IN THE MATTER OF

DIVE N' SURF, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3356. Complaint, Dec. 23, 1991—Decision, Dec. 23, 1991

This consent order requires, among other things, the California-based company, d/b/a Body Glove International, to label or otherwise identify the constituent fiber content, percentages of fiber content, manufacturer's name, and country of origin for their textile fiber products, as required by the Textile Fiber Products Identification Act. In addition, the order requires the respondent to distribute a copy of the order to each of its operating divisions.

Appearances

For the Commission: *Sylvia J. Kundig* and *Jeffrey A. Klurfeld.*

For the respondent: *Steven B. Lehat, Sheldon & Mak,* Pasadena, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Dive N' Surf, Inc., a corporation, also trading and doing business as Body Glove International ("respondent"), has violated the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Dive N' Surf, Inc., is a corporation organized, existing and doing business under the laws of the State of California. Its office and principal place of business is 530 6th Street, Hermosa Beach, California.

PAR. 2. Respondent is an importer, manufacturer, and wholesaler of textile fiber products, including, but not limited to, wearing apparel constructed of neoprene ("neoprene-type garments"), such as wet-suits, that consist of a rubber substance enclosed between two layers of a knit fabric.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The neoprene-type garments constitute Textile Fiber Products, as that term is defined by the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.*, and the Rules and Regulations promulgated thereunder, 16 CFR 303.

PAR. 5. The neoprene-type garments were misbranded by respondent in that they were not stamped, tagged, labeled, or otherwise identified as required by Section 4(b) of the Textile Fiber Products Identification Act, 15 U.S.C. 70b, and in the manner and form prescribed by the Rules and Regulations promulgated under that Act, 16 CFR part 303.

PAR. 6. Under Section 3(f) of the Textile Fiber Products Identification Act, 15 U.S.C. 70(a), a violation of that Act and the Rules and Regulations promulgated thereunder, is an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 7. The acts or practices of respondent, as alleged in this complaint, were and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder. These acts and practices constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45.

Commissioner Yao not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of

said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Dive N' Surf, Inc., is a corporation organized, existing and doing business under the laws of the State of California. Its office and principal place of business is 530 6th Street, Hermosa Beach, California.

2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Dive N' Surf, Inc., a corporation, trading and doing business under that name or as Body Glove International or by any other name, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale or sale of any textile fiber product, as that term is defined by the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.*, do forthwith cease and desist from:

Offering for sale or selling any such textile fiber product without the product being stamped, tagged, labeled, or otherwise identified as required by Section 4(b) of the

Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under that Act.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect the compliance obligations that arise out of this order.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent shall, within sixty (60) days after service on it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Yao not participating.

IN THE MATTER OF

REPRODUCTIVE GENETICS IN VITRO, P.C., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3357. Complaint, Dec. 23, 1991—Decision, Dec. 23, 1991

This consent order prohibits, among other things, a provider of infertility services and its president from making false and unsubstantiated claims regarding the success of their in vitro fertilization program.

Appearances

For the Commission: *Walter Gross* and *Michael A. Katz.*

For the respondents: *Kevin Kuhn, Montgomery, Little, Young, Campbell & McGrew,* Englewood, CO.

COMPLAINT

The Federal Trade Commission, having reason to believe that Reproductive Genetics In Vitro, P.C., a corporation, and George P. Henry, president, director and sole stockholder of Reproductive Genetics In Vitro, P.C., hereinafter collectively referred to as respondents, have violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(a), and that an action by it is in the public interest, issues this complaint and alleges that:

PARAGRAPH 1. Respondent Reproductive Genetics In Vitro, P.C. is a Colorado corporation with its principal office and place of business located at 455 South Hudson Street, Denver, Colorado.

PAR. 2. Respondent George P. Henry, M.D., is the president, director and sole stockholder of Reproductive Genetics In Vitro, P.C. Dr. Henry's place of business is also located at 455 South Hudson Street, Denver, Colorado.

