



BUREAU OF COMPETITION

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

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Harry B. Sondheim, Chair
The Commission for the Revision
of the Rules of Professional Conduct
State Bar of California
Office of Professional Standards
555 Franklin Street
San Francisco, California 94102

Dear Mr. Sondheim:

The Federal Trade Commission's Bureaus of Competition, Consumer Protection and Economics¹ are pleased to submit these comments respecting proposed modifications of the California Rules of Professional Conduct. In this letter we focus only on the proposed rules affecting advertising and solicitation, which we understand the Commission for the Revision of the Rules of Professional Conduct ("Commission") will be discussing at its January 16, 1987 meeting.

The rules proposed by the Commission appear to permit more attorney advertising, particularly advertising through the mail, than the current Rules of Professional Conduct, and should therefore benefit consumers of legal services. We support this relaxation of restrictions on advertising. The proposed rules, however, would prohibit telephone and in-person solicitation, with very limited exceptions. In addition, the proposed rules may be interpreted to prohibit some advertising that is neither false nor deceptive and which consequently presents little risk of harm to consumers. To increase the availability of truthful, nondeceptive information to consumers, we urge the Commission to modify Proposed Rules 2-101(B) and (C) to prohibit only uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence. We also urge the Commission to modify Rule 2-101(D)(5) and Standards 1-3 so that they will not prohibit truthful, nondeceptive advertising.

Truthful, nondeceptive advertising communicates information about the individuals or firms that offer services that consumers may wish to purchase. Such information facilitates purchasing

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.

decisions that reflect true consumer preferences and promotes the efficient delivery of services. Empirical evidence suggests that removing restrictions on the dissemination of truthful information about lawyers and legal services will tend to enhance competition and lower prices.² Although some concern has been voiced that advertising may lead to lower quality legal services, the empirical evidence 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

Truthful, nondeceptive telephone and in-person solicitation may also provide useful information to consumers about the availability of legal services. On the other hand, both telephone and in-person solicitation may have some potential for abuse if a lawyer contacts an injured or emotionally upset consumer. In most other circumstances, however, such adverse effects are unlikely. Therefore, a comprehensive ban on solicitation is unnecessary and may harm consumers by depriving them of useful information.

Solicitation

Proposed Rules 2-101(B) and (C) would prohibit telephone and in-person solicitation except of family members and people with whom the lawyer has had a prior professional relationship. These rules are undesirable because they would preclude truthful, nondeceptive communications in circumstances that pose little or no risk of undue influence.

Truthful, nondeceptive in-person solicitation may provide information to consumers that will help them select a lawyer. As the Supreme Court observed in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 457 (1978), in-person contacts can

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). See also 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. 337 (1972).

³ 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).

convey information about the availability and terms of a lawyer's or law firm's legal services and serve the same function in this respect as print advertisements.

We recognize that abuses may result from in-person solicitation by lawyers. Injured or emotionally distressed people may be vulnerable to the exercise of undue influence when face to face with a lawyer, as the Supreme Court found in Ohralik, 436 U.S. at 465. We do not believe, however, that this is a justification for a broad prohibition on in-person solicitation. 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 FTC ordered AMA to cease and desist from banning solicitation, but permitted AMA to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence ("the AMA standard").

In-person solicitation does not necessarily involve the exercise of undue influence. Lawyers encounter potential clients at meetings of political and business organizations and at social events. Indeed, lawyers traditionally have built their law practices through such contacts. If a lawyer discusses his or her legal services with a potential client under such circumstances, no undue influence is likely to be involved. In such a situation, the potential client need not respond immediately and can subsequently select a lawyer should a need for legal services arise.

Telephone solicitation similarly can convey useful information to consumers, and it presents no greater risk of the exercise of undue influence than does in-person solicitation. In most circumstances, telephone solicitation appears unlikely to result in consumer harm. Consumers are accustomed to telephone marketing. They receive calls from persons offering the sale of various goods and services, conducting surveys about the products and services consumers use, seeking contributions to charities, and requesting support for political candidates. Consumers can easily terminate offers of legal services communicated by telephone. Telephone solicitation is in some respects similar to in-person solicitation; a lawyer might be able to persuade a vulnerable person to hire the lawyer. But there are also dissimilarities between the two forms of solicitation. A telephone solicitor may be less able to exercise influence than

an in-person solicitor, and it may be easier for the recipient of a telephone solicitation to terminate a conversation than it is for a potential client who is solicited in person. Certainly, false and deceptive telephone solicitation may appropriately be prohibited. Although the AMA standard may be appropriate, we are not yet ready to conclude that it should be applied to telephone solicitation. But the broad ban on telephone solicitation contained in Proposed Rules 2-101(B) and (C) is unnecessarily restrictive.

