UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

BUREAU OF COMPETITION

COMMISSION AUTHORIZED
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July 17, 1989

William F. Blews, Esq.
Member, Board of Governors
The Florida Bar
P.O. Box 417
St. Petersburg, Florida 33731

Dear Mr. Blews:

I am writing in response to your letters of June 13 and 26, 1989, in which you requested the views of the Federal Trade Commission staff on certain proposed amendments to the Florida Rules of Professional Conduct.[1] These amendments would generally establish more restrictive standards than now exist in the areas of attorney advertising and solicitation. We believe that several of these proposals may restrict the flow of truthful and useful information to consumers, and therefore, on balance, have the potential to impede competition or increase costs without providing countervailing benefits to consumers.

The discussion of these issues will be divided into a number of sections. The first of these describes the FTC staff's interest and previous experience in this field. The remaining sections then take up the specific provisions of the proposed amendments that raise the most serious concerns about adverse effects on consumer welfare, including the provisions governing: (1) client testimonials; (2) self-laudatory statements; (3) visual aspects of television advertising; (4) cautions against excessive reliance on advertising; (5) solicitation in personal injury cases; and (6) solicitation of another lawyer's clients.[2]

The interest and experience of the Federal Trade Commission

Congress has empowered the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive

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[1] These comments are the views of the staff of the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or of any individual Commissioner.

[2] Our comments are limited to these specific areas, in part due to the constraints of time. This does not necessarily mean that we endorse the remainder of the proposed rules, however.

acts or practices in or affecting commerce.[3] Pursuant to this statutory mandate, the Commission and its staff encourage competition among members of licensed professions to the maximum extent compatible with other legitimate goals.[4] For several years the Commission and its staff, through law enforcement proceedings and analysis, have been evaluating the competitive effects of public and private restrictions on the business practices of lawyers, dentists, optometrists, physicians, and other state-licensed professionals. Our goal has been to identify restrictions that impede competition or increase costs without providing countervailing benefits to consumers. As part of this effort the Commission has examined the effects of public and private restrictions limiting the ability of professionals to contact prospective clients and to advertise truthfully.[5]

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[3] 15 U.S.C. Sec. 41 et seq.

[4] The Commission's staff has previously submitted comments to state governments and professional associations on the regulation of professional advertising, particularly advertising by attorneys. See, e.g., Comments of the Federal Trade Commission Staff on the American Bar Association Model Rules of Professional Conduct (November 22, 1988); Comments of the Federal Trade Commission Staff on the Rules of the Idaho State Board of Chiropractic Physicians (December 7, 1987); Comments of the Federal Trade Commission Staff on the Rules of Professional Conduct of the New Jersey Supreme Court, submitted to the Committee on Attorney Advertising of the New Jersey Supreme Court (November 9, 1987); Comments of the Federal Trade Commission Staff on the Code of Professional Responsibility of the Alabama State Bar, submitted to the Supreme Court of Alabama (March 31, 1987); Comments of the Federal Trade Commission Staff on the rules of the South Carolina Boards of Optometry and Opticianry, submitted to the Legislative Audit Council of the State of South Carolina (February 19, 1987).

[5] See, e.g., American Medical Association, 94 F.T.C. 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 thrust of the AMA decision -- "that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011) -- accords with the reasoning of recent Supreme Court decisions involving professional regulations. See, e.g., Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988) (holding that nondeceptive targeted mail solicitation is protected by the First Amendment); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (holding that an attorney may not be disciplined for seeking legal business through printed advertising containing truthful and nondeceptive

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Advertising informs consumers of options available in the marketplace, and encourages competition among firms seeking to meet consumer needs. Advertising may be especially valuable for people first entering a profession, because it enables them to become known to potential clients and to reach an efficient competitive size more quickly than they otherwise might. Studies indicate that prices for professional services tend to be lower where advertising exists than where it is restricted or prohibited.[6] Empirical evidence also indicates that while restrictions on professional advertising tend to raise prices, they do not generally increase the quality of available goods and services.[7] These relationships between price, quality, and advertising have been found to apply in the provision of legal services as well as in the provision of other professional services.[8]

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[5] (...continued)
information and advice regarding the legal rights of potential clients or for using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding a state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding invalid a Virginia prohibition on price advertising by pharmacies).

