SUBMISSION OF THE STAFF
OF THE
FEDERAL TRADE COMMISSION*

TO THE

AMERICAN BAR ASSOCIATION
COMMISSION ON ADVERTISING

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* These views are those of the staff of the Federal Trade Commission, and are not necessarily those of the Commission or any Commissioners.

I. Introduction

The staff of the Federal Trade Commission is pleased to offer these comments on the issues presented by efforts to regulate lawyer advertising. These views are those of the staff of the Federal Trade Commission, and are not necessarily those of the Commission or any Commissioners.

Some degree of regulation of lawyer advertising may well be necessary to ensure against deception, especially with respect to aspects of legal services about which the consuming public is not well informed. But some rules addressed to particular risks of deception may be too broad; by preventing the communication of truthful and nondeceptive information that consumers may find useful in choosing a lawyer, they may inhibit competition and informed consumer choice. Another concern, that undignified advertising undermines respect for the legal profession and institutions of justice, has led some jurisdictions to impose severe constraints on advertising style and content. These restraints, which may also inhibit competition and consumer choice, may be stricter than necessary to promote the values at stake. Consumers appear to be more discriminating than the profession has believed, for surveys generally show consumers responding positively to advertising that would be considered "dignified" and also to some advertising methods that the most restrictive rules prohibit. Preventing truthful, nondeceptive communications that many consumers apparently do not find offensive and may even find useful could impose costs that should be considered carefully.

II. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[1] Pursuant to this statutory mandate, the FTC encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal goals. For several years the FTC and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals.[2] In addition, the staff has submitted comments about these issues to state legislatures and administrative agencies and others.[3] As one of the

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[1] 15 U.S.C. Sec. 41 et seq.

[2] See, e.g., American Medical Ass'n, 94 F.T.C. 701 (1979); Iowa Chapter of American Physical Therapy Ass'n, 111 F.T.C. 199 (1988) (consent order); Wyoming State Bd. of Chiropractic Examiners, 110 F.T.C. 145 (1988) (consent order); Connecticut Chiropractic Ass'n, 114 F.T.C. 708 (1991) (consent order); American Psychological Ass'n, C-3406 (consent order issued December 16, 1992, 58 Fed. Reg. 557 (January 6, 1993)); Texas Bd. of Chiropractic Examiners, C-3379 (consent order issued April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)); National Ass'n of Social Workers, C-3416 (consent order issued March 3, 1992, 58 Fed. Reg. 17411 (April 2, 1993)); and California Dental Ass'n, D-9259 (administrative complaint issued July 9, 1993).

[3] Recent comments by the Commission staff about professional advertising include comments to the New Jersey Board of Medical Examiners, September 7, 1993; South Carolina Legislative Audit Council, January 8, 1993 (medical boards); Missouri Board of Chiropractic Examiners, December 11, 1992; and Texas Sunset Advisory Commission, August 14, 1992 (medical boards).

two federal agencies with principal responsibility for enforcing antitrust laws, the FTC is particularly interested in restrictions that may adversely affect the competitive process and raise prices (or decrease quality) to consumers. As an agency charged with a broad responsibility for consumer protection, the FTC is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception.

The Commission and its staff have had a long-standing interest in the effects on consumers and competition of regulation of lawyer advertising. The Commission supported the 1983 amendments to the American Bar Association's Model Rules, which eliminated subjective criteria and permitted media and direct mail advertising and the use of trade names.[4] The staff submitted a comment to this Commission on Advertising in 1986, advising against the adoption of formal "guidelines" about dignity in lawyer advertising.[5] The Commission submitted a brief amicus curiae in the judicial challenge to Iowa's rules that sharply limit lawyer advertising,[6] and the staff later submitted a brief to Florida about the proposed rules there.[7] The staff has commented frequently about other proposals to regulate lawyer advertising.[8]

III. Federal Trade Commission Policies and Enforcement Actions Involving Professional Advertising

Advertising informs consumers of options available in the marketplace and encourages competition among firms seeking to meet consumer needs. This is as true of advertising by professionals as it is of advertising by other kinds of business or service. These procompetitive functions of advertising may be especially important in facilitating the entry of new firms, by making them known to potential clients and helping them reach more quickly an efficient competitive size. But these procompetitive functions may still be significant regardless of a firm's size or age. Studies have shown that prices for certain professional services tend to be lower where the services can be advertised than where advertising is restricted or prohibited.[9]

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[4] Letter to Morris Harrell, President, ABA (January 17, 1983).

[5] Letter to Thomas S. Johnson, ABA Commission on Advertising (December 8, 1986).

[6] Brief of the Federal Trade Commission, State Bar v. Humphrey et al. (Supreme Ct. of Iowa, Law No. 69088, Jan. 17, 1984).

[7] Response to Petition to Amend Rules (Supreme Ct. of Florida, Case No. 70,366, May 13, 1987).

[8] See, e.g., comments to Supreme Court of Mississippi, January 14, 1994; Supreme Court of New Mexico, July 29, 1991; State Bar of Arizona, April 17, 1990; Ohio State Bar Association, November 3, 1989; Florida Bar Board of Governors, July 17, 1989; New Jersey Supreme Court, November 9, 1987; Supreme Court of Alabama, March 31, 1987; State Bar of Georgia, March 31, 1987.

