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COMMISSION APPROVED

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

BUREAU OF COMPETITION

May 1, 1987

Honorable Darrell V. McGraw, Jr.
Chief Justice
Supreme Court of Appeals of West Virginia
State Capitol Building
Charleston, West Virginia 25305

Dear Chief Justice McGraw:

The Federal Trade Commission staff is pleased to submit these comments respecting the proposed Rules of Professional Conduct of the West Virginia State Bar.[1] Ancil Ramey, the Clerk of the Court, indicated to us that although the Court is not holding a formal comment period regarding the proposed rules, it would nonetheless be interested in receiving our remarks.

In this letter, we focus on the proposed rules regarding fees, practice with nonlawyers, advertising, and solicitation. These proposed rules would in some respects permit more attorney communication with prospective clients than the existing rules allow, and should therefore assist consumers, to at least a limited extent, in making more informed choices about legal services. For example, the proposed rules would eliminate the existing prohibitions on "undignified" advertising and the existing restrictions on the use of trade names. We are concerned, however, that some of the proposed rules may still harm consumers by restraining price competition, discouraging referrals and associations between attorneys, restricting the development of innovative and potentially more efficient forms of legal practice, and unnecessarily limiting the information available to consumers.

As is discussed in more detail below, we urge the Court to: (1) clarify in the commentary to proposed Rule 1.5(a) that only fees that are so high as to suggest a breach of fiduciary duty to the client would be unreasonable; (2) delete proposed Rule 1.5(e) so as not to discourage referrals and associations of attorneys in different law firms for particular cases; (3) eliminate the restrictions in proposed Rule 5.4 on practice with nonlawyers; (4) amend proposed Rule 7.1 to clarify that truthful,

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[1] These comments represent the views of the Federal Trade Commission's Bureaus of Competition, Consumer Protection, and Economics, and not necessarily those of the Commission itself. The Commission has, however, voted to authorize us to submit these comments for your consideration.

nondeceptive endorsements and experience, success, and comparison claims are permitted; (5) delete proposed Rule 7.2(a), and modify proposed Rule 7.2(c) to allow the payment of referral fees to attorneys and the use of for-profit referral services; (6) delete proposed Rule 7.3 and adopt instead more limited restrictions on solicitation; and (7) modify proposed Rule 7.4 to allow express and implied claims of specialty.

Proposed Rule 1.5: Fees

Proposed Rule 1.5(a): Reasonableness of Fee

Proposed Rule 1.5(a) states that "[a] lawyer's fee shall be reasonable," and subparagraph (3) provides that "the fee customarily charged in the locality for similar legal services" is to be considered in determining reasonableness. Lawyers might interpret this language to bar "unreasonably" low fees. Such an interpretation would discourage price competition among traditional practitioners; it also could restrain competition from legal clinics and other nontraditional providers of legal services.

The proposed rule is also undesirable insofar as it may appear to set a ceiling on fees. We do not believe that consumers of legal services would benefit from price regulation, whether a minimum or maximum price is imposed. For that reason, we believe that proposed Rule 1.5(a) should be applied only in extreme cases where an attorney's fee is so high that it represents a clear abuse of the client or suggests a possible breach of fiduciary duty. We therefore suggest that the accompanying commentary make clear that low fees may never be deemed unreasonable and that fees may be found to be unreasonably high only if, under the circumstances, the attorney appears to be exploiting the client.

Proposed Rule 1.5(e): Fee-Splitting

Proposed Rule 1.5(e), apparently derived from Rule 1.5(e) of the ABA's Model Rules of Professional Conduct, states that division of a fee between lawyers who are not in the same firm may be made only if the client is advised of the division and does not object, the fee is "reasonable," and the division is in proportion to the services performed by each lawyer or, alternatively, according to the allocation agreed on by the lawyers if, by written agreement with the client, each lawyer assumes joint responsibility for the representation. We are concerned that the proposed rule might unnecessarily discourage both referrals and associations between lawyers in different law

firms under circumstances in which such activity may benefit consumers.

