



820 O'Keefe Avenue, New Orleans, Louisiana 70113-1116
Telephone (504) 581-4892 Facsimile (504) 561-6024
[Http:// www.hhkc.com](http://www.hhkc.com)

Harry Herman (1914-1987)
Russ M. Herman*
Maury A. Herman*
Morton H. Katz*
Sidney A. Cotlar*
Steven J. Lane
Leonard A. Davis*
James C. Klick[‡]

* A Professional Law Corporation
‡ Also Admitted in Texas

Stephen J. Herman
Brian D. Katz

Soren E. Gisleson
Joseph E. "Jed" Cain

Joseph A. Kott, M.D. J.D. (Of Counsel)

Offices in New Orleans and
Covington, Louisiana

This Firm and its Partners Are Also
Partners in Herman, Mathis, Casey,
Kitchens & Gerel, LLP

Temporary Address:
201 St. Charles Ave., Suite 4310
New Orleans, Louisiana 70170

Sender's Direct Dial: (504) 799-6454
Sender's E-Mail Address: sherman@hhkc.com

Visit: www.gravierhouse.com

November 21, 2006

VIA E-MAIL AND BY U.S. MAIL

Rules of Professional Conduct Committee

Attention: Timothy F. Averill, Esq.

Louisiana Supreme Court

400 Royal Street, Suite 1190

New Orleans, Louisiana 70130

E-Mail: tfa@lajao.org

Re: Proposed Rules of Professional Conduct 7.1, et seq.

To the Honorable Members of the Committee:

I am a partner in the firm of Herman Herman Katz & Cotlar, LLP, located in New Orleans, Louisiana, and in the national firm of Herman Mathis Casey Kitchens & Gerel, LLP, with central offices in Atlanta, Georgia. I handle litigation for both plaintiffs and defendants in commercial, personal injury, complex and other cases. I am the author of *America and the Law: Challenges for the 21st Century*, and serve as an Adjunct Professor to Loyola Law School in Advanced Torts: Class Actions. I am a member of the Louisiana and American Bar Associations, sit on the Board of Governors of the Louisiana Trial Lawyers Association, serve as the Louisiana State Network Coordinator for Trial Lawyers for Public Justice, and am past President of the Civil Justice Foundation.¹ I respectfully submit the following written comments in support of Proposed Rules 7.2 and 7.5.

¹This background is provided for informational purposes only. These written comments reflect my personal observations and opinions as a practicing attorney, and should not in any way be construed to represent the position (if any) of HHKC, Herman Mathis, Loyola Law School, the Louisiana Trial Lawyers Association, Trial Lawyers for Public Justice, or the Civil Justice Foundation.

In fact, I would be in favor of a complete ban on all television advertising by attorneys. But, in the alternative, I welcome Proposed Rules 7.2 and 7.5, and any additional regulation.

In 1998, I published a collection of legal essays. "The Betrayed Profession" included the following commentary on lawyer advertising:

Like other forms of commercial speech, lawyer advertising has the potential to provide the public with valuable information about products which are harmful, about frauds which may have been committed without their knowledge, about their rights, about the vindication of those rights, and about the ways in which those rights may become limited or prescribed.

As a practical matter, however, lawyer advertising in virtually all cases fails to meet such goals. The ads do not provide the public with any substantive information, but merely encourage people to go to a particular lawyer for the evaluation of his or her potential claim.

Lawyer advertising also cheapens the profession. It turns lawyers into merchants and salesmen, and turns the pursuit of justice into a mechanical administration of claims.

While only a very very small fraction of attorneys advertise on television, those are the attorneys that everyone sees. Those are the attorneys with whom the public identifies. And those are the attorneys which therefore become representative, in the public psyche, of the entire profession. The ads themselves, unfortunately, are generally cheap, distasteful, and wholly unprofessional, which leads the public to form such an impression of all attorneys, despite the fact that the overwhelming majority of attorneys do not in any way resemble the lawyers who advertise on tv.

While the First Amendment, and the anti-trust laws, a free-market economy, and various other factors militate against a prohibition on lawyer advertising, the bar association, as a profession, should be able to place reasonable restrictions on the style and the content of lawyer advertising, which would permit an attorney to communicate information and offer his or her legal services in an honest, respectable, and professional way.