[9] 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

Empirical evidence also shows that while certain restrictions on professional advertising tend to raise prices, the restrictions studied did not generally increase the quality of available goods and services.[10] Advertising is not, of course, invariably benign. Advertising may sometimes be unfair or deceptive or may violate other legitimate goals of public policy. But truthful advertising is generally beneficial and procompetitive. Thus, restraints on truthful advertising can restrain competition and deprive consumers of the benefits of a competitive marketplace and of information they may find useful and valuable in making decisions.

The FTC has examined the effects of many kinds of public and private restrictions limiting the ability of professionals to contact prospective clients and to advertise truthfully. The leading decision is the Commission's 1979 ruling in American Medical Association ("AMA").[11] The Commission held there that the AMA's restraints on advertising, patient solicitation, and alternative forms of practice violated both the competition and the consumer protection aspects of Section 5.[12] But, in recognition of how consumer protection promotes healthy competition, the Commission's order banning the restraints permitted the AMA to continue to monitor advertising for the purpose of preventing deception.[13]

The Commission has applied those principles many times, in many professional settings, since AMA. In Massachusetts Board of Optometry,[14] the Commission struck down restraints that prevented not only advertising of prices and discounts, but also advertising of professional affiliations and advertising that included testimonials or that was "sensational" or "flamboyant." The Commission found there was no justification for such a flat ban on "undignified" advertising. Other Commission actions during the 1980's dealt with restraints on advertising among engineers, accountants, physicians, dentists, and optometrists. The cases considered both restraints related to price and those addressed to other aspects of the content and style of professional advertising.[15]

Eyeglasses, 15 J.L. & Econ. 337 (1972). See Section IV infra for discussion of similar studies and results involving the legal profession.

[10] Bond et al., supra n. 9; see also Benham, Licensure and Competition in Medical Markets, in Frech, ed., Regulating Doctors' Fees (1990); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

[11] American Medical Ass'n, 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).

[12] Id. at 1010.

[13] Id. at 1030.

[14] 110 F.T.C. 549 (1988).

[15] Ass'n of Independent Dentists, 100 F.T.C. 518 (1982); Broward County Medical Ass'n, 99 F.T.C. 622 (1982); Michigan Ass'n of Osteopathic Physicians 102 F.T.C. 1092 (1983); Washington, D.C. Dermatological Society, 102 F.T.C. 1292 (1983); Michigan Optometric Ass'n, 106 F.T.C. 342 (1985); Montana Bd. of Optometrists, 106 F.T.C. 80 (1985); Louisiana State Bd. of Dentistry, 106 F.T.C. 65 (1985); Rhode Island Bd.

It has become increasingly difficult for professional associations to defend restraints on non-deceptive advertisements of their practitioners' prices. Thus, attention is increasingly turning to restraints on other aspects of advertising. The Commission's recent actions involving professional advertising reflect this trend, addressing efforts to control advertising style and content.[16] These cases, about restraints imposed on engineers, psychologists, social workers, chiropractors, and dentists, have considered most of the same issues — banning testimonials, "self-laudatory" claims, claims about quality or superiority, and appeals to emotion, and limiting advertising to certain media and specified "tombstone" details — that are raised by proposals to limit advertising by lawyers.

The AMA decision rests on the premise "that broad bans on advertising and soliciting are inconsistent with the nation's public policy."[17] In support of that conclusion, the Commission cited the Supreme Court's principal decision applying the First Amendment to the regulation of lawyer advertising.[18] The Commission's continuing application of the Federal Trade Commission Act to professional advertising has been fully consistent with the Court's application of the First Amendment to lawyer advertising.[19] However, the Commission has brought no cases involving restraints on lawyer advertising. The reason it has not is the same as the reason why the Supreme Court has applied the First Amendment, rather than the Sherman Act, to those restraints.[20] The restraints are typically formal rules issued by the courts, and thus, as state action, are not subject to antitrust enforcement.

The Bates Court recognized that consumers' unfamiliarity with what lawyers can do for them might justify continuing supervision and even regulation of some aspects of legal

of Accountancy, 107 F.T.C. 293 (1986); American Academy of Optometry, Inc., 108 F.T.C. 25 (1986); Tarrant County Medical Society, 110 F.T.C. 119 (1987); Structural Engineers Ass'n of Northern California, Inc., 112 F.T.C. 530 (1989).

[16] Connecticut Chiropractic Ass'n, supra n. 2; Texas Bd. of Chiropractic Examiners, supra n. 2; American Psychological Ass'n, supra n. 2; Ass'n of Soil & Foundation Engineers, C-3430 (consent order, June 11, 1993); Nat'l Ass'n of Social Workers, supra n. 2 (1993); Nat'l Soc. of Professional Engineers, C-3454 (consent order, August 6, 1993); American Dental Ass'n, Dkt. 9093 (compliance letter, November 2, 1993); California Dental Ass'n, supra n. 2.

[17] 94 F.T.C. at 1011.

[18] Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (state prohibition on advertising struck down; opinion recognizes role of advertising in the efficient functioning of the market for professional services).