Division of fees may provide incentives for attorney referrals and associations that are desirable for the client. Referrals by one lawyer to another may help consumers identify a lawyer whose expertise is appropriate for their particular case and whose caseload allows prompt attention to that case. Absent a referral, consumers might have to use less efficient means of engaging the services of an attorney qualified to handle their particular case. In addition, a referral to a lawyer with particular expertise, even if based in part on the financial interest of the referring lawyer, may serve the client's interest better than retention of the case by a lawyer who lacks the requisite expertise.

Proposed Rule 1.5(e) would inhibit referrals by lawyers. First, the provision that a division of fees be "in proportion to the services performed by each lawyer" might be interpreted to prohibit referral fees, because it is unclear whether giving a prospective client the name and telephone number of another lawyer competent to handle that client's legal problems constitutes compensable "services" under the language of the proposed rule.[2] Even if this provision were interpreted to permit referral fees, it might be interpreted to allow only nominal fees. Second, the alternative requirement that a referring attorney assume responsibility for the independent professional judgments of the attorney who is actually handling the case is likely to create a substantial deterrent to making referrals. Because of the liability for malpractice that joint responsibility might entail,[3] the referring attorney probably

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[2] According to case law and ABA Opinions, a mere referral does not constitute a legal service and therefore an attorney is not entitled to any portion of the fee when he has merely referred a client to another. See Palmer v. Breyfogle, 217 Kan. 128, 535 P.2d 955, 958 (1975); McFarland v. George, 316 S.W.2d 662 (Mo. 1968); Note, Referral Fees and the Effect of Disciplinary Rule 2-107, 8 J. Legal Prof. 225, 228-29 (1983); Note, Division of Fees Between Attorneys, 3 J. Legal Prof. 179, 186 (1978) (citing ABA Opinions).

[3] The comment to proposed Rule 1.5 on division of fees states that "[j]oint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved." Proposed Rule 5.1 governs responsibilities of a partner for the ethical conduct of another partner in the same

(continued...)

would be compelled to review the other attorney's work. This could result in duplication of effort. It would seem that the referring attorney and the attorney handling the case should be able to determine among themselves how to divide the total legal fee.

Two justifications have been offered to support bans on referral fees. First, it has been argued that permitting referral fees would tempt some lawyers to refer legal matters to the lawyer who paid the highest referral fee, rather than to the best qualified lawyer. In personal injury and other cases that are taken on a contingent fee basis, however, the referring lawyer typically receives one-third of any fee recovered by the lawyer who handles the case.[4] Thus, it is probable that the referring attorney will select the lawyer who he believes is the most likely to recover the largest award for the prospective client. After all, 20% of an attorney's recovery in a contingent fee case is better than 40% of nothing; to this extent, the attorney's and the client's interests are the same. In addition, a lawyer referring a client to a specialist has every incentive to make good referrals in order to maintain client goodwill, in the interest of obtaining repeat business and of preserving his or her professional reputation.

Second, some have argued that the attorney to whom the case is referred will increase the total fee paid by the client in order to recoup the referral fee. This does not appear to be a valid concern. First, in a genuinely competitive market for legal services--that is, one in which information about services and fees is easily available to consumers--the attorneys could not raise their fees without losing some clients who are price-sensitive. In addition, by facilitating referrals to experts, referral fees may actually reduce the total fees charged to clients. Because of their more predictable and more specialized workload, experts may be able to reduce costs and pass such savings on to clients.

An association of two or more lawyers in different firms may also benefit consumers. As the comment to proposed Rule 1.5,

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[3](...continued)
law firm, as well as responsibilities of supervisory lawyers. Because it focuses on these relationships, its application in the context of a "joint responsibility" situation is unclear.

[4] Referral Fees: Everybody Does It, But Is It OK?, ABA J., Feb. 1, 1985, at 40.

entitled "Division of Fee," states, such associations may benefit a client in cases in which neither attorney alone could serve the client as well. For example, one lawyer may not have sufficient time, resources, or expertise to handle all aspects of a particular client's case.

Proposed Rule 1.5(e) might discourage such associations. The provision that a division of fees between attorneys in different law firms be proportional to the services performed by each lawyer would impose rigidity on the allocation of the fee. If lawyers were allowed to negotiate their respective shares of the total legal fee, they could allocate the fee according to the factors they deem important, including number of hours spent, prior knowledge of the facts, relationship with the client, or degree of expertise. The alternative provision, imposing joint responsibility on one attorney for the independent professional judgments of another, also appears likely to deter associations of attorneys in different law firms, just as joint responsibility would deter attorney referrals.