In the past eight years, I have continued to observe the effects of television advertising by attorneys on my clients, (particularly plaintiffs in personal injury and other consumer cases), the legal profession, and society as a whole. It is my strong belief that: **(i)** lawyer advertising is not simply a "commercial" issue between or among competing attorneys; **(ii)** lawyer television advertising falsely and deceptively alters the impressions and opinions of the public in general, and jurors in particular, which has a direct adverse effect on all litigants, in all cases; and, **(iii)** the effects of lawyer television advertising on competition between and among plaintiffs' attorneys yields systemic effects, which work to the detriment of the public at large.

Most lawyers who advertise on television take the position that their competitors are simply jealous or resentful about losing business. This may be true, in part. But what is missing from such a limited analysis are the effects of their television advertising on other cases.

Virtually all lawyer advertising on television is inherently false and misleading because it creates and fosters a false and misleading impression that there is a “litigation explosion” as well as a “lawsuit lottery” – facts which are belied by the empirical evidence.² Lawyer advertising on television affects the substantive law by feeding the “tort reform” movement. And, most importantly, lawyer advertising on television affects the jury pool, which views litigants and their attorneys with a jaundiced eye, based on the images and attitudes derived in large measure from lawyer advertising on tv. These dynamics are not limited to the cases which are “up for grabs” in a commercial sense. Even if you remove from the equation the business that firms like mine lose to television advertisers through direct competition, our firm and our clients are adversely affected by their television ads in every plaintiff case.

Lawyers who advertise on television are profiting at my expense and the expense of my clients. We are effectively subsidizing their gains.

Moreover, I would argue that the effects on direct competition are themselves systemic, and exert consequences more widely on the population at large. It is well-known and well-accepted, in this regard, that one of the primary benefits of the contingency fee system is to allow plaintiffs’ attorneys to take risks on more expensive and otherwise challenging cases. Lawyer advertising on television has greatly altered this dynamic. Because the television advertisers scoop up most of the easy cases, many of the lawyers who have traditionally been willing to invest their time, money and efforts in challenging cases are less willing and able to do so. *Pro bono*-type cases of social significance are the first to fall by the wayside.

Again, parties who have nothing to do with the direct competition between and among plaintiffs’ attorneys are left without adequate representation, and pay the price for the television advertiser’s rewards. Moreover, because the tort system is robbed of its deterrent effects, all of society suffers.

Products liability cases, for example, serve a particularly important function in terms of public safety and protection. Yet products liability cases are also typically difficult and expensive to prosecute. When, therefore, firms like mine are forced to turn down products liability cases for economic reasons, the deterrent effects of the tort system are watered down and the entire public is exposed to a greater risk of harm.³

²See generally, *AMERICA AND THE LAW: Challenges for the 21st Century* (Gravier House Press 1999), pp.43-80, 221-237. In addition, I believe that various organizations such as ATLA and LTLA have conducted extensive focus group, polling and other research which verifies both that (i) the public is misinformed and (ii) the ill-founded opinions and attitudes of the public are shaped largely by lawyer television advertising.

³One caveat and concern I do have about the Proposed Rules, in this regard, is the inclusion of “or indirectly” within Proposed Rule 7.2(c)(7). If lawyers are going to advertise on television, they should be encouraged to refer

Certainly this could be viewed as a self-serving argument. But the reality is that the injury caused by lawyer television advertising is not simply a competitive or “commercial” injury. Lawyer advertising on television threatens uninvolved litigants, the integrity of the legal profession, and society as a whole. My clients, would-be clients, and the public at large are forced to subsidize the profits of lawyers who advertise on tv. It’s unprofessional, and the Professional Rules should be tailored to circumvent it within the bounds of the Constitution and the law.

On that note, I would offer one final observation. The underlying principle embodied in the First Amendment is that “good speech” can generally be used to combat “bad speech”, and, out of those competing forces in the marketplace of ideas, truth will prevail. This is one of those rare instances where no “good speech” can be used to effectively combat the effects of lawyer tv advertising. Nor should it be the responsibility of a handful of competing plaintiffs’ attorneys to attempt to shoulder that entire burden for society as a whole.

I appreciate your time and consideration in this matter.

Respectfully submitted,

/s/ Steve Herman

STEPHEN J. HERMAN, ESQ.

matters, where appropriate, to other counsel who might be better suited to prosecute those cases. If a traditional referral fee (otherwise in accordance with Rule 1.5) can be considered an “indirect” payment by a non-advertising lawyer, that would seem to prohibit something that the Rules should encourage.