[19] See Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990) (attorney's letterhead may use statement of bona fide specialty certification; Commission filed brief amicus curiae); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (nondeceptive targeted mail solicitation is protected); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (upholds seeking business through printed advertising containing truthful and nondeceptive information and advice about legal rights and nondeceptive illustrations or pictures).

[20] Bates, 433 U.S. at 359-363.

advertising. After all, when a claim is made that the First Amendment protects commercial speech, the first question to be asked is whether the speech is misleading; if it is, then the First Amendment does not protect it.[21] The Commission, in its actions involving professional advertising, has taken care not to discourage self-regulation that disciplines false and deceptive advertising. The Commission's orders against professional association restraints on advertising include provisos such as that in the AMA order itself, permitting action against advertising claims that the association "reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act."[22]

IV. Effects of Advertising for Legal Services

Research has confirmed that advertising may have the same effects in markets for routine legal services that have been shown in other professional service markets.[23] A study by the staff of the FTC concluded that fees for simple legal services were higher in states where advertising was restricted and found that lawyers who advertised generally charged lower prices.[24] Another study, based on the same data as the FTC staff study, also concluded that increased advertising leads to increased competition and lower prices for routine legal services.[25] The likely effects on price and quality might be different for different kinds of services, with advertising more likely to lead to lower prices at no loss in quality for relatively routine services that could be standardized.[26]

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[21] Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980). The First Amendment also does not apply to commercial speech about an act that is illegal. The other parts of this First Amendment analysis ask whether the asserted state interest is substantial or merely arguable; whether the regulation directly advances the asserted interest; and whether the regulation is more extensive than necessary to serve that interest. Even non-misleading commercial speech may be restricted if the restriction directly advances a substantial state interest and the restriction is no more extensive than necessary to serve the asserted interest.

[22] American Medical Association, 99 F.T.C. 440, 441 (1982).

[23] The studies are summarized in Calvani, Langenfeld & Shuford, Attorney Advertising and Competition at the Bar, 41 Vand. L. Rev. 761 (1988).

[24] Jacobs et al., Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984).

[25] Schroeter, Smith & Cox, Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 35 J. Indus. Econ. 49 (1987).

[26] Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. Bar Found. Research J. 179 (1979). This study compared services provided by a legal "clinic" that advertised heavily with those of traditional, non-advertising lawyers. Quality of service was assessed through a questionnaire to elicit consumers' subjective satisfaction with the services they received and through an objective comparison of results. Subjectively, consumers were at least as satisfied with the clinic's services as with those of other lawyers along such dimensions as promptness of service, concern about the client's problems, keeping the client informed, charging a fair and reasonable fee, and honesty. The objective test was a regression analysis to

To some extent, these studies dealt with simpler issues than those the legal profession is facing now. Most of the studies examined the impact made by the fact of advertising, rather than the effects of particular advertising techniques or particular regulatory restrictions. When these studies were done, the profession was still responding to the basic change that Bates brought about, from a profession with virtually no advertising to one with at least some. The Court in Bates rejected several arguments that were advanced to justify banning advertising entirely,[27] but left many particular issues open. The profession is addressing the issues that the Bates decision did not: what particular types of advertising might be deemed to be inherently false, deceptive or misleading; how to treat advertising relating to the quality of services; and whether media other than print raise special problems. This comment does not discuss in-person or mail solicitation, the other issues that Bates explicitly left open.

Debate about regulation of lawyer advertising discloses continuing concerns to prevent deceptive publicity that would mislead laypersons, cause distrust of the law and lawyers, and undermine confidence in the legal system.[28] These are important policy concerns. We suggest that the matters at stake be addressed by imposing restrictions on advertising that are tailored to prevent unfair or deceptive acts or practices or otherwise to serve consumers, rather than imposing restrictions that tend chiefly to dampen competition.

Two dimensions of the debate are deception and dignity. Thus, the Iowa rules counsel against undue emphasis upon "style and advertising stratagems" and prohibit advertising that appeals not only to "emotions" and "prejudices," but even to "likes and dislikes."[29] Its rules claim that there is "no public benefit" from advertising that is too loud or too frequent or is

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determine whether representation by the clinic's lawyers was a factor that improved the client's outcome in child support proceedings; the study concluded there was evidence that it did. See also Hazard et al., Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services, 58 N.Y.U. Law Rev. 1058 (1983), predicting that advertising would be more useful, both to consumers and practitioners, for more standardized services, but less important for services that are likely to vary greatly in individual cases.

[27] In particular, Bates rejected the arguments that advertising of any kind about legal services would be "inherently" misleading, 433 U.S. at 372-75; that advertising would lead to the undesirable economic effects of raising costs and entry barriers, 433 U.S. at 377; that advertising would reduce the quality of legal services, 433 U.S. at 378; that prohibition is necessary because regulation would be too difficult, 433 U.S. at 379; that advertising would undermine "professionalism," 433 U.S. at 368-72; and that advertising would harm the administration of justice, 433 U.S. at 375-76.

