

I. 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

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, C-3351 (consent order issued November 19, 1991, 56 Fed. Reg. 65093 (December 13, 1991)); 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).

legislatures and administrative agencies and others.³ As one of the 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. As part of this effort, the FTC has examined the effects of public and private restrictions limiting the ability of professionals to contact prospective clients and to advertise truthfully.⁴

³ The Commission's staff has previously submitted comments to state governments and professional associations on the regulation of professional advertising, including advertising by attorneys. See, e.g., comments to Supreme Court of New Mexico, July 29, 1991; State Bar of Arizona, April 17, 1990; Florida Bar Board of Governors, July 17, 1989; American Bar Association, November 22, 1988; New Jersey Supreme Court, November 9, 1987; Supreme Court of Alabama, March 31, 1987; 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; Texas Sunset Advisory Commission, August 14, 1992 (medical boards).

⁴ See, e.g., 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). 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 Supreme Court decisions applying the First Amendment to professional regulation. See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990) (attorney's letterhead may use statement of bona fide specialty certification); Shapiro v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (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); Bates v. State Bar of

II. Description of the Proposed Rule.

The basic principle of the proposed rule is that a lawyer may not make, or permit to be made, communications about the lawyer or the lawyer's services that are false, misleading, deceptive, or unfair.⁵ The subparts of this rule and the comments on it indicate several more specific rules and intended applications. A communication that "is likely to create an unjustified expectation about results the lawyer can achieve" would violate the rule; the comment says this would preclude communicating a lawyer's actual results or endorsements from satisfied clients.⁶ Comparisons with other lawyers' services, regardless of whether they are false, misleading, deceptive, or unfair, would be banned unless they can be factually substantiated; the comment makes clear that the intention is to ban claims of superiority.⁷ Testimonials would be banned explicitly, on the grounds that they are inherently misleading to laymen and constitute an implied claim about the results the lawyer could obtain.

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).

⁵ Proposed Rule 7.1. These comments deal only with aspects of Proposed Rule 7.

⁶ Proposed Rule 7.1(b) and Comment.

⁷ Proposed Rule 7.1(c) and Comment.

One subpart, aimed specifically at advertising, sets out restraints on content and style for advertisements in different media. Advertisements may not use dramatizations and may only use illustrations that present information that "can be factually substantiated and is not merely self-laudatory."⁸ More generally, a lawyer may not make statements that are "merely self-laudatory" or that describe or characterize the quality of the lawyer's services.⁹ In electronic media advertising, no background sound would be permitted, except instrumental music.¹⁰ Only a single voice could be used, and the voice must be that of a full-time employee of, or a lawyer affiliated with, the firm whose services are advertised. In a television advertisement, that individual must appear on-screen.¹¹ Use of professional announcers, as well as celebrity endorsers, would thus be prohibited. These constraints are intended to ensure that advertising provides "only useful, factual information" in a "nonsensational" manner; the rule would ban sound effects, "sound tracks," slogans and jingles, because those techniques "fail to meet these standards and diminish public confidence in the legal system."¹² The comment states that the rule is intended to permit advertisements in which "the lawyer

⁸ Proposed Rule 7.2(e), (f).

⁹ Proposed Rule 7.2(j); such statements would be permitted to existing clients or to prospective clients who request them.

¹⁰ Proposed Rule 7.2(b) and comment.

¹¹ Proposed Rule 7.2(b).

¹² Comment to Proposed Rule 7.2.

personally appears to explain a legal right, the services the lawyer is available to perform, and the lawyer's background and experience."¹³

A prescribed disclaimer would be required on all advertising, except print advertising that contains only specified items of information and carries no illustrations.¹⁴ The disclosure reads, "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Mississippi." The disclaimer must be recited orally at the loudest volume level and slowest speed as the rest of the advertisement;¹⁵ it takes about 15 seconds. In a print advertisement or other written communication, it must appear in the largest and boldest type.¹⁶ Television and radio advertisements must also include a further disclosure that additional information about the lawyer's

¹³ Id.

¹⁴ Proposed Rule 7.2(d). The items that may be included in a print advertisement without triggering the disclosure requirement are: the names of the firm and its lawyers, addresses, phone numbers and office hours, dates of bar admission and jurisdictions where licensed, foreign language ability, participation in prepaid legal service plans, acceptance of credit cards, fee for initial consultation, and information about sponsorship of public service announcements or charitable, civic, or community programs. Proposed Rule 7.2(n).

¹⁵ Proposed Rule 7.2(d)(i).

¹⁶ Proposed Rule 7.2(d)(ii).

services is available free on request; this may be displayed, rather than narrated.¹⁷

Advertising would be permitted in most public media, but not through motion pictures or video cassettes because, according to the comment, information on those media may rapidly become outdated and hence misleading.¹⁸ Advertisements (and all written communications) must contain the name of a lawyer or referral service responsible for their content, and must disclose the geographic location of the office whose lawyers will actually perform the services.¹⁹ Advertisements that mention fees must include disclosures about how fees are computed and possible liability for expenses,²⁰ and specific advertised fees must be honored for at least 90 days.²¹

¹⁷ Proposed Rule 7.4(e)(1). This rule would require any firm that advertises to make available, free, in written form "a factual statement detailing the background, training and experience of each lawyer or law firm"; if the lawyer or firm claims special expertise or limits its practice to special types of cases, the statement must set out "the factual details of the lawyer's experience, expertise, background, and training in such matters." Proposed Rule 7.4(a). This statement must be included with all advertisements by written communication, and an announcement of its availability must be included in all print or display advertising. Proposed Rules 7.4(b), 7.4(e)(2), 7.4(e)(3).

