APPENDIX

C

March 1, 2004

To: Board of Professional Responsibility

From: C. L. Darrow

Re: Rule of Professional Conduct 7.6(a) and Supreme Court Rule 44

I am the general counsel of R.W. Lynch Co., Inc., an advertising agency which has specialized in services to law firm for almost 20 years. We currently serve lawyers in every U.S. state, including Tennessee.

I am a member of the California Bar, but I am not licensed in Tennessee. I have focused my practice on lawyer advertising since 1988 and also served on the ABA's Commission on Advertising for three years in the mid-90's.

We hereby request that the Board make a determination that the lawyer advertising cooperative described below is not included in the scope of RPC 7.6(a) and SCR 44 or, in the alternative, to find that to apply these rules to said cooperative would violate both the U.S. and Tennessee constitutions.

RPC 7.6(a) states as follows:

"An intermediary organization is a lawyer advertising cooperative, lawyer referral service, prepaid legal insurance provider, or a similar organization the business or activities of which include the referral of its customers, members, or beneficiaries to lawyers for the performance of fee-generating legal services or the payment for or provision of legal services to the organization's customers, members, or beneficiaries in matters for which the organization does not bear ultimate responsibility..."

Our company coordinates "group" or "joint" lawyer advertising and these groups are usually referred to as "lawyer advertising cooperatives". Most people don't know much about how these cooperatives work and there are several different varieties of coops. Coops are a fairly recent development in lawyer marketing. When lawyers pool their advertising dollars to jointly buy commercials, it makes expensive advertising more affordable for solo practitioners and small firms, including minority-owned firms. Every state now has one or more of these groups currently operating and complying with the state's RPC's. Several states now recognize and specifically refer to this type of advertising in their disciplinary rules or ethics opinions (California, Maryland, New York, Texas, Oregon, Pennsylvania). However, there is no counterpart to RPC 7.6(a) in the ABA Model Rules and no other state lumps together the three unique entities

screening or similar function is performed. There's also a brief discussion of the subject matter in the ABA's Annotated Model Rules of Professional Conduct (Fifth Edition, 2003), pages 543-544. This discussion cites the case of Alabama State Bar Ass'n v. R.W. Lynch Co., 655 So. 982 (Ala.1995), the one litigated case I know of which features the issue of the difference between a lawyer cooperative and a lawyer referral service.

The several differences between lawyer referral services and the prototype group advertising are listed on this letter's Exhibit "A". The key ingredients of a referral service that are not part of this form of cooperative advertising is the screening and subjective referral of a caller to an attorney. (The Knoxville Bar Association underscores this in its April 17, 2003 letter to the Court referring to Rule 44: "The goal of our (lawyer referral) program is to provide referrals to lawyers as well as other community resources. Basic screening questions help determine whether the client needs to be referred to a social service agency, legal aid or to a lawyer listed with our service".)

Clearly, the R.W. Lynch-type advertising cooperative does not "refer" (consumers) as that term is defined in the legal community.

In fact, if the answering service serving our cooperative performed call screening as required by SCR 44 B (10), the advertising group would be considered a for profit lawyer referral service and Tennessee lawyers would be prohibited from participation (see RPC 7.2, Comment [7]).

THE DESCRIBED LAWYER ADVERTISING COOPERATIVE DOES NOT HAVE "CUSTOMERS", "MEMBERS" OR "BENEFICIARIES."

The word "customer" is defined as follows in the American Heritage Dictionary (Third Edition): "One that buys goods or services." It is clear that a caller is not buying a good or service from R.W. Lynch by calling the 800 number in an ad. The caller does not buy anything from Lynch or pay anything to Lynch. Even the telephone call is free. The people who call the Injury Helpline 800 number in the ads are not "customers" of R.W. Lynch. And they certainly aren't "members" of any group or "beneficiaries" of any prepaid plan. Are people who respond to a lawyer directory such as the Yellow Pages also "customers," "members" or "beneficiaries"? If so, will the Yellow Pages be required to register with the Board under RPC 7.6(a) and SCR 44? I think the answer is "NO". Or, if three Nashville lawyers in separate solo practices share office space also decide to share the costs of an advertisement and hire a small local advertising agency to create and publish the commercial and set up a common answering service – will the advertising agency be required to register the "entity" as a lawyer advertising cooperative? I don't think so.

