

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.

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(8)(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. Shapiro 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.

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tive manner, we currently have no basis for concluding that Section 1 would likely have an anticompetitive effect.

Section 2: Uninvited Presence at Accident Scenes

Section 2 states that no ATLA member shall go to the scene of an event that caused injury unless requested to do so by an injured party, an aggrieved survivor, or a relative of either.

A lawyer who anticipates being retained by an injured party or survivor might want to go to the scene of an accident as soon as possible in order to locate or interview witnesses or examine the accident site for helpful clues about the accident. It is possible that lawyers who do field investigations soon after the accident have found such investigations to be the most efficient way to gather information relevant to representing their clients. If that is so, then a ban on accident scene visitation may raise some lawyers' costs of doing business, which could have an adverse effect on competition.

Section 2 may be a prophylactic provision intended to prevent abusive personal solicitation of accident victims or survivors. This goal is entirely compatible with the antitrust laws. But Section 2 may be overbroad to the extent it prevents ATLA members from visiting the scene of an injury-causing event even when there is no danger that such solicitation could occur. Because there is no time limit in Section 2, it would preclude a lawyer from visiting the scene of an accident even after the accident victims or aggrieved survivors have been removed from the scene. Section 2, therefore, may have an unreasonably anticompetitive effect.

Section 3: Media Appearances

Section 3 would prohibit an ATLA member (other than a bar association designee) from initiating a television appearance or commenting to any news media concerning an injury-causing event within 10 days of the event unless the member forgoes any financial return resulting from the compensation of those injured or killed.

It is possible that this rule could have the effect of limiting the flow of truthful, nondeceptive information to people who may benefit from it and in circumstances that could limit potential problems associated with in-person solicitations. We understand, however, that this rule is designed to ensure that attorneys who appear on television or in other news media, ostensibly as disinterested commentators on the legal consequences of injury-causing events, have no direct financial

incentive to use this occasion to solicit clients or to attempt to prejudice potential jurors. That purpose is valid, but because we do not have sufficient information to permit us to weigh the countervailing effects, we currently have no basis for concluding that Section 3 would likely have an anticompetitive effect.

It is also our understanding that Section 3 would not prohibit advertising on television or in other news media. If Section 3 were interpreted as a ban on advertising within 10 days of an injury-causing event, it could restrict competition unreasonably and violate the antitrust laws.

Section 5: False or Misleading Advertising

Section 5 would prohibit ATLA members from personally, or through a representative, making false or misleading representations of trial experience or past results of litigation. We recognize that professional associations have an important role to play in policing false and deceptive advertising because of their professional expertise and their interest in protecting the image of the profession. Although it is possible to interpret the term "misleading advertising" so broadly as to prohibit virtually any representations about past experience or litigation, which could lead to anticompetitive results, on its face this provision is not a violation of the antitrust laws.

Section 6: Personal Contact to Advise of Unrecognized Legal Claim

Section 6 would prohibit an ATLA member from initiating personal contact with anyone other than a client, former client, relative, or close friend to advise them of the possibility of an unrecognized legal claim for damages, unless the attorney forgoes any financial interest in the compensation of the injured party.

This provision could harm consumers by decreasing an ATLA member's incentive to inform potential clients of unrecognized legal claims, which decreases the likelihood that injured parties will seek and obtain redress for their injuries. On the other hand, a lawyer's initiation of personal contact to apprise a potential client of an unrecognized legal claim, like in-person solicitation, may involve "the coercive force of the personal presence of a trained advocate" and "pressure on the potential client for an immediate yes-or-no answer." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985). Although Section 6, like Section 1, could be interpreted or

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applied in an anticompetitive manner, we currently have no basis for concluding that Section 6 would likely have an anticompetitive effect.

CONCLUSION

While Section 2 of the Code may be somewhat overbroad, the other provisions of the Code do not appear likely on their face to have a significant anticompetitive effect and, therefore, to violate Section 5 of the FTC Act. If those provisions are interpreted or applied in an anticompetitive manner, then the proposed Code could unreasonably hinder competition among lawyers who handle personal injury cases, and thus violate Section 5 of the FTC Act.⁸

This advisory opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered.⁹ It does not constitute approval for specific instances of implementation of the Code that may become the subject of litigation before the Commission or any court, since interpretations and enforcement of the Code in particular situations may prove to cause significant injury to competition and consumers, and thereby violate the Federal Trade Commission Act. The Commission maintains the right to reconsider the questions involved and, with notice to the requesting party in accordance with Section 1.3(b) of the Commission's Rules of Practice, to rescind or revoke its opinion.

