



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

Office of Policy Planning
Bureau of Consumer Protection
Bureau of Economics

May 11, 2007

Ms. Lilia G. Judson
Executive Director
Indiana Supreme Court
Division of State Court Administration
115 West Washington Street
Suite 1080, South Tower
Indianapolis, IN 46204

Re: Proposed Amendments to Indiana Rules of Court Concerning
Attorney Advertising

Dear Ms. Judson:

The Staff of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Consumer Protection, and Bureau of Economics¹ is pleased to submit these comments on Proposed Amendments to the Indiana Rules of Court ("Proposed Amendments"),² which address attorney advertising and solicitation. The FTC Staff believes that although deceptive advertising by lawyers should be prohibited, restrictions on advertising and solicitation should be specifically tailored to prevent deceptive claims and should not unnecessarily restrict the dissemination of truthful and non-misleading information. Accordingly, the FTC Staff generally supports the Proposed Amendments because they prohibit false, deceptive and misleading advertisements, and do not impose blanket prohibitions on specific forms of advertisements. The FTC Staff believes that additional modifications regarding the scope of the prohibition on comparative claims and restrictions on attorney referral programs could further enhance consumer access to helpful information about legal services.

¹ This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

² The Proposed Amendments are available at [http://www.in.gov/judiciary/rules/proposed/2007/pcr-isba\(jan\).pdf](http://www.in.gov/judiciary/rules/proposed/2007/pcr-isba(jan).pdf).

Discussion

The FTC enforces laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, including deceptive and misleading advertising practices.³ Pursuant to its statutory mandate, the Commission encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal goals. In particular, the Commission seeks to identify and prevent, where possible, business practices and regulations that impede competition without offering countervailing benefits to consumers.⁴ The Commission and its staff have had a long-standing interest in the effects on consumers and competition arising from the regulation of lawyer advertising.⁵

Debate about attorney advertising involves important policy concerns, such as preventing statements that would deceive or mislead lay people and thereby undermine public trust in lawyers and the legal system. The FTC Staff's view is that consumers are better off if concerns about potentially misleading advertising are addressed through the adoption of advertising restrictions that are narrowly tailored to prevent deceptive claims. By contrast, imposing overly broad restrictions that prevent the communication of truthful and non-misleading information that some consumers may value is likely to inhibit competition and frustrate informed consumer choice. Similarly, imposing restrictions on some types of solicitation may increase consumer search costs. In addition, research has indicated that overly broad restrictions on truthful

³ Federal Trade Commission Act, 15 U.S.C. § 45.

⁴ Specific statutory authority for the FTC's advocacy program is found in Section 6 of the FTC Act, under which Congress authorized the FTC "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce," and "[t]o make public from time to time such portions of the information obtained by it hereunder as are in the public interest." *Id.* § 46(a), (f).

⁵ *See, e.g.*, Letter from FTC Staff to the Florida Bar (Mar. 23, 2007), available at <http://www.ftc.gov/be/V070002.pdf>; Letter from FTC Staff to the Rules of Professional Conduct Committee, Louisiana State Bar Association (Mar. 14, 2007), available at <http://www.ftc.gov/opa/2007/03/fyi07225.htm>; Letter from FTC Staff to the Office of Court Administration, Supreme Court of New York (Sept. 14, 2006), available at <http://www.ftc.gov/os/2006/09/V060020-image.pdf>; Letter from FTC Staff to the Professional Ethics Committee for the State Bar of Texas (May 26, 2006), available at <http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf>; Letter from FTC Staff to Committee on Attorney Advertising, the Supreme Court of New Jersey (Mar. 1, 2006), available at <http://www.ftc.gov/be/V060009.pdf>; *see also, e.g.*, Letter from FTC Staff to Robert G. Esdale, Clerk of the Alabama Supreme Court (Sept. 30, 2002), available at <http://www.ftc.gov/be/v020023.pdf>. In addition, the staff has provided its comments on such proposals to, among other entities, the Supreme Court of Mississippi (Jan. 14, 1994); the State Bar of Arizona (Apr. 17, 1990); the Ohio State Bar Association (Nov. 3, 1989); the Florida Bar Board of Governors (July 17, 1989); and the State Bar of Georgia (Mar. 31, 1987). *See also* Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra*).

advertising may adversely affect prices paid and services received by consumers.⁶

The Proposed Amendments prohibit an attorney from participating in advertising that is false, misleading, or which promotes behavior that is either illegal or in violation of rules governing attorney conduct.⁷ The Proposed Amendments define advertising as, “Any manner of public communication partly or entirely intended or expected to promote the purchase or use of the professional services of a lawyer”⁸ The Proposed Amendments prohibit solicitation in certain circumstances, restrict the types of referral programs attorneys may utilize,⁹ and limit how an attorney may communicate a speciality or a firm name.¹⁰ Also, absent “special circumstances that serve to protect the probable targets of an advertisement from being misled or deceived,” the Proposed Amendments impose a presumption that advertising is misleading if it, among other things, expresses or implies a prediction of future success, makes an unsubstantiated comparison to other lawyer’s services, refers to past results in a manner that creates an expectation of similar results in future matters, contains an endorsement or testimonial that may create an unjustified expectation about a lawyer’s abilities or a person’s legal rights, or consists of a dramatization

⁶ See, e.g., Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising, June 24, 1994, at 5-6 (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra* note 5). See also Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 SUP. CT. ECON. REV. 265, 293-304 (2000) (discussing the empirical literature on the effect of advertising restrictions in the professions and citing, among others: James H. Love & Jack H. Stephen, *Advertising, Price and Quality in Self-regulating Professions: A Survey*, 3 INTL. J. ECON. BUS. 227 (1996); J. Howard Beales & Timothy J. Muris, *State and Federal Regulation of National Advertising* 8-9 (1993); R.S. Bond, J.J. Kwoka, J.J. Phelan & I.T. Witten, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980); J.F. Cady, *Restricted Advertising and Competition: The Case of Retail Drugs* (Washington, D.C.: American Enterprise Institute, 1976); J.F. Cady, *An Estimate of the Price Effects on Restrictions on Drug Price Advertising*, 14 ECON. INQ. 490, 504 (1976); James H. Love, et al., *Spatial Aspects of Competition in the Market for Legal Services*, 26 REG. STUD. 137 (1992); Frank H. Stephen, *Advertising, Consumer Search Costs, and Prices in a Professional Service Market*, 26 APPLIED ECON. 1177 (1994)); *In the Matter of Polygram Holdings, Inc.*; FTC Docket No. 9298, at 38 n.52 (F.T.C. 2003), *aff’d*, 416 F.3d. 29 (D.C. Cir. 2005) (same). See also Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1 AMERICAN BAR FOUND. RES. J. 179, 184 (1979) (discussing that attorney advertising results in the phenomena of increased consumer requests for legal services coupled with lower prices and higher quality of services, particularly in specialized areas of the law); see Frank H. Stephen & James H. Love, *Regulation of the Legal Professions*, 5860 ENCYCLOPEDIA OF L. & ECON. 987, 997 (1999), available at <http://encyclo.findlaw.com/5860book.pdf> (empirical studies demonstrate that restrictions on attorney advertising have the effect of raising fees).

⁷ See Rule 7.2(b).

⁸ See Rule 7.2(a). The comment to Rule 7.2 explains that, “Lawyer advertising can serve a valuable public purpose by informing persons about lawyers and the law, making both more available, affordable, and useful to the public. . . Advertising which blankets the legal profession in a fog of puffery or diminishes respect for the courts. . . is inconsistent with the public’s best interests.”

⁹ See Rule 7.3.

