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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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COMMISSION AUTHORIZED

November 3, 1989

Albert Bell, Esq.
General Counsel
Ohio State Bar Association
33 West Eleventh Avenue
Columbus, Ohio 43201

Dear Mr. Bell:

The staff of the Federal Trade Commission is pleased to respond to your request for comments on the proposed amendments to the Ohio Code of Professional Responsibility.[1] These amendments would generally establish more restrictive standards than now exist for attorney advertising and solicitation. We believe that several of these proposals may restrict the flow of valuable information to consumers and on balance, may have the potential to impede competition or increase costs without providing countervailing benefits to consumers.

THE INTEREST AND EXPERIENCE OF THE FEDERAL TRADE COMMISSION.

Congress has empowered the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] Pursuant to this statutory mandate, the Commission and its staff

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[1] These comments are the views of the staff of the Cleveland Regional Office and the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or of any individual Commissioner.

[2] 15 U.S.C. § 45 (1982).

encourage competition among members of licensed professions to the maximum extent compatible with other legitimate goals.[3]

For several years the Commission and its staff, through law enforcement proceedings and in studies, have been evaluating the competitive effects of public and private restrictions on the business practices of lawyers, dentists, optometrists, physicians, and other state-licensed professionals. Our goal has been to identify restrictions that impede competition or increase costs without providing countervailing benefits to consumers.[4] As part of this effort the Commission has examined the effects of public and private restrictions limiting the ability of professionals to contact prospective clients and to advertise truthfully.[5]

Advertising informs consumers of options available in the marketplace, and encourages competition among firms seeking to meet consumer needs.[6] Advertising

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[3] The Commission's staff has previously submitted comments to state governments and professional associations on the regulation of professional advertising, particularly advertising by attorneys. *See, e.g.*, Comments of the Federal Trade Commission Staff on the Florida Rules of Professional Conduct (July 17, 1989); Comments of the Federal Trade Commission Staff on the American Bar Association Model Rules of Professional Conduct (Nov. 22, 1988); Comments of the Federal Trade Commission staff on the Rules of Professional Conduct of the New Jersey Supreme Court, submitted to the Committee on Attorney Advertising of the New Jersey Supreme Court (Nov. 9, 1987); Comments of the Federal Trade Commission Staff on the Code of Professional Responsibility of the Alabama State Bar, submitted to the Supreme Court of Alabama (March 31, 1987).

[4] *See, e.g.*, Cleveland Regional Office and Bureau of Economics, FTC, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (1984).

[5] *See, e.g.*, 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*, 445 U.S. 676 (1982).

[6] In several cases, the Supreme Court has held that restrictions on advertising and solicitation violate the Constitution. *See, e.g.*, Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988) (non-deceptive targeted mail solicitation is protected by the First Amendment); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (an attorney may not be disciplined for seeking legal business through printed advertising containing truthful and non-deceptive information and advice regarding the legal rights of potential clients or for using non-deceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (a state cannot, consistent with the First Amendment, absolutely prohibit

(continued...)

may be especially valuable for persons first entering a profession, because it enables them to become known to potential clients and develop business more quickly than they otherwise might. Studies indicate that prices for professional services tend to be lower where advertising exists than where it is restricted or prohibited.[7] Empirical evidence also indicates that while restrictions on professional advertising tend to raise prices, they do not generally increase the quality of available goods and services.[8] The effects of advertising on price and quality have been found to occur in the provision of legal services as well as in the provision of other professional services.[9]

This is not to say that advertising is invariably benign. It may sometimes be unfair or deceptive, or may violate other legitimate goals of public policy. We believe, however, that truthful advertising is generally beneficial. Therefore, you may wish to recommend that the Supreme Court of Ohio impose only restrictions on advertising that are narrowly tailored to prevent unfair or deceptive acts or practices, or to accomplish some other significant objective.

The remaining sections of the letter will apply these general principles to the specific amendments proposed.

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[6](...continued)
attorney advertising); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (a state cannot prohibit price advertising by pharmacies).