¹⁸ Proposed Rule 7.2(a) and Comment.

¹⁹ Proposed Rules 7.2(c), 7.2(l).

²⁰ Proposed Rule 7.2(h).

²¹ Proposed Rule 7.2(j); fees advertised in publications that appear infrequently, such as yellow pages, must be honored for a year.

Specialization or limitation of practice may be announced, but only for areas of practice that have occupied more than 30 percent of the lawyer's time (or 300 hours annually).²² The rule lists the 31 areas of practice and the intellectual property specialties that may be identified and prohibits using other descriptions of the kinds of cases a lawyer handles.²³ Lawyers who accept cases outside of their specialties may not be listed under specialty classifications in telephone directories and their advertisements must appear together with a prescribed disclaimer.²⁴

Use of trade or fictitious names (except those of deceased partners) would be prohibited. The term "legal clinic" or "legal services" could be used in conjunction with a lawyer's own name, but only for practices that provide routine services for fees lower than the prevailing rates.²⁵

²² Proposed Rule 7.6(a)(4).

²³ Proposed Rule 7.6(a)(1), 7.6(a)(2), 7.6(c).

²⁴ Proposed Rule 7.6(a)(3)(b). The disclaimer reads,

A description or identification of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more experienced or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by Rule of the Supreme Court of Mississippi.

²⁵ Proposed Rule 7.7(b).

III. Effects of the Proposed Rules.

Advertising, by professionals as well as by other kinds of businesses, informs consumers of options available in the marketplace and encourages competition among firms seeking to meet consumer needs. These procompetitive functions of advertising can be significant regardless of a firm's size or age. They 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. Studies indicate that prices for professional services tend to be lower where advertising exists than where it is restricted or prohibited.²⁶ Empirical evidence also indicates that while certain restrictions on professional advertising tend to raise prices, the restrictions studied do not generally increase the quality of available goods and services.²⁷ These relationships among price, quality, and advertising have been found to exist in the provision of certain legal services as well as in the provision of other professional

²⁶ 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).

²⁷ 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, in Frech, ed., Regulating Doctors' Fees (1990); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

services.²⁸

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. The comments that accompany the proposed rules recognize the importance of "not interfering with the free flow of useful information to prospective users of legal services," while also noting concerns about potential interference with the fair and proper administration of justice and concerns that practices that are misleading or overreaching can create unjustified expectations and "adversely affect the public's confidence and trust in our judicial system."²⁹ The staff's reservations about some aspects of the proposals do not arise from disagreement that these are important issues. We suggest that the Supreme Court of the State of Mississippi can balance the matters at stake by imposing restrictions on advertising that are tailored to prevent unfair or deceptive acts or practices or otherwise to serve consumers, rather than imposing

²⁸ 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 Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. Bar Found. Research J. 179 (1979).

²⁹ Comments on Proposed Rule 7.2.

restrictions that tend chiefly to dampen competition.

The ban against all assertions relating to the quality of services offered, except for items of information that are expressly permitted by other, narrower provisions,³⁰ may be unnecessarily broad. "Self-laudatory" statements and claims concerning "the quality of legal services," which the rules would prohibit, 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.

Similarly, the proposed rules prohibiting comparative claims and illustrations that "cannot be factually substantiated" could be applied too broadly. Requiring that some kinds of claims be substantiated can, of course, serve consumers by helping to ensure that claims are not misleading; however, if substantiation is demanded for representations that, although not misleading, concern

³⁰ See Proposed Rule 7.2(n). These specific enumerations of permissible quality-related claims would apparently take precedence, as a matter of rule interpretation, over the broader prohibition of Rule 7.2(j).

qualities that are not easy to measure, messages that consumers may find useful may be barred. 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 susceptible to objective substantiation, may nonetheless communicate useful information, indicating qualities that the firm seeks to emphasize in its practice. The illustration that the comment specifically disapproves, a clenched fist, could similarly represent a feature that a firm could legitimately seek to emphasize about its practice, such as tenacity, that would probably not be susceptible to objective substantiation.³¹ The commentary on the proposed rule shows a concern that the forbidden claims could mislead consumers about the results lawyers can achieve. But the proposed rule would ban all non-substantiable comparative claims and illustrations, regardless of whether they had any particular bearing on likely outcomes.

