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**COMMISSION
APPROVED**

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF COMPETITION

November 20, 1986

Richard T. Dunn
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Dear Mr. Dunn:

The Federal Trade Commission's Bureaus of Competition, Consumer Protection and Economics¹ are pleased to submit these comments respecting proposed modifications of the Illinois Code of Professional Responsibility.

In this letter we focus specifically on the proposed rules affecting advertising and solicitation by lawyers. Truthful, nondeceptive advertising disseminates information about the individuals or firms that offer services that consumers may wish to purchase. Such information facilitates purchasing decisions that reflect true consumer preferences and promotes the efficient delivery of services. Empirical evidence supports the proposition that removing restrictions on truthful information about lawyers and legal services enhances competition and lowers prices.² Although some concern has been voiced that advertising may lead to lower quality legal services, empirical work suggests that the quality of services provided by firms that advertise is at least as high as, if not higher than, that of firms that do not advertise.³

The Committee's proposals appear to permit more attorney advertising than the current Code of Professional Responsibility, and this will provide benefits to consumers of legal services. The proposals, however, still unnecessarily restrict advertising

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 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).

³ T. Morris and F. McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, Am. Bar Found. Research (1979).

about attorneys and legal services. To increase the availability of truthful, nondeceptive information to consumers, we urge the Committee to make the four following modifications to proposed Rules 2-101 and 2-103: (1) Modify the definition of false and misleading advertising in Rule 2-101(a) so that it would not prohibit truthful, nondeceptive testimonials, endorsements, statements about a lawyer's experience, and comparisons that cannot be quantified; (2) Modify Rule 2-101(b) to eliminate the list of approved "public media" that lawyers may use to advertise; (3) Amend Rule 2-101(c) to eliminate restrictions on solicitation except for solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence; and (4) Amend Rule 2-103 so that it will not prohibit goodwill advertising or truthful, nondeceptive statements that a lawyer is experienced in a particular field of law.

Rule 2-101(a): Definition of False and Misleading Advertising

We fully endorse the Committee's view that false and deceptive advertising should be prohibited. Nonetheless, we are concerned about the potential effects of two of the definitions of "false" and "misleading" contained in Rule 2-101.

First, proposed Rule 2-101(a)(2) could be read to prohibit client endorsements and truthful communications about an attorney's record of favorable verdicts. The ABA committee comments accompanying ABA Model Rule 7.1, from which Rule 2-101(a)(2) is derived, suggest that such information is "likely to create an unjustified expectation about results the lawyer can achieve," and should be prohibited. The ABA's interpretation appears to be unnecessarily restrictive and may discourage truthful, nondeceptive communications. Accordingly, we urge the Committee to delete this provision.

Many law firms list references and major clients in the Martindale-Hubbell Law Directory. The choice of the listed clients is generally no accident, but reflects an intuition that the representation of a major bank or corporation may suggest to potential clients that the firm can handle complicated legal problems, or cases in which large sums of money may be at risk. To permit such major clients to attest truthfully in endorsement advertising that they use a firm's legal services simply gives the general public the same information that is available to users of legal directories. Similarly, when a famous athlete or actor appears in a commercial to say truthfully that he uses a particular firm or attorney, it tells consumers that someone who can spend a substantial sum to find a good attorney, and who may

have significant assets at stake, believes a particular lawyer to be effective. At the very least, such endorsements may enhance audience attention and retention, and consequently increase the effectiveness of the advertisement.

Of course, many attorneys do not have large corporate or famous individual clients. But we are not aware of any reason to believe that it would be harmful for an average consumer to appear in a commercial and to say truthfully that he received prompt and satisfactory service from a particular attorney. Although many factors other than an attorney's skill can affect the outcome of a case, there is no reason to believe that consumers naively expect that the future will always resemble the past.