[6] Bond, Kwoka, Phelan & Whitten, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham & Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

[7] Bond et al., Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980). See also Benham, Licensure and Competition in Medical Markets, draft AEI conference paper (1989); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

[8] See Jacobs et al., Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Calvani, Langenfeld & Shuford, Attorney Advertising and Competition at the Bar, 41 Vand. L. Rev. 761 (1988); Schroeter, Smith & Cox, Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 35 J. Indus. Econ. 49 (1987); Muris & McChesney, Advertising and the
(continued...)

This is not to say that advertising is invariably benign. It may sometimes be unfair or deceptive, or may violate other legitimate goals of public policy. We believe, however, that truthful advertising is generally beneficial. Therefore, we suggest that the Board of Governors should impose restrictions on advertising only if those rules are narrowly tailored to prevent unfair or deceptive acts or practices, or to accomplish some other significant objective.

The remaining sections of the letter will apply these general principles to the specific amendments proposed.

4-7.1(d): Client testimonials

Proposed rule 4-7.1(d) would prohibit communications containing testimonials from current or former clients. In this respect it is even more stringent than the current Florida regulations, which ban testimonials only insofar as they contribute to "unjustified expectations" as to the results that may be expected from a lawyer.

We believe that truthful testimonials from actual clients may be valuable to consumers of legal services. For example, the listing of certain clients such as major banks or corporations in the Martindale-Hubbell directory suggests that a firm can handle complicated legal problems in which large sums of money may be at risk. Advertising in which clients attest that they use a firm's legal services provides the general public the same type of information that is available to users of legal directories. Advertising in which clients discuss their reasons for satisfaction with a law firm conveys even more information than legal directories convey. An advertisement in which a famous athlete or actor states truthfully that he or she uses a particular firm or attorney indicates to consumers that someone who can spend a substantial sum to find an attorney, and who may have significant assets at stake, believes a particular lawyer to be effective. Such testimonials are not necessarily misleading, and to prohibit them may impede the flow of useful information to consumers. The Board may wish instead to prohibit only those testimonials that are likely to mislead. Alternatively, the Board could delete this rule entirely, and allow such matters to

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[8] (...continued)
Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979).

be covered by the general prohibition in rule 4-7.1 against "false or misleading communication."

4-7.1(e): Self-laudatory statements

This proposed rule would prohibit advertisements containing "any self laudatory statements" or "any statement describing the quality of the lawyer's services." This provision appears to be overbroad. Statements describing the quality of the lawyer's services can convey useful information and may be valued by consumers. Moreover, most advertisements are self-laudatory to some extent. The proposed rule could therefore have the effect of banning virtually all specific claims about the quality of an attorney's work, the convenience of business hours or billing arrangements, and similar matters. Such a ban could be harmful to consumers in two ways. First, it could make it more difficult for consumers to find lawyers who are suited to their own individual needs. Second, it could lessen the beneficial rivalry among competing lawyers. When a lawyer cannot truthfully call attention to the desirable aspects of his or her practice, the incentive to improve or to offer different services or prices is likely to be reduced.

We appreciate that this rule may be intended to reach only a narrow class of overstated and potentially misleading claims. However, the language of the proposed rule does not seem sufficiently precise to ensure that the rule will apply only to those cases. As a result, the potential breadth of the restrictions might well deter attorneys from engaging in activities that are not intended to be prohibited. The Board of Governors may therefore wish to limit the scope of this rule to self-laudatory claims that are likely to mislead consumers.

4-7.2(b): Television advertising

This proposed rule would severely restrict the visual portion of television advertisements. One variant of the proposed rule would allow only the text of the narrator's words to appear on screen. Another variant would allow the text and a "nondramatic" screen appearance by the lawyer whose services are being advertised. Neither version of the rule would permit the use of actors, background music, visual action, dramatic voices, or other features common to television advertising.

This proposal also appears to be overbroad. Again, we appreciate that the rule is intended, at least in part, to

maintain the dignity and professionalism of the legal community. As before, however, the Board may want to bear in mind that advertising restraints of this sort are costly to consumers. Graphics, dramatizations, reenactments, and similar techniques can help consumers understand their legal rights and obligations and can identify attorneys who appear responsive to particular needs. The unavailability of such techniques may make it harder for consumers to make informed decisions about hiring legal counsel. It may tend to exclude from effective participation in the legal system those citizens who would remain uninformed about their legal rights in the absence of television advertisements. It may also make it harder for lawyers to devise vivid advertising images that will engage the viewer's attention, thereby enabling the lawyers to convey their messages.

