



BUREAU OF COMPETITION

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COMMITTEE APPROVED

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

DEC 8 1978

Mr. Thomas S. Johnson, Chairman
Commission on Advertising
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Dear Mr. Johnson:

The Federal Trade Commission's Bureau of Competition, Consumer Protection and Economics¹ appreciate this opportunity to comment on the proposal of the American Bar Association's Commission on Advertising to prepare and issue guidelines respecting dignity in advertising. We urge the Commission not to engage in this exercise. We understand that the Commission has not yet developed guidelines and, therefore, we cannot comment on specific language. Nonetheless, no matter how guidelines are phrased, they may harm consumers by reducing the availability of truthful, nondeceptive information without providing any countervailing benefit. Furthermore, such guidelines appear to be unnecessary as individual consumers may decide for themselves which advertisements they consider to be undignified and may, if they choose, refuse to patronize lawyers whose advertising they find offensive.

The Federal Trade Commission, as a part of its effort to ensure that consumers receive the benefit of competition among licensed professionals, has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.² Studies have shown that prices for professional goods and services are lower where

¹ This letter represents the views of the Bureaus, and not necessarily those of the Commission. The Commission, however, has authorized submission of these comments.

² 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 professionals may restrain only false or deceptive advertising (94 F.T.C. at 1009-10, 1019-20) -- is consistent with the reasoning of recent Supreme Court decisions involving regulation of professional advertising. See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265 (1985); In Re R.M.J., 455 U.S. 191 (1982) (under the First Amendment, advertising may be prohibited only if it is inherently deceptive or where the record establishes that it has, in fact, been deceptive).

advertising exists than where it is restricted or prohibited.³ Studies have also provided evidence that restrictions on advertising raise prices but do not increase the quality of goods and services.⁴ Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result.

The Federal Trade Commission has examined various justifications offered for restrictions on advertising and has concluded that these arguments do not justify restrictions on truthful advertising. For this reason, the Commission staff believes that only advertising that is false or deceptive should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and may contribute to an increase in prices and a reduction in the range and quality of services.

The American Bar Association, in promulgating the Model Rules of Professional Conduct, abandoned its restriction on advertising that is not "dignified." The Model Rules of Professional Conduct omitted the requirement, previously contained in Disciplinary Rule 2-101(B) of the Model Code of

³ Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and 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. 357 (1972).

⁴ Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979). See also Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976). Accord, Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980). The report of the presiding official in the Federal Trade Commission's Ophthalmic Practice Rulemaking Proceeding, 50 Fed. Reg. 598 (1985), was critical of certain aspects of the Bureau of Economics study, but did not address the conclusion of the study that restrictions on advertising result in increased prices and provide no quality-related benefits to consumers. Federal Trade Commission, Report of the Presiding Officer on Proposed Trade Regulation Rule: Ophthalmic Practice Rules (1986).

Professional Responsibility, that advertising be "presented in a dignified manner." The Model Rules contain no provision on dignity. The issuance of guidelines on dignified advertising, however, would signal a return to restrictions on some types of truthful, nondeceptive advertising.

Publication of guidelines on dignity in advertising may harm consumers by depriving them of information that would be useful in selecting a lawyer. We understand that the purpose of such guidelines would be to persuade lawyers to eschew advertising that the drafters deem to be undignified. But advertising that is not false or deceptive, even though viewed by some as lacking in dignity, nonetheless may assist consumers in choosing legal services that best suit their needs. For example, during the hearings held by the Commission on Advertising in Washington, D.C. on October 10, 1986, some witnesses indicated that they considered the advertisement of holiday discounts on legal services and the use of billboard advertising to be undignified. An advertisement offering a reduced price on legal services provides information that consumers concerned about the cost of legal services might find very useful. Similarly, billboards may be an effective medium for a lawyer to communicate his or her name, phone number, and areas of practice. Guidelines on dignity may have the effect of (1) excluding information from advertisements that consumers wish to consider in selecting a lawyer, and (2) deterring lawyers from using media that are effective in communicating their message.

Guidelines on dignity may also discourage lawyers from including pictures and sounds or using techniques that are effective in attracting viewers' attention and increasing audience retention of the information in the advertisement. For example, in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265 (1985), the Supreme Court reversed, on First Amendment grounds, a state court decision imposing discipline for violating a disciplinary rule requiring that advertising "be presented in a dignified manner without the use of drawings, [or] illustrations" Attorney Philip Zauderer had placed a newspaper advertisement including a drawing of the Dalkon Shield intrauterine device and the question "Did you use this IUD?" The Supreme Court pointed out that illustrations or drawings in advertisements serve "important communicative functions: [they attract] the attention of the audience to the advertiser's message, and . . . may also serve to impart information directly." Id. at 2280. The Court ruled that commercial illustrations enjoy First Amendment protections and the burden is on the state to present a government interest sufficient to justify a restriction on the use of

illustrations. The Court held that the state's interest in promoting dignity in attorneys' communications with the public was insufficient to justify such a restriction. Similarly, under antitrust precedent, an association of competitors faces substantial antitrust risks if it seeks to impose on the market the association's view of what is dignified, thereby depriving consumers of the benefits of truthful, nondeceptive advertising.

Although we understand that the Commission on Advertising intends the guidelines to be voluntary, they may become mandatory or be regarded by lawyers as mandatory. First, many state courts have followed the ABA's guidance in promulgating mandatory state disciplinary rules for lawyers. As of July 18, 1986, fourteen states had adopted, with some modifications, the ABA Model Rules of Professional Conduct.⁵ State courts might similarly incorporate dignity guidelines into disciplinary rules. Second, even if the guidelines are not adopted as disciplinary rules, the ABA has traditionally been an authoritative voice of the profession, and its guidelines may therefore have an adverse effect on lawyers' advertising because of moral suasion and peer pressure.

Guidelines on dignity may also have a chilling effect on advertising beyond the intent of the drafters. Because dignity is a vague, subjective concept, it cannot be defined precisely. To the extent that the guidelines describe undignified advertising in general terms, attorneys may not be able to determine whether a particular advertisement would be considered undignified. Even if the guidelines are relatively specific, their promulgation may nonetheless convey the message that the ABA encourages lawyers to avoid a broader range of undignified advertising. Thus, attorneys may abandon a proposed advertisement that they fear would violate the guidelines even though the Commission on Advertising would not regard the advertisement as undignified.

Finally, the guidelines do not appear to be necessary, because consumers can decide for themselves whether advertisements are dignified and withhold their business from lawyers whose advertisements they regard as offensive. The purpose of advertising is to attract consumers to a particular lawyer or law firm. An advertisement that offends consumers will not achieve its purpose and the lawyer can be expected to react appropriately.

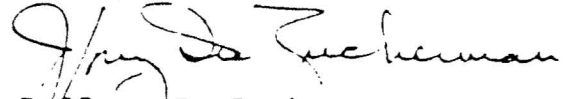
⁵ Letter from Michael Frank, Chairman, Special Committee on Implementation of the ABA Model Rules of Professional Conduct to Chairpersons of Model Rules Study Committee (July 18, 1986).

Mr. Thomas S. Johnson, Chairman

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In sum, the Commission on Advertising should not issue guidelines on dignity in advertising, because they may harm consumers and are unnecessary to protect consumers from deception.

Sincerely,



Jeffrey I. Zuckerman
Director
Bureau of Competition