[28] See, e.g., Iowa, Code of Professional Responsibility for Lawyers ("Iowa Rules"), EC 2-12. Iowa's rules are also premised on the belief, echoing Bates, that public lack of sophistication about legal services and the importance of the interests at stake justify special rules to avoid misleading the public and assure that information in advertising is relevant to selection of counsel. Iowa Rules, EC 2-11. See also Mississippi Bar, Petition, Appendix 12, In Re Amendment to the Mississippi Rules of Professional Conduct (Mississippi Supreme Ct., No. 89-R-99018), expressing concerns about potential interference with the fair and proper administration of justice, because misleading or overreaching advertising practices can create unjustified expectations and adversely affect the public's confidence and trust in the judicial system.

[29] Iowa Rules, EC 2-12.

marked by unspecified "excesses" of content or scope.[30] The rules show that the concern is that such communications to a consuming public that lacks sophistication about legal services would hinder, rather than facilitate, intelligent selection of counsel.[31]

To the extent these concerns are about deception, they might be analyzed in much the same way that the Commission addresses deception and competition issues under Section 5 of the FTC Act. These will be discussed in more detail below, in the context of particular proposals that would apparently treat certain types of information or communication as inherently misleading.

To the extent the concerns are about "dignity," the Supreme Court has said that First Amendment rights cannot be infringed merely to preserve "dignity" in professional communications.[32] To be sure, the issue has been framed in terms of maintaining respect for the system of justice, not just maintaining respect for members of a professional class. Before attempting to promote this respect through actions that could inhibit competition and consumer interests, by preventing communications that are truthful, useful, and even, to many consumers, acceptably "dignified," one should examine carefully the basis for concerns that undignified advertising by lawyers would undermine public confidence in the system of justice.

Consumers appear to be less hostile to professional advertising than lawyers are.[33] Results of the ABA Commission's opinion survey suggest that consumers respond both to production quality and to content, and that both factors matter in conveying dignity. This survey also showed that consumers did not necessarily find print advertising to be more dignified than television advertising and that advertisements that used sophisticated production techniques may have been perceived as more, rather than less, "dignified."[34]

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[30] Iowa Rules, EC 2-11. This rule also expresses concern about advertising that "unduly emphasizes unrepresentative biographical information."

[31] Iowa Rules, EC 2-11.

[32] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).

[33] American Bar Association, Commission on Advertising, Report on the Survey on the Image of Lawyers in Advertising ("ABA Commission Survey") (January, 1990); Note, An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising, 77 Iowa Law Review 179 (1991) ("Iowa-Wisconsin Survey"); Weeks & Stem, Media and Price Disclosure Effects in Legal Service Advertising: A Comparison of Attorney and Consumer Attitudes, 3 J. of Professional Services Marketing 257 (1987). Surveys about attitudes toward advertising by other professionals show similar results: although the professionals involved are deeply suspicious, consumers are significantly more tolerant. Burton, Medical Doctors and Consumers View Medical Advertising, 9 Health Marketing Quarterly 81 (1991); Burton, Attitudes Toward the Advertising by Lawyers, Doctors, and CPA's, 8 J. of Professional Services Marketing 115 (1991).

[34] ABA Commission Survey, supra n. 33 at 29. Some print advertisements were found less dignified than some television advertisements, and the advertisement that was viewed most positively was a television spot. The results also suggest that "dignity" alone may not capture everything that consumers would find positive about an

The ABA Commission Survey apparently did not address whether consumers thought better or worse of lawyers and the legal profession, either individually or in general, because of the advertisements. Another survey of consumers in Iowa and Wisconsin, adjacent states with different rules about lawyer advertising, has attempted to do that.[35] The ABA Commission may find it useful to study the results of this survey. Neither the staff nor the Federal Trade Commission has adopted or endorsed the methods or results of any of the surveys and research reports cited here. Consumers were asked to make judgments about the attributes of honesty, competency, helpfulness, effectiveness, and reliability. On scale of 1 (low) to 7, Iowa consumers' ratings of all lawyers on these attributes averaged 4.74, compared to Wisconsin's 4.32. Concerning lawyers who advertise, the Iowa responses averaged 3.88, compared to Wisconsin's 3.84; the difference was reportedly not significant. Responses from consumers generally showed no significant differences between their perception of lawyers' advertisements and of advertisements in general. However, those Iowa consumers who had actually seen lawyers' advertisements thought they were more truthful than most advertisements. These consumers rated lawyers' advertisements at 2.82 on a scale of 1 (most truthful) to 5, compared to 2.96 for advertisements in general; that difference was reportedly significant. These Iowa consumers' response might, of course, be explained by their having seen only the kinds of limited advertising that the Iowa rules permit. This response, and the Iowa consumers' slightly higher rating of the legal profession in general, suggest that regulating advertising more closely may improve somewhat the profession's public image.

Other parts of the Iowa-Wisconsin Survey project analyzed individual responses to particular advertisements and methods. Responses were similar to those reported for the ABA Commission Survey.[36] To the direct question, whether the individual consumer would use the services of an attorney who advertised, most consumers who participated in the Iowa-Wisconsin Survey said yes, and the proportion increased after the advertisements were viewed, from 67 percent to 74 percent. About that same proportion of consumers did not agree that advertising would tend to lower the dignity of the profession and the public's image of lawyers. Consumers' reactions to the first of these statements were essentially unchanged after viewing the commercials. Viewing the commercials did increase the proportion who thought advertising would lower the public's image of lawyers and the proportion who thought advertising would

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advertisement. Consumers rated an advertisement that deliberately used humor more positively than several others that were judged more dignified. ABA Commission Survey at 35-36.

