BUREAU OF COMPETITION

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



June 8, 1987

Honorable Robert F. Stephens
Chief Justice
Supreme Court of Kentucky
New Capitol Building, Room 231
Frankfort, Kentucky 40601

Dear Chief Justice Stephens:

The Federal Trade Commission staff is pleased to submit these comments respecting the proposed Kentucky Rules of Professional Conduct, Supreme Court Rule 3.135, and the proposed Guidelines for Certification of Specialists in Kentucky ("Guidelines").[1] It is our understanding that the Court will hold a public hearing on the proposed rules and guidelines on June 11 and that the Court is interested in receiving our views before that date.

In this letter, we focus on the proposed rules regarding fees, practice with nonlawyers, advertising, and solicitation. In addition, we address existing Rule 3.135,[2] which deals with attorney advertising, and some of the proposed Guidelines relating to advertising of specialty. We are concerned that some of the proposed rules and the existing rule may harm consumers by restraining price competition, discouraging referrals and associations between attorneys, restricting the development of innovative and efficient forms of legal practice, and unnecessarily limiting the information available to consumers. We also believe that the proposed Guidelines may restrain advertising more than is necessary to protect consumers.

As is discussed in more detail below, we urge the Court to: (1) clarify in the commentary to proposed Rule 1.5(a) that only fees that are so high as to suggest a breach of fiduciary duty to the client would be unreasonable; (2) delete proposed Rule 1.5(e)

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[1] These comments represent the views of the Federal Trade Commission's Bureaus of Competition, Consumer Protection, and Economics, and not necessarily those of the Commission itself. The Commission has, however, voted to authorize us to submit these comments for your consideration.

[2] We comment on the existing Supreme Court rule in the event that the Court does not adopt the proposed Kentucky Rules of Professional Conduct and because, even if the Court adopts the proposed Rules, portions of the existing rule may remain in effect.

so as not to discourage referrals and associations of attorneys in different law firms for particular cases; (3) eliminate the restrictions in proposed Rule 5.4 on practice with nonlawyers, and on lawyers influencing the professional judgment of other lawyers; (4) amend proposed Rule 7.1 to clarify that truthful, nondeceptive endorsements and experience, success, and comparison claims are permitted; (5) delete proposed Rule 7.2(a) to permit advertising in any media; (6) delete Rule 3.135(6)(a)(i) to allow attorneys to advertise all truthful, nondeceptive information; (7) amend Rule 3.135(4) to eliminate the restrictions on the use of self-laudatory statements and the requirement that statements in advertisements be "informative," and to clarify what the Court interprets as "unfair"; (8) modify proposed Rule 7.2(b) to allow the payment of referral fees to attorneys and the use of for-profit referral services; (9) modify proposed Rule 7.3 to remove the broad ban on solicitation; (10) modify proposed Rule 7.4 to allow express and implied claims of specialty, and delete Rule 3.135(5)(b)(2) and proposed Guideline VII.A.2 and B so as not to discourage specialty advertising; and (11) delete proposed Guideline IV.E to promote competition between Board certified specialists and referring attorneys.

Interest and Experience of the Federal Trade Commission

For more than a decade, the Commission has investigated the effects of restrictions on the business practices of state-licensed professionals, including lawyers, accountants, dentists, physicians, non-physician health-care providers, and others. The goal of the Commission has been to identify and seek the removal of restrictions that prevent professionals from advertising or providing services that consumers want without providing countervailing benefits. We believe that Supreme Court Rule 3.135, and certain of the proposed Guidelines and proposed Kentucky Rules of Professional Conduct, may result in such adverse effects.

Proposed Rule 1.5: Fees

Proposed Rule 1.5(a): Reasonableness of Fee

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 legal services" is to be considered in determining reasonableness. We support the Bar's clarification in the commentary to proposed Rule 1.5(a) entitled "Disputes over Fees" that subparagraph (3) is intended "to prohibit unreasonably high fees and does not prevent a lawyer from sharing [sic] fees that are less than 'customary.'" This commentary will avoid lawyers' interpreting this language to bar "unreasonably" low fees. It will thus allow price competition

among traditional practitioners and also might promote competition from legal clinics and other nontraditional providers of legal services.

Although proposed Rule 1.5(a) would permit more price competition in certain respects, it nevertheless is undesirable insofar as it may set a ceiling on fees. We do not believe that consumers of legal services benefit from price regulation, whether a minimum or maximum price is imposed. Setting a minimum price may increase prices and setting a maximum price may reduce the quality of services offered. 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. We therefore suggest that the commentary make clear that fees may be found to be unreasonably high only if, under the circumstances, the attorney appears to be exploiting the client.

Proposed Rule 1.5(e): Fee-Splitting

Proposed Rule 1.5(e), apparently derived from Rule 1.5(e) of the ABA's Model Rules of Professional Conduct, states that division of fees between lawyers who are not in the same firm may be made only in two alternative circumstances. First, division of fees is permitted if the division is in proportion to the services performed by each lawyer. Alternatively, division of fees is permitted according to the allocation agreed on by the lawyers if, by written agreement with the client, each lawyer assumes joint responsibility for the representation. In either case, the client must be advised of and not object to the participation of all the lawyers involved and the total fee must be "reasonable." We are concerned that the proposed rule might unnecessarily discourage both referrals and associations between lawyers in different law firms under circumstances in which such activity may benefit consumers.