PAR. 3. Respondents are, and have been, engaged in offering and providing services for the treatment of infertility through in vitro fertilization ("IVF").

PAR. 4. Respondents have created and disseminated promotional materials, including, but not limited to, the promotional materials

referred to herein, promoting the services provided in treating infertility and in particular, the IVF program.

PAR. 5. The acts and practices of respondents alleged in this complaint are, and have been, in or affecting commerce, as "commerce" is defined in the FTC Act.

PAR. 6. In the course and conduct of their business, respondents have created and disseminated a promotional brochure entitled "IN VITRO FERTILIZATION AND EMBRYO TRANSFER" which has been distributed through the mail and across state lines to prospective infertility patients, for the purpose of inducing, and which was likely to induce, directly or indirectly, the purchase of respondents' infertility services. (Attachment A) The brochure contains the following statements:

1. "At Reproductive Genetics In Vitro, the success rate (in establishing a pregnancy) of the IVF procedure is 25% per attempt since the inception of the program."

2. "The reported worldwide experience suggests a less than 10% chance of success (in establishing a pregnancy) with no increased risks of abnormalities."

PAR. 7. Through the use of the statement and representation referred to in paragraph six (1), respondents have represented, directly or by implication, that women who participate in a single attempt at conception in their IVF treatment program have a 25 percent chance of establishing a pregnancy.

PAR. 8. In truth and in fact, the likelihood that women who participate in a single attempt at conception in respondents' IVF treatment program will achieve pregnancy is considerably less than 25 percent. Therefore, respondents' representation as set forth in paragraph six (1) was and is false and misleading.

PAR. 9. Through the use of the statement referred to in paragraph six (1), respondents have represented, directly or by implication, that at the time they made such a representation they possessed and relied upon a reasonable basis for such a representation.

PAR. 10. In truth and in fact, at the time respondents made the representation referred to in paragraph nine, respondents did not possess and rely upon a reasonable basis for such representation. Therefore, respondents' representation as set forth in paragraph nine was and is false and misleading.

PAR. 11. Through the use of the statements referred to in paragraph six, respondents have represented, directly or by implica-

tion, that it had a success rate that was about two and one-half times greater than the worldwide average and that at the time it made such a representation it possessed and relied upon a reasonable basis for such a representation.

PAR. 12. In truth and in fact, at the time respondents made the representation referred to in paragraph eleven, respondents did not possess and rely upon a reasonable basis for such a representation. Therefore, respondents' representation as set forth in paragraph eleven was and is false and misleading.

PAR. 13. Through the use of the statement referred to in paragraph six (1), respondents have represented, directly or by implication, that they have a specified "success rate" in achieving pregnancies without disclosing that it has excluded from that statistic patients who had begun respondents' IVF treatment program, but who were unable to complete the program and achieve pregnancies because they could not achieve an embryo transfer.

PAR. 14. Respondents' exclusion from the calculation of their success rates of patients whose treatment programs were unsuccessful because they could not achieve an embryo transfer is a material fact to consumers considering treatment for infertility.

PAR. 15. Respondents failure to disclose, in the representations set forth in paragraph thirteen, that they have excluded from their success statistics patients who had begun respondents' treatment programs, but who were unable to complete those programs because they could not achieve an embryo transfer, renders respondents' representation of success deceptive because it is likely to mislead potential purchasers of respondents' services into believing that the chances of becoming pregnant are greater than they actually are.

PAR. 16. The acts and practices of respondents alleged in this complaint constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a) of the FTC Act.

