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May 30, 2003

R. Hewitt Pate
Acting Assistant Attorney General
Antitrust Division
United States Department of Justice
Room 3109
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Proposed Regulations of the Kentucky Attorneys' Advertising Commission

Dear Mr. Pate:

The Attorneys' Advertising Commission of the Kentucky Bar Association has proposed new regulations that would sharply curtail advertising by Kentucky attorneys. The regulations would prevent attorneys from, among other things, using actors and props in television commercials, using client testimonials and references to results in past cases, and mentioning claims for damages of any kind without going on to provide detailed descriptions of the legal principles that govern such claims. A copy of the proposed regulations is enclosed.

As reflected in Public Citizen's comments on the proposed regulations, which are also enclosed, we believe that the regulations would violate the First Amendment and impose restrictions far beyond those that can be justified on the basis of the Kentucky Supreme Court's rules prohibiting false and misleading advertising by attorneys.

In addition, we believe that the proposed regulations would inhibit competition in the market for the provision of legal services in Kentucky. Moreover, it does not appear to us that these regulations are immune from antitrust scrutiny under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). As the Supreme Court held in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), bar organizations do not fall within the scope of *Parker* immunity. The Court went on to hold in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), that state bar rules are entitled to *Parker* immunity *if they are approved by a state supreme court. See id.* at 362. Absent such approval, they fall within *Goldfarb's* holding that an antitrust challenge is available where "it cannot fairly be said that the State ... through its Supreme Court Rules required the anticompetitive activities" *Goldfarb*, 421 U.S. at 790.

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Kentucky's proposed advertising regulations have not been promulgated or, so far as we can tell, approved by the Kentucky Supreme Court. Rather, the Rules of Professional Conduct issued by the Supreme Court provide that the Advertising Commission may promulgate rules subject only to approval by the Board of Governors of the Kentucky Bar Association, and notice and an opportunity for comment by members of the Association. The Commission's rulemaking notice recites only that the proposed regulations were approved by the Board of Governors and will go into effect following consideration of any comments from members of the Association. It is therefore evident that the regulations, should they go into effect, are the product only of the Commission and the Bar Association, not of the Supreme Court.

Nor can it be said that the regulations reflect "active supervision" by the Supreme Court or implement any "clearly and affirmatively expressed" state policy. *Bates*, 433 U.S. at 362. The Supreme Court's rules clearly articulate only a state policy against advertising that is actually false, deceptive, or misleading. They do not clearly and affirmatively express a policy of stifling competition by suppressing advertising that is not in fact false or misleading.

To the extent that the regulations are anticompetitive and are the product of concerted activity among the members of the Bar, who are competitors in the provision of legal services, we believe that they may violate Section 1 of the Sherman Act. *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). In light of the probable absence of state action exemption from the antitrust laws for the promulgation of these regulations, we suggest that the Antitrust Division examine the question of their legality under federal law.

Thank you for your consideration of this matter.

Sincerely yours,

Scott L. Nelson

cc: Antitrust Division - New Case Unit
601 D Street NW, Suite 10011
Washington, DC 20530

Kentucky Attorneys' Advertising Commission