

Linda A. Klein
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5109
Fax: (312) 988-5100
abapresident@americanbar.org

March 23, 2017

Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Subject: Letter of March 7, 2017, Regarding Attorney Advertising

Dear Mr. Chairman:

Thank you for your letter of March 7, 2017, asking what steps the American Bar Association is taking to review the matter of attorney advertising that is alleged to harm patients by leading them to discontinue taking prescribed medication. Your letter refers to an American Medical Association resolution adopted June 15, 2016.

The ABA's Standing Committee on Ethics and Professional Responsibility has a working group that is considering possible revision of the ABA Model Rules of Professional Conduct governing attorney advertising, and I have forwarded your letter and the AMA resolution to that committee for its review.

Our ethics committee's review is based on a report by the Association of Professional Responsibility Lawyers, an influential association of lawyers with expertise in legal ethics, discipline, and malpractice, that has recommended making state rules more uniform and focusing on the "false and misleading" standard. A 2015 ARPL report found that complaints about lawyer advertising are rare and usually made by other lawyers and not consumers. It recommends that "Lawyers should not be subject to discipline for 'potentially misleading' advertisements" 2015 Report of the Regulation of Lawyer Advertising Committee 29 (June 22, 2015) *available at* http://aprl.net/wp-content/uploads/2016/07/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf. Additionally, as you may be aware, the Virginia State Bar Council has proposed to the Virginia Supreme Court revisions to the Virginia Rules of Professional Conduct that are comparable to the APRL proposals. *Available at* http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/amendments_rules_7_2016-09-30.

The ABA, of course, does not sanction misleading or untruthful advertising – by lawyers, doctors, pharmaceutical companies, or anyone else. The issue raised by the AMA appears to be not the misleading nature of advertisements, but the harmful consequences to some members of the public who may misunderstand ads and decide on their own to discontinue a course of treatment.

While the ABA working group has not completed its review, it is considering the following points:

First, many people are injured or killed each year from taking prescription drugs and would benefit from having a lawyer help them or their families determine whether they are entitled to compensation for the harms caused, and they might not otherwise know where to turn were it not for a lawyer's advertisement. A June 2014 article published by the Harvard Center for Ethics observed that "even properly prescribed drugs (aside from misprescribing, overdosing, or self-prescribing) cause about 1.9 million hospitalizations a year. Another 840,000 hospitalized patients are given drugs that cause serious adverse reactions. About 128,000 people die from drugs prescribed to them." (Donald Light, "New Prescription Drugs: A Major Health Risk with Few Offsetting Advantages," available at <http://ethics.harvard.edu/blog/new-prescription-drugs-major-health-risk-few-offsetting-advantages> (June 27, 2014).) These injuries and deaths may or may not be caused by the wrongful action of a pharmaceutical company, a physician, or a hospital; knowing how to obtain counsel can assist those injured in making that assessment.

Second, the U.S. Supreme Court ruled in 1977 that the right of lawyers to advertise is protected as commercial speech under the First Amendment. (*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).) A year earlier the Court held that pharmacists' advertising of prescription drug pricing was also protected under the First Amendment. (*Virginia State Pharmacy Bd. v. Virginia Citizens Council*, 425 U.S. 748 (1976).) Truthful lawyers' ads that mention the dangers of drugs or devices are also protected by the First Amendment. Thus state supreme courts (and, therefore, the ABA Model Rules) would need to find a compelling interest to regulate such advertising beyond a concern that some members of the public might misunderstand an advertising message that is not misleading.

Third, false and misleading ads are already regulated. Every state currently has a rule prohibiting lawyer advertising that is "false and misleading." All states also have a version of Model Rule 8.4(c) that prohibits lawyers from conduct that involves "dishonesty, fraud, deceit or misrepresentation." This is the same standard that the AMA applies to physician advertising: "There are no restrictions on advertising by physicians except those that can be specifically justified to protect the public from deceptive practices." AMA Code of Medical Ethics § 9.6.1, available at <https://www.ama-assn.org/sites/default/files/media-browser/code-of-medical-ethics-chapter-9.pdf>.

While the AMA resolution and explanation state that attorney ads have the potential to frighten people and thus cause them to discontinue taking their medicine, it does not allege that those ads are false, misleading, or deceptive. To determine whether a lawyer advertisement violates the state lawyer disciplinary rules in the states where it is shown, the appropriate procedure is to file a complaint against the specific advertising lawyer with that state's disciplinary agency.

The ABA appreciates your interest in this subject and your concern about individuals who might be harmed when discontinuing a course of medication because a consumer misunderstands a lawyer's advertisement. We hope that you share our interest in ensuring that individuals who are injured or killed each year by taking prescribed medications, or their survivors, are able to obtain

March 23, 2017
Page 2 of 2

information about their legal rights and engage counsel to seek redress if supported by the law and facts in each case.

We are pleased to respond to your letter and look forward to seeing the results of your oversight inquiry into this subject. Please do not hesitate to contact me if you have any further questions.

Sincerely,

A handwritten signature in cursive script that reads "Linda Klein". The signature is written in black ink and is positioned above the typed name and title.

Linda A. Klein
President
American Bar Association