V874657

BUREAU OF COMPETITION

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

COMMISSION APPROVED (2)

March 31, 1987

G. Robert Oliver, Chairperson
Code of Professional Responsibility Committee
State Bar of Georgia
800 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

Dear Mr. Oliver:

The Federal Trade Commission staff is pleased to submit these comments on the Proposed Rules and Disciplinary Standards of Professional Conduct of the Code of Professional Responsibility Committee of the State Bar of Georgia.[1] In this letter, we focus only on the proposed Rules and Standards concerning fees, forms of business organization, advertising, and solicitation.

The proposals before the Committee would in some respects permit more attorney communication with prospective clients than do the existing Rules and Standards, and should therefore assist consumers in making informed choices about legal services. Some of the proposed rules, however, may harm consumers by restraining price competition, restricting the development of innovative and potentially more efficient forms of legal practice, and limiting unnecessarily the information available to consumers.

As is discussed in more detail below, we urge the Committee to (1) make clear in the commentary to proposed Rule 1.5(a) that only extremely high fees would be unreasonable; (2) eliminate the restrictions in proposed Rule and Standard 5.4 on practice with nonlawyers; (3) modify proposed Rule and Standard 7.1 to make clear that endorsements and experience, success, comparison, and quality claims are all permitted; (4) modify proposed Rule and Standard 7.3 to eliminate the broad ban on telephone solicitation, to permit in-person contact for the purposes of obtaining professional employment with all but those who, because of their particular circumstances, are vulnerable to undue influence, or who have informed the lawyer that they do not wish to be solicited, and to delete the restrictions in Rule and

---

1 This letter represents the views of the FTC's Bureaus of Competition, Consumer Protection, and Economics, and not necessarily those of the Commission. The Commission has, however, voted to authorize the staff to submit these comments to you.

Standard 7.3(b)(3) and (4) governing written communications; (5) alter proposed Rule and Standard 7.4 to remove the restriction on express or implied claims of specialty or certification; and (6) delete proposed Rule and Standard 7.5(e), which prohibit a law firm from practicing under more than one name, and proposed Rule and Standard 7.5(f)(1), which require inclusion of the name of a lawyer in a trade name.[2]

Proposed Rule 1.5(a): Fees

Proposed Rule 1.5(a) states that "[a] lawyer's fee shall be reasonable," and subparagraph (3) provides that "the fee customarily charged in the locality for similar services" is to be considered in determining reasonableness. Lawyers might interpret this language to bar "unreasonably" low fees. Such an interpretation could tend to discourage price competition among traditional practitioners; it could also restrain competition from legal clinics and other non-traditional providers of legal services.

The proposed rule is also undesirable insofar as it may appear to set a ceiling on fees. We are opposed to price regulation, whether it imposes a minimum or maximum price. For that reason, we believe that proposed Rule 1.5(a) should be applied only in extreme cases where an attorney's fee is so high that it represents a clear abuse of the client or suggests a possible breach of fiduciary duty.[3] We therefore suggest that the accompanying commentary make clear that low fees are not deemed unreasonable and that only fees that are extremely high under the particular circumstances of the case may be found unreasonable within the meaning of the rule.

Proposed Rule and Standard 5.4: Professional Independence of a Lawyer

Proposed Rule and Standard 5.4 would prohibit a lawyer from forming a partnership or sharing legal fees, except under limited circumstances, with a nonlawyer, or from practicing in a professional corporation or other organization authorized to

---

2 Although we understand that the Standards provide the basis for disciplinary proceedings, the section on Scope states that some of the Rules are "imperatives" and "define proper conduct for purposes of professional discipline." Even the permissive rules may strongly influence attorneys' behavior because of their desire to abide by professional norms. Therefore, we will be commenting on the Rules as well as the Standards.

3 Many instances of above "normal" fees may imply no client abuse. For example, a client may wish to obtain the services of a particularly busy attorney on a rush basis.

practice law for a profit if a nonlawyer owns an interest in the organization or is an officer or director. The proposed rule limits the ability of lawyers to establish multidisciplinary practices with other professionals, such as psychologists, nurses, or accountants, to deal efficiently with both the legal and nonlegal aspects of specific problems.