For the reasons stated above, we urge the Court to delete proposed Rule 1.5(e) in its entirety. It is not clear that any regulation of division of fees is necessary. Even if some such regulation is deemed necessary, the less restrictive alternative of requiring disclosure to the client of the existence of the fee division arrangement might be imposed. Such disclosure would allow the client to choose between accepting or declining a referral or association.

Proposed Rule 5.4: Professional Independence of a Lawyer

Proposed Rule 5.4 prohibits a lawyer from forming a partnership or sharing legal fees with a nonlawyer, except under limited circumstances, or from practicing in an organization authorized to practice law for a profit if a nonlawyer owns an interest in the organization or is an officer or director. This proposed rule would limit the ability of lawyers to establish multi-disciplinary practices with other professionals, such as psychologists or accountants, to deal efficiently with both the legal and nonlegal aspects of specific problems. Proposed Rule 5.4 also would appear to preclude lawyers from including any lay persons, such as marketing directors, as partners in their law firms. Finally, such a restriction would appear to prohibit corporate practice, and thereby prevent the use of potentially efficient business formats.

In American Medical Association, 94 F.T.C. 701, 1017-18 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an

equally divided Court, 455 U.S. 676 (1982), the Federal Trade Commission found that the AMA's ethical restrictions on the formation of professional associations with nonphysicians had an adverse effect on competition. The AMA's form of practice restrictions precluded a wide variety of professional ventures and potentially efficient business formats, such as health maintenance organizations and prepaid health care plans. The Commission concluded that the prohibitions were much broader than needed to prevent nonphysician influence over medical procedures or consumer deception about the skills of a nonphysician partner or associate.

The staff of the Federal Trade Commission's Bureau of Economics concluded from a study of the optometric profession that the price of optometric services is lower in jurisdictions in which business associations between professionals and lay persons are permitted.[5] Restrictions on such business associations impede the formation of chain firms and other volume operations and thus make it difficult to achieve economies of scale.[6]

Proposed Rule 5.4 would limit potentially procompetitive professional ventures, innovative business formats, and perhaps some forms of prepaid legal services. Paragraphs (c) and (d)(3) alone should adequately preserve the lawyer's independent professional judgment. We therefore urge the Court to delete all of proposed Rule 5.4, except paragraphs (c) and (d)(3).

Proposed Rule 7.1: Communications Concerning a Lawyer's Services

The beneficial effects of advertising are widely recognized. Truthful, nondeceptive advertising communicates information about individuals or firms offering the services that consumers may wish to purchase. Such information helps consumers make purchase decisions that reflect their true preferences and promotes the efficient delivery of services. Before advertising by attorneys was permitted, many Americans failed to obtain the services of an

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[5] Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry 25-26 (1980).

[6] Bureau of Consumer Protection, Federal Trade Commission, Ophthalmic Practice Rules: State Restrictions on Commercial Practice 57-60 (1986).

attorney, even when they had serious legal problems,[7] primarily because of their fear that legal representation would cost too much or their inability to locate a lawyer sufficiently skilled at handling their particular problems.[8] A recent empirical study suggests that the removal of restrictions on the dissemination of truthful information about lawyers and legal services will tend to enhance competition and lower prices.[9] Although some have voiced concern that advertising may lead to lower quality legal services, the empirical evidence suggests that the quality of legal services provided by firms that advertise is at least as high as, if not higher than, that provided by firms that do not advertise.[10]

We fully endorse the view that false and deceptive advertising should be prohibited. Nonetheless, as set forth below, we are concerned that the definition of "false or misleading" contained in proposed Rule 7.1 may prohibit much truthful, nondeceptive advertising.