[35] Iowa-Wisconsin Survey, supra n. 33.

[36] A 1983 survey commissioned by the Iowa bar association found that consumers generally had high expectations about the possible informational value of lawyer advertising; however, after seeing three actual television advertisements, their opinions about lawyers were sharply lower. Res Gestae, p. 59, August 1988. It is difficult to tell from the published report what kinds of advertisements the subject audience saw. Inconsistencies between the results of this survey and those of later surveys might be explained in part by differences in the number and nature of the particular advertisements used. The ABA Commission survey, for example, used five television spots and five print advertisements, of widely varying style and content, perhaps encouraging the subjects to make more discriminating judgments.

lower the profession' credibility; both views were in significant minority, though.[37] The consumers in the Iowa-Wisconsin Survey tended to identify offers of help, identification of expertise or specialization, truthfulness or sincerity, humor, production quality, and absence of a hard-sell as "positive." Conversely, they identified hard-sell mentality, greed or manipulation of the system, cheap production quality, insincerity or slickness, and patronizing or manipulative tone as "negative."[38]

Although the empirical surveys have not addressed this question, it is possible that some consumers are most effectively reached by advertising that might be considered undignified. If so, some lawyers may choose to direct that kind of advertising to those consumers. In considering regulations intended to preserve public esteem for the system of justice, the interest of effectively communicating the availability of legal services to such consumers should not be ignored.

One of the most important questions is also one of the most difficult to answer: whether different rules about advertising produce differences in the price and quality of legal services. The studies cited above tend to show that increased advertising lowers prices for routine services, without reducing quality.[39] No more recent systematic research on this issue has been reported. The results of the Iowa-Wisconsin Survey, which asked lawyers to report on their fees, are ambiguous.

V. Issues about Deception Raised by Restrictions on Advertising Methods

Most of the particular proposals to prohibit or regulate the content or style of lawyer advertising can be understood as being about whether the practices are misleading. The rules in most jurisdictions state a basic, general policy against advertising that is false, fraudulent, misleading, deceptive, or unfair.[40] Often, the rules call particular attention to misrepresentations about likely outcomes.[41] The concerns expressed by these principles are consistent with the

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[37] Before viewing the commercials, 33 percent agreed that advertising would lower the profession's dignity; afterwards, the figure was 34 percent. Before, 16 percent agreed that advertising would lower the public's image of lawyers; afterwards, the figure was 20 percent. Before, 23 percent agreed that advertising would lower the profession's credibility; afterwards, the figure was 34 percent.

[38] Views on the value of disclaimers were divided. Fifty-four percent thought disclaimers were useful, although many of these also thought they were likely to be ineffective or to invalidate the advertisement, while 46 percent thought they were self-evident, redundant, patronizing, or unlikely to provide useful information.

[39] Jacobs et al., supra n. 24; Schroeter et al., supra n. 25; Muris & McChesney, supra n. 26.

[40] See, e.g., Iowa Rules, DR 2-101(A); Florida, Rules of Professional Conduct ("Florida Rules"), Rule 4-7.1; American Bar Association, Model Rules of Professional Conduct ("ABA Model Rules"), Rule 7.1.

[41] See, e.g., Iowa Rules, EC 2-12, referring to "false hopes of success or undue expectations"; Florida Rules, Rule 4-7.1(b); ABA Model Rules, Rule 7.1(b).

FTC's policy concerns in the enforcement of its own basic law prohibiting "unfair or deceptive acts or practices."[42]

The following discussion addresses some particular rules that treat certain practices as, in effect, inherently misleading. The discussion is based on the rules of Iowa and Florida, two states whose rules are among the most strict. It discusses several particular kinds of restraints, and compares the rules to how the Commission has treated similar rules in its law enforcement actions concerning restraints on professional advertising.

Some of these restraints are apparently addressed to a concern that consumers not be misled by overconfident assertions or subtle but unfounded implications that a lawyer can achieve particular results in their case. Other restraints, which prohibit the use of common advertising techniques and production tools, seem motivated by a belief that it is improper for a consumer to base the choice of a lawyer on any considerations other than assessment of "objective" facts, and a belief that the "stratagems" of advertising corrupt the communication of those facts.[43]

A. "Self-laudatory" claims, testimonials, and substantiation requirements

Banning assertions because they are "self-laudatory" or relate to the quality of services offered[44] may be unnecessarily broad. "Self-laudatory" statements and claims concerning the quality of legal services are not necessarily either unfair or deceptive. While advertising fitting these descriptions could be employed to deceive consumers, many instances of non-deceptive, useful advertising could fit these descriptions as well. Most advertisements are self-laudatory to some extent, explicitly or implicitly. And even subjective, self-laudatory assertions about the quality of services offered, such as the importance a firm places on courtesy and attentiveness in the delivery of legal services to the public, can also convey information of some value.[45]

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[42] Whether an advertisement is considered false or deceptive under Section 5 depends on whether it makes a representation that is material and that is likely to mislead a consumer acting reasonably in the circumstances, or whether it fails to disclose information necessary to prevent the representations that are made from creating a materially misleading impression. See Thompson Medical Co., 104 F.T.C. 648 (1984); International Harvester, 104 F.T.C. 949 at 1057 (1984).

[43] Thus, Iowa's policy is to limit public communications to information that is unambiguous and relevant to a layperson's decision about legal rights or selection of counsel, communicated in ways that comport with the dignity of the profession and do not demean the administration of justice. Iowa' rules disapprove "undue emphasis on style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel." Iowa Rules, EC 2-12.

[44] Iowa Rules, DR 2-101(A); Florida Rules, Rule 4-7.2(f).

[45] Recognizing the risk that an overbroad ban could discourage dissemination of useful and procompetitive information, the Commission has often taken action against restrictions on "flamboyant" or "self-laudatory" or subjective "superiority" claims in advertisements. See California Dental Ass'n, supra n. 2 (complaint); Mass. Bd.

Similarly, rules against any comparative claims and illustrations that cannot be factually substantiated could be too broad.[46] Requiring that material claims be substantiated can, of course, serve consumers by helping to ensure that claims are not misleading. But if substantiation is demanded for representations that, although not misleading, concern subjective qualities that are not easy to measure and for which substantiation may not normally be expected, then messages that consumers may find useful may be barred. For example, claims or assertions about aspects of service might be understood as at least implicitly comparative, and thus subject to the requirement of factual substantiation. Such claims as that the firm provides "friendly," "diligent," "prompt," or "convenient" service, while probably not always susceptible to objective substantiation, may nonetheless communicate useful information, indicating qualities that the firm seeks to emphasize in its practice. The broad prohibition might be based on a concern that unsubstantiated claims could mislead consumers about the results lawyers can achieve. But if that is the concern, then it would be better addressed by a rule directed more narrowly to claims that could be construed as having some bearing on likely outcomes.[47]

Rules restricting a wide class of claims may be aimed at a limited subset of that class, such as materially misleading and unfounded claims about a lawyer's ability to secure relief for clients or about the relative quality of a lawyer's work product. Such claims might be disciplined through narrower prohibitions that did not present as great a risk of chilling potentially useful communications. For example, some states ban endorsements and testimonials outright.[48] The bases for such a ban could be belief that one client's experience with a lawyer has no bearing on what another client could expect or that endorsements and testimonials pose too great a risk

of Optometry, supra n. 14; Montana Bd. of Optometrists, 106 F.T.C. 80 (1985); Nat'l Soc. of Professional Engineers, supra n. 16; Structural Engineers Ass'n of Northern California, Inc., 112 F.T.C. 530; Texas Bd. of Chiropractic Examiners, supra n. 2.

[46] Iowa Rules, DR 2-101(A) (no claim that is not verifiable); Florida Rules, Rule 4-7.1(c), Rule 4-7.2(f) (no comparisons of services or illustrations unless they can be factually substantiated; cf. ABA Model Rules, Rule 7.1(c) (substantiation required for comparative claims, but not for illustrations).

[47] The Commission's actions on this issue balance a concern that rules not be overly restrictive with a recognition that substantiation may sometimes be required. See American Dental Ass'n, supra n. 16, where the Commission objected to the Association's ban on all claims implying quality or superiority that are not susceptible to reasonable verification by the public, as imposing a far greater limitation than required by the Commission's substantiation policy; Texas Chiropractors, supra n. 2 (complaint details restrictions in rules; order prohibits disciplinary actions and rules prohibiting advertising, but permits such actions against practices reasonably believed to be false, misleading or deceptive, or otherwise prohibited by law); American Psychological Ass'n, supra n. 2 (order against rules banning advertisements about comparative desirability of offered services and truthful claims of unusual or "one of a kind" abilities, but permitting rules and policies about, among other things, solicitation of testimonial endorsements from persons who, because of their particular circumstances, are vulnerable to undue influence): Connecticut Chiropractic Ass'n, supra n. 2 (order permits rules requiring substantiation of claims about qualifications).

[48] See, e.g., Florida Rules, Rule 4-7.1(d).

of promising particular outcomes in court. The two concerns are distinct, and the first one especially may be overly cautious. To be sure, testimonials and endorsements can be used in ways that mislead about likely outcomes, and it may be both appropriate and necessary to take action against those that do.[49] But some aspects of professional services, unrelated to particular outcomes, might well be communicated truthfully and usefully by a report of a client's actual experience. Rather than a conclusive ban, an approach might be taken similar to that of the Commission's guides on this subject, that seeks to ensure that client testimonials are truthful and not misleading.[50] More generally, rules might target those claims that make insupportable representations about particular results or that inaccurately imply the existence of objective substantiation.

