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.

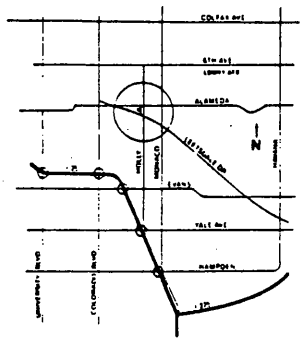
Cost

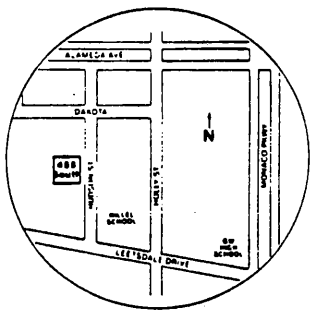
The cost of the program may be prohibitive for many couples at this time. We anticipate the sequence of steps necessary to attempt in vitro fertilization-embryo transfer will cost $4,500.00 and the entire amount is due prior to attempting the procedures. This does not include the initial (one time only)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

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

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

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.

TABLE OF COMMODITIES*

DECISIONS AND ORDERS

*Commodities involved in dismissing or vacating orders are *italicized.*

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DECISIONS AND ORDERS

* Covering practices and matters involved in Commission orders. References to matters involved in vacating or dismissing orders are indicated by *italics*.

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