[7] Bond, Kwoka, Phelan & Whitten, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980); Benham & Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J. L. & Econ. 421 (1975); Benham, *The Effects of Advertising on the Price of Eyeglasses*, 15 J. L. & Econ. 337 (1972).

[8] Bond, *supra* note 7, at 3. *See also* Benham, Licensure and Competition in Medical Markets, draft AEI conference paper (1989); Cady, *Restricted Advertising and Competition: The Case of Retail Drugs* (1976).

[9] *See* Calvani, Langenfeld & Shuford, *Attorney Advertising and Competition at the Bar*, 41 Vand. L. Rev. 761 (1988); Schroeter, Smith & Cox, *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, 35 J. Indus. Econ. 49 (1987); *Consumer Access to Legal Services*, *supra* note 4; Muris & McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 Am. B. Found. Research J. 179 (1979).

Restrictions on Advertising Content: DR 2-101(A)(1), (3)-(6).

The proposed rules would prohibit "self-laudatory" statements, claims concerning "the quality of the lawyer's legal services," emotional appeals, client testimonials, any claims that are not verifiable, and certain kinds of fee advertisements. These provisions are similar in that they limit what lawyers can say, particularly about the quality of their legal services. Each of these provisions may prohibit truthful claims and therefore appears overbroad.

A. Representations of Quality and Self-Laudation.

Statements describing the quality of a lawyer's services can convey useful information and may be valued by consumers. Moreover, most advertisements are self-laudatory to some extent. The proposed rules could have the effect of banning virtually all specific claims about the quality of an attorney's work, the convenience of business hours or billing arrangements, and similar matters. A ban on quality and self-laudatory statements could harm consumers in two ways. First, the ban could make it more difficult for consumers to find lawyers who are suited to their needs. Second, it could lessen the beneficial rivalry among competing lawyers. When a lawyer cannot truthfully call attention to the desirable aspects of his or her practice, the incentive to improve or to offer different services or prices is likely to be reduced.

We recognize that these rules may be intended to prohibit only a narrow class of overstated and potentially misleading claims. The proposed rules, however, do not seem sufficiently precise to ensure that they will apply only to those cases. As a result, the potential breadth of the restrictions may deter lawyers from engaging in activities that are not intended to be prohibited. The Association may therefore wish to recommend provisions that prohibit only quality claims or self-laudatory statements that are likely to mislead consumers. Alternatively, the Association might consider deleting these provisions entirely, allowing such claims to be covered by the prohibition in the same section against any "false, fraudulent, misleading, deceptive, or unfair" statement.

B. Emotional Appeals.

It is difficult to determine what is covered under this provision. Advertising often appeals to the emotions and anxieties of some persons. For example, an

admonition to seek the advice of counsel for work-related accidents might well appeal to the emotions of one recently injured on the job. Yet, this type of advertisement may encourage such an individual to explore his or her rights to legal redress by consulting an attorney. The Association may therefore wish to clarify this provision.

C. Client Testimonials.

The proposed amendments would prohibit any public communication of testimonials of "past or present clients pertaining to the lawyer's capability."[10] The rule would go beyond the existing Ohio Rule (as well as American Bar Association Model Rule 7.1), which only prohibits testimonials that are false, misleading, or likely to create an unjustified expectation about the results a lawyer can achieve.

We believe that consumers may derive useful information from an advertisement featuring an ordinary client asserting truthfully that he received satisfactory service from a particular attorney.[11] Public advertising in which clients attest that they use a firm's legal services provides the general public the same type of 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 an attorney, and who may have significant assets at stake, believes a particular lawyer to be effective.

Such testimonials are not inherently misleading, and to prohibit them may impede the flow of valuable information to consumers. We therefore believe that consumers might benefit if the Association were to consider deleting this suggested rule and recommend that all testimonials be covered under the general prohibition in DR 2-101(A)(1) against any "false, fraudulent, misleading, [or] deceptive" statement. Alternatively, the Association may wish to adopt provisions similar to the Federal Trade Commission's Guides Concerning Use of Endorsements and Testimonials in

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[10] We recognize that the provision does not prohibit the traditional inclusion of a list of clients in legal directories.

