



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

Office of Policy Planning
Bureau of Consumer Protection
Bureau of Competition
Bureau of Economics

August 10, 2007

S. Guy deLaup, Esq.
President
Louisiana State Bar Association
601 St. Charles Avenue
New Orleans, LA 70130-3404

Re: Louisiana State Bar Association Rules of Professional Conduct
Committee Request for Comments Regarding Proposed Rules on
Lawyer Advertising and Solicitation

Dear Mr. deLaup:

The staff of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics write in response to a letter from Marta-Ann Schnabel, immediate past-President of the Louisiana State Bar Association (the "Bar"), dated May 21, 2007.¹ In her letter, Ms. Schnabel invited our further comments regarding the Louisiana State Bar Association's Rules of Professional Conduct Committee's ("Committee") Revised Proposed Rules on Lawyer Advertising and Solicitation ("Revised Proposed Rules").² We understand that the Bar already has submitted the Revised Proposed Rules to the Court for its review and therefore also will submit a copy of this letter to the Court. This letter briefly identifies our outstanding concerns about the Revised Proposed Rules.

Truthful advertising performs an indispensable role in the allocation of resources in a free enterprise system because it makes it easier for consumers to compare the price and quality offered by competing suppliers.³ Empirical research has found that restrictions on attorney

¹ This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments. A copy of Ms. Schnabel's letter is enclosed.

² On March 14, 2007, the Commission Staff submitted Comments to the Louisiana Bar, which are enclosed and are available at <http://www.ftc.gov/be/V070001.pdf>. The Proposed Rules were revised on March 21, 2007, and are available at <http://www.lsb.org/committees/ethicrulescomments.asp>.

³ *Bates v. Ariz. State Bar*, 433 U.S. 350, 364 (1977).

advertising lead to higher prices for legal services and there is little evidence that restricting attorney advertising is likely to raise the quality of legal services.⁴ Accordingly, while false and deceptive advertising by lawyers should be prohibited, FTC Staff believe consumers are worse off when states ban an entire class of attorney advertising without any evidence that such advertising is either actually or inherently deceptive or misleading.⁵ Rather, consumers benefit when concerns about potentially deceptive advertising are addressed by requiring attorneys to provide more information, such as disclosures, rather than through prohibitions restricting the flow of truthful information to consumers.⁶

Despite some modifications, the Revised Proposed Rules still appear to prohibit forms of advertising that are not inherently or actually misleading.⁷ Because the Rules already prohibit deceptive and misleading advertisements, we suggest that rather than broadly banning those specific forms of advertising prohibited by the Rules, the Bar and the Court consider providing

⁴ See Frank H. Stephen & James H. Love, *Regulation of the Legal Professions*, 5860 ENCYCLOPEDIA OF L. & ECON. 987, 997 (1999), available at <http://encyclo.findlaw.com/5860book.pdf> (discussing empirical studies demonstrating that restrictions on attorney advertising have the effect of raising fees); James H. Love & Frank H. Stephen, *Advertising, Price and Quality in Self-Regulating Professions*, 3 INT'L J. ECON. BUS. 227, 237 (1996) (“There is very little evidence that advertising lowers the quality of service offered to the public, or that restricting its use by professionals is likely to raise quality.”).

⁵ See, e.g., *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 110 (1990) (“A state may not . . . completely ban statements that are not actually or inherently misleading.”).

⁶ See generally *id.* at 108 (“[D]isclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information”); see also *In re R.M.J.*, 455 U.S. 191, 201-03 (1982) (explaining that states may not absolutely prohibit potentially misleading information, but may require a disclaimer or explanation (citing *Bates*, 433 U.S. at 375)); *Bates*, 433 U.S. at 376 (“correct but incomplete” information does not render attorney advertising inherently misleading and “the preferred remedy of a potentially misleading omission is more disclosure, rather than less”); *Pearson v. Shalala*, 164 F.3d 650, 657 (D.C. Cir. 1999) (holding that the commercial speech doctrine embodies “a preference for disclosure over outright suppression”).