Proposed Rule 7.1(b): "Unjustified Expectations"

The West Virginia State Bar proposes that the Court adopt, in connection with proposed Rule 7.1, the comments drafted by the American Bar Association with respect to the identical provisions in ABA Model Rule 7.1. The ABA comments state:

> The prohibition in paragraph (b) of statements that may create "unjustified

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[7] For example, a nationwide survey in 1974 by the American Bar Foundation and the American Bar Association found that only nine percent of the people who had property damage problems, ten percent of those who had landlord problems, and one percent of those who felt that they were the victims of employment discrimination sought the services of an attorney after the most recent occurrence. B. Curran, The Legal Needs of the Public: The Final Report of a National Survey 135 (1977).

[8] Id. at 228, 231.

[9] Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984).

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

> expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's recording obtaining favorable verdicts, and advertisements containing client endorsements.

The comments suggest that such information "may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances." This interpretation of the phrase "likely to create an unjustified expectation" is so broad that it could chill the use of much advertising that is truthful and beneficial to consumers. For example, consumers may wish to consider an attorney's past results as one of several factors in selecting a lawyer. While it may be impossible to provide complete information about prior cases in an advertisement, there is no reason to believe an advertisement of prior experience could not be presented in a way that is not deceptive. "[I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision." Bates v. State Bar of Arizona, 433 U.S. 350, 374 (1977).

In addition, we urge the Court to delete example 3 of the comment concerning proposed Rule 7.1. While the commentary derived from the ABA Model Rules appears to prohibit all advertising concerning past results or client endorsements, example 3 appears to permit some such advertising. These two portions of the comment conflict with one another and thus some attorneys might not understand which portion would govern their conduct. Moreover, it is unclear what advertisements must include in order to "exclude misleading comparisons," as required by example 3. The ambiguity of this comment could chill advertising of past results and advertisements containing client endorsements.

Advertising by means of testimonials and endorsements has traditionally been recognized as effective by sellers of goods and 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 truthfully that they use a firm's legal services gives the general public the same information that is available to users of legal directories. Moreover, advertising in which clients discuss their reasons for satisfaction with a law firm conveys even more information than

do legal directories. Furthermore, an advertisement in which a famous athlete or actor states truthfully that he or she uses a particular firm or attorney indicates to consumers that someone who can spend a substantial sum to find a good attorney, and who may have significant assets at stake, believes a particular lawyer to be effective. Finally, testimonials are not necessarily misleading and may be effective in attracting and retaining consumer interest in the advertiser's message.

In short, we believe that advertisements containing client endorsements or information about past successes can be presented in ways not likely to create unjustified expectations. We therefore urge the Court to disavow the ABA commentary with respect to proposed Rule 7.1(b) and to delete example 3.

Proposed Rule 7.1(c): Comparison Advertising

Proposed Rule 7.1(c) provides that a lawyer shall not compare "the lawyer's services with other lawyers' services, when the comparison cannot be factually substantiated." We believe that this rule may unnecessarily inhibit competition. Information that accurately compares the particular qualities of competing law firms may encourage improvement and innovation in the delivery of services and assist consumers in making rational purchase decisions. Of course, comparisons containing false or deceptive statements of fact, either about the advertiser or a competitor, provide no benefit to consumers and can be harmful. However, such statements already are prohibited by proposed Rule 7.1(a).

We are concerned that proposed Rule 7.1(c) may deter the use of comparison advertising and preclude truthful, nondeceptive statements merely because they are not amenable to empirical testing.[11] Examples of such statements are "Friendlier service"

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[11] In its statement of policy regarding comparative advertising, the Federal Trade Commission recognized the benefits of comparative advertising and indicated concern about standards set by self-regulatory bodies that might discourage the use of such advertising:

> On occasion, a higher standard of substantiation by advertisers using comparative advertising has been required by self-regulation entities. The Commission evaluates comparative advertising in the same

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or "More convenient hours." Even though such statements are not readily subject to verification, they may be truthful and nondeceptive, and indicate the qualities that the advertiser believes are important to consumers. Moreover, such statements can attract consumers' attention to the advertising attorney. Even advertising that is designed only to attract attention can inform consumers of a lawyer's presence in a community, which in and of itself is useful information.

Proposed Rule 7.1 (c)'s requirement of factual substantiation appears to be broader than necessary to prevent deception. The Commission generally requires that advertisers have a "reasonable basis" for any objectively verifiable and material claims that they make, because the act of making such