[11] The restrictions on quality and self-laudatory statements may prohibit valuable testimonials or endorsements by non-clients as well. In its Guide Concerning Use of Endorsements and Testimonials in Advertising, the Federal Trade Commission recognizes the validity of expert and celebrity endorsements. The Commission suggests, however, that "[e]ndorsements must always reflect the honest opinions, findings, beliefs, or experiences of the endorser." 16 C.F.R. § 255.1(a) (1989). *See also Id.* § 255.2 and § 255.5.

Advertising.[12] Essentially, those guides require that testimonials be reflective of the honest opinions of the endorser,[13] that, absent adequate disclosure to the contrary, the endorser's experience be "representative of what consumers generally achieve[,]"[14] and that paid endorsements be represented as such.[15]

D. Non-Verifiable Claims.

The proposed rules would also preclude advertising claims that are "not verifiable." Some claims, however, such as "friendlier service" are not capable of verification. Such claims can be readily judged by any consumer utilizing the service and may not present a significant problem. Such claims may indicate qualities that the attorney seeks to emphasize in his or her practice and that may be important to consumers. Moreover, such communications can attract consumers' attention to the advertising attorney. Even communication that is designed only to attract attention can inform consumers of a lawyer's presence in a community, which is itself useful information.

Accordingly, the Association may wish to recommend that these restrictions on advertising content be removed and replaced by requirements that an attorney have a reasonable basis for any material objective claims, and that such claims be truthful and non-deceptive.

E. Fee Advertising.

Proposed Rule 2-101(A)(6) would limit permissible communications relating to legal fees and may essentially prohibit reduced or promotional prices.[16] "Unrestrained subjective characterization of rates" would be prohibited, but "restrained subjective characterizations of rates" would be allowed.

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[12] 16 C.F.R. § 255 (1989).

[13] § 255.1.

[14] § 255.2.

[15] § 255.5.

[16] We recognize that proposed rule 2-101(D)(1) would permit rate advertising. Insofar as that provision would also require that rate advertising be dignified, it would bear many of the same problems as 2-101(A)(6). Therefore, our comments here apply to both provisions.

The rule gives examples of both restrained and unrestrained characterizations of rates. Even with these examples, however, the distinction between "restrained" and "unrestrained" is so difficult to make that the rule could be used to deter much advertising that is truthful and beneficial to consumers. It is not clear, for instance, whether "fair-priced" is restrained or unrestrained.

Moreover, even some of the examples of "unrestrained characterizations" would be useful to consumers. A tax attorney might want to offer reduced fees on tax preparation for a few weeks prior to the busiest tax season; an attorney might want to offer for a week a "special low price" on preparation of a will. A new attorney might want to announce the opening of his or her practice with "special introductory fees." Under Proposed Rule 2-101(A)(6), attorneys would not be permitted to communicate such information to consumers. They may be precluded or deterred from communicating and employing promotional prices, even where such activity would facilitate efforts to enter the legal market or to introduce new and innovative services.

We suggest that the Association exercise caution before placing restrictions on price information. Of course, it is well-recognized that communications relating to fees that are false or misleading should be prohibited because they would harm consumers. Proposed Rule 2-101(A)(6), however, precludes non-deceptive communications relating to legal fees.

<u>Specific Admonition Concerning Reliance on Advertising: DR 2-101(A).</u>

The proposed amendments apparently would require all public communications (except listings in the telephone, city, or legal directories) to conclude with the following admonition:

> Deciding whether you need to hire a lawyer and choosing a specific attorney or firm to represent you are very important decisions which *should not* be made only on the basis of advertising or a lawyer's own claims to be an expert. This admonition is required by the Code of Professional Responsibility for lawyers adopted by the Supreme Court of Ohio. [*Emphasis in original.*]

Any disclosure obligation might tend to increase advertising costs – it may increase the length of the message and it may force advertisers to forego some other portion of the message that would have been delivered had the space not been occupied by the disclosure. Unnecessary disclosure requirements can thus result in a decrease in useful information available to consumers. If the Association believes that the kind of disclosure mandated in the proposed rule is warranted in some circumstances, it might consider a rule drawn narrowly to mandate disclosure only in those situations.[17] Alternatively, the Association might consider eliminating the proposed disclosure requirement entirely.

Prior Approval of Advertising by Court Agency: DR 2-101(A).

The proposed amendments would require copies of all advertising, in any form, to be filed with and approved by a court agency (or representative) prior to dissemination. This provision would go beyond the existing Ohio Rule [DR 2-101(D)], which requires only that radio and television advertisements be recorded and kept by the advertising attorney, and it would go beyond the ABA Model Rule (7.2), which requires only that a copy and dissemination record of any advertisement be kept by the attorney for two years.

The State of Ohio certainly has a legitimate interest in deterring deceptive or misleading advertising by attorneys, and a "prior review" mechanism could be used to further that interest. Prior approval, however, may also result in a restricted flow of truthful, valuable information to consumers for two reasons. First, the reviewing agency may err and disapprove of advertisements that contain no false or misleading statements. Second, even if a lawyer's planned advertising would be approved, that approval would be uncertain, and the review process is likely to delay dissemination. Because of the built-in delay in securing approval and the uncertainty of approval, the rule's effect may be to discourage attorneys from advertising. At the very least, the requirement of prior review would raise attorneys' advertising costs, thereby potentially increasing costs to consumers. The ABA has also cautioned against prior review obligations: "A requirement [of prior review] would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality."[18] For these reasons, the Association may prefer to address the issue of deceptive advertising by a general prohibition enforced by sanctions for violations. Such a

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[17] For example, advertisements containing express or implied claims that a person should make an immediate decision to hire an attorney could arguably warrant a disclosure.

[18] Comment, ABA Model Rule 7.2 (*as amended*, 1989).

response is less likely to deter useful advertising while still serving to suppress misleading communications.

Requirement that Broadcast Advertising Be Non-Dramatic: DR 2-101(B)(3).

The proposed amendments would require all broadcast advertising to be "articulated only by a single nondramatic voice," and in the case of television advertising, would provide that "no visual display shall be employed other than that acceptable for print media." This proposed rule would severely restrict all broadcast advertising. The rule would prohibit the use of actors, background music, visual action, dramatic voices and other features common to broadcast advertising.

Advertising restraints of this sort are costly to consumers. Graphics, dramatizations, re-enactments, and similar techniques can help consumers understand their legal rights and obligations and can identify attorneys who appear responsive to particular needs. A musical slogan, an image of animated characters, or a dramatization may, for instance, convey an image to which consumers in need of legal assistance can relate and may thereby enhance consumer retention of information in an advertisement. In addition, these techniques can create a unifying theme for a firm's advertising, linking the firm's various advertisements in the consumer's mind, and thereby increasing the impact of the advertising. The unavailability of such techniques may make it harder for consumers to make informed decisions about hiring legal counsel, and may limit the effectiveness of advertising designed to reach persons who are uninformed about their legal rights.

We recognize that the rule is intended, at least in part, to maintain the dignity and professionalism of the legal community. However, any danger to consumers that might result from the prohibited advertising appears to be largely speculative and might be outweighed by the benefits expected from the dissemination of truthful information.[19]

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[19] The ABA has also warned against restricting modes of attorney advertising and the content of advertisements:

> Questions of effectiveness and taste in advertising are matters of speculation and subjective judgement. . . . Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of

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For these reasons, the Association may wish to consider reversing the presumptions of the proposed rule. Rather than allowing only non-dramatic advertising and banning all other forms, the rule might instead ban only those specific techniques that have been affirmatively shown to be likely to mislead, and it might presumptively permit all other techniques.[20]

In-person and Telephone Solicitation: DR 2-101(E)(1).

Proposed Rule 2-101(E)(1) would prohibit virtually all forms of in-person and telephone solicitation by attorneys.[21] While we recognize the Association's concerns that direct solicitation might lead to abuse, we believe that solicitation can provide consumers with helpful information about the nature and availability of legal services, and that any potential for abuse can effectively be prevented through more limited and specific regulatory provisions.

