



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

Office of Policy Planning  
Bureau of Consumer Protection  
Bureau of Competition  
Bureau of Economics

March 23, 2007

Elizabeth Clark Tarbert, Esq.  
Ethics Counsel  
The Florida Bar  
651 E. Jefferson Street  
Tallahassee, FL 32399-2300

Re: The Florida Bar's Proposed Changes to the Florida Rules of Professional Conduct Regarding Computer-Accessed Communications

Dear Ms. Tarbert:

The staff of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics<sup>1</sup> is pleased to submit these comments regarding the Florida Bar's Special Committee on Website Advertising's ("Committee") Proposed Changes to Rule 4-7.6 of the Florida Rules of Professional Conduct regarding Computer-Accessed Communications ("Proposed Rule").<sup>2</sup> As a general principle, it is important to protect consumers of legal services from deceptive and misleading advertising. The Proposed Rule, however, unnecessarily restricts truthful and non-misleading advertising, may result in higher prices paid for legal services and less consumer choice. This letter briefly summarizes the Commission's interest and experience in the

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<sup>1</sup> This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, Bureau of Competition 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.

<sup>2</sup> The Proposed Rule is available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/30A24068733B904C8525726F007C5E80/\\$FILE/4-7.6%20approved%20by%20bog%20for%20publication%201-26-06.doc?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/30A24068733B904C8525726F007C5E80/$FILE/4-7.6%20approved%20by%20bog%20for%20publication%201-26-06.doc?OpenElement). We understand that the modifications to Rule 4-7.6 have been approved by the Bar's Board of Governors, who have invited public comment. We further understand that the Proposed Rule follows the Supreme Court of Florida's rejection of proposed changes to Rule 4-7.6 in November, 2006. *See In re: Amendments to the Rules Regulating the Florida Bar - Advertising*, 2006 WL 3093126, \*2 (Fla., Nov. 2, 2006) (The Court stated it would, "consider the regulation of Internet communications when the Bar files the report of the special committee," and "request[ed] that the Bar undertake an additional and contemporary study of lawyer advertising, which shall include public evaluation and comments about lawyer advertising[.]")

regulation of attorney advertising and provides an analysis of the anticipated effects on consumers and competition of the Proposed Rule.<sup>3</sup>

### **Interest of the Federal Trade Commission**

The FTC enforces laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, which includes primary responsibility for stopping deceptive advertising.<sup>4</sup> 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.<sup>5</sup> 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 and solicitation.<sup>6</sup> The FTC believes that while false and misleading advertising by lawyers should be prohibited, imposing overly broad restrictions that prevent the communication of truthful and non-misleading information that some consumers value is likely to inhibit competition and frustrate informed consumer choice. This position is supported by

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<sup>3</sup> Although this letter focuses on the policy implications of the Proposed Rule with respect to consumers and competition, the Bar may wish also to evaluate the Rule's prohibitions under First Amendment criteria. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (striking down bar prohibitions against attorney advertising in general); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (commercial speech regulations must be narrowly tailored to directly advance a substantial government interest); *see also Florida Bar v. Went for It*, 515 U.S. 618, 632 (1995) (commercial speech regulations must be in proportion to the interest served and be factored against other less-burdensome alternatives).

<sup>4</sup> Federal Trade Commission Act, 15 U.S.C. § 45.

<sup>5</sup> 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).

<sup>6</sup> *See, e.g.,* 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/V060017CcommentsonaRequestforAnEthicsOpinionImage.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*).

research indicating that overly broad restrictions on truthful advertising may adversely affect prices paid and services received by consumers.<sup>7</sup>

### **Likely Effects of the Proposed Rule**

Currently the rule regarding computer-accessed communications classifies all Internet websites as “information provided to a prospective client at the prospective client’s request.”<sup>8</sup> The Proposed Rule would subject homepages, websites except for homepages (“websites”),<sup>9</sup> emails, and other computer-accessed communications to rule 4-7.2 regarding attorney advertising, which prohibits attorney advertisements from containing: (1) unverified comparisons of the lawyer’s or law firm’s services with other lawyer’s services,<sup>10</sup> and descriptive statements describing or characterizing the quality of the lawyer’s services;<sup>11</sup> (2) statements referring to past successes or results obtained;<sup>12</sup> and (3) testimonials.<sup>13</sup> Although the Proposed Rule exempts websites from some of the restrictions in Rule 4-7.2 if specific disclaimers are made, FTC Staff believes that it is likely to restrict unnecessarily the dissemination of truthful and non-misleading information on homepages and websites.<sup>14</sup> The Florida Rules of Professional Conduct already prohibit false, misleading, or deceptive communications and prohibit attorneys from engaging in

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<sup>7</sup> See, e.g. Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 Supreme Court Economic Review 265, 293-304 (2000) (discussing the empirical literature on the effect of advertising restrictions in the professions); *In the Matter of Polygram Holdings, Inc, et al*; FTC Docket No. 9298 (F.T.C. 2003), at 38 n.52 (same); Frank H. Stephen & James H. Love, *Regulation of the Legal Professions*, 5860 Encyclopedia of Law and Economics 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); 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*.