Copies of your request and this response are being placed on the public record pursuant to Section 1.4 of the Commission's Rules of Practice.

By direction of the Commission, Commissioner Owen recused and Commissioner Starek not participating.

Letter of Request

January 13, 1989

Dear Mr. Clark:

Pursuant to the procedures set forth in 16 CFR 1.2, the Association

⁸ The Commission has successfully challenged a professional association's restriction on truthful, nondeceptive advertising and solicitation under Section 5 of the FTC Act. See *AMA, supra*. In addition, the Commission has obtained numerous consent orders from professional groups requiring them to cease and desist from imposing restrictions on truthful, nondeceptive advertising. If ATLA adopts the proposed Code and the Code results in substantial anticompetitive effects, the Commission may take such actions as would be in the public interest.

⁹ In preparing an advisory opinion, it is the Commission's practice to rely on information provided by the requesting entity, and not to conduct an independent investigation.

of Trial Lawyers of America ("ATLA") respectfully requests an advisory opinion from the Federal Trade Commission as to the legality under the federal antitrust laws of a Code of Conduct which prohibits various forms of unethical conduct by ATLA members.

The ATLA Code of Conduct, conditionally approved by the ATLA membership on July 31, 1988, was developed to respond to growing public criticism of abusive forms of solicitation and client representation by members of the legal profession. The Code principally was designed as a client protection measure to restrict solicitation of clients in circumstances where they are particularly vulnerable and under severe emotional and physical duress.

In addition, the Code was designed to improve ATLA's image as a lobbying organization. The negative publicity and popular outcry surrounding the phenomenon of lawyers rushing to mass disaster scenes threatened to snowball into a crusade for short-sighted tort reforms, which would disadvantage ATLA members and consumers of legal services. ATLA recognized that the better approach was to use the controversy as an impetus to formulate much-needed rules to protect consumers from the conduct of unscrupulous attorneys. Above all, ATLA wanted to take the lead in "cleaning-up" the image of the legal profession.

ATLA requests a favorable advisory opinion from the Commission in order to implement the Code of Conduct. An advisory opinion is necessary because the application of federal antitrust laws to codes of ethics, such as the ATLA Code, has been unpredictable and uncertain. There is no clear Commission or court precedent to guide a voluntary professional organization which takes action to prohibit unethical practices through the adoption of rules which apply only to its members. Without a favorable Commission opinion, ATLA will be unable to implement the Code. Thus, it is important that the Commission clarify its position on the reach of the antitrust laws to the adoption of the Code of Conduct as a credible means of curbing professional misconduct.¹

Initially, ATLA requested review of the Code of Conduct by the Department of Justice pursuant to the business review procedures of 28 CFR 50.6. (See letters of June 16, 1988 and September 6, 1988, Tabs 1 and 2). However, on September 19, 1988, the Department of

¹ It is ATLA's position that an advisory opinion from the Commission would offer the most reliable guidance to ATLA and other professional organizations similarly situated. However, if the Commission determines that an advisory opinion is not warranted, ATLA alternatively requests the issuance of an advisory opinion from the FTC staff pursuant to 16 CFR 1.1(b).

Justice advised ATLA counsel that since the Code "is presently being investigated by the Federal Trade Commission . . . the Antitrust Division has agreed to allow the Commission to handle this inquiry." (Tab 4) ATLA counsel immediately contacted the FTC staff and forwarded to them copies of the materials filed with the Department of Justice. In a letter dated September 15, 1988, ATLA counsel requested that the FTC convert its investigation into an advisory opinion proceeding since the DOJ filing had antedated the commencement of the FTC investigation. (Tab 3)

A meeting with FTC staff was held on September 23, 1988. At the request of the FTC staff, ATLA voluntarily provided extensive information and documentation relating to the origins, vote, and reasons for promulgation of the Code. ATLA also provided information on ATLA demographics, membership, affiliates, organization and other documents. (For the Commission's convenience, copies of the ATLA Information Response of October 27, 1988 accompany this letter.) (Tab 5)