For all these reasons the Board may wish to consider reversing the presumptions of the proposed rule. Rather than allowing television[9] advertising only in certain specialized formats, and banning all others, the rule might instead ban only those specific techniques that have been affirmatively shown to be likely to mislead, and it might presumptively permit all other techniques.[10]

4-7.2(d): Caution against reliance on advertising

Another provision of the new rules would caution consumers against excessive reliance on advertising. Proposed Rule 4-7.2(d) would require, in most advertisements and communications, the following disclaimer: "The determination of the need for legal services and the choice of a lawyer are important decisions that should not be based solely upon advertisements or self-proclaimed expertise."

Any disclosure obligation tends to increase advertising costs, both because it may increase the length of the message and because it may force advertisers to forego some other portion of the message that would have been delivered had the space not been occupied by the disclosure. Unnecessary disclosure requirements can thus result in a decrease in useful information available to

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[9] The proposed rule also restricts the use of dramatic elements in radio advertising. The principles underlying our comments about television would apply to that medium as well.

[10] This presumption would remain rebuttable, however. Any advertising technique could still be banned on an appropriate showing of likely consumer harm.

consumers. Moreover, some disclosures may further discourage advertising if consumers are thought likely to understand the disclosure to reflect negatively on the advertiser, even when such an inference is unjustified. Although required disclosures may be justified in some instances, the proposed rule here appears broader than necessary[11]

4-7.4(b)(1): Solicitation in personal injury cases

While written solicitation is generally permitted, proposed rule 4-7.4(b)(1) would carve out an exception to this principle. It would prohibit solicitation in cases involving personal injury or wrongful death, or otherwise relating to "an accident or disaster involving the person to whom the communication is addressed or a relative of that person."

This provision appears to us to have both desirable and undesirable features. On the one hand, we recognize that the conduct that would be banned has certain negative effects. The solicitation of accident victims may encourage individuals with baseless claims to pursue legal redress, thereby forcing the public to incur some of the costs of specious litigation. It may also strike many people as unprincipled and opportunistic, and it could to that extent generate costs in the form of ill will that the entire bar and legal system would eventually have to bear. For example, we understand that some observers are concerned that attorney advertising may tend to produce a juror bias against plaintiffs generally. On the other hand, a flat ban on such solicitation will generate costs of its own, most notably by making it more difficult for potential plaintiffs to find a lawyer who is willing and able to pursue the kind of case addressed by the rule. The Board may wish to consider both the costs and benefits of this provision in deciding whether to adopt it. In this connection, we note that it may be possible to amend the rule so as to minimize its costs while still retaining its principal benefits. For example, the Board may be able to draw a line that would ban solicitation only in certain kinds of egregious cases where it is most likely to appear opportunistic.

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[11] The proposed rule will apply to all communications (such as letters) and to all advertisements except those containing no illustrations or visual displays. Some lawyers may try to avoid these provisions by switching to presumptively less efficient advertising formats that are not covered by the rule. Since the rule's coverage is so complete, however, many advertisers will presumably find it impractical to do this.

4-7.4(c)(1)(g): Solicitation of another lawyer's clients

This proposed rule limits the amount of direct competition among lawyers. It provides that any written solicitation must include the following disclaimer in its opening paragraph: "If you have already retained a lawyer for this matter, please disregard this letter."

Like several other provisions on which we have commented, this one may be overbroad. We recognize, of course, that clients may sometimes enter into contractual relationships under which a particular lawyer acquires the right to handle a certain matter in its entirety. We would not advocate rules that encourage the breach of those contracts. Nonetheless, in many other instances the client will be free to terminate the relationship with the attorney at will. At least in this latter context the proposed rule could operate as a direct restraint on competition, and could thereby injure consumers.

Conclusion

In short, we believe that some of the proposed rules under consideration for regulating attorney advertising and solicitation may not give sufficient weight to the value of free and informed consumer choice. We therefore suggest that you consider modifying the rules to permit a wider range of truthful communications, and to ban only those that are likely to be unfair or deceptive, or to otherwise violate significant state objectives in a way that threatens to cause net injury to consumers. As part of this process you may want to review the rules to ensure that any prohibitions are drafted narrowly and precisely.

We appreciate this opportunity to give you our views. Please feel free to get back in touch if you have any questions, or if we can help in any other way.

Sincerely,

Jeffrey I. Zuckerman
Director
Bureau of Competition