<sup>8</sup> See Rule 4-7.6(b)(3).

<sup>9</sup> The Comment to Proposed Rule 4-7.6 distinguishes a homepage from other webpages (*compare* Rule 4-7.6(b)(1) and Rule 4-7.6(b)(2)) based on the degree of consumer initiation required to obtain the content provided. Thus, Rule 4-7.6(b)(2) allows attorneys to place testimonials, statements of past success, and descriptive statements on “websites except for homepages,” as long as they are accompanied by specified disclosures. For information on how to present online disclosures most usefully to consumers while not unnecessarily burdening attorneys and law firms, the Committee may wish to consult FTC guidance concerning how to disclose clearly and conspicuously information in the on-line context. See generally, Federal Trade Commission, *Dot Com Disclosures: Information about Online Advertising* (May 2000) available at [http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom\\_index.pdf](http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom_index.pdf).

<sup>10</sup> See Rule 4-7.2(c)(1)(I).

<sup>11</sup> See Rule 4-7.2(c)(2).

<sup>12</sup> See Rule 4-7.2(c)(1)(F).

<sup>13</sup> See Rule 4-7.2(c)(1)(J).

<sup>14</sup> We also note that application of these restrictions to other forms of attorney advertising is also likely to deprive Florida consumers of truthful, non-misleading information.

any dishonest, fraudulent, and deceitful conduct and misrepresentations.<sup>15</sup> Because the Bar has safeguards in place to protect consumers, FTC Staff recommends adopting a less restrictive alternative than those proposed which constrain truthful, non-misleading statements in computer-accessed communications.

First, the Proposed Rule would prohibit comparative claims that have not been objectively verified from appearing in any forms of computer-accessed communications<sup>16</sup> and prohibit descriptive statements from appearing on computer-accessed communications other than websites.<sup>17</sup> Comparative advertising can encourage improvement and innovation in the delivery of services and benefit consumers with assistance in making rational purchase decisions.<sup>18</sup> Requiring that comparative 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. To the extent that the Proposed Rule's broad restrictions might be based on a concern that unsubstantiated comparisons and descriptions could mislead consumers, the concern would be better addressed by a rule requiring that advertising claims that consumers would normally expect to be substantiated, must be substantiated.<sup>19</sup>

Second, the Proposed Rules would prohibit reporting past success on homepages and electronic solicitations, pursuant to Rule 4-7.2(c)(1)(F).<sup>20</sup> Many lawyers and law firms (including both Florida-based law firms and multi-jurisdictional law firms with offices in Florida) post on main homepages announcements, press releases, and other stories that involve client representations that consumers may find informative. Similarly, lawyers often announce their

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<sup>15</sup> See Rule 4-7.2(c)(1) and Rule 8.4(c), respectively.

<sup>16</sup> See Rule 4-7.2(c)(1)(I) as applied through Rule 4-7.6.

<sup>17</sup> Proposed Rule 4-7.6(b)(2)(C) states that websites may contain factually verifiable statements describing or characterizing the quality of the lawyer's services if, either alone or in the context in which they appear, such statements are not otherwise misleading.

<sup>18</sup> See Letter from Federal Trade Commission to the New Jersey Supreme Court's Committee on Attorney Advertising (Nov. 9, 1987), available at 1987 WL 874590.

<sup>19</sup> In addition, it is not entirely clear whether literally accurate descriptions (such as advertising that an attorney is listed among "Super Lawyers" or "America's Best Lawyers," or that a lawyer has earned a "highest" "AV" ranking awarded by *Martindale-Hubbell*) that may appear on a lawyer's homepage, website, e-mail or other advertisement will now be barred either as improper comparisons or as descriptive monikers that imply an ability to obtain future results. Such information may benefit consumers so long as it is neither false nor misleading.

<sup>20</sup> Proposed Rule 4-7.6(b)(2)(A) would allow statements of past success on websites except for homepages if that statement is accompanied by the following disclaimer: "Not all results are provided, the results are not necessarily representative of results obtained by the lawyer, and a prospective client's individual facts and circumstances may differ from the matter in which the results are provided."

achievements via e-mail and web-log (“blog”) reporting. Such communications may be truthful and non-misleading and can help consumers in assessing the caliber or personal style of a lawyer or law firm.

Third, the Proposed Rule would prohibit attorneys from using any testimonials on their homepages and electronic solicitations.<sup>21</sup> Testimonials and information about previous representations can convey valuable information to consumers and help spur competition. Accordingly, the FTC Staff recommends that they be prohibited only if the endorsement, testimonial, or other information deceives consumers. As explained in the FTC’s Endorsement Guides, a consumer testimonial is likely to be deceptive if the experience described is not the consumer’s actual experience or is not representative of what consumers generally experience.<sup>22</sup>

The FTC Staff is also concerned that the Proposed Rule would require all computer-accessed communications except for homepages and websites to be filed with and reviewed by the Bar, which is comprised of competing attorneys, for compliance, evaluation and approval.<sup>23</sup> Bar opinions of non-compliance with the Proposed Rule will result in the attorney being notified that dissemination of the computer-accessed solicitation may result in professional discipline. In this manner, the advertising rules likely compel substantial compliance because non-complying attorneys would face serious risks to their livelihoods.

The FTC supports legitimate industry self regulation because, when implemented properly, it can benefit consumers and competition.<sup>24</sup> However, there are risks to competition when one group of competitors regulates another. For example, attorneys reviewing advertisements and solicitations may have the incentive, and would have the ability, to limit advertising by competitors to soften competition rather than to protect consumers.<sup>25</sup> This is

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<sup>21</sup> Proposed Rule 4-7.6(b)(2)(B) would allow testimonials on websites except for homepages if the testimonial is accompanied by the following disclaimer: “Not all clients have provided testimonials, the results are not necessarily representative of results obtained by the lawyer, and a prospective client’s individual facts and circumstances may differ from the matter in which the testimonials are provided.”

<sup>22</sup> *See generally* Federal Trade Commission, Guide Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255. As part of the Commission’s regulatory review of its Endorsement Guides, the Commission is presently seeking public comment to the Guides.

<sup>23</sup> *See* Rules 4-7.7.6(c), 4-7.7, and 4-7.8. This concern extends to all forms of advertising that are subject to review, pre-approval, and approval under Rule 4-7. The FTC Staff recommends that the Bar address the impact of this rule on consumers when it undertakes the “additional and contemporary study of lawyer advertising” as mandated by the Supreme Court of Florida.

<sup>24</sup> *See, e.g.*, Deborah Platt Majoras, “Self Regulatory Organizations and the FTC,” Address to the Council of Better Business Bureaus (Apr. 11, 2005), (available at <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>).

<sup>25</sup> Our concern about the policy and competitive constraints it imposes extends to the screening and approval requirements of all attorney advertising as described in Rule 4-7.7.

Elizabeth Clark Tarbert, Esq.  
March 23, 2007  
Page 6 of 7

especially true given that advertisements and solicitations as defined may include those sent by out-of-state attorneys to Florida residents. The FTC Staff is concerned that any potential benefits from such extensive filing, disclosure, and review requirements would be outweighed by the detrimental effect that such a regulatory obligation might have upon competition.<sup>26</sup> The FTC Staff encourages the Committee to revise the Rules so as to exclude such communications from this form of review.

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In conclusion, the FTC Staff believes that while deceptive and misleading advertising by lawyers should be prohibited, restrictions on advertising that are specifically tailored to prevent nothing other than deceptive claims provide the optimal level of protection for consumers. Consumers benefit from robust competition among attorneys and from important price and quality information that advertising and solicitation can provide. Rules that unnecessarily restrict the dissemination of truthful and non-misleading information are likely to limit competition and harm consumers of legal services in Florida.

Respectfully submitted,

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<sup>26</sup> Due to the risk of anticompetitive behavior, a leading antitrust treatise advocates subjecting any governmental agency made of members of the profession that it regulates to direct and active governmental supervision. See AREEDA & HOVENKAMP, I ANTITRUST LAW ¶227a, at 500 (2d ed. 2000) (“Without reasonable assurances that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required.”)

Elizabeth Clark Tarbert, Esq.  
March 23, 2007  
Page 7 of 7

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