In December 1988, FTC staff advised ATLA counsel that they had completed their investigation. ATLA counsel was further advised that the staff would not convert this matter to an advisory opinion proceeding as ATLA counsel had requested. Instead, the FTC staff indicated that, if ATLA filed a formal request for an advisory opinion from the Commission, FTC staff would recommend that the Bureau of Competition terminate its investigation of ATLA. Now that ATLA has filed for an advisory opinion, it is our expectation that the staff will recommend termination of the FTC investigation and the matter will be ripe for the FTC to review the Code of Conduct under advisory opinion procedures.

To facilitate our request for a favorable advisory opinion, we have enclosed all of the documents that were presented to both the Department of Justice and the FTC staff to assist in the evaluation of the ATLA Code of Conduct. The materials include a narrative, documents concerning the creation and adoption of the Code, information about the Association, its services, and its membership. In addition, we direct the Commission's attention to the legal memorandum annexed to our June 16, 1988 letter to the Department of Justice which provides an antitrust analysis of the ATLA Code. (Tab 1)

ATLA believes that it is entitled to a favorable advisory opinion since implementation of the Code does not raise any antitrust concerns. ATLA is a voluntary professional society without market

power in any relevant market. A showing of market power is a prerequisite to a finding of an antitrust violation under the rule of reason, which clearly governs this case.

The Code is motivated by ethical rather than commercial concerns and is narrowly drafted to protect clients and potential clients from solicitation when they are under severe physical and mental distress and particularly vulnerable to undue influence.

The Code, in most respects, parallels ethical provisions already in place in most states and reflects an effort by ATLA to publicly declare that it expects its members to adhere to the highest ethical standards concerning client representation. When the Code is implemented, violation of its provisions by an ATLA member only will serve as a basis for a complaint against the member under the disciplinary procedures of the ATLA Bylaws. (Bylaw III(3)(d)).

In order to update the information previously filed with the FTC, Tab 6 contains a copy of a Resolution of the ATLA Board of Governors approved on November 11, 1988 which clarifies that the Code of Conduct will not be implemented by ATLA until the FTC issues a favorable ruling.

Under these circumstances, ATLA requests the FTC to issue a formal advisory opinion approving implementation of the Code of Conduct. In the event that the Commission finds that some portions of the Code raise antitrust concerns, we request specific comments relating to individual Code provisions so that conforming amendments can be implemented and presented to the ATLA membership for ratification.

Respectfully submitted,

Bill Wagner

Enclosures

EXHIBIT A (REVISED)

ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Code of Conduct

Kansas City, Missouri
July 31, 1988

1. No ATLA member shall in person, or through a representative, contact any injured party, or an aggrieved survivor in an attempt to solicit a potential client when

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there has been no request for such contact from or on the behalf of the injured party, an aggrieved survivor, or a relative or friend of either.

2. No ATLA member shall go to the scene of an event which caused injury unless requested to do so by an injured party, an aggrieved survivor, or a relative of either.

3. No ATLA member shall initiate a television appearance or initiate any comment to any news media concerning an event causing injury within 10 days of the event unless the member foregoes any financial return from the compensation of those injured or killed, provided, however, that an individual designated by a bar association to state the official position of such bar association may initiate such media contact to communicate such position.

4. No ATLA member shall personally, or through an associate attorney, file a complaint with a specific *ad damnum* amount unless required by local rules of court. If such amount is stated, it shall be based upon good faith evaluation of facts which the member can demonstrate.

5. No ATLA member shall personally, or through a representative, make representations of trial experience or past results of litigation either of which is in any way false or misleading.

6. No ATLA member shall personally, or through a representative, initiate personal contact with a potential client (who is not a client, former client, relative or close personal friend) for the purpose of advising that individual of the possibility of an unrecognized legal claim for damages unless the member foregoes any financial interest in the compensation of the injured party.

7. No ATLA member shall file or maintain a frivolous suit, issue, or position. However, no ATLA member should refrain from urging or arguing any suit, issue or position that is believed in good faith to have merit.