This provision appears to us to have both desirable and undesirable features. On the one hand, we recognize that the conduct that would be banned has certain negative effects. Injured or emotionally distressed people may be vulnerable to the exercise of undue influence when face-to-face with a lawyer. For instance, the Supreme Court in *Ohralik v. Ohio State Bar Association*,[22] held that states may prohibit in-person solicitation. That case, however, involved particularly egregious conduct -- in-person solicitation of an accident victim still hospitalized. The state does have an interest in monitoring solicitation in order to deter that type of abuse. In-person

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[19](...continued)

> information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Comment, ABA Model Rule 7.2 (*as amended*, 1989).

[20] This presumption would remain rebuttable, however. Any advertising technique could still be banned on an appropriate showing of likely consumer harm.

[21] Although "telephone solicitation" is not specifically mentioned, it would appear to be covered by the ban on "in-person" solicitation.

[22] 436 U.S. 447 (1978).

solicitation is especially difficult to monitor, and so the state might elect to prohibit this form of solicitation entirely.[23]

On the other hand, in-person solicitation by lawyers in many instances does not involve coercion or the exertion of undue influence. The Supreme Court in *Ohralik* noted in *dicta* that in-person contacts can convey information about the availability and terms of a lawyer's legal services and, in this respect, may serve much the same function as advertising.[24] Many lawyers traditionally have built their law practices through such contacts. Under such circumstances, the possibility of abuse is reduced. 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.

The Federal Trade Commission considered the concerns that underlie the *Ohralik* opinion when it decided *American Medical Association.*[25] 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. Similarly, the Association may wish to consider whether the danger for abuse warrants proscribing all in-person solicitation and thereby sacrificing the potential consumer benefits that temperate solicitation may provide.

Telephone solicitation can also provide useful information, and it may present less risk of harm to consumers than does in-person, face-to-face solicitation. We recognize, of course, that telephone sales can be used to injure consumers. Consequently, we would not oppose a prohibition on false, unfair or deceptive telephone solicitation. However, the use of the telephone to sell goods and services has become relatively common in contemporary society. It is not clear to us that telephone solicitation by lawyers is necessarily likely to harm consumers.

Thus, we believe that the proposed ban on solicitation may injure consumers, though we do not believe that more limited restrictions on solicitation directed at actual abuse would have this effect. For example, the Association may wish to

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[23] *Cf. Ohralik*, 436 U.S. at 466 (Due to frequent lack of witnesses, "in-person solicitation would be virtually immune from effective oversight and regulation from the State.")

[24] 436 U.S. at 457.

[25] 94 F.T.C. 701 (1979), *aff'd*, 536 F.2d 443 (2d Cir. 1980), *aff'd mem. by an equally divided court*, 455 U.S. 676 (1982).

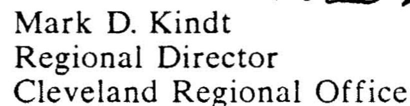
recommend a rule that prohibits false or deceptive solicitation[26] and solicitation directed to any person who has made it known that he or she does not wish to receive communications from the lawyer. In addition, the Association may wish to propose a rule that prohibits solicitation involving, in the language of the comment to Proposed Rule 2-101(A)(1), "undue influence, intimidation, [or] overreaching."[27] So long as these terms are interpreted fairly and objectively – and not applied to ban solicitations that pose no danger of abuse – such a provision would adequately protect consumers and simultaneously allow them to receive helpful information about legal services.

CONCLUSION.

We suggest that you consider modifying the rules to permit a wider range of truthful communications and to ban only those that are likely to be unfair or deceptive or otherwise violate significant state objectives in a way that threatens or causes net injury to consumers. As part of this process, you may want to review the rules to ensure that any prohibitions are drafted narrowly and precisely.

We appreciate this opportunity to give you our views. Please feel free to get back in touch if you have any questions or if we can help in any other way.

Sincerely,



Mark D. Kindt
Regional Director
Cleveland Regional Office

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[26] Proposed Rule 2-101(A)(1) already prohibits false or deceptive communications.

[27] 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 face-to-face contact. Written advertisements seem 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.