



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

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

March 14, 2007

Richard Lemmler, Jr., Esq.
Ethics Counsel
Rules of Professional Conduct Committee
Louisiana State Bar Association
601 St. Charles Avenue
New Orleans, LA 70130-3404

Re: Louisiana State Bar Association Rules of Professional Conduct
Committee Request For Comments Regarding Proposed Rules on
Lawyer Advertising and Solicitation

Dear Mr. Lemmler:

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 Economics¹ is pleased to submit these comments pursuant to the Louisiana State Bar Association Rules of Professional Conduct Committee's ("Committee") Request for Comments² to its Proposed Rules on Lawyer Advertising and Solicitation ("Proposed Rules").³ This letter briefly summarizes the Commission's interest and experience in the regulation of attorney advertising and solicitation and provides the staff's opinion regarding the anticipated effects of the Proposed Rules on consumers and competition.

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 practices.⁴ 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

¹ 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.

² We understand that the original deadline of November 24, 2006 for comments has been lifted, and that the Committee has not set a new deadline.

³ The Proposed Rules are available at <http://www.lsba.org/committees/ethicrulescomments.asp>.

⁴ Federal Trade Commission Act, 15 U.S.C. § 45.

and prevent, where possible, business practices and regulations that impede competition without offering countervailing benefits to consumers.⁵ 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.⁶ The FTC believes that while false and deceptive 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 research indicating that overly broad restrictions on truthful advertising may adversely affect prices paid and services received by consumers.⁷

The FTC Staff is concerned that several provisions of the Proposed Rules unnecessarily restrict truthful advertising and may adversely affect prices paid and services received by consumers. In addition, provisions regarding advertising screening and approval by a committee composed of competing attorneys may deter truthful and non-misleading advertising and present risks to competition. The FTC Staff believes that Louisiana consumers can be adequately protected from false and misleading advertising by using less restrictive means and through enforcement of narrower rules.

In several respects, the Proposed Rules are nearly identical to rules proposed by the New York Unified Court System in June, 2006, particularly those involving prohibitions against

⁵ 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).

⁶ *See, e.g.*, 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, 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*).

⁷ *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 and 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> (Concluding that empirical studies demonstrate that restrictions on attorney advertising likely have the effect of raising fees); Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising, 5-6 (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra*).

certain selected forms of advertising including actor portrayals, depictions and similar dramatic techniques;⁸ comparative claims;⁹ statements about endorsements and testimonials;¹⁰ communications that create an expectation of results an attorney is likely to achieve;¹¹ and advertisements that look like legal pleadings.¹² The FTC Staff submitted comments to the New York Office of Court Administration in September, 2006, in which we recommended eliminating or modifying such rules.¹³ We advised generally that, although such broad prohibitions might be based on a concern that such advertising could mislead consumers about the results lawyers can achieve, it would be better addressed by a rule directed more narrowly to claims that could be construed as having some bearing on likely outcomes. On January 4, 2007, the New York Unified Court system promulgated revised rules, which incorporated nearly all of the FTC Staff's recommendations.¹⁴

In addition to our concerns with restrictions similar to those proposed in New York, the FTC Staff has a particular concern with provisions requiring attorneys to file advertisements for review by a committee composed of competitors.¹⁵ First, a requirement that ads be filed with the Committee will likely raise the cost of doing business for attorneys and thus likely result in higher prices that consumers must pay.

Second, the Proposed Rules allow the review committee to issue opinions of non-compliance. Although under the terms of the Proposed Rules, Committee opinions of non-compliance would not carry the weight of law, such finding must be reported to the Bar's Office of Disciplinary Counsel (unless the advertising attorney agrees in writing that she will not

⁸ See provisions contained in §§ 7.2(c)(1) and 7.5(b)(1) of the Proposed Rules.

⁹ See *id.* at § 7.2(c)(1)(G).

¹⁰ See *id.* at §§ 7.2(c)(1)(D) and, to the extent applicable, 7.2(c)(14).

¹¹ See *id.* at § 7.1(c)(1)(L), and to other portions of § 7.1(c) as applicable.

¹² See *id.* at § 7.2(c)(1)(K).

¹³ See 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>. Because these parts of the Proposed Rules are nearly identical to the New York Proposed Amendments, Maureen Ohlhausen, Director of the FTC Office of Policy Planning, supplied a copy of our New York comments to the Louisiana Bar in November, 2006.

¹⁴ The revised Rules of the Unified Court System of New York (with red-lined changes comparing the initial draft) are available at http://www.nycourts.gov/rules/attorney_ads_amendments.shtml. Among the changes, New York would allow claims regarding past success, if they are substantiated and accompanied by a brief disclosure, and removed several of the other proposed restrictions. We note that the FTC Staff does not endorse the new rules entirely as many of the rules require disclosures that may not be necessary. Unnecessary disclosures can have a deterrent effect on advertising and increase costs to consumers. See generally Letter from Federal Trade Commission to the New Jersey Supreme Court's Committee on Attorney Advertising (November 9, 1987) available at 1987 WL 874590.

¹⁵ See § 7.7 of the Proposed Rules.

disseminate the advertisement), and will be given evidentiary weight if the matter is prosecuted.¹⁶ In this manner, the Proposed Rules likely would compel substantial compliance by Louisiana attorneys because non-complying attorneys would face serious risks to their livelihoods.

The FTC supports legitimate and fair industry self regulation because, when implemented properly, it can provide efficiencies and other benefits to consumers.¹⁷ However, there are risks to competition when one group of competitors is charged with regulating another. For example, attorneys on the advertising committee may have the incentive, and would have the ability, to limit advertising by competitors to soften competition rather than to protect consumers.¹⁸

The FTC Staff recommends that the Committee forego the filing and screening components of the Proposed Rules in favor of enforcing the general prohibition against deceptive and misleading claims through sanctions for violations. If the Committee nevertheless believes that screening is necessary to curtail consumer harm, given the risks to competition, we recommend that the Committee take steps to ensure that the review Committee as a whole, and its members individually, are fully subject to federal and state antitrust laws.¹⁹

In conclusion, the FTC Staff believes that while deceptive advertising by lawyers should be prohibited, reasonable restrictions on advertising that are specifically tailored to prevent deceptive claims in ways that preserve competition 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 Louisiana.

Respectfully submitted,

Maureen K. Ohlhausen, Director
Office of Policy Planning

¹⁶ See *id* at §§ 7.7(g) & (h).

¹⁷ See Deborah Platt Majoras, “Self Regulatory Organizations and the FTC,” Address to the Council of Better Business Bureaus (April 11, 2005), available at <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>.

¹⁸ Indeed, several prominent Supreme Court cases have involved state bar ethics rules and opinions that were found to restrain competition. See generally *Bates v. State Bar of Arizona*, 433 U.S. 350, 372-74 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); and *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

¹⁹ 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.”).

Richard Lemmler, Esq.
March 14, 2007
Page 5 of 5

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