ATTACHMENT A

IN VITRO FERTILIZATION AND EMBRYO TRANSFER

AS A TREATMENT FOR INFERTILITY

The IVF Team

George Henry, M.D. graduated from the University of Michigan Medical School, and was board certified in Obstetrics and Gynecology after residency at the University of Colorado. He completed a 2 year fellowship in Human Genetics at the University of Colorado Health Science Center. In December, 1981, Dr. Henry was certified in Clinical Genetics and Clinical Cytogenetics (Chromosomes). He is the first physician in the Rocky Mountain Region board certified in both Obstetrics Gynecology and Genetics, and the only person in the Region certified in Cytogenetics.

Jonathan Van Blerkom, Ph.D., has been actively involved since 1970 in research concerning molecular and cellular aspects of mammalian reproduction and early embryonic development including the areas of spermatogenesis, oogenesis, ovulation, pre- and post-implantation embryogenesis. Dr. Van Blerkom received a Ph.D. in Molecular, Cellular and Developmental Biology from the University of Colorado in 1974, is a Professor in the Department of Molecular, Cellular and Developmental Biology at C.U. Boulder, and has authored or coauthored over 80 scientific articles and 3 books. Dr. Van Blerkom's research experience emcompasses all aspects of preovulatory oocyte development, fertilization and early postfertilization embryogenesis.

Richard Porreco, M.D. graduated from the University of Colorado School of Medicine where he also completed his residency in Obstetrics and Gynecology. He completed a Fellowship in Maternal-Fetal Medicine and Genetics at the University of California, San Diego. He is Board Certified in Maternal-Fetal Medicine and Clinical Genetics. In addition to his association with Reproductive Genetics, In Vitro, he is Director of Perinatal Services in the St. Luke's/Denver Children's Hospital Perinatal Program.

A SERVICE OF

REPRODUCTIVE GENETICS *IN VITRO*, P.C.

Level Three
455 South Hudson Street
Denver Colorado 80222
(303) 399-1464

Nanette L. Doyle, R.N. graduated from Purdue University, West Lafayette, IN, in 1981 with a Bachelor of Science in Nursing. After graduation she worked the postpartum, post-surgical unit, which included the newborn nursery, for two years at the Lafayette Home Hospital. Nanette then relocated to Denver and was employed by Denver General Hospital in the high risk labor and delivery department. She has been the Nurse Coordinator at Reproductive Genetics Center since June of 1985.

Susan Strobel Maly, R.N. graduated from Emory University School of Nursing in Atlanta, GA in 1978 with a Bachelor's of Science degree. After graduation, she was a staff nurse in medical-surgical nursing at Jackson Memorial Hospital in Miami, Florida for two years. Upon arriving in Denver in 1980, she was a high risk Labor and Delivery nurse for 4 years at Denver General Hospital. She also spent two years in both the high risk and well baby nurseries at DGH. Since November 1986, she has been the Assistant Nurse Coordinator at Reproductive Genetics Center.

Who Is An Appropriate Candidate for IVF?

While this technique is of great potential benefit to infertile couples it should only be considered after extensive infertility evaluation has already been accomplished. For most infertile couples other established treatment options will be more economical and more effective.

The most ideal candidates for IVF are women who have blocked or absent fallopian tubes or other complications that cannot be surgically corrected. Women with endometriosis, a common abnormality in which uterine tissue grows around the fallopian tubes and ovaries, are also good candidates.

In men, compromised semen quality may indicate IVF as a possible solution to an infertility problem.

In some cases, the reason for a couple's infertility is unknown, so IVF may be an appropriate treatment.

Other conditions may be considered appropriate after careful review of medical records.

The IVF Procedure

In vitro fertilization presently involves:

1. Administration of fertility drugs to stimulate maturation of egg cells.
2. Monitoring the growth of the follicles in the ovary by daily measurement of hormone levels in the woman's bloodstream and daily examination of the ovaries by ultrasound imaging.
3. Administration of a medication to complete the maturation of the eggs and allow the timing of surgery prior to ovulation.
4. Ultrasound guided ovum retrieval to withdraw the maturing eggs from the ovary.
5. Transfer of the eggs to the laboratory for microscopic examination to assess maturation.
6. Addition of prepared semen cells to allow fertilization to occur in the laboratory (in vitro historically has meant "in glass").
7. Transfer of the fertilized eggs to the uterus via a small tube inserted through the cervix.

Success Rates for IVF

The service requires the combined efforts of a team with expertise in Obstetrics and Gynecology, Reproductive Biology, Embryology, and Genetics with a goal of establishing a pregnancy which can proceed in the usual fashion once the infertility has been overcome. The reported worldwide experience suggests a less than 10% chance of success with no increased risk of abnormalities.

At Reproductive Genetics In Vitro, the success rate of the IVF procedure is 25% per attempt since the inception of the program in September of 1982 as one of the earliest programs in this country.

Referral to an IVF Program

Referrals do not have to be made by physicians. Any couple who has been identified as an appropriate IVF candidate is welcome into the program. You may call (303) 399-1464 for more detailed information.

After a review of records to be certain a couple has the potential to benefit from the technique, a counseling session is necessary to review all of the steps in the program including goals, benefits, risks and limitations.

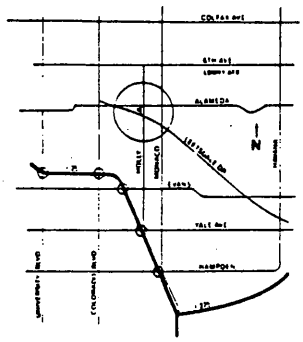
Cost

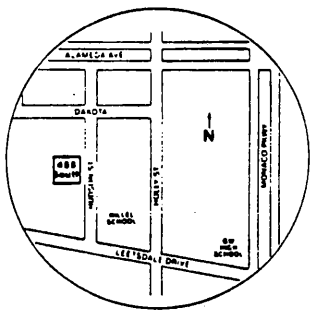
The cost of the program may be prohibitive for many couples at this time. We anticipate the sequence of steps necessary to attempt in vitro fertilization-embryo transfer will cost $4,500.00 and the entire amount is due prior to attempting the procedures. This does not include the initial (one time only) in vitro counseling fee of $100.00. This also does not include transportation or lodging costs for couples outside the Denver area.

REPRODUCTIVE GENETICS *IN VITRO, P.C.*

Level Three
455 South Hudson Street
Denver, Colorado 80222
(303) 399-1464

WE ARE LOCATED AT
Level Three, 455 South Hudson Street
Denver, Colorado / (303) 399-1464





DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsels for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such an agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Reproductive Genetics In Vitro, P.C. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 455 South Hudson Street, Denver, Colorado.

Respondent George P. Henry, M.D. is the president of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondents Reproductive Genetics In Vitro, P.C., and George P. Henry, M.D., individually, and respondent Reproductive Genetics In Vitro, P.C.'s officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, sale or offering for sale of services relating to the treatment of infertility through in vitro fertilization do forthwith cease and desist from representing, directly or by implication:

A. That the success rate in achieving pregnancies for their patients is higher than or compares favorably with the success rates of other providers of these services, unless at the time of making such representations, respondents possess and rely upon a reasonable basis for making such comparison which shall, at a minimum, consist of results for their own patients that are based upon either the same or essentially equivalent test procedures for determining pregnancy that were used to produce the results with which the comparison is made.

B. That any of their patients have achieved pregnancies through respondents' treatment program unless at the time of making such representation, respondents possess and rely upon a reasonable basis for making such representation. Such reasonable basis shall consist of competent and reliable scientific evidence substantiating the representation. For any test to be "competent and reliable" it must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate and reliable results, and shall not consist solely of human chorionic gonadotrophin laboratory blood analysis.

C. That a percentage of respondents' patients have given birth or achieved pregnancy, unless the percentage represented accounts for all patients who received medication in an effort to stimulate ovulation in connection with the provision of in vitro fertilization services; or, in lieu thereof, respondent discloses the basis used in calculating or arriving at the percentage represented. Such disclosure shall include the numerator and denominator used in calculating the percentage represented, and shall be made clearly and prominently, in close proximity to such percentage, and in a manner that can be easily understood by prospective purchasers of respondents' services.