Disclaimer and other disclosure obligations, which many jurisdictions require,[51] tend to increase advertising costs, by requiring that messages be longer or by forcing advertisers to displace other information. Disclosure obligations may also discourage advertising if advertisers believe consumers will take the disclosure to reflect negatively on the advertiser, regardless of whether that imputation is justified. Because of these effects, disclosure requirements that are unnecessary can reduce the amount of useful information available to consumers. Disclosures and disclaimers can sometimes be necessary to prevent deception.[52] It is important in evaluating disclosure requirements to weigh the costs against the expected benefits.

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[49] For example, the Commission has taken many actions against the use of deceptive testimonials in advertisements of weight loss and diet firms. See, e.g., Nutri/System, Inc., C-3474, Diet Center, Inc., C-3475, and Physicians Weight Loss Centers, Inc., et al., C-3476 (consent orders issued December 22, 1993, 59 Fed. Reg. 6647-48 (February 11, 1994)); Weight Watchers International, Inc., Dkt. 9261, and Jenny Craig, Inc., Dkt. 9260 (administrative complaints issued September 24, 1993). The complaints allege that advertisements containing testimonials and stories of individual consumer experiences were false and misleading because the advertising firms lacked a reasonable basis to substantiate the representation that the experiences depicted were typical. The cease and desist orders would prohibit advertisements with endorsements or testimonials about weight loss success if that success is not representative of what other participants in the program generally achieve, unless the advertisement also contains specified disclosures about actual success rates or disclaimers that the success depicted is not typical.

[50] Federal Trade Commission, Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255. A copy of these guides is attached. These guides explicate and illustrate the application of the Federal Trade Commission Act's legal standards of unfairness and deception. In enforcement actions, the Commission has issued orders against rules prohibiting truthful, nondeceptive testimonials from actual consumers. American Psychological Ass'n, supra n. 2; Massachusetts Bd. of Optometry, supra n. 14; Nat'l Ass'n of Social Workers, supra n. 2; Texas Bd. of Chiropractic Examiners, supra n. 2.

[51] Iowa Rule DR 2-101(A), (B)(1); Florida Rules, Rule 4-7.2(d).

[52] Thus, the orders in the Commission's recent diet center cases, supra n. 49, would require disclosures or disclaimers in connection with certain testimonials and representations about fees.

B. Regulation of style and content of media advertising

Constraints on the style and content of broadcast advertisements could discourage competition in the legal profession. Such restraints have been defended as intended to ensure that advertising is limited to what is "useful," "factual," and "informational," presented in a manner that is "nonsensational."[53] But such restraints can prohibit communications that are not deceptive, misleading, or unfair, and that are likely to be "useful" to consumers by helping them identify suitable providers. Both the style and the content of a provider's advertisement may help consumers decide whether the provider is suitable for their needs. The constraints would prevent the use of common methods that advertising firms have used for generations to make their messages memorable. These methods are unlikely to hoodwink unsuspecting consumers, because consumers are thoroughly familiar with them. Whether a slogan, musical tag, or illustration is misleading, deceptive, or unfair to consumers would depend on what it says and how it is understood, not on whether it is catchy and effective.[54]

The apparent intent and effect of the most severe rules is to limit radio and television advertising to nondramatic narration by a single voice of specified facts about a practice's identity and location.[55] Visual material is banned or sharply limited, and even background music is sometimes forbidden or regulated. These severe restraints on media advertising have been supported by claims[56] that "unique" characteristics of TV and radio, including "pervasiveness," purported "ease" of abuse through them, and audience "passiveness," make them "especially subject to regulation in the public interest". Such restraints are designed to prohibit "suspense," "exaggerations," "situations calling for legal services," and "scenes

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[53] See Mississippi Bar Petition, supra n. 28.

[54] The Commission has issued orders against rules that restricted information to "tombstone" details about identity and office hours and locations, Wyoming Bd. Of Podiatry, 107 F.T.C. 19 (1986); Texas Bd. of Chiropractic Examiners, supra n. 2; that required advertising to "contribute to the esteem of the profession" or be in good taste, Connecticut Chiropractic Ass'n, supra n. 2; cf. Nat'l Soc. of Professional Engineers, supra n. 16; California Dental Ass'n, supra n. 2 (complaint); and that prohibited advertising likely to appeal to emotions, American Psychological Ass'n, supra n. 2. In these actions, the Commission's concern has not been whether particular advertisements were dignified, but that efforts to maintain dignity, without regard to truthfulness or deception, may restrict competition. Whether or not an advertisement is dignified, or whether greater dignity would promote a social value or interest other than competition and the welfare of consumers, would not normally be considered relevant to any issue in an enforcement action under Section 5 of the Federal Trade Commission Act.

[55] Iowa Rules, DR 2-101(B)(5) (single voice, not melodramatic, with visual content limited to same items as print; voice must not be that of the lawyer); Florida Rules, Rule 4-7.2(b), (e), (f) (single voice, no background sound except instrumental music; illustrations allowed if "verifiable"; no dramatizations; voice may be that of the lawyer or employee, but must not be a recognizable celebrity).

[56] Mississippi Bar Petition, supra n. 28.

creating consumer problems through characterization and dialogue ending with the lawyer solving the problem."[57]

These restrictions effectively prohibit dramatizations. But dialogue and demonstration may be effective ways to explain the law, particularly to consumers who do not already know how legal terminology corresponds to their experiences and problems. Dramatizations or illustrations that some consumers — and professionals — view as tacky or offensive, but are not deceptive, may not offend other consumers at all, and those who do find them objectionable may register their distaste by refusing to patronize the offenders. The comment to the recent Mississippi proposal describes one ideal of "dignified" advertising, namely lawyers speaking to the audience personally to explain consumers' legal rights and the lawyers' services, background, and experience.[58] Survey research suggests that such advertisements are viewed most positively by consumers as well as by lawyers.[59]

Some other proposals that would also make advertising more difficult could restrict communication of truthful, non-deceptive information. Requiring advertisements to list each particular location where services will be provided will increase costs and may make cooperative advertising arrangements difficult or infeasible.[60] The concern is evidently that consumers might be misled if the office or firm that provides services is not the one identified in the advertising. But if the advertisement leaves room for uncertainty about the identity and location of the particular attorney, that uncertainty would probably be cleared up when the consumer called the attorney (or the advertised telephone number) to set up an appointment. In any event, such problems could be dealt with by applying a general rule against deception, without burdensome disclosure obligations. Requiring that only certain phrases be used in describing the kinds of cases a lawyer takes, and preventing the use of other terms regardless of whether they are deceptive, may deprive consumers of particularly important information they need in choosing a lawyer.[61] Consumers may understand their problems by rubrics that do not appear on lists of approved labels.

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[57] Id.

[58] Rules are designed "to encourage a focus on providing useful information to the public about legal rights and needs and the availability and terms of legal services." Mississippi State Bar Petition, supra n. 28.

[59] Some proposals would require on-screen or on-microphone appearances by the lawyers, which could discourage many professionals from using broadcast advertising. The limitation could reward the telegenic, for others could not hire on-the-air professionals to help them put their message out. It is curious that other rules, such as Iowa's, prohibit such personal appearances. The effect of requiring personal participation may be to prevent the use of advertising materials that are produced professionally and sold to lawyers in many different jurisdictions. Rather than prevent deception, the result could be to prevent effective advertising by requiring more expensive individually-tailored productions.

[60] Florida Rules, Rule 4-7.2(l).

[61] Iowa Rules, DR 2-105.

Finally, banning trade or fictitious names, regardless of whether there has been any showing of deception, may deprive consumers of valuable information, increase consumer search costs, and lessen competition.[62] In other contexts, the FTC has found that restrictions on the use of non-deceptive trade names hinder the growth and development of firms and make it difficult for them to advertise multiple outlets.[63] In some professional fields trade names can be essential to the establishment of large group practices that can offer lower prices. Trade names can be chosen that are easy to remember and, in addition, convey useful information, such as the location or other characteristics of a business. Over time, trade names can come to be associated with a certain level of quality, service and price, thus aiding consumers' search and promoting competition.

Two kinds of trade names are already commonly permitted in the law. The long-standing pattern of retaining the names of former partners in the "institutional" name of a practice is widely condoned. And rules now usually permit calling a practice a "clinic," if it is a low-price provider of routine services.[64] In each case, the words used, even though not the name of any particular lawyer who would provide services, convey information about the practice that consumers may find valuable, in a way that is memorable and thus effective as a marketing tool. Other words could serve the same informative function without being deceptive or misleading. Restrictions on trade names are often intended to ensure identification and accountability of individual practitioners. But this goal may be achieved by other means, without losing the competitive benefits of trade names.

VI. Conclusion

Truthful, non-deceptive advertising promotes competition and consumer choice. This is as true of advertising for professional services as it is of advertising for other services and products. Determining what is non-deceptive depends on context, of course, and requires an assessment of consumers' experience and expectations. To the extent that consumers are unfamiliar with what lawyers can actually do for them, it may be necessary to pay particular attention to ways that lawyers' advertising might mislead. But it should not be assumed that consumers cannot understand advertising messages or resist the blandishments of advertising artistry. Some rules addressed to particular risks of misrepresentation seem too broad and risk preventing communication of truthful, nondeceptive information. Much of the current debate about legal advertising displays a concern that advertising lacking "dignity" will diminish public

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[62] Iowa Rules, EC 2-13 (use of trade or assumed name "could mislead" about the lawyer's identity, responsibility, or status); but see Florida Rules, Rule 4-7.7(b) (non-deceptive trade name permitted as long as lawyer actually practices under the trade name).

[63] Federal Trade Commission, Ophthalmic Practices Rule, Statement of Basis and Purpose, 54 Fed. Reg. 10285, 10289 (March 13, 1989).

[64] See, e.g., Iowa Rules, DR 2-101(G) ("clinic" must limit its practice to the specific legal services for which fixed fees may be advertised).

respect for the legal profession and, in turn, for the courts and the institutions of justice. We do not doubt the importance of maintaining public respect for the integrity of the judicial system. But broad rules to enforce criteria of "dignity" may prevent the communication of useful, nondeceptive information and thus inhibit competition and consumer choice. Strict rules to enforce "dignity" may not give consumers enough credit, for consumers apparently respond more positively to advertising that would be considered "dignified." And consumers appear to be less offended by certain supposedly undignified methods than professionals themselves are.