The rules may have been proposed as a response to a limited class of claims, namely overreaching and potentially misleading claims on which consumers could be expected to place serious reliance, such as unfounded or misleading claims about a lawyer's ability to secure relief for clients or about the relative quality

³¹ The Comment interprets this illustration as a (prohibited) self-laudatory claim about the lawyer's ability to achieve results.

of a lawyer's work product. If so, such claims could be disciplined through narrower prohibitions that did not present as great a risk of chilling potentially useful communications. For example, rather than banning endorsements and testimonials outright, the court might consider an approach, similar to that taken by the Commission's guides on this subject, that seeks to ensure that client testimonials are truthful and not misleading.³² More generally, the rules might target those claims that make insupportable representations about particular results or that inaccurately imply the existence of objective substantiation.³³

The constraints on the style and content of broadcast advertisements could discourage competition in the legal profession. The comment on these restraints states that they are intended to ensure that advertising is limited to what is "useful," "factual," and "informational," presented in a manner that is "nonsensational." But the restraints will 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

³² 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.

³³ This might be done by deleting Rule 7.2(j) and recasting Rule 7.1(c)'s substantiation provision.

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.

The ban against dramatizations is apparently intended to eliminate risks of distortion or of creating legal problems rather than solving them. The comment shows that the rule is intended to limit advertisements to identification of providers and explanations of the law. 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. And requiring on-screen or on-microphone appearances by the lawyers presenting the explanations is likely to discourage many professionals from using broadcast advertising. Perhaps the permitted format, of the lawyer talking into the camera about the law, would be effective for some lawyers, but for others it would not, and the difference in effectiveness may have little to do with differences in the quality of their legal services. The proposed rule could reward the telegenic, for others could not hire on-the-air professionals to help them put their message out.

The disclaimer and other disclosure obligations will 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. And the disclaimer would occupy a large fraction of a spot broadcast announcement and a prominent place in a printed display-- unless the display were limited to the "tombstone" information that the rule permits. Because of these effects, disclosure requirements that are unnecessary can reduce the amount of useful information available to consumers.³⁴ Accordingly, it is important in evaluating disclosure requirements to weigh such costs against the expected benefits.

The proposed ban on advertising through video cassettes and movies is said to be required because information in these media would become outdated and hence misleading. But if that is the case, it may be better to enforce a standard against misleading advertising or to ensure that outdated material is withdrawn from use, rather than to ban outright the use of media that might be cost-effective alternatives to other forms of advertising.

³⁴ There is some evidence that longer, more elaborate disclosures are no more effective than shorter ones in alerting consumers to issues that are otherwise undisclosed in an advertisement. See Murphy and Richards, Investigation of the Effects of Disclosure Statements in Rental Car Advertisements, 26 J. Cons. Aff. 351 (1992).

Some other features that would also make advertising more difficult should be considered carefully. Requiring advertisements to list each particular location where services will be provided will increase costs and may make cooperative advertising arrangements difficult or infeasible. The concern is evidently that consumers might be misled if the office that provides services is not the one identified in the advertising. But uncertainty about particular locations would probably be cleared up the moment the consumer called to set up an appointment. In any event, such problems could be dealt with by applying a general rule against deception, without the burdensome disclosure obligation that the rule would impose. 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. Consumers may understand their problems by rubrics that do not appear on the list of approved labels.

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. 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.³⁵ 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.

The proposed regulations would permit the use of two kinds of trade names. The rules would condone the long-standing pattern in the legal profession of retaining the names of former partners in the "institutional" name of a practice. And they would permit calling a practice a "clinic," if it was a low-price provider of routine services.³⁶ 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

³⁵ Ophthalmic Practices Rule, Statement of Basis and Purpose, 54 Fed. Reg. 10285, 10289 (March 13, 1989).

³⁶ Care should be taken that enforcement of this rule does not lead to reductions in price competition. On the one hand, standardizing terminology can benefit consumers: if the word "clinic" applies only to providers whose fees are relatively low, then those consumers who are concerned most about price could find a suitable provider quickly by narrowing their search to "clinics." But determining whether a firm is in compliance with this regulation will require comparing its fees with those prevailing in the community. The processes of determining the prevailing fees and judging whether the firm's fees are enough lower to justify the use of the "clinic" label should not be used by attorneys or law firms to develop or maintain collusive, standard fee levels or schedules in violation of federal or state antitrust laws.

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.

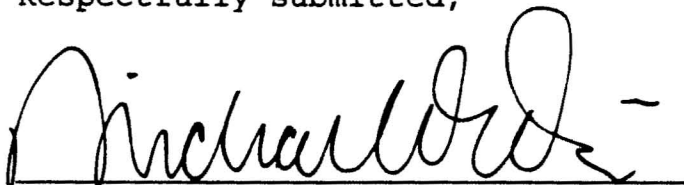
IV. Conclusion.

Some parts of the proposed rule to regulate attorney advertising may give insufficient weight to the contributions that nondeceptive advertising can make to informed consumer choice. We therefore suggest that you consider modifying the rules to permit a wider range of truthful communications and to narrow their prohibitions to target only those representations that pose a clear likelihood of consumer injury through material unfairness or

deception, or that otherwise violate significant public policy objectives in a way that threatens to cause injury to consumers.

We appreciate this opportunity to provide our views.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael C. Wise", written over a horizontal line.

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