Second, proposed Rule 2-101(a)(3) allows communications that accurately compare the particular qualities of lawyers or their services, but only if "the comparison can be factually substantiated." This may preclude truthful, nondeceptive statements that are not amenable to empirical testing. Examples of such statements are "Friendlier service" or "More convenient hours." Such statements, and others that may be mere "puffery," are not readily subject to verification, but their benefits may outweigh any possible harms because they indicate which qualities the advertiser deems important. We urge the Committee to modify proposed Rule 2-101(a)(3) by substituting the phrase "has a reasonable basis" for the phrase "can be factually substantiated."

Rule 2-101(b): Approved Media

We are concerned about the listing of permitted media in proposed Rule 2-101(b), because attorneys and lawyers groups may interpret it as exclusive and conclude that all media not listed are prohibited. The listing of specific media that may be used in advertising could discourage innovation and the use of novel forms of expression in ways not intended by the Committee, especially since the term "public media" is ambiguous. For example, the rule might be interpreted to prohibit sponsorship of exhibits or youth sports teams. Moreover, the rule fails to anticipate changing technologies. If "written communication" is interpreted to refer only to physically permanent writings, advertising in computer bulletin boards, on-line directories, or other increasingly popular electronic media may be prohibited.

Rule 2-101(c): Solicitation

Proposed Rule 2-101(c) prohibits lawyers from soliciting professional employment by a nonlawyer, both in person and by telephone, telegraph, letter or other writing, with certain narrow exceptions. This prohibition is overly broad because it would preclude truthful, nondeceptive communications in circumstances that pose little or no risk of undue influence. Consumers could be protected by a narrower prohibition of false or deceptive communications and uninvited in-person contact with persons who, because of their particular circumstances, are vulnerable to undue influence.

We understand that the Committee has not reviewed this proposed Rule since the Seventh Circuit issued its opinion in Adams v. Attorney Registration and Disciplinary Commission, 801 F. 2d 968 (7th Cir. 1986). We also understand that the Committee intends to make this proposal consistent with that opinion. In Adams, the Seventh Circuit relied on the First Amendment to sustain a preliminary injunction against enforcement of the Illinois disciplinary rule banning targeted mailings. The court held that the state's interest in preventing coercion of consumers was not substantial in the context of mailings. As the court noted, the consumer may simply throw out a letter or may read it several times and reflect on its contents before making a decision. We believe that the Adams opinion provides compelling support for the proposition, which we commend to the Committee, that letters, telegrams, and other written communications should be treated no differently from other forms of advertising.

With extremely limited exceptions, proposed Rule 2-101(c) prohibits telephone and in-person solicitation. This provision is more restrictive than necessary to protect consumers because attorneys can use these means of communication to provide truthful, nondeceptive information in many situations without risk of undue influence. For example, it is not clear to us that solicitation of a business person at a business or social gathering would necessarily involve undue influence. Similarly, consumers are accustomed to receiving telephone calls offering goods and services, and they can easily terminate unwanted calls.

As the opinion in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), demonstrates, some in-person contacts can result in undue influence. But this is not a justification for a prohibition on all such contacts, just as the possibility of deception provides no legitimate basis for banning all advertisements. The Federal Trade Commission considered the concerns that underlie the Ohralik opinion when it decided

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). After weighing the possible harms and benefits to consumers, the Commission ordered AMA to cease and desist from restricting solicitation, but permitted AMA to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence. We urge that the Committee adopt this standard to protect consumers while allowing them to receive information about available legal services.

Rule 2-103: Fields of Practice

a) Goodwill Advertising

Another unnecessary restriction on advertising, in our view, may be found in proposed Rule 2-103, which provides that:

"[A] lawyer or firm may specify:

* * *

(2) Other information about the lawyer or firm, their practice, or the types of legal matters in which they will accept employment, which a reasonable person might regard as relevant in determining whether to seek their services."
(Emphasis added.)