¹⁰ See Rules 7.4 & 7.5.

without adequate disclosure.¹¹

Some Rule 7.3 Restrictions on Solicitations May Provide Protections for Consumers,
While Others May Impede Consumer Access to Efficient Attorney-Matching Programs

Rule 7.3, entitled Recommendation or Solicitation of Professional Employment, provides some protections for consumers, but also may limit the use of some attorney referral programs. Rule 7.3(b) bars attorneys from approaching potential clients who have made known their desire not to be solicited,¹² from engaging in coercion,¹³ from solicitation within 30 days of an event involving personal injury or wrongful death,¹⁴ or if the person is unable to exercise reasonable judgment.¹⁵ The FTC certainly supports such efforts to protect consumers from unwanted and coercive solicitation.

Rule 7.3(e), however, also prohibits attorneys from participating in referral services unless such service is affiliated with a public defender, an approved not-for-profit program, a bar association, or a military legal assistance office.¹⁶ We understand that many consumers and attorneys participate in online services that provide Internet-based attorney/client matching platforms.¹⁷ Online matching programs do not refer one particular attorney to a consumer, but through web-based programs consumers invite attorneys to respond to an inquiry. Online matching services recruit licensed attorneys who typically pay an application fee and a regular

¹¹ See Rule 7.2(c). We note that “special circumstances” as used in the rule is unclear; we recommend that the Bar provide guidance as to what such special circumstances would rebut the presumption imposed by the rule.

¹² See Rule 7.3(b)(1).

¹³ See Rule 7.3(b)(2).

¹⁴ See Rule 7.3(b)(3). We note that, unlike the other restrictions contained in 7.3(b), to withstand Constitutional scrutiny, the state would likely need to demonstrate that this provision advances a state interest in a direct and material way. See *Florida Bar v. Went For It*, 515 U.S. 618, 626 (1995). In *Went for It*, the Court upheld a restriction nearly identical to 7.3(b)(3) because the Florida Bar demonstrated a non-speculative state interest in preventing a specific consumer harm, which it illustrated with a report containing substantiated data showing that Florida consumers opposed solicitations in the immediate wake of an accident. *Id.* at 626-27.

¹⁵ See Rule 7.3(b)(4) & (5)

¹⁶ See Rule 7.3(e)(1)-(4).

¹⁷ See, e.g., Letter from the Federal Trade Commission to the Professional Ethics Committee of the Texas State Bar, May 2006, available at <http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf>. Although not all services are identical, many share the same general business model. See, e.g., LexisNexis/Martindale Hubbel’s Attorney Match (http://www.lawyers.com/find_a_lawyer/am/am_aop_list.php); Casepost (<http://www.casepost.com>); LegalConnection (FindLaw) (<http://www.legalconnection.com>); LegalMatch (www.legalmatch.com); and Legal Fish (www.legalfish.com).

subscription fee to participate in the program.¹⁸ A potential client who visits the matching service's website can review the material about attorneys, how they are recruited, and how the matching service works. Interested consumers then post a listing with the service describing their legal needs, which the service sends to all applicable participating attorneys. Attorneys may then send, through the service, a response to the client, the substance of which would contain information such as fees, experience, and other qualifications that may inform the client when selecting counsel. With this information, the client determines which attorneys – if any – to contact, and initiates the contact. In some instances, the client's application may invite an attorney to contact a client directly.

Online legal matching services have the potential to reduce consumers' costs in finding legal representation, which would likely increase competition among attorneys to provide legal services. When consumers face large costs to obtain information about marketplace prices and quality, businesses have less incentive to compete.¹⁹ A large amount of empirical research has found that restrictions on advertising in professions lead to higher prices and either a negative or no effect on quality.²⁰ In the same way that advertising has been shown to benefit consumers of professional legal services, online legal matching services may make it less expensive for consumers to evaluate providers of legal services.²¹

It is unclear whether online legal matching services would be classified as referrals under the Proposed Amendments since they appear only to set up a platform for attorneys to respond to client requests rather than supply a recommendation. If the Bar is concerned that consumers may be misled with respect to the pool of attorneys to which their requests are sent, there are less

¹⁸ We understand that in some of these programs member attorneys may prepare a web page that may disclose preferred areas of practice, years of experience, bar affiliations, and any other pertinent information.

¹⁹ Several economists have developed models that predict firms will be able to charge higher prices when consumers face high costs in obtaining marketplace information. See, e.g., Dale O. Stahl, *Oligopolistic Pricing with Sequential Consumer Search*, 79 AM. ECON. REV. 700 (1989); Kenneth Burdett & Kenneth L. Judd, *Equilibrium Price Dispersion*, 51 ECONOMETRICA 955 (1983); John Carlson & R. Preston McAfee, *Discrete Equilibrium Price Dispersion*, 91 J. POL. ECON. 480 (1983); Steven C. Salop & Joseph E. Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUDIES 293 (1977). Using these models as a theoretical framework, several authors have found evidence that the Internet has led to lower prices by reducing consumers' costs of comparing prices. See, e.g., Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481 (2002); Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 49 MGM'T SCIENCE 563 (2000); James C. Cooper, *Price Levels and Dispersion in Online and Offline Markets for Contact Lenses*, FTC Bureau of Economics Working Paper (2006), available at <http://www.ftc.gov/be/workpapers/wp283.pdf>.

²⁰ See Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 SUP. CT. ECON. REV. 265, 293-304 (2000) (collecting citations to empirical literature on the effect of advertising restrictions in the professions); *In the Matter of Polygram Holdings, Inc.*, FTC Docket No. 9298 (F.T.C. 2003), at 38 n.52 (same).

²¹ Studies have found, for example, that the use of online consumer-to-vendor matching services in the retail auto industry have reduced prices to consumers by approximately two percent. See Fiona Scott Morton *et al.*, *Internet Car Retailing*, 49 J. INDUS. ECON. 501 (2001); Florian Zettelmeyer *et al.*, *Cowboys or Cowards: Why Are Internet Car Prices Lower?* (2005), at <http://flomac.haas.berkeley.edu/~florian/Papers/selection.pdf>.

restrictive alternatives than effectively barring such types of legal matching programs. For example, a legal matching service working with Indiana attorneys could be required to disclose to consumers the number of attorneys and firms that participate in the program, the number to whom the consumer's request was sent, and how the service generated the list of attorneys to whom the request was sent. Further, the service could be required to explain how, if at all, it limited attorney participation. Unless consumer harm has been demonstrated from legal matching and referral services, the FTC Staff recommends that the Bar consider revising Rule 7.3 to clarify that attorneys may participate in these types of services.

The Substantiation Requirement for All Comparative
Advertisements May Prohibit Some Useful, Non-Deceptive Advertising

The FTC Staff is concerned about the effect of the Proposed Amendments' presumption that comparative claims are not misleading only if such claims can be "factually substantiated."²² Requiring that material claims be substantiated can, of course, serve consumers by helping to ensure that claims are not misleading. But if substantiation is demanded for representations that, although not misleading, concern subjective qualities that are not easy to measure and for which substantiation may not normally be expected, then messages that consumers may find useful may be barred. The broad prohibition might be based on a concern that unsubstantiated comparative claims could mislead consumers about the results lawyers can achieve. But if that is the concern, then it would be better addressed by a rule directed more narrowly to claims that could be construed as having some bearing on likely outcomes, such as Proposed Amendments 7(c)(2) and 7(c)(6).

Conclusion

In conclusion, the FTC Staff believes that the Proposed Amendments are likely to promote effective attorney advertising regulation by prohibiting deceptive and misleading attorney advertising without imposing blanket prohibitions on forms of speech. We are concerned, however, that while some restraints on solicitation may serve consumer interests, others may impede consumer access to efficient attorney-matching programs, and that the substantiation requirement on comparative advertisements may prohibit some useful, non-deceptive advertising. Accordingly, we urge the Bar to modify the Proposed Amendments to facilitate consumer access to useful information about legal services.

²² See Rule 7.2(c)(5).

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May 11, 2007
Page 7 of 7

Respectfully submitted,

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