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<sup>1</sup> This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Plann

Elizabeth Clark Tarbert, Esq.  
March 23, 2007  
Page 2 of 7

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<sup>3</sup> Although this letter focuses on the policy implications of the Proposed Rule with respect to consumers and competition, the Bar may wish also to evaluate the Rule's prohibitions under First Amendment criteria. *See, e.g., Bates*

Elizabeth Clark Tarbert, Esq.  
March 23, 2007  
Page 3 of 7

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<sup>7</sup> See, e.g. Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 Supreme Court Economic Review 265, 293-304 (2000) (discussing the empirical literature on the effect of advertising restrictions in the professions); *In the Matter of Polysium Holdi*

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<sup>15</sup> See Rule 4-7.2(c)(1) and Rule 8.4(c), respectively.

<sup>16</sup> See Rule 4-7.2(c)(1)(I) as applied through Rule 4-7.6.

<sup>17</sup> Proposed Rule 4-7.6(b)(2)(C) states that websites may contain factually verifiable statements describing or characterizi

achievements via e-mail and web-log (“blog”) reporting. Such communications may be truthful and non-misleading and can help consumers in assessing the caliber or personal style of a lawyer or law firm.

Third, the Proposed Rule would prohibit attorneys from using any testimonials on their homepages and electronic solicitations.<sup>21</sup> Testimonials and information about previous representations can convey valuable information to consumers and help spur competition. Accordingly, the FTC Staff recommends that they be prohibited only if the endorsement, testimonial, or other information deceives consumers. As explained in the FTC’s Endorsement Guides, a consumer testimonial is likely to be deceptive if the experience described is not the consumer’s actual experience or is not representative of what consumers generally experience.<sup>22</sup>

The FTC Staff is also concerned that the Proposed Rule would require all computer-accessed communications except for homepages and websites to be filed with and reviewed by the Bar, which is comprised of competing attorneys, for compliance, evaluation and approval.<sup>23</sup> Bar opinions of non-compliance with the Proposed Rule will result in the attorney being notified that dissemination of the computer-accessed solicitation may result in a fine of up to \$10,000.

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<sup>21</sup> Proposed Rule 4-7.6(b)(2)(B) would allow testimonials on websites except for homepages if the testimonial is accompanied by the following disclaimer: “Not all clients have provided testimonials, the results are not necessarily representative of results obtained by the lawyer, and a prospective client’s individual facts and circumstances may differ from the matter in which the testimonials are provided.”

<sup>22</sup> See generally Federal Trade Commission, Guide Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255. As part of the Commission’s regulatory review of its Endorsement Guides, the Commission is presently seeking public comment to the Guides.

<sup>23</sup> See Rules 4-7.7.6(c), 4-7.7, and 4-7.8. This concern extends to all forms of advertising that are subject to review, pre-approval, and approval under Rule 4-7. The FTC Staff recommends that the Bar address the impact of this rule on consumers when it undertakes the “additional and contemporary study of lawyer advertising” as mandated by the Supreme Court of Florida.

<sup>24</sup> See, e.g., Deborah Platt Majoras, “Self Regulatory Organizations and the FTC,” Address to the Council of Better Business Bureaus (Apr. 11, 2005), (available at <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>).

<sup>25</sup> Our concern about the policy and competitive constraints it imposes extends to the screening and approval requirements of all attorney advertising as described in Rule 4-7.7.

Elizabeth Clark Tarbert, Esq.  
March 23, 2007  
Page 6 of 7

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<sup>26</sup> Due to the risk of anticompetitive behavior, a leading antitrust treatise advocates subjecting any governmental agency made of members of the profession that it regulates to direct and active governmental supervision. *See AREEDA & HOVENKA*

Elizabeth Clark Tarbert, Esq.  
March 23, 2007  
Page 7 of 7

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