Proposed Rule 2-103(a)(2) is worded almost identically to existing Rule 2-101(a)(8). Given the history of very restrictive limitations on professional advertising that were common in this country before the decision in Bates v. State Bar of Arizona, 433

4 The Illinois State Bar Association, in Opinions 832 and 84-4, indicated that attorneys may not advertise through Welcome Wagon. The Bar Association took the position that Welcome Wagon's delivery of an attorney's card was an implicit recommendation by Welcome Wagon of that attorney's services. Such an interpretation is based on erroneous premises. Welcome Wagon disclaims any such recommendation, and similar advertising intermediaries could do the same. Proposed Rule 2-101(d) permits paid written communications, and does not prohibit the delivery of such written communications by intermediaries such as Welcome Wagon. We urge the Committee to disavow Opinions 832 and 84-4, and to indicate in comments to proposed Rule 2-101(d) that attorneys may experiment with many vehicles of paid advertising, including Welcome Wagon.

U.S. 350 (1977), there is a danger that a statement purporting to authorize only certain kinds of information to be advertised may, by implication, be read to prohibit all others.

Read broadly, this rule could be interpreted as prohibiting any attorney advertising unless it provides information that a reasonable person might regard as relevant in determining whether to seek the attorney's services. Such a reading might preclude attorney advertising intended to achieve name recognition and generate goodwill, such as that promoting an understanding of the law, saluting an anniversary of the U.S. Constitution, or extending Christmas greetings. The fact that such advertisements are quite common demonstrates that other types of businesses consider them to be a worthwhile investment. This type of advertising appears to be an efficient means of promoting name recognition. Because of the risk that any listing of the kinds of information that may be advertised may be interpreted as exclusive, we urge the Committee to make clear that Rule 2-103(a) is not intended as a limitation on the content of nondeceptive communications.

(b) Communications Concerning Specialty

We have two concerns about Rule 2-103(b): First, it may inhibit truthful claims about special training or experience; and, second, it prohibits the use of the word "specialist."

Clearly, it would be deceptive for an attorney to advertise that he or she is "certified" in an area of law if no certification procedure exists or if the attorney has not obtained certification. But if the proposed rule's prohibition of implicit claims of specialization were interpreted broadly, it could prohibit truthful statements about special experience and training. A statement that an attorney is a member of an organization of trial lawyers might be prohibited, even though it would inform consumers that the attorney has sufficient interest in trial advocacy to join the organization and that the attorney has access to the organization's training and materials. There are many ways to obtain expertise, even absent a formal certification process, and information that an attorney has special skills in a particular field is clearly useful to consumers needing help in that field.

The rule also forbids a lawyer from using the word "specialist" in making a truthful claim that he or she has developed skills or focused his or her practice on an area of the law. Use of this term may be the clearest, most efficient way to

communicate that information. It is not clear that a claim that one is a "specialist" would be understood by lay persons to imply that a lawyer has obtained formal recognition as a specialist. The prohibition of false claims of certification further diminishes the likelihood of such a public misunderstanding. We are not aware of any reason to believe that advertising as a "specialist" would create an unjustified expectation about the results that a lawyer can achieve, any more than identifying oneself as a surgeon generates an expectation that every operation will be a success. We therefore urge the Committee to eliminate the prohibition of truthful, nondeceptive claims that a lawyer is a specialist.

Conclusion

In conclusion, it appears that the Committee's rule proposals will allow significantly more advertising than does the current Code of Professional Responsibility, and will thereby benefit consumers of legal services. We share the view that advertising "restrictions should be imposed only to the extent that they can be specifically justified to protect the public." We hope that this letter will be of assistance in pointing out ways in which particular rules may restrict competition and injure consumers, and we urge the Committee to consider these issues in assessing the proposed rules.

Sincerely,



Jeffrey I. Zuckerman
Director
Bureau of Competition

⁵ Committee Comments on Rule 2-101, Illinois Code of Professional Responsibility, reprinted in Ill. Ann. Stat. ch. 110, Article VIII at 690 (Smith-Hurd Supp. 1985).