Division of fees can provide incentives for attorney referrals and associations that are desirable for the client.

> Unlike lawyers in large firms, who can refer matters to their partners and receive a share of the fees, when lawyers in small firms receive a matter that is outside their normal expertise, they may not forward it to a more qualified attorney and still participate in the fee. Consequently, they have less incentive to refer matters to more qualified counsel. [Division of fees] will benefit clients because it makes it more likely that

> their matters will be forwarded to the most appropriate counsel. . . .[3]

Proposed Rule 1.5(e) would inhibit referrals by lawyers. First, the requirement that a division of fees be "in proportion to the services performed by each lawyer" might be interpreted to prohibit referral fees, because it is unclear whether giving a prospective client the name and telephone number of another lawyer competent to handle that client's legal problems constitutes compensable "services" under the language of the proposed rule.[4] Even if this provision were interpreted to permit referral fees, it might be interpreted to allow only a very small portion of the total fees to be paid to the referring attorney. Second, the alternative requirement that a referring attorney assume responsibility for the independent professional judgments of the attorney who is actually handling the case is likely to deter referrals. Because of the liability for malpractice that joint responsibility might entail,[5] the referring attorney probably would be compelled to review the other attorney's work. This could result in costly duplication of effort. It would seem that the referring attorney and the

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[3] Report of the Special Committee to Consider Adoption of the ABA Model Rules of Professional Conduct or to Consider Revisions of the 1969 Code at 8-9 (March 1986).

[4] A referral may be a valuable service. But according to state court and ABA opinions, a "mere" referral does not constitute a "service" and therefore an attorney is not entitled to any portion of the fee when he or she has merely referred a client to another. See Corti v. Fleisher, 93 Ill. App.3d 517, 417 N.E.2d 764, 772 (1981); Palmer v. Breyfogle, 217 Kan. 128, 535 P.2d 955, 958 (1975); McFarland v. George, 316 S.W.2d 662 (Mo. 1968); Note, Referral Fees and the Effect of Disciplinary Rule 2-107, 8 J. Legal Prof. 225, 228-29 (1983); Note, Division of Fees Between Attorneys, 3 J. Legal Prof. 179, 186 (1978) (citing ABA Opinions).

[5] The comment to proposed Rule 1.5 on division of fees states that "[j]oint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved." Proposed Rule 5.1 governs responsibilities of a partner for the ethical conduct of another attorney in the same law firm, as well as responsibilities of supervisory lawyers. Because it focuses on these relationships, its application in the context of a "joint responsibility" situation is unclear.

attorney handling the case should be able to determine among themselves how to divide the total legal fee.

Two justifications have been offered to support bans on referral fees. First, it has been argued that permitting referral fees would tempt some lawyers to refer legal matters to the lawyer who pays the highest referral fee, rather than to the best qualified lawyer. In personal injury and other cases that are taken on a contingent fee basis, however, the referring lawyer typically receives one-third of any fee recovered by the lawyer who handles the case.[6] Thus, it is probable that the referring attorney will select the lawyer who he or she believes is the most likely to recover the largest award for the prospective client. Clearly, 20% of an attorney's recovery in a contingent fee case is better than 40% of nothing; to this extent, the attorney's and the client's interests are the same. Even when no contingency fee is involved, a lawyer referring a client to a specialist has every incentive to make suitable referrals in order to maintain client goodwill, in the interest of obtaining repeat business and of preserving his or her professional reputation.

Second, some have argued that the attorney to whom a case is referred will increase the total fee paid by the client in order to recoup the referral fee. This does not appear to be a valid concern. First, the attorney could not raise his or her fees without losing some clients who are price-sensitive. In addition, by facilitating referrals to experts, referral fees may actually reduce the total fees charged to clients. Because of their more predictable and more specialized workload, experts may be able to reduce costs and pass on such savings to clients.

Associations of two or more lawyers in different firms may also benefit consumers. The comment to proposed Rule 1.5 entitled "Division of Fee" correctly recognizes that such associations may benefit a client in cases in which neither attorney alone could serve the client as well. For example, one lawyer may not have sufficient time, resources, or expertise to handle all aspects of a particular client's case. An attorney from Firm X might serve as chief trial attorney, while his or her co-counsel from Firm Y might perform the bulk of the pretrial preparation.

Proposed Rule 1.5(e) might discourage such associations. The provision that a division of fees between attorneys in different law firms be proportional to the services performed by

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[6] Referral Fees: Everybody Does It, But Is It OK?, A.B.A. J., Feb. 1985, at 40.

each lawyer would impose rigidity on the allocation of the fee. If lawyers were allowed to negotiate their respective shares of the total legal fee, they could allocate the fee according to the factors they deem important, including number of hours spent, prior knowledge of the facts, relationship with the client, or degree of expertise. The alternative provision, imposing joint responsibility on one attorney for the independent professional judgments of another, also appears likely to deter associations of attorneys in different law firms, just as joint responsibility would deter attorney referrals.