II.

It is ordered, That respondents George P. Henry, M.D. and Reproductive Genetics In Vitro, P.C., a corporation, its successors and assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, sale or offering for sale of services relating to the treatment of infertility, do forthwith cease and desist from representing, directly or by implication, that a number or percentage of respondents' patients give birth or achieve pregnancy, or have given birth or achieved pregnancies, unless such is the case, or otherwise misrepresent respondents' success rate in achieving births or pregnancies.

III.

It is further ordered, That respondents, their successors or assigns, shall forthwith distribute a copy of this order to each of their officers, agents, representatives, and employees, who are engaged in the preparation and placement of advertisements or promotional materials, who communicated with patients or prospective patients, or who have any responsibilities with respect to the subject matter of this order; and for a period of ten (10) years from the date of entry of this order, distribute same to all of respondents' future officers, agents, representatives, and employees having said responsibilities.

IV.

It is further ordered, That respondents shall maintain for a period of three (3) years after the date the representation was last made, and make available to the Federal Trade Commission upon request, business records supporting any claims of success in connection with their infertility treatment programs.

V.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any

other change in respondents which may affect compliance obligations arising out of this order.

VI.

It is further ordered, That respondents shall, within (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with all requirements of this order.

The proposed Code of Conduct of the Association of Trial Lawyers of America does not appear likely to have a significant anticompetitive effect and therefore, to violate Section 5 of the FTC Act. *[Association of Trial Lawyers of America, P894002]*

January 2, 1991

Dear Mr. Herman:

This letter responds to your request for a Federal Trade Commission ("FTC" or "Commission") advisory opinion concerning the proposed Code of Conduct ("Code") of the Association of Trial Lawyers of America ("ATLA"). The Commission understands that ATLA is a voluntary national bar association of approximately 65,000 trial lawyers, most of whom represent injured victims in civil actions and defendants in criminal cases. You have requested that the Commission advise ATLA whether its proposed Code complies with Section 5 of the Federal Trade Commission Act.[1] ATLA has conditionally approved the Code, but has made implementation dependent upon a favorable evaluation by the Commission.

The federal antitrust laws do not prohibit professional associations from adopting reasonable ethical codes designed to protect the public. Such self-regulatory activity serves legitimate purposes, and in most cases can be expected to benefit, rather than to injure, competition and consumers of professional services. We note in this regard that ATLA has stated that its Code "was developed to respond to growing public criticism of abusive forms of solicitation and client representation by members of the legal profession."[2]

In some instances, however, particular ethical restrictions can unreasonably restrict competition and thereby violate the antitrust laws. Even ethical restrictions that appear reasonable on their face may be interpreted or applied in an anticompetitive manner. Our approval of any particular Code provision does not extend, of course, to anticompetitive interpretations or applications of that provision.

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[1] This opinion letter addresses only the proposed Code as set forth in Exhibit A (Revised) (Tab 2) of ATLA's January 13, 1989 filing. It does not address Sections 4 or 7 of the proposed Code, except to note that those sections do not raise antitrust concerns.

[2] Letter from Bill Wagner, President, ATLA, to Donald S. Clark, Secretary, FTC (Jan. 13, 1989).

CODE PROVISIONS

Code Enforcement

We begin our analysis by noting that the proposed Code may have a significant impact on how ATLA members compete with one another. An ATLA Code violation could lead to internal discipline by ATLA,[3] and to the extent that ATLA confers substantial benefits on its members, the threat of loss of those benefits will give members an incentive to abide by the Code. In addition, an ATLA member may legitimately fear that disciplinary action will affect his reputation. Finally, professionals are likely to regard their association's professional norms as authoritative even if the association's disciplinary sanctions do not include the possibility of loss of license.[4] Thus, the proposed Code, if adopted, is likely to guide the conduct of ATLA members.

