_fa.html

“The same rules would also apply to email sent by lawyers to public listservs, and even to private email if it “concern[s] the availability for professional employment of a lawyer or law firm.” [Sec. 1200.1\(l\)](#). Unlike web pages, however, email would have to be saved for a period of *three* years. [Sec. 1200.6\(n\)](#).”

To understand how patently unworkable these recordkeeping and filing requirements are, merely consider a typical week in the life of “Adam Smith, Esq.”: I might publish somewhere between three and five new articles (I usually publish first thing in the morning), and then amend them in minor ways throughout the course of the day in response to reader comments, observations, or corrections. Presumably each publication and amendment would require two separate printouts, one for storage as well as one to be mailed and filed with the New York attorney disciplinary committee. Additionally, since my site permits “comments” (akin to letters-to-the-editor) from readers, each such submission would presumably trigger an additional storage/filing event.

Not only would this onerous paperwork severely cut into time available for truly productive activity, it is frankly inconceivable that it could have the remotest benefit for anyone concerned.

Their Profound Misconception of The Value of Truthful Communication

The drafters of the proposed amendments are wholly out of touch with both the jurisprudence surrounding the value of truthful communication in a free, and free-market, society, as well as with the revolution in communication and distribution brought about by 21st Century developments in online media. Indeed, it would not be far wrong to describe the drafters’ attitude to speech as reflecting an 18th-Century (and pre-Bill of Rights, at that) mentality.

In *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), the Supreme Court heard a challenge under the First and Fourteenth Amendments to the validity of a Virginia statute declaring it unprofessional for a licensed pharmacist to advertise the prices of prescription drugs. The Court held (425 U.S. 772):

“What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.”

Instructive is the Court’s framework of analysis leading it to that conclusion. First, the Court recognized that commercial speech is entitled to First Amendment protection (425 U.S. 765):

“As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate. [...]

“Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely “commercial,” may be of general public interest.”

Nevertheless, the Court recognized the State’s countervailing interest in maintaining professionalism (425 U.S. 766):

“Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high

degree of professionalism on the part of licensed pharmacists. Indisputably, the State has a strong interest in maintaining that professionalism.”

The fatal problem with the State’s regulatory scheme, however, was the way it went about attempting to safeguard professionalism, and it’s worth exploring the Court’s reasoning in some detail in order to expose the uncanny similarities between the restrictions invalidated in *Virginia Pharmacy* and those under consideration today (425 U.S. 769, 770):

“[O]n close inspection it is seen that the State’s protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event. The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service. The more painstaking pharmacist is also protected but, again, it is a protection based in large part on public ignorance. [...]

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

The Role of Lawyer Communications

Websites, blogs, and other online publications written by lawyers and law firms—including my own site—are becoming the most dynamic, fertile, and valuable resource for fellow practitioners and the lay public alike to learn about legal subjects important to them. In my own case, I know from personal experience that more than one Managing Partner of an AmLaw 100 firm has told me he considers my site “more valuable than *The American Lawyer*” since publishing online—and a couple of dozen times a month—enables me to address issues in a timely fashion impractical in print media.

Furthermore, such online publications by lawyers, law professors, and other commentators on the profession are viewed as an increasingly authoritative source of scholarship and advancement of legal learning—a “first draft of the law review article,” as one astute observer put it. Indeed, as of August, 2006, legal blogs had been formally cited in decided, published cases 32 times², by courts including The United States Supreme Court, and the 2nd, 9th, 10th, and 11th Circuit Courts of Appeal.

Finally, with respect to “commercial” overtones of online lawyer communications, I respectfully submit that it is *precisely the timely, informed discussion of topical legal issues* that enables buyers of legal services to make a truly informed evaluation of the relative abilities and expertise of competing attorneys. Simple claims to the effect that a lawyer or a law firm provide high-quality service, or offer fair prices, or obtain favorable results, lack credibility, and consumers discount these naked assertions.

² “Cases Citing Legal Blogs—Updated List,” August 6, 2006, available at: http://3lepiphany.typepad.com/3lepiphany/2006/08/cases_citing_le.html

By contrast, ongoing dialogues about legal issues (say, Sarbanes-Oxley in the corporate arena, or stock options backdating), which exhibit sophisticated expertise, is persuasive and valuable. The proposed regulations' impact in suppressing these public fora for discussion and increased understanding of the state of the art in legal practice today would represent an incalculable loss to society, and deprive it of the pre-eminent source of legitimately earned and honestly come by respect for the bar.

I respectfully submit the proposed amendments be withdrawn, permanently and in their entirety.

Sincerely,

Bruce MacEwen