For the reasons stated above, we urge the Court to delete proposed Rule 1.5(e) in its entirety. It is not clear that any regulation of fee division is necessary. Should the Court deem it to be necessary, the less restrictive alternative of requiring disclosure might be imposed. If consumers are not generally aware of the practice of paying referral fees, disclosure may be necessary so that consumers can assess referrals effectively. If the Court decides to require disclosure, however, the requirement should be devised carefully to avoid imposing unnecessary costs.

Proposed Rule 5.4: Professional Independence of a Lawyer

Proposed Rule 5.4 prohibits a lawyer from forming a partnership or sharing legal fees with a nonlawyer, except under limited circumstances, or from practicing in an organization authorized to practice law for a profit if a nonlawyer owns an interest in the organization. This proposed rule would limit the ability of lawyers to establish multi-disciplinary practices with other professionals, such as psychologists or accountants, to deal efficiently with both the legal and nonlegal aspects of specific problems. Proposed Rule 5.4 also would appear to bar lawyers from including any lay persons, such as marketing directors, as partners in their law firms. Finally, such a restriction would appear to prohibit corporate practice, and thereby prevent the use of potentially efficient business formats.

The Commission has examined similar restrictions on associations between physicians and nonphysicians and concluded that they restrain competition unnecessarily. 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 nonphysician influence over medical procedures or consumer deception about the skills of a nonphysician partner or associate.

The Commission staff has studied the benefits to consumers of associations between professionals and lay persons. The staff of the Federal Trade Commission's Bureau of Economics concluded from a study of the optometric profession that the price of optometric services is lower in jurisdictions in which business associations between professionals and lay persons are permitted.[7] Restrictions on such business associations impede the formation of chain firms and other volume operations and thus make it difficult to achieve economies of scale.

Proposed Rule 5.4 might limit potentially procompetitive professional ventures, innovative business formats, and perhaps some forms of prepaid legal services. By imposing restrictions on business associations between lawyers and nonlawyers, proposed Rule 5.4 might prevent lawyers from achieving savings in marketing that could be passed on to consumers. For example, the proposed rule would not permit a retailer such as Sears to employ attorneys to provide legal services to the public. If attorneys were permitted to enter into such an arrangement, it would be feasible for them to advertise on a national scale and share advertising time with other Sears service providers, such as its insurance, stock brokerage, and realty subsidiaries.

Nonlawyer officers and directors may provide law firms with managerial or marketing expertise. Proposed Rule 5.4 would permit nonlawyers to be corporate directors and officers in law firms, which would enable law firms to secure their expertise. We are concerned, however, that the proposed rule would discourage nonlawyers from seeking such positions, since paragraph (a) and subparagraph (d)(1) would prohibit nonlawyers from sharing the profits or owning an interest in the law firm.

Subparagraph (d)(2) provides that a lawyer shall not practice with a for-profit organization if a nonlawyer has the right to direct or control the lawyer's professional judgment. That subparagraph alone should adequately preserve the lawyer's independent professional judgment which, according to the commentary to proposed Rule 5.4, was the purpose of this disciplinary rule.

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[7] Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry 25-26 (1980).

Proposed Rule 5.4(c) is apparently intended as a further guarantee of the lawyer's independent professional judgment. The proposed rule provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The word "person" in the proposed rule appears to encompass both lawyers and nonlawyers.[8] If so, the proposed rule, in effect, would prohibit an attorney handling a case based on a referral from allowing his or her professional judgment to be directed or regulated by the referring attorney. The attorney accepting a referral would be unable to base a decision concerning a particular legal issue on a consultation with the referring attorney, even when that consultation might be beneficial to the particular client.

Furthermore, proposed Rule 5.4(c) appears to conflict with proposed Rule 1.5(e). One circumstance under which proposed Rule 1.5(e) would permit attorneys from different firms to divide fees is where "each lawyer assumes joint responsibility for the representation."[9] Proposed Rule 5.4(c), on the other hand, would prohibit the referring attorney from directing or regulating the professional judgment of the attorney who received the referral. Thus, the proposed rules would leave the referring attorney in the predicament where he or she might be liable for the other attorney's handling of the case, but still could not influence that attorney's professional judgment.

We therefore urge the Court to delete all of proposed Rule 5.4, except paragraph (c) and subparagraph (d)(2), and to amend paragraph (c) so that it applies only where a nonlawyer directs a lawyer's professional judgment.

Proposed Rule 7.1: Communications Concerning a Lawyer's Services

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 decisions that reflect their true preferences and promotes the efficient delivery of services. Before advertising by attorneys

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[8] A literal reading of proposed Rule 5.4 (c) would prohibit an associate attorney from allowing his or her professional judgment to be influenced by a partner in the same firm. This undoubtedly was not the intention of the Bar.

[9] Proposed Kentucky Rule of Professional Conduct 1.5(e)(1)(b).

was permitted, many Americans failed to obtain the services of an attorney, even when they had serious legal problems,[10] primarily because they feared that legal representation would cost too much or they were unable to locate a lawyer sufficiently skilled at handling their particular problems.[11] 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 lower prices.[12] Although concern has been voiced 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.[13]

We fully endorse the view that false and deceptive advertising should be prohibited. Nonetheless, as set forth below, we believe that the definition of "false or misleading" contained in proposed Rule 7.1 may prohibit much truthful, nondeceptive advertising.