In American Medical Association, 94 F.T.C. 701, 1017-18 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982), the Federal Trade Commission found that the AMA's ethical restrictions on the formation of professional associations with nonphysicians had an adverse effect on competition. The AMA's form of practice restrictions precluded a wide variety of professional ventures and potentially efficient business formats, such as health maintenance organizations and prepaid health care plans. The Commission concluded that the prohibitions were much broader than needed to prevent non-physician influence over medical procedures or consumer deception about the skills of a non-physician partner or associate. Proposed Rule and Standard 5.4 similarly limit potentially procompetitive professional ventures and innovative business formats. Paragraphs (c) and (d)(3) alone should adequately preserve the lawyer's independent professional judgment. Therefore, we recommend that the Committee delete all of proposed Rule and Standard 5.4, except 5.4(c) and 5.4(d)(3).

Proposed Rule and Standard 7.1: Advertising

The beneficial effects of advertising are widely recognized. Truthful, nondeceptive advertising communicates information about individuals or firms offering the services that consumers may wish to purchase. Such information helps consumers make purchase decisions that reflect their true preferences and promotes the efficient delivery of services. Before advertising by attorneys was permitted, many Americans failed to obtain the services of an attorney, even when they had serious legal problems.[4] A recent empirical study suggests that the removal of restrictions on the dissemination of truthful information about lawyers and legal services will tend to enhance competition and

---

[4] For example, a nation-wide survey in 1974 by the American Bar Foundation and the American Bar Association found that only 9 percent of the people who had a property damage problem, 10 percent of those with landlord problems, and 1 percent of those who felt that they were the victims of employment discrimination sought the services of an attorney after the most recent occurrence. B. Curran, The Legal Needs of the Public: The Final Report of a National Survey 135 (1977).

to lower prices.[5] Although some have voiced concern that advertising may lead to lower quality legal services, the empirical evidence suggests that the quality of legal services provided by firms that advertise is at least as high as, if not higher than, that provided by firms that do not advertise.[6]

We fully endorse the Committee's view that false and deceptive advertising should be prohibited. Nonetheless, we are concerned that the definitions of "false" and "misleading" contained in Rule and Standard 7.1(a)(2) might prohibit much truthful, nondeceptive advertising, as set forth below.

"Unjustified Expectations": Proposed Rule and Standard 7.1(a)(2)

Proposed Rule and Standard 7.1(a)(2) could be read to prohibit client endorsements and truthful communications about an attorney's record of favorable verdicts. The comment with respect to proposed Rule 7.1 states:

> "The prohibition in paragraph (b) of statements that may create 'unjustified expectations' would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."

The comment goes on to suggest that such information "may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances." The comment's construction of the prohibition of advertising "likely to create an unjustified expectation" is thus so broad that it could chill the use of much truthful advertising that is beneficial to consumers. For example, consumers may wish to use an attorney's past results as one of several factors to consider in choosing a representative. "[I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision." Bates v. State Bar, 433 U.S. 350, 374 (1977).

---

5 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).

6 Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179.

The comment also interprets proposed Rule 7.1(a) to prohibit the use of endorsements. Such advertising traditionally has been recognized as effective by sellers of goods and services. For example, the choice of the clients listed in the Martindale-Hubbell directory generally reflects an intuition that the representation of a major bank or corporation suggests that a firm can handle complicated legal problems in cases in which large sums of money may be at risk. Advertising using clients who attest truthfully 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, an advertisement in which a famous athlete or actor states truthfully that he or she uses a particular firm or attorney, 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.

We believe it is unlikely that advertisements containing client endorsements or information about past successes will create unjustified expectations, and the potential benefits to consumers of such information outweigh any potential harms. We therefore urge the Court to delete the commentary with respect to proposed Rule 7.1(a)(2).

Substantiation: Proposed Rule and Standard 7.1(a)(3),(4)

Proposed Rule and Standard 7.1(a)(3) and (4) would prohibit communications that compare a lawyer's services with those of other lawyers, or that make claims concerning the quality of a lawyer's services, unless the comparison or claims can be "factually substantiated." Information that accurately compares the particular qualities of competing law firms or that truthfully makes claims about a firm's services may encourage improvement and innovation in the delivery of services and assist consumers in making rational purchase decisions. Indeed, in one sense, such comparisons and quality claims are the essence of competition. Of course, comparisons or claims containing false or deceptive statements of fact, either about the advertiser or a competitor, provide no benefit to consumers and can be harmful. However, such statements would be prohibited by proposed Rule and Standard 7.1(a)(1).

Proposed Rule and Standard 7.1(a)(3) and (4) may preclude truthful, nondeceptive comparative statements or quality claims, such as "friendlier service," or "your legal rights explained in terms you can understand." Such statements are not readily subject to verification, but they provide information about the advertiser's legal services that may be useful to many potential

clients.[7] We urge the Committee to modify proposed Rule and Standard 7.1(a)(3) and (4) to require only that an attorney have a reasonable basis for any material, objective claims.

Proposed Rule and Standard 7.3: Direct Contact with Prospective Clients

Proposed Rule and Standard 7.3(b) would facilitate consumers' selection of a lawyer by permitting targeted direct mailings. It is our view, however, that proposed Rule and Standard 7.3(a) are too restrictive in prohibiting, except under very limited circumstances, telephone and in-person contact for the purpose of obtaining professional employment, and in imposing several regulations on written communications. These provisions would restrict the flow of information more than is necessary to protect consumers, because they would preclude truthful, nondeceptive communications in circumstances that pose little or no risk of undue influence.

In-Person Solicitation

In-person solicitation may provide consumers with truthful, nondeceptive information 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 convey information about the availability and terms of a lawyer's or law firm's legal services and, in this respect, serve much the same function as print advertising.

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 observed in Ohralik, 436 U.S. at 465. We do not believe, however, that this is a justification for a broad prohibition on all in-person solicitation. The Federal Trade Commission considered the

---

7 In its statement of policy regarding comparative advertising, the Federal Trade Commission recognized the benefits of comparative advertising and indicated concern about standards set by self-regulatory bodies that might discourage the use of such advertising:

> "On occasion, a higher standard of substantiation by advertisers using comparative advertising has been required by self-regulation entities. The Commission evaluates comparative advertising in the same manner as it evaluates all other advertising techniques . . . . [I]nterpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate and should be revised." 16 C.F.R. 14.15(c)(2) (1986).

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 the AMA to cease and desist from banning solicitation, but permitted the AMA to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence.

In-person solicitation by lawyers usually does not involve the exercise of undue influence.[8] Lawyers often encounter potential clients at meetings of political and business organizations and at social events. Indeed, many lawyers traditionally have built their law practices through such contacts. Under such circumstances, the potential client need not respond immediately and the possibility of undue influence is minuscule. Similarly, lawyers present speeches and seminars to prospective clients that establish goodwill and help attendees to understand the law and identify situations in which they might need a lawyer. Such personal contacts present little risk of undue influence and provide the benefit of enabling prospective clients to assess the personal qualities of attorneys.

Accordingly, as to in-person solicitation, we urge that the Rules and Standards be modified to prohibit only: (1) solicitation involving false or deceptive communications; (2) uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence; and (3) solicitation of persons who have made known to the lawyer that they do not want to be contacted by the lawyer. Such rules would protect consumers while, at the same time, allowing them to receive information about available legal services. In proscribing the use of undue influence during in-person solicitation, phrasing designed to reach the same result, as in proposed Rule and Standard 7.3(b)(4), would have the appropriate effect.

Telephone Solicitation

The comment to Rule 7.3 states that contact by telephone is included in the prohibited personal contact. 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. Telephone solicitation may present even less risk of the exercise of undue influence than does in-person solicitation. Consumers are accustomed to

---

8 To the extent that attorneys rely on client goodwill to obtain referrals, a strategy of overreaching to gain clients would seem to be counterproductive.

telephone marketing. They receive calls from persons offering the sale of various goods and services, conducting surveys about products and services, seeking contributions to charities, and requesting support for political candidates. Consumers can easily terminate offers of legal services communicated by telephone.

On the other hand, there may be reasons why restrictions on telephone solicitation not appropriate for other professionals might still be properly applied to lawyers. The AMA standard may be suitable for telephone solicitation, but may, on the contrary, be too restrictive, so we are not yet ready to conclude that it should be applied to telephone solicitation. Certainly, telephone solicitation containing false or deceptive communications, and telephone solicitation of persons who have made known to the lawyer that they do not want to receive calls from the lawyer, may appropriately be prohibited. But in any case, the broad ban on telephone solicitation in proposed Rule and Standard 7.3 is unnecessarily restrictive.

Written Communications

Proposed Rule and Standard 7.3(b) would more narrowly prohibit written communication if: "the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence" ((b)(3)); or "the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer" ((b)(4)).

Written communication is unlikely to be coercive, or involve the exercise of undue influence. As the New York Court of Appeals has observed, "the elements of intimidation and duress . . . are not present in the case of mail solicitation and . . . the process of decision-making may actually be aided by information contained in the mailing." In re Von Wiegen, 63 N.Y.2d 163, 170, 470 N.E.2d 838, 841 (1984), cert. denied, 105 S. Ct. 2701 (1985). According to the U.S. Court of Appeals for the Seventh Circuit, "individuals are less subject to harassment, overreaching and duress through mailings than they are through direct personal contact. It is easier to throw out unwanted mail than an uninvited guest. A letter may be read through several times and its contents reflected upon before a decision is made." Adams v. Attorney Registration & Disciplinary Commission, 801 F.2d 968, 973 (7th Cir. 1986). On the other hand, the risk of punishment for stepping over the somewhat ambiguous lines set out in proposed Rule and Standard 7.3(b)(3) and (4) could have a chilling effect on mailings. While such regulatory flexibility

may be justified when there has been a history of harmful conduct, we are aware of little evidence of abuse of written solicitations. Consequently, we recommend that proposed Rule and Standard 7.3(b) be amended to delete subsections (3) and (4).

Proposed Rule and Standard 7.4: Communication of Fields of Practice

Proposed Rule 7.4 and its accompanying comment would prohibit the use of the term "specialist," any derivative of that root word, or any other claim "implying" that a lawyer is a specialist, unless the attorney practices patent law or admiralty, or has been certified as a specialist through a program approved by the State Disciplinary Board of the State Bar. While the rule does allow a lawyer to indicate fields of practice, we believe that it is overly broad in restricting an attorney's ability to make truthful claims that he or she has developed distinct skills in a specific area of the law. A true statement that an attorney is a member of an organization of trial lawyers, for example, might be outlawed as an implied claim of specialization, even though it informs consumers that the attorney has sufficient interest in trial advocacy to join such an organization and has access to the organization's training and materials. There are many ways to obtain expertise, and information that an attorney has experience or special skills in a particular field is clearly useful to consumers. The use of the term "specialist" may be the clearest, most efficient way to communicate this information.[9]

Clearly, advertising claims concerning successful completion of a certification program can provide consumers with facts about an attorney's special skills when the program's requirements are reasonably related to proficiency in the subject area certified. On the other hand, when uncertified attorneys are prohibited from truthfully advertising their training and skill, consumers will be deprived of information to help them choose among qualified practitioners. We believe that depriving consumers of useful information about uncertified attorneys' special skills or expertise could lessen competition in those areas of legal practice for which certification programs exist.

In addition, the prohibition on advertising the receipt of a certificate from a training program not previously approved by the State Bar could discourage attorneys from taking additional training after law school and could place a restraint on the development of private certifying organizations. The approval

---

9 Nor do we 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.

process could, in fact, mislead consumers into thinking that training programs lacking Bar approval are inferior and that attorneys receiving certificates from such programs are less qualified than practitioners trained in Bar-approved programs. The inefficiency and injury to competition would be particularly acute if the requirements for Bar approval are not reasonably related to attaining proficiency in the specialized field.[10] The prospect of state approval threatens to turn certification into a form of licensing of a specialty in the minds of consumers, who will ultimately pay higher legal fees because of their misunderstanding.[11]

We recommend that the Committee remove all prohibitions on truthful, nondeceptive claims, express or implied, that a lawyer is a specialist; and that it delete the provision for Bar approval of certification programs so that attorneys who have successfully completed certification or other training programs will be allowed to communicate that fact. Proposed Rule and Standard 7.1(a), prohibiting false or deceptive communications, would prevent claims concerning training that is not reasonably related to proficiency in the subject area.

Proposed Rule and Standard 7.5: Firm Names and Letterheads

We support proposed Rule and Standard 7.5 to the extent that they would permit a law firm to use a trade name. We differ, however, with the prohibition on the use by a firm of more than one name and the requirement that a trade name include the name of at least one attorney practicing under the trade name.

A trade name is used to identify particular goods or services. Over time, consumers tend to associate the trade name with attributes of the services, such as quality, price, or type of service. In addition, a trade name by itself can convey information, such as location of the provider or field of practice.

---

10 Currently, for example, under Rule 16 of the State Disciplinary Board Internal Rules, certification programs will not be approved unless their prerequisites include membership in the Georgia Bar. This requirement, in effect, eliminates programs designed for attorneys throughout the nation (e.g., programs for certified specialties in matters of federal law or that have few practitioners in each state) as candidates for approval. No plausible justification for such a restriction comes to mind.

11 Claims relating to certificates that are not bona fide would be prohibited under the rule against "false and misleading" advertising.

Proposed Rule and Standard 7.5(e) state that "[a] law firm shall not simultaneously practice law in Georgia under more than one name." The comment to Rule 7.5 gives the example that ABC law firm may not operate a separate office called ABC Legal Clinic.

A law firm may wish to use more than one name to create separate identities for different offices if each office practices in a different area of the law, provides a different level of service, attracts a different clientele or is marketed differently. It may be more efficient for a law firm to have different firm names associated with services with different sets of attributes in order to communicate more easily with potential clients through advertising and reputation. For example, one firm name might be used for complex corporate services while another would be used for more routine individual services.

While a law firm could set up a separate entity to operate under a different firm name, there may be cost savings from combining legal operations under one firm, through the sharing of overhead, computer services, and management and accounting functions for example. In addition, a firm could have greater flexibility in shifting resources, such as legal support staff, as client demand fluctuates, if the separate operations were part of one firm. These efficiencies could result in lower costs and hence lower prices for clients.

We believe the risk that the public might be confused or misled by a law firm practicing under different names is minimal and is outweighed by the possible benefits described above. Furthermore, it may be less misleading to the public to have distinct legal services associated with different names so that the consumer will know to which office to go to obtain the services he or she needs. Therefore, we recommend that proposed Rule and Standard 7.5(e) be deleted.

Proposed Rule and Standard 7.5(f)(1) require that a trade name include "the name of at least one of the lawyers practicing under said name," unless the firm name consists of the names of deceased or retired firm members. Current Standard 9 permits the use of a trade name without such a requirement. Inclusion of the attorney's name may distract consumers from the information the firm wishes to convey through its name, such as its area of practice or location of its office. The requirement

of including a lawyer's name would appear unnecessary since the consumer will learn the identity of the lawyer who will provide him legal services when he visits the law firm's office. Furthermore, the requirement may not inform the consumer of the identity of the lawyers who will handle his or her matter because, especially in a large firm, the named partners may have no involvement in the consumer's matter. Finally, we note that the Code of Professional Responsibility Committee recognized that firm names need not include the name of a lawyer practicing in the firm because it did not impose this requirement on firms whose names are limited to the names of deceased or retired members. Therefore, we recommend that subparagraph (1) be deleted from proposed Rule and Standard 7.5(f).

Conclusion

It appears that the Committee's proposed Rules and Standards will allow the dissemination of more information about legal services than the current Code of Professional Responsibility and Standards of Conduct and will thereby benefit consumers of legal services. We urge that the Committee eliminate the remaining unnecessary restrictions on competition among attorneys by: (1) modifying the comment to proposed Rule 1.5 to make clear that only extremely high fees are prohibited; (2) deleting all of proposed Rule and Standard 5.4, except paragraphs (c) and (d)(3); (3) modifying proposed Rule and Standard 7.1 to make clear that endorsements and success and experience claims are permitted, and to require only that an attorney have a reasonable basis for any material, objective claims; (4) modifying proposed Rule and Standard 7.3 to permit in-person contact with all but those who, because of their particular circumstances, are vulnerable to undue influence, or who have informed the lawyer that they do not wish to be solicited, to eliminate the broad ban on telephone contact, and to delete proposed Rule and Standard 7.3(b)(3) and (4) governing written communications; (5) amending proposed Rule and Standard 7.4 to allow express or implied claims of specialty or certification; and (6) deleting proposed Rule and Standard 7.5(e), which prohibit a law firm from practicing under more than one name, and proposed Rule and Standard 7.5(f)(1), which require inclusion of the name of a lawyer in a trade name.

We hope that this letter will be of assistance in pointing out ways in which particular rules and standards may restrict competition and injure consumers, and we appreciate having had the opportunity to present these views.

Sincerely yours,

Jeffrey I. Zuckerman
Director
Bureau of Competition