There may be some PITLA-type advertising groups whose procedures (or lack thereof) fit under the novel umbrella created by RPC 7.6(a), but the advertising program that R.W. Lynch coordinates in Tennessee does not.

directly advances the government interest asserted, and whether it is more extensive than necessary to serve that interest." (Page 566)

The last "prong" of this test was later modified in Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989). The Court said the test should be one of a "reasonable fit". Thus, if commercial speech is truthful and non-deceptive, but the state substantiates a significant state interest and crafts regulations that directly advance that interest, those regulations must be a reasonable fit that are "narrowly tailored to achieve the desired objective." (492 U.S. 469 at 470).

And, referring to the First Amendment issues, the Tennessee Bar Association made the following crucial point in Section 5 of their Response to the Petition of Board of Responsibility to Adopt Rule 7.6 Regulations: "The proposed rule sets forth various stringent restrictions on advertising and marketing activities of intermediary organizations...." "The Tennessee Bar Association's Section 5 is titled, "THE ADVERTISING AND MARKETING REQUIREMENTS SHOULD BE NARROWLY TAILORED TO THEIR PURPOSES."

The 1977 case of Bates v. State Bar of Arizona, 433 U.S. 350, and several cases based on Bates which also applied the 4-pronged test of Central Hudson, form the legal foundation for a lawyer's right to advertise. When applied to the rules being considered here, we must focus on the following questions and decide in the light of the pertinent First Amendment cases:

1) Did the State carefully calculate the effect of the rules on both attorneys and consumers?

2) Were any additional speech restrictions necessary? Did the State develop the empirical evidence to show that there was a substantial problem?

3) Did the State demonstrate that new restrictions were really necessary to combat this "substantial problem?"

4) Why weren't the then existing rules (if enforced) regarding false, misleading or deceptive advertising sufficient to address whatever concerns the State had? (The Fox case requires that the State show that any additional restrictions on speech are reasonably necessary because existing restrictions are insufficient.) In other words, the State must justify that blanket prohibitions are necessary rather than case by case regulation because, based on hard evidence, it has proven that case by case regulation has not worked.

With reference to lawyers who participate in the R.W. Lynch-type lawyer advertising cooperative, I think that the drafters of Rule 7.6(a) and the SCR 44 failed to ask these crucial questions and to abide by the important standards which are required by the First Amendment and the U.S. Supreme Court's pertinent

Differences Between Lawyer Referral Services and R.W. Lynch Group Advertising

Group Advertising	Lawyer Referral Services
1. Advertising states that it is advertising paid for by the lawyers.	1. Give impression of providing non-biased public service information.
2. Advertising states that it is not a lawyer referral service.	2. Advertises as a lawyer referral service.
3. There is no screening of calls. Answering service performs clerical function only and obtains only caller's name, phone number and zip code.	3. Service screens calls and exercises discretion as to nature and merit of cases. Some callers are advised to call other agencies or that they don't have an appropriate case.
4. Advertising lawyers pay a flat monthly fee for advertising only and do not split fees no matter how many or what kind of cases develop.	4. Lawyers pay a membership fee and often split fees with the lawyer referral service based on cases generated.
5. Lawyers may charge their normal fees.	5. Lawyers usually must charge lower rates for initial client contacts.
6. Lawyers select an exclusive geographical area for which to advertise. All calls from the exclusive area are forwarded to the lawyer for that area.	6. May use lawyer rotation or discretion (see #12 below)
7. Advertising lists each participant by name and geographical area.	7. Only lawyer referral service name is listed.
8. The advertising lawyers are the sponsors of the ad.	8. The referral service is the sponsor of the ad.
9. R.W. Lynch is a full-service advertising agency.	9. The referral service is not an advertising agency.
10. Participating lawyers approve and consent to the content of the ad.	10. Referral service lawyers have no say as to the content of the ad and do not approve it.
11. No such statements or representations are made.	11. Often states or implies that services of participating lawyers are preferable to those of other lawyers.
12. The answering service has no such discretion.	12. The service may use discretion as to which lawyer to send a caller. Sometimes "clients" are matched with lawyers based on various factors.

Exhibit "A"