Proposed Rule 7.1(b): "Unjustified Expectations"

The State Bar of Kentucky proposes that the Court adopt, in connection with proposed Rule 7.1(b), the comments drafted by the American Bar Association with respect to the identical provisions in ABA Model Rule 7.1. The ABA comments state:

> The prohibition in paragraph (b) of statements that may create "unjustified

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[10] For example, a nationwide survey in 1974 by the American Bar Foundation and the American Bar Association found that only nine percent of the people who had property damage problems, ten percent of those who had landlord problems, and one 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).

[11] Id. at 228, 231.

[12] 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).

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

> 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 comments suggest that information about past results "may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances." This interpretation of the phrase "likely to create an unjustified expectation" is so broad that it could chill the use of much advertising that is truthful and beneficial to consumers. For example, consumers may wish to consider an attorney's past results as one of several factors in selecting a lawyer. While it may be impossible to provide complete information about prior cases in an advertisement, there is no reason to believe an advertisement of prior experience could not be presented in a way that is not deceptive. Information that is less than complete may, nonetheless, not be misleading as long as it does not omit material facts. "[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 of Arizona, 433 U.S. 350, 374 (1977).

Advertising by means of testimonials and endorsements has traditionally been recognized as effective by sellers of goods and services. For example, the listing of certain clients such as major banks or corporations in the Martindale-Hubbell directory suggests that a firm can handle complicated legal problems in which large sums of money may be at risk. Advertising in which clients attest truthfully that they use a firm's legal services provides the general public the same information that is available to users of legal directories. Advertising in which clients discuss their reasons for satisfaction with a law firm conveys even more information than do legal directories. An advertisement in which a famous athlete or actor states truthfully that he or she uses a particular firm or attorney indicates to 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. Testimonials are not necessarily misleading and may be effective in attracting and retaining consumer interest in the advertiser's message.

In short, we believe that advertisements containing client endorsements or information about past successes can be presented in ways not likely to create unjustified expectations. We

therefore urge the Court to modify the ABA commentary with respect to proposed Rule 7.1(b) and make clear that advertisements containing truthful and nondeceptive endorsements, testimonials, and statements of attorneys' prior results are permitted.[14]

Proposed Rule 7.1(c): Comparative Advertising

Proposed Rule 7.1(c) provides that a lawyer shall not compare "the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." We believe that this rule may unnecessarily inhibit competition by prohibiting lawyers from making truthful advertising claims that are not amenable to empirical substantiation. Information that accurately compares the particular qualities of competing law firms may encourage improvement and innovation in the delivery of services and assist consumers in making rational purchase decisions. Of course, comparisons containing false or deceptive statements of fact, either about the advertiser or a competitor, can be harmful. However, such statements already are prohibited by proposed Rule 7.1(a).

We are concerned that proposed Rule 7.1(c) may deter the use of comparative advertising and preclude truthful, nondeceptive statements merely because they are not amenable to empirical testing.[15] Examples of such statements are "Friendlier service"

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[14] In addition, we recommend that the Court delete Rule 3.135 (5)(a)(ii), which is substantially similar to proposed Rule 7.1(b), or clarify that this provision does not prohibit advertisements containing endorsements and testimonials.

[15] In a 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

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or "More convenient hours." Even though such statements are not readily subject to verification, they may be truthful and nondeceptive, and indicate the qualities that the advertiser believes are important to consumers. Moreover, such statements can attract consumers' attention to the advertising attorney. Even advertising that is designed only to attract attention can inform consumers of a lawyer's presence in a community, which is itself useful information.

Proposed Rule 7.1 (c)'s requirement of factual substantiation appears to be broader than necessary to prevent deception. The Commission generally requires that advertisers have a "reasonable basis" for any objectively verifiable and material claims that they make, because the act of making such a claim implies some basis for it, and consumers would be deceived if a reasonable level of support were lacking.[16] However, "puffery" and subjective claims do not similarly imply that substantiation exists, and so may be used without it.

We therefore recommend that the Court modify proposed Rule 7.1(c) to require only that an attorney have a reasonable basis for any material, objective claims, and that such claims be truthful and nondeceptive.[17]

Proposed Rule 7.2(a): Permissible Advertising Media

Attorneys may interpret the list of media in proposed Rule 7.2(a) as exclusive and conclude that advertising in media not listed is prohibited. The listing of specific media that may be used in advertising could also discourage innovation in ways not intended by the Court, especially since the phrase "public media" is ambiguous. For example, the rule might be interpreted to prohibit sponsorship of museum exhibits. In addition, the specificity of the rule fails to anticipate changing technologies. Thus, for example, the rule might be interpreted to exclude advertising in computer bulletin boards, on-line directories, or similar media that may play increasingly

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[15](...continued)
revised.

16 C.F.R. 14.15(c)(2) (1986).

[16] See FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984).

[17] Rule 3.135(5)(a)(iii) contains a provision similar to proposed Rule 7.1(c) and we suggest that this portion of the existing rule be deleted.

important roles as electronic communication becomes more common. Therefore, we recommend that the Court delete proposed Rule 7.2(a).[18]

Rule 3.135(6)(a)(i): Permissible Contents of Advertisements

Rule 3.135(6)(a)(i) specifies the types of information that attorneys may include in an advertisement. Rule 3.135(6)(b) provides that an attorney who wants to include information not specified in subparagraph (a)(i) must send a copy of the advertisement to the Attorneys Advertising Commission thirty days in advance of dissemination. The ABA has recognized the danger of imposing such restrictions: limiting the types of information that may be advertised would impede the flow of information about legal services to many sectors of the public and "assumes that the bar can accurately forecast the kind of information that the public would regard as relevant."[19] We share the ABA's concern and believe that only false and deceptive advertising should be prohibited. Nor is it clear that the exception provided in paragraph (b) is adequate to overcome the deficiencies of this rule. The exception contains an advance notice requirement that is likely to delay the dissemination of information and reduce lawyers' ability to compete through advertising. Because of the built-in delay in securing approval and the uncertainty of approval, the exception may be insufficient to overcome the rule's effect of discouraging attorneys from providing information to consumers, other than that contained in the categories specified in subparagraph (a)(i). Accordingly, we recommend that the Court delete Rule 3.135(6).

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[18] We agree with the Bar's decision not to propose that the Court adopt ABA Model Rule 7.2(b) and (d). ABA Model Rule 7.2(b) states that a "copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used." This recordkeeping requirement would entail administrative costs and thus might discourage attorney advertising. ABA Model Rule 7.2(d) requires that lawyers include in their advertisements "the name of at least one lawyer responsible for its content." Inclusion of a lawyer's name might distract consumers' attention from the information the lawyer or firm wants to communicate in the advertisement and thus reduce the effectiveness of the advertisement.

[19] Comment to ABA Model Rule of Professional Conduct 7.2 (Aug. 2, 1983).

Rule 3.135(4): Unfair and Self-Laudatory Claims

Rule 3.135(4) prohibits attorneys from including in their advertisements "a statement or claim which is false or tends to be misleading, deceptive, or unfair, or which is self-laudatory rather than designed to inform the public."

We do not question the need to prohibit the use of "unfair" statements or claims in attorney advertisements. In fact, Section Five of the Federal Trade Commission Act prohibits "[u]nfair methods of competition. . . and unfair. . . acts or practices. . . ."[20] We are concerned, however, that without an explanation of what constitutes an "unfair" statement or claim, the term "unfair" might be interpreted by some attorneys to prohibit advertising that poses little risk of consumer injury. In a statement of policy, the Federal Trade Commission set forth a test for determining whether a consumer injury is legally "unfair."[21] To justify a finding of unfairness, the injury must: (1) be substantial[22]; (2) not be outweighed by any countervailing benefits to consumers or competition that the practice produces[23]; and (3) be an injury that consumers themselves could not reasonably have avoided.[24] We suggest that the Court consider this interpretation of "unfair" and ensure that the

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20 15 U.S.C. § 45(a)(1).

21 Letter from Federal Trade Commission to Senators Wendell H. Ford and John C. Danforth 5 (Dec. 17, 1980).

22 In most cases, a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services. "Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair. Thus, for example, the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers. . . ." Id. at 5-6.

23 Most business practices involve a mixture of costs and benefits to purchasers. The Commission recognizes these tradeoffs and will not find a practice unfair unless its net effects are injurious. The Commission also considers the costs that a remedy would entail. Id. at 6.

24 Normally consumers' purchase decisions control the market without regulatory intervention. Certain types of sales techniques, however, may prevent consumers from effectively making their own decisions, in which case corrective action may be necessary. Id. at 7.

commentary clearly conveys to lawyers what advertising is permitted.

The prohibition of self-laudatory advertising may preclude virtually all superiority claims. This prohibition may also restrict many forms of comparative advertising, which, as we stated above in our discussion of proposed Rule 7.1 (c), can be a highly effective means of informing and attracting clients. When attorneys cannot truthfully compare the attributes of their services to those of their competitors, their incentive to improve their services or reduce their prices is likely to decrease.

Bans on self-laudatory claims are particularly likely to injure competition and consumers when they are interpreted to prohibit a wide range of factual statements. For example, virtually all statements about an attorney's qualifications, experience, or performance can be considered to be self-laudatory. Bans on all such claims would make it very difficult for attorneys to provide consumers with truthful information about their services.

By prohibiting attorneys from engaging in advertising that is "self-laudatory rather than designed to inform the public," Rule 3.135(4) could chill attorney advertising. It may be difficult for attorneys to predict what statements or claims the Court might regard as informative rather than self-laudatory. Attorneys may interpret the rule to prohibit advertising of any category of information not listed in Rule 3.135(6)(a)(i).

For these reasons, we urge the Court to amend Rule 3.135(4) to eliminate the restrictions on self-laudatory statements and the requirement that statements be designed to inform the public, and to clarify what statements or claims the Court considers to be "unfair."

Proposed Rule 7.2(b): Lawyer Referral Services

Proposed Rule 7.2(b) appears to preclude the use of for-profit lawyer referral services or other legal service organizations. Such organizations enable lawyers to pool their advertising resources while maintaining independent practices. Consumers in need of legal advice on a particular subject may benefit from the knowledge such services possess about the particular expertise of each member attorney. For-profit referral services may be able to provide more useful information to consumers than nonprofit bar association referral services, which may be obliged to give referrals on an equal basis to all attorneys.

Proposed Rule 7.2(b) also appears to prohibit the payment of fees to lawyers who refer prospective clients to other lawyers. As we mentioned above in our discussion of proposed Rule 1.5(e), such a prohibition could have substantial anticompetitive effects. For these reasons, we urge the Court to delete the requirements in proposed Rule 7.2(b) that lawyers not pay referral fees to other lawyers, and that lawyer referral services and similar legal service organizations be not-for-profit.

Proposed Rule 7.3: Direct Contact With Prospective Clients

Proposed Rule 7.3 would prohibit virtually[25] all forms of direct client solicitation because, according to the comment to the proposed rule, there is a "potential for abuse inherent in direct solicitation."[26] We believe that solicitation can provide consumers with helpful information about the nature and availability of legal services, and that any potential abuses can be effectively prevented through more limited and specific regulatory provisions. We urge the Court, therefore, to modify proposed Rule 7.3 and adopt more limited restrictions on solicitation.

Written communications from lawyers may provide useful information to prospective clients. For example, by targeting letters to a particular audience, the lawyer can provide information to those consumers who are most likely to need legal services and to benefit from information about what services are available, Spencer v. Honorable Justices of the Supreme Court of Pennsylvania, 579 F. Supp. 880, 891 (E.D. Pa. 1984), aff'd mem., 760 F.2d 261 (3d Cir. 1985), and who may need to have a lawyer take action expeditiously on their behalf. As the court stated in Koffler v. Joint Bar Association, 51 N.Y.2d 140, 146, 412 N.E.2d 927, 931, 432 N.Y.S.2d 872, 875-76 (1980), cert. denied, 450 U.S. 1026 (1981):

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[25] The proposed rule would not apply to the solicitation of family members or of those with whom the lawyer had a prior professional relationship, or where pecuniary gain was not a significant motive for the solicitation.

[26] We understand that the Court's order in Shapero v. Kentucky Bar Association, 86-SC-335-KB (Ky. March 27, 1987), modified Rule 3.135(5)(b)(i) as to mail advertising, using language virtually identical to proposed Rule 7.3. Our comments on proposed Rule 7.3 would therefore apply equally to the current rule.

> To outlaw the use of letters . . . addressed to those most likely to be in need of legal services . . . ignores the strong societal and individual interest in the free dissemination of truthful price information as a means of assuring informed and reliable decision making in our free enterprise system . . . .

The Seventh Circuit reasoned similarly in Adams v. Attorney Registration and Disciplinary Commission, 801 F.2d 968, 973 (7th Cir. 1986), that "[p]rohibiting direct mailings to those who might most desire and might most benefit from an attorney's services runs afoul of the concerns for an informed citizenry that lay at the heart of Bates." Without truthful information, consumers are not able to select the quality and price of legal services that best suit their needs.

Lawyers may be able to communicate with prospective clients more efficiently by using targeted mailings and telegrams than by using other forms of advertising. Targeted mailing and telegrams may be costly. Because they are sent to consumers who have the greatest need for legal services, however, they are likely to have a higher response rate than other forms of advertising. Consumers who choose to respond to such written communications incur lower search costs because they need not contact numerous lawyers to find one able to handle a legal problem.

Targeted mail and telegraph advertising, as long as it is truthful and nondeceptive, poses little danger of consumer harm. Although it is not impossible, it is unlikely that written communications will be intrusive or coercive, or involve intimidation or duress. In re Von Wiegen, 63 N.Y.2d 163, 170, 470 N.E.2d 838, 841, 481 N.Y.S.2d 40, 43 (1984), cert. denied sub nom. Committee on Professional Standards v. Von Wiegen, 105 S. Ct. 2701 (1985); Koffler, 51 N.Y.2d at 149, 412 N.E.2d at 933, 432 N.Y.S.2d at 877-78. A letter or a telegram from an attorney offering legal services requires no immediate response. The consumer can give the communication careful consideration and make a reasoned decision about selecting a lawyer.

In-person contact may also provide consumers with truthful, nondeceptive information that will help them select a lawyer. As the Supreme Court stated 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 legal services and, in this respect, serve much the same function as advertising.

In-person solicitation by lawyers in many instances does not involve coercion or the exercise of undue influence. Lawyers often encounter prospective 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 possibility of abuse seems 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, but do provide the benefit of enabling prospective clients to assess the personal qualities of attorneys. Since lay persons might find aggressive solicitation to be offensive, lawyers have an incentive not to engage in such solicitation.

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 reasoned in Ohralik, 436 U.S. at 465. We do not believe, however, that this justifies a broad prohibition on all 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 the AMA to cease and desist from banning all solicitation, but permitted it to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence.

Telephone solicitation can also provide useful information, and it may present less risk of harm to consumers than does in-person solicitation. We recognize, of course, that telephone sales can be used to injure consumers. Consequently, we would not oppose a prohibition on false or deceptive telephone solicitation. However, the use of the telephone to sell goods and services has become relatively common in our society. It is not clear to us that telephone solicitation by lawyers is necessarily likely to harm consumers. For example, a lawyer may call an acquaintance who owns a business and offer a legal service, or a lawyer may hire a telephone marketing firm to call all residents of a neighborhood and offer the lawyer's services to write a will. In both cases, consumers will be provided useful information and the likelihood of harm seems small.

Thus, we oppose the proposed broad ban on solicitation. We would not oppose more limited restrictions on solicitation directed at actual abuses. For example, we believe it would be

appropriate for the Court to prohibit false or deceptive solicitation[27] and solicitation directed to any person who has made it known that he or she does not wish to receive communications from the lawyer.

In addition, the Court may wish to prohibit solicitation involving, in the language of the comment to proposed Rule 7.3, "undue influence, intimidation, [or] overreaching."[28] If the Court concludes that such a prohibition is necessary, we urge that its terms be interpreted narrowly. Some licensing boards and private associations in other professions have interpreted these or similar terms broadly and have applied them to ban solicitation under circumstances that pose no danger of abuse. So long as these terms are interpreted fairly and objectively, such a provision would adequately protect consumers and simultaneously allow them to receive helpful information about legal services.

Advertising of Fields of Practice

Proposed Rule 7.4

Proposed Rule 7.4 and its accompanying comment would prohibit the use of the term "specialist," 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 state certification program. While the proposed rule would allow a lawyer to indicate fields of practice,[29] we believe that it is overly broad in restricting an

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[27] Proposed Rule 7.1(a) already prohibits false or deceptive communications.

[28] Different kinds of solicitation may present different risks of abuse, so the proper interpretation of these terms may depend on whether the solicitation at issue involves mail, telephone, or in-person contact. As noted above, written communication seems to present little danger of coercion or undue influence. Telephone solicitation may present less potential for abuse than in-person solicitation because telephone calls are easier to terminate than face-to-face conversations.

[29] If the proposed Guidelines for Certification of Specialists in Kentucky are adopted, they would be incorporated into proposed Rule 7.4(c). They would prohibit an attorney who is not Board certified from advertising fields of practice without including a prescribed disclaimer, which might discourage advertising of areas of practice. We discuss the proposed Guidelines below.

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 needing help in that field. Furthermore, the use of the term "specialist" may be the clearest, most efficient way to communicate such information. We do not believe that advertising oneself as a "specialist" in a particular field of law implies that the attorney is certified as a specialist by the state. 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 procedure that the surgeon performs will be a success. Therefore, we recommend that the Court remove all prohibitions against truthful, nondeceptive claims, express or implied, that a lawyer is a specialist.

Rule 3.135(5)(b)(ii)[30]

Rule 3.135(5)(b)(ii) requires all advertisements that list or suggest areas of an attorney's practice to state, in print of equal size and character to the print used in listing the areas of practice, "This is an advertisement. Kentucky law does not certify specialties of legal practice." This disclosure requirement appears to impose unnecessary burdens on attorneys who wish to inform the public of the areas of law in which they provide services, and might discourage lawyers from advertising their areas of practice.

The rule is likely to reduce the effectiveness of advertisements of areas of practice because the disclaimer might create a negative impression in consumers' minds. The disclaimer may suggest to some consumers that it is improper to mention a particular area of practice in an advertisement if the State of Kentucky does not test the practitioner's expertise. The disclosure might also create the erroneous impression that the lawyer lacks expertise in the area of law mentioned in the advertisement. Consequently, some attorneys may refrain from

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[30] It is our understanding that proposed Guideline VII., if adopted, would supersede existing Rule 3.135(5)(b)(ii), but we offer our views on the rule because the Court may not adopt the proposed Guidelines.

advertising truthful, nondeceptive information about their expertise.

The rule also would increase the cost of advertising by requiring lawyers to purchase additional advertising time and space to include the prescribed statement. Particularly for an attorney with a limited advertising budget, such as one who can afford only a two- or three-line advertisement in the classified section of a daily newspaper, the additional costs imposed by the rule could be significant.

The concern expressed in subparagraph (5)(b)(ii) appears to be that consumers will mistake advertising claims concerning areas of practice for claims of Board certification of specialties. We have no evidence indicating that a mere statement of area of practice connotes certification of specialty. We believe it is undesirable to impose a disclosure requirement that may deter truthful, nondeceptive advertising absent evidence or a reasonable belief that advertising without the disclosure is likely to mislead consumers. We therefore recommend that the Court delete Rule 3.135(5)(b)(ii).

Proposed Guideline VII[31]

The proposed Guidelines for Certification of Specialists in Kentucky might discourage attorneys from advertising their experience or even the fact that they offer services in a particular field of law. Proposed Guideline VII.A provides that attorneys certified in a particular field of law by the state's Specialization Commission may advertise "Board Certified as a Specialist" in that area, but that attorneys not so certified by the Commission who wish to advertise services in a particular field of law must include in their advertisements a disclaimer stating, "Not Board Certified as a specialist" in that area. In addition, proposed Guideline VII.B provides that, "[w]here the Commission has not yet designated an area of law and has not yet certified attorneys in that area, any attorney wishing to advertise that he or she renders legal services in that area must include in such advertising [the disclaimer] 'Kentucky does not presently certify specialists in ____.'"

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[31] We offer our comments only on proposed Guidelines for Certification of Specialists in Kentucky VII and IV.E, and do not take a position on other aspects of the proposed Guidelines, such as the merits of the certification program.