Section 1: Uninvited Solicitations

Section 1 of the proposed Code states that no ATLA member shall personally, or through a representative, contact any injured party or an aggrieved survivor in an attempt to solicit a potential client when there has been no request for such contact from or on behalf of the injured party, an aggrieved survivor, or a relative or friend of either. It is the Commission's understanding that Section 1 is intended to apply only to direct, personal contact between a lawyer (or his representative) and an injured party, and that it does not restrict advertising or written communication.[5]

Direct solicitation by lawyers, like advertising, can be a useful source of information about a consumer's legal rights and remedies, and also can provide information about the terms and availability of legal services. Depending on the approach of the individual lawyer or his agent, personal solicitation also can provide an opportunity for the potential purchaser of services to ask questions of the seller.

Section 1 of the proposed Code is intended to protect persons particularly vulnerable to undue influence from being pressured to

[3] ATLA's letter of January 13, 1989, cited Bylaw III(3)(d) for the proposition that if the proposed Code is adopted and an ATLA member violates it, the violation will "serve as a basis for a complaint against the member under the disciplinary procedures of the ATLA Bylaws." This Bylaw provides that a member may be expelled, suspended, or censured for "unethical conduct, or for . . . misconduct which brings discredit to said member, The Association, or the profession of law."

[4] *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773, 791 n. 21 (1975).

[5] For example, under the Code, a lawyer or his representative, would be permitted to send targeted mail. A prohibition against targeted mailings would clearly be problematic from an antitrust standpoint. *Cf. Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988).

purchase legal services.[6] As the Supreme Court reasoned in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 457-58, 465 (1978), in-person solicitation by lawyers may actually disserve the individual and societal interest in informed and reliable decisionmaking where it discourages persons needing counsel from engaging in a critical and unhurried comparison of the terms and availability of legal services. Such in-person solicitation

> may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.

Id. at 457. The potential for overreaching is significantly greater when a lawyer, "a professional trained in the art of persuasion," personally solicits a prospective client who may be physically or emotionally overwhelmed by the circumstances giving rise to the need for legal services. *Id.* at 465.

A more narrowly tailored restriction on injurious solicitation practices may readily be contemplated, and indeed has been adopted in at least one jurisdiction.[7] A broad ban may nonetheless be justified if a narrower restriction (such as the one adopted by the District of Columbia Court of Appeals) would be ineffective—because, for example, direct solicitation "is not visible or otherwise open to public scrutiny" and, as a result, may be "virtually immune to effective oversight" unless banned entirely. *Id.* at 466.

This is a plausible contention that cannot either be credited or rejected without further factual inquiry. For example, we presently have no evidence on the prevalence of abusive in-person solicitation practices by trial lawyers, or the likely success (or failure) of narrower restrictions aimed at remedying such abuses. Although Section 1 of the proposed Code could be interpreted or applied in an anticompeti-

[6] The Commission has recognized this type of public interest rationale in trade regulation rules such as those governing door-to-door sales, 16 CFR 429, and funeral industry practices, 16 CFR 453.

[7] The District of Columbia's Rules of Professional Conduct permit uninvited in-person solicitation so long as: (1) the solicitation does not involve false or misleading statements or claims; (2) the solicitation does not involve the use of undue influence; and (3) the potential client's apparent physical or mental condition would not prevent him or her from exercising "reasonable, considered judgment" when selecting a lawyer. Rule 7.1(b), Rules of Professional Conduct, District of Columbia Court of Appeals, adopted March 1, 1990 (effective date January 1, 1991). In *American Medical Association*, 94 FTC 701 (1979), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd mem. by an equally divided Court*, 455 U.S. 676 (1982), the FTC ordered the AMA to cease and desist from banning all solicitation, but permitted it to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence.