



BUREAU OF COMPETITION

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

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George A. Kuhlman, Esq.
Ethics Counsel
American Bar Association
Center for Professional Responsibility
750 North Lake Shore Drive
Chicago, Illinois 60611

COMMISSION AUTHORIZED

Dear Mr. Kuhlman:

I am writing in response to Mr. Brad Hoffman's letter of October 20, 1988, which invited our comments on proposed revisions to the Model Rules of Professional Conduct.¹ The Model Rules currently prohibit the use of targeted direct mailings, a marketing technique in which solicitation letters are sent to people who are known to need a particular legal service. In a decision earlier this year, however, the Supreme Court held that such letters are protected from state interference by the First Amendment. Shapiro v. Kentucky Bar Association, 108 S. Ct. 1916 (1988). The Ethics Committee has therefore drafted amendments to bring the model rules into conformity with this decision. These changes are centered on Rules 7.2 and 7.3, which govern, respectively, advertising and direct contact with prospective clients. Though the proposed changes relax restrictions on promotional activity by attorneys, we believe that some of the modified rules would continue to restrain such activity unnecessarily.

As you know, this Bureau has long been interested in the process of competition among professionals, including lawyers. We have submitted comments to over a dozen states that were

¹ These comments are the views of the staff of the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission itself or of any individual Commissioner. Our comments on these issues will reach you later than we would wish, and after your preferred deadline of October 19. The FTC's original copy of the proposed changes was unfortunately sent to Steven A. Stack, Jr., rather than to a member of the agency's staff, and so we did not receive a text of the proposals until after the deadline had passed.

considering revisions to their own rules of attorney conduct,² as well as to the American Bar Association's House of Delegates when that body was considering an earlier proposed amendment of the Model Rules.³ Our interest in the issues raised by rules of professional conduct stems from our responsibility to enforce the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce. 15 U.S.C. § 45 (Supp. IV 1986).

Based on our experience, we believe that the proposed revisions of the Model Rules represent substantial progress toward providing consumers with the benefits of a competitive market in legal services. In particular, we applaud the effort to permit additional modes of advertising and forms of solicitation. At the same time, however, we believe that the amended rules, if adopted, would continue unduly to restrict some forms of live telephone solicitation, to the detriment of consumers. Further, we believe that the rules could stimulate beneficial competition if they defined more precisely the term "recorded communication," and if the official comment did not suggest that merely sending a second solicitation letter, when the lawyer has not received a response to the first, could constitute impermissible harassment. These points will be discussed in sequence below.

Telephone solicitation

Although the proposed new rules permit targeted mailings -- as Shapero requires -- they absolutely prohibit most telephone solicitation. This restriction can harm consumers by raising the costs of locating an attorney and may not be consistent with the constitutional principles set out by the Supreme Court in the relevant cases. In Shapero, the Court held that bans on written

² For a sampling of recent correspondence, see the letters from me to Harold L. Rubenstein, Esq., Secretary, New Jersey Supreme Court's Committee on Attorney Advertising (Nov. 9, 1987); to the Hon. David Prager, Chief Justice, Supreme Court of Kansas (Aug. 28, 1987); to the Hon. Darrell V. McGraw, Jr., Chief Justice, Supreme Court of Appeals of West Virginia (May 1, 1987); to G. Robert Oliver, Chairperson, Code of Professional Responsibility Committee, State Bar of Georgia (March 31, 1987); and to the Honorable John B. Doolin, Chief Justice, Oklahoma Supreme Court (March 24, 1987).

³ Letter from Jeffrey I. Zuckerman, Director, Bureau of Competition, to the Members of the House of Delegates of the American Bar Association (Feb. 6, 1987).

solicitation are constitutionally invalid. In Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), on the other hand, it held that bans on in-person solicitation are permissible. Telephone solicitation appears to fall somewhere between these two modes of contact. Telephone solicitation is more troublesome than written communications since it involves a live interchange with a trained advocate,⁴ who may pressure the potential client for an immediate decision, and since individual conversations are not likely to be recorded for subsequent review. On the other hand, telephone solicitation does not involve the more coercive circumstances of a face-to-face meeting and the prospective client can more easily terminate it by the simple act of hanging up the phone.

The proposed Model Rules would resolve these divergent interests by distinguishing between two different types of telephone solicitation. The rules apparently would permit pre-recorded messages of the sort used with automatic dialing machines, evidently on the theory that this format presents relatively little risk of overbearing or high-pressure salesmanship.⁵ At the same time, however, the rules would continue to proscribe live telephone solicitation, presumably in the belief that its interactive nature makes this format essentially identical to in-person solicitation.

We note first that the proposed ban on live telephone solicitation appears to be inconsistent with the official Comment on Rule 7.3. The rule itself prohibits all live telephone solicitation, while the Comment justifies the rule solely by reference to the narrower circumstances of soliciting a potential client who is already known to need legal services.

Moreover, the line drawn in the draft rules may not be the most desirable one. We believe that the complete prohibition of live telephone solicitation might not serve the interests of consumers. Other regulatory approaches could protect potential clients from abusive tactics while allowing them to enjoy the benefits that live telephone solicitation offers. Indeed,

⁴ Sometimes, however, phone solicitation may be conducted by an agent of the lawyer rather than by the lawyer. Because these individuals may not possess the same influence that the Supreme Court has attributed to attorneys, the model rules might usefully permit such agents some leeway to engage in telephone solicitation.

⁵ Rule 7.3(a), with certain qualifications not relevant here, bans "in-person or telephone contact." However, Rule 7.2(a) explicitly authorizes the use of advertising, including "recorded communications."

consumers might best be served, on balance, if live telephone solicitation is treated like written solicitation, so that both forms are subject merely to a general prohibition of solicitation that involves "coercion, duress or harassment."

Other measures are also available to respond to the danger of abusive telephone solicitation. For instance, lawyers and their agents might be required to omit from their telephone message any request for an immediate decision, or to allow prospective clients to rescind any agreement without obligation within a set period of time. Alternatively, lawyers and their agents might be required to preserve copies of their telephone scripts. A rule that embodied any of the suggested alternative restrictions, alone or in combination, would be likely to benefit consumers more than would an absolute ban on telephone solicitation.

We believe that any rule adopted should clearly authorize attorneys to solicit by telephone prospective members of prepaid legal service plans. The Comment to Rule 7.3 now states that lawyers may contact prospective organizers of such plans, but, by not mentioning prospective members, seems to imply that these individuals may not be solicited. Prepaid legal service plans may offer consumers important advantages, however, as the Comment appears to recognize, yet not every person belongs to a group that is likely to subscribe to one. In addition, prepaid legal plans rarely involve immediate legal need, and so solicitation for participation in them is unlikely to raise a question of impaired consumer judgment.

Definition of "recorded communication"

Regardless of your final treatment of live telephone solicitation, we suggest that you provide a more explicit definition of the "recorded communications" that are permitted by Rule 7.2(a). As discussed above, this term apparently refers to prerecorded and autodialed phone messages. That construction seems to correspond best to the overall structure of the rules. Since this is not clear on the face of the rules, however, a formal definition or explanatory comment might stave off future uncertainty.

Warning against multiple contacts

A final problem with the new rules involves their possible effect of discouraging the use of multiple or follow-up letters. Proposed section 7.3(b)(2) prohibits the use of solicitation

involving "coercion, duress or harassment." This prohibition is reasonable enough on its face. The official Comment then suggests, however, that this standard can be easily violated by written solicitations: "Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b)."

This sentence is apparently premised upon the idea that a repetitive letter-writing campaign could, in theory, rise to the level of harassment. Even if this concern is well-founded, however, the Comment appears to be overbroad. It may be read as prohibiting attorneys from sending even a second letter in the face of silence by the recipient, even though such a mailing would probably be more informative than abusive. Because the Comment might have an unnecessary chilling effect, therefore, we suggest that it be deleted.

Conclusion

We believe that the changes you propose would amend the Model Rules in ways that would benefit consumers. We do suggest, however, that you adopt a less restrictive approach to live telephone solicitation and that you make two other specific drafting changes relating to "recorded communications" and "harassing conduct."⁶

We appreciate this opportunity to give you our thoughts on the proposed amendments. Please get back in touch if you would like to discuss our comments, or if I can help in any other way.

Sincerely yours,

for *Barbara A. Clark, Acting*
Jeffrey I. Zuckerman
Director

⁶ Our comments here are limited to some of the revisions proposed by the Ethics Committee. We have previously commented on other aspects of the Model Rules. See n.2 *supra*.