



BUREAU OF COMPETITION

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

COMMISSION AUTHORIZED

April 17, 1990

Bruce Hamilton
Executive Director
State Bar of Arizona
363 North First Avenue
Phoenix, Arizona 85003

Dear Mr. Hamilton:

I am writing in response to your letter of March 29, 1990, in which you requested the views of the Federal Trade Commission staff on certain proposed amendments to the Arizona Rules of Professional Conduct.¹ These amendments would generally establish more restrictive standards than now exist in the areas of attorney advertising and solicitation. We believe that several of these proposals may restrict the flow of truthful and useful information to consumers, and therefore, on balance, have the potential to impede competition or increase costs without providing countervailing benefits to consumers.

The discussion of these issues will be divided into a number of sections. The first of these describes the FTC staff's interest and previous experience in this field. The remaining sections then take up the specific provisions of the proposed amendments that raise the most serious concerns about adverse effects on consumers, including the provisions governing: (1) client testimonials; (2) electronic media advertising; (3) cautions against excessive reliance on advertising; and (4) written communications with prospective clients.²

The interest and experience of the staff of the Federal Trade Commission

Congress has empowered the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive

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 or of any individual Commissioner.

² Our comments are limited to these specific areas, in part due to the constraints of time.

acts or practices in or affecting commerce.³ Pursuant to this statutory mandate, the Commission and its staff encourage competition among members of licensed professions to the maximum extent compatible with other legitimate goals.⁴ For several years the Commission and its staff, through law enforcement proceedings and analysis, 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. 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

³ 15 U.S.C. Sec. 41 et seq.

⁴ 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 Rules of Professional Conduct of the Florida Supreme Court, submitted to William F. Blews, Member, Florida Bar Board of Governors (July 17, 1989); Comments of the Federal Trade Commission Staff on the American Bar Association Model Rules of Professional Conduct (November 22, 1988); Comments of the Federal Trade Commission Staff on the Rules of the Idaho State Board of Chiropractic Physicians (December 7, 1987); 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 (November 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); Comments of the Federal Trade Commission Staff on the rules of the South Carolina Boards of Optometry and Opticianry, submitted to the Legislative Audit Council of the State of South Carolina (February 19, 1987).

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, 455 U.S. 676 (1982). The thrust of the AMA decision -- "that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011) -- accords with the reasoning of recent Supreme Court decisions involving professional regulations. See, e.g., Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988) (holding that nondeceptive targeted mail solicitation is protected by the First (continued...))

Advertising informs consumers of options available in the marketplace, and encourages competition among firms seeking to meet consumer needs. Advertising may be especially valuable for people first entering a profession, because it enables them to become known to potential clients and to reach an efficient competitive size more quickly than they otherwise might. Studies indicate that prices for certain professional services tend to be lower where advertising exists than where it is restricted or prohibited.⁶ Empirical evidence also indicates that while certain restrictions on professional advertising tend to raise prices, the restrictions studied do not generally increase the quality of available goods and services.⁷ These relationships between price, quality, and advertising have been found to apply in the provision of certain legal services as well.⁸

⁵ (...continued)

Amendment); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (holding that an attorney may not be disciplined for seeking legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients or for using nondeceptive illustrations or pictures); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding a state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (holding invalid a Virginia prohibition on price advertising by pharmacies).

⁶ 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).

⁷ Bond et al., *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980). 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).

⁸ See Jacobs et al., *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (1984); Calvani, Langenfeld & Shuford, Attorney
(continued...)

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, we suggest that the Board of Governors should impose restrictions on advertising only if those rules 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.

ER 7.1(b)(5): Client testimonials

Proposed rule ER 7.1(b)(5) would prohibit communications containing testimonials from current or former clients.

We believe that truthful testimonials from actual clients may be valuable to consumers of legal 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 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. Advertising in which clients discuss their reasons for satisfaction with a law firm conveys even more information than legal directories convey. Such testimonials are not necessarily misleading, and to prohibit them may impede the flow of useful information to consumers. The Board may wish instead to prohibit only those testimonials that are likely to mislead. Alternatively, the Board could delete this section entirely, and allow such matters to be covered by the general prohibition in rule ER 7.1(b) against "false or misleading communication."

⁸ (...continued)

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

ER 7.2: Electronic Media Advertising

This proposed rule would severely restrict the visual and audio elements of electronic media advertisements. The proposed rule would allow only the text of the narrator's words to appear on screen in television advertisements. Both on television and radio the only audio allowed would be that of a single, non-dramatic voice with no other background sound. The rule would thus prohibit the use of actors, background music, visual action, dramatic voices, and other features common to electronic media advertising.

This proposal appears to be overbroad. We appreciate that the rule is intended, at least in part, to maintain the dignity and professionalism of the legal community. The Board may want to bear in mind however that advertising restraints of this sort are costly to consumers. Graphics, dramatizations, reenactments, and similar techniques can help consumers understand their legal rights and obligations and can identify attorneys who appear responsive to particular needs. The unavailability of such techniques may make it harder for consumers to make informed decisions about hiring legal counsel. It may also make it harder for lawyers to devise vivid advertising images that will engage the viewer's attention, thereby enabling the lawyers to convey their messages.

For all these reasons the Board may wish to consider shifting the focus of the proposed rule. Rather than allowing electronic media advertising only in certain specialized formats, and banning all others, the rule might instead ban only those specific techniques that could likely mislead or otherwise cause harm to consumers.

ER 7.1(m) and ER 7.2: Caution against reliance on advertising

Another provision of the new rules would caution consumers against excessive reliance on advertising. Proposed Rule ER 7.1(m) would require that all advertisements and written communications involving direct contact with prospective clients contain the following disclaimer: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions. Before you decide, we will send you free written information about our qualifications and experience." Proposed Rule ER 7.2 would require that all electronic media advertisements shall contain the following disclaimer: "The determination of the need for legal services and the choice of a

lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise."

Any disclosure obligation tends to increase advertising costs, both because it may increase the length of the message and because 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. Moreover, some disclosures may further discourage advertising if consumers are thought likely to understand the disclosure to reflect negatively on the advertiser, even when such an inference is unjustified. Accordingly, it is important in evaluating disclosure requirements to weigh such costs against any benefits that can be clearly identified.

ER 7.3(d): Written Communications with Prospective Clients

This proposed rule limits the amount of direct competition among lawyers. It provides that the first sentence of any written communication to a prospective client concerning a specific occurrence shall be: "If you have already retained a lawyer for this matter, please disregard this letter."

While this may not seem as restrictive as the current rule,⁹ it may still be overbroad. We recognize, of course, that clients may sometimes enter into contractual relationships under which a particular lawyer acquires the right to handle a certain matter in its entirety. We would not advocate rules that encourage the breach of those contracts. Nonetheless, in many other instances the client will be free to terminate the relationship with the attorney at will. At least in this latter context the proposed rule could operate as a direct restraint on competition, and could thereby injure consumers.

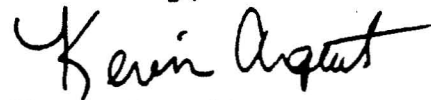
⁹ ER 7.2(f) provides that a lawyer shall not send a written communication to a prospective client for the purpose of obtaining professional employment if the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter.

Conclusion

In short, we believe that some of the proposed rules under consideration for regulating attorney advertising and solicitation may not give sufficient weight to the value of free and informed consumer choice. We therefore 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 to otherwise violate significant state objectives in a way that threatens to cause 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,



Kevin Arquit
Director
Bureau of Competition