Accordingly, as to in-person solicitation, we urge that the Commission prohibit only uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence. False or deceptive solicitation should also be prohibited. In addition, a ban on solicitation of a person who has made known to the lawyer a desire not to receive communications from the lawyer would be appropriate. Such rules would protect consumers while, at the same time, allowing them to receive information about available legal services.

Proposed Rule 2-101(D)(5) provides that solicitation shall not be "transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct." Prohibiting solicitation that involves coercion, duress, or the other evils enumerated in Proposed Rule 2-101(D)(5) may be appropriate, depending upon the interpretation of the rule's terms. For example, a phone call to a former client at his or her home offering legal services might be viewed by some as an "intrusion"; more than one call to a former client could be viewed by some as "harassing conduct." Licensing boards and private associations in other professions have employed such interpretations anticompetitively, to ban solicitation under circumstances that pose no danger of harm to consumers. Thus, we urge that the Commission interpret Rule 2-101(D)(5) no more restrictively than the AMA standard.

Advertising

Proposed Rule 2-101(D)(5) also prohibits advertisements that are "transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct." Proposed Standard 3 would in effect prohibit the delivery of a "communication" to a potential client "whom the member knows or should reasonably know is in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel." "Communication" is defined by Rule 2-101(A) to include advertisements directed to the general public. Virtually all

newspaper, television or other media advertising will be seen by at least a few consumers who are not able to exercise "reasonable judgment." But advertisements communicated by print or electronic media to the general public present virtually no risk of being intrusive, coercive, vexatious, or harassing. Accordingly, Proposed Rule 2-101(D)(5) and Standard 3 appear to prohibit some advertising that is truthful and nondeceptive without providing any compensating benefits to consumers. We urge the Commission to modify Proposed Rule 2-101(D)(5) and Standard 3 so that they would not apply to media advertising.

Proposed Standard 1 would establish a presumption that communications containing guarantees, warranties or predictions of the result of a legal action are in violation of Proposed Rule 2-101. Legal advice often involves a prediction, based on precedent, as to the likely outcome of a legal action. The effect of Standard 1 would be to ban the use of legal advice in truthful, nondeceptive advertising, including newsletters to clients and newspaper advertising to the general public. For example, a lawyer might advertise in a newspaper that Tax Court precedent allows particular treatment of a type of income, and suggest that consumers come to the firm for further tax advice. Such an advertisement could be interpreted as a prediction of the outcome of a tax matter. The Supreme Court held in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265, 2276-77 (1985), on constitutional grounds, that states may not prohibit advertisements containing legal advice that are not false or deceptive. Prohibiting such advertising would be harmful to consumers because it would deprive them of information that could be useful in selecting an attorney. We suggest that Standard 1 be modified to apply only to guarantees or warranties of results of legal actions.

Proposed Standard 2, by similarly establishing a presumption of violation, would in effect require that communications containing a testimonial or endorsement must include a disclaimer that the testimonial or endorsement is not a guarantee, warranty or prediction of the outcome of a legal matter. The imposition of a disclaimer requirement might discourage these forms of advertising unnecessarily by increasing their cost. Such a burden on advertising appears unnecessary, for many testimonials and endorsements imply no guarantee or warranty to consumers. For example, a former client might indicate that an attorney responded promptly to all the client's inquiries and explained the case in a way the client could understand. Such statements create no expectation about the outcome of a case. We suggest that Standard 2 be written to apply only to communications that contain testimonials or endorsements that imply a warranty or guarantee with respect to the outcome of a legal matter.

Harry B. Soncheim

-6-

Conclusion

The Commission's proposed rules will permit more advertising than do the current Rules of Professional Conduct, and we applaud the Commission's reforms in this respect. We urge, however, that the proposed new rules be modified to prohibit truthful, nondeceptive in-person solicitation only of persons who, because of their particular circumstances, are vulnerable to undue influence. We further urge that the Commission modify Rule 2-101(D)(5) and Standards 1-3 so as not to prohibit truthful, nondeceptive advertising, and interpret them consistently with the undue influence standard.

Sincerely,



Jeffrey I. Zuckerman
Director
Bureau of Competition