The stated purpose of these guidelines is to "[l]imit misleading and deceptive advertising of legal services."[32] We agree that advertising should not be false, misleading, or deceptive. Clearly, it would be deceptive for an attorney to advertise that he or she is "Board certified" in a field of law if no Board certification for that field exists, or if the attorney has not obtained such Board certification. Advertising of that sort, however, would be prohibited by proposed Rule 7.1(a). Absent evidence or a reasonable belief that consumers would be misled by truthful advertisements of areas of practice, it does not appear that any additional regulation on specialty advertising, such as one imposing disclosure requirements, is necessary.

Advertising Board certification in a particular field of law can provide consumers with beneficial information about attorneys' special skills if certification requirements are reasonably related to assuring proficiency in the subject area certified. On the other hand, when attorneys who are not Board certified are deterred by a required disclaimer from truthfully advertising their training and skills, consumers will be deprived of information to help them choose among qualified practitioners.[33] A statement in an advertisement of a field of law that the advertising attorney is "not Board certified as a specialist" has a negative connotation. Consumers could be led to believe erroneously that that attorney is incompetent to handle their legal needs in a particular field when the attorney may actually have such expertise but merely has not completed the certification procedures. The potential consumer misunderstanding engendered by this proposed guideline could, by reducing the number of practitioners that the public will patronize, lessen competition in fields for which Board certification is available, and could thereby raise legal services costs in those subject areas.

Proposed Guideline VII.B requires attorneys who wish to advertise that they render legal services in a particular field for which no Board certification exists to include a statement in their advertisements that Kentucky does not presently certify specialists in that field. As discussed with respect to the

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[32] See Kentucky Bar Association Board of Governors, Guidelines for Certification of Specialists in Kentucky 2 (March 13, 1987).

[33] As we stated above in our discussion of Rule 3.135(5)(b)(ii), such disclosure requirements also increase the cost of advertising by mandating that lawyers purchase additional time and space to include the disclaimer.

similar disclaimer required by Rule 3.135(5)(b)(ii), consumers might be led to believe erroneously that the lawyer lacks expertise or should not list an area of practice for which there is no certification program. This disclaimer requirement could harm consumers who need to obtain legal services in a particular field by deterring attorneys from advertising an area of practice. For these reasons, we urge the Court to delete proposed Guideline VII.A.2 and B.

Proposed Guideline IV.E: Limitations on Specialization

Proposed Guideline IV.E would provide that "[w]here a client is referred by an attorney to a certified specialist for representation in the specialist's area of law, the specialist may not enlarge the scope of services beyond the area. The specialist shall encourage the client to return to the referring attorney for handling future legal needs or referral in another area." We are concerned that this proposed guideline would reduce competition between referring lawyers and certified specialists.

The proposed guideline would appear merely to protect referring attorneys from competition and not to protect consumers in any way. In fact, it would reduce consumer choice by requiring the specialist to steer the client back to the referring lawyer. According to the proposed guideline, the specialist is not supposed to offer services outside the specialty even under circumstances in which the specialist has more time, resources, or expertise than the referring attorney to perform the necessary legal services. Since consumers of legal services could be harmed if proposed Guideline IV.E were adopted, we recommend that the Court delete it.

Conclusion

Certain features of the proposed Kentucky Rules of Professional Conduct might injure consumers by imposing unnecessary restrictions on price competition, referrals and associations, efficient forms of practice, and dissemination of information about legal services. Rule 3.135 may prohibit the dissemination of truthful, nondeceptive advertising. The proposed Guidelines might deprive consumers of useful information about attorneys' expertise and areas of practice, and reduce competition between referring attorneys and certified specialists. We urge that the Court eliminate unnecessary restrictions on competition among attorneys by: (1) clarifying in the commentary to proposed Rule 1.5(a) that only fees that are so high as to suggest a breach of fiduciary duty to the client would be unreasonable; (2) deleting proposed Rule 1.5(e) so as not to discourage referrals and associations of attorneys in

different law firms for particular cases; (3) eliminating the restrictions in proposed Rule 5.4 on practice with nonlawyers, and on lawyers influencing the professional judgment of other lawyers; (4) amending proposed Rule 7.1 to clarify that truthful, nondeceptive endorsements and experience, success, and comparison claims are permitted; (5) deleting proposed Rule 7.2(a) to permit advertising in any media; (6) deleting Rule 3.135(6)(a)(i) to allow attorneys to advertise all truthful, nondeceptive information; (7) amending Rule 3.135(4) to eliminate the restrictions on the use of self-laudatory statements and the requirement that statements in advertisements be "informative," and clarifying what the Court interprets as "unfair"; (8) modifying proposed Rule 7.2(b) to allow the payment of referral fees to attorneys and the use of for-profit referral services; (9) modifying proposed Rule 7.3 to remove the broad ban on solicitation; (10) modifying proposed Rule 7.4 to allow express and implied claims of specialty, and deleting Rule 3.135(5)(b)(2) and proposed Guideline VII.A.2 and B of the proposed Guidelines for Certification of Specialists in Kentucky to encourage specialty advertising; and (11) deleting proposed Guideline IV.E so as not to discourage competition between Board certified specialists and referring attorneys.

We hope that this letter is helpful in assessing how particular rules and guidelines may restrict competition and injure consumers. We appreciate this opportunity to present our views.

Respectfully submitted,

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Director