⁷ Specifically, the Revised Proposed Rules prohibit non-deceptive and non-misleading advertising that includes references to and testimonials about past results (Rule 7.2(c)(1)(D)); promises results (Rule 7.2(c)(1)(E)); includes portrayals of clients by non-clients or re-enactments of events that are not actual (Rule 7.2(c)(1)(I)); includes portrayals of judges or juries and portrayals of fictitious lawyers (Rule 7.2(c)(1)(J)); resembles a legal document (Rule 7.2(c)(1)(K)); involves the use of nicknames, monikers, mottos or trade names that imply an ability to obtain results (Rule 7.2(c)(1)(L)); or uses a “recognizable” spokesperson (Rules 7.5(b)(1)(C) & 7.5(b)(2)(C)). The Revised Proposed Rules also prohibit unsubstantiated comparative advertising (Rule 7.2(c)(1)(G)), even for non-misleading comparisons involving subjective qualities that are not easy to measure and for which substantiation may not normally be expected. Moreover, the Rules are not identical to those adopted by the New York State Unified Court System in January 2007. For example, the New York rules permit testimonials regarding past results; clients and attorneys to be portrayed by actors; advertisements that are reasonably likely to create an expectation of results a lawyer may achieve; and the use of recognizable spokespersons. We also note that, even though the New York Court adopted rules less restrictive than those proposed, a federal district court recently found unconstitutional the rules’ prohibitions on testimonials about pending matters; irrelevant advertising techniques; portrayals of lawyers exhibiting characteristics unrelated to legal competence; nicknames, trade names, mottos and monikers that imply an ability to achieve results; portrayals of fictitious law firms; portrayals of judges; and pop-up advertisements. See *Alexander v. Cahill*, 2007 WL 2120024 (N.D.N.Y. 2007).

S. Guy deLaup
August 10, 2007
Page 3 of 4

guidance on how some advertising may be deceptive⁸ and how to cure such potential deception through clear disclosures.⁹ Such a policy both informs attorneys of potential pitfalls in advertising while not foreclosing the free flow of truthful information to consumers.

Finally, with respect to the safe harbor provisions adopted in Rule 7.8, by exempting several forms of communication from the screening requirement, the safe harbor provisions are likely to benefit consumers by increasing the flow of useful information concerning the market for legal services. As stated in our March letter, however, when one group of attorneys has the ability to determine whether their competitors' advertisements conform to the Rules, there are risks to competition. Accordingly, we recommend that the Bar forgo the filing and screening components altogether or that the Rules at least ensure that the Review Committee as a whole, and its members individually, are fully subject to federal and state antitrust laws.

We appreciate the invitation for further comment. Please do not hesitate to contact us with any questions.

Respectfully submitted,

Maureen K. Ohlhausen, Director
Office of Policy Planning

⁸ The Indiana State Bar Proposed Rules on Attorney Advertising have very few prohibitions on speech but provide substantial guidance on how subjective forms of advertising may be deceptive. *See* Indiana State Bar, Proposed Amendments to Rules Governing Attorney Conduct, available at [http://www.in.gov/judiciary/rules/proposed/2007/pcr-isba\(jan\).pdf](http://www.in.gov/judiciary/rules/proposed/2007/pcr-isba(jan).pdf). Although the FTC Staff does not endorse the Indiana Proposed Rules or their comments entirely (*see* Letter from FTC Staff to Indiana Superior Court (May 11, 2007), available at <http://www.ftc.gov/be/V070010.pdf>), these Rules are an example of how to provide guidance to attorneys on avoiding deceptive advertising without prohibiting certain forms of advertising altogether.

⁹ As we noted in our March 2007 letter, although disclosures may cure some informational defects, unnecessary disclosures can deter some advertising and increase costs to consumers. *See generally* Letter from Federal Trade Commission to the New Jersey Supreme Court's Committee on Attorney Advertising (November 9, 1987), available at 1987 WL 874590.

S. Guy deLaup
August 10, 2007
Page 4 of 4

Lydia B. Parnes, Director
Bureau of Consumer Protection

Jeffrey Schmidt, Director
Bureau of Competition

Michael R. Baye, Director
Bureau of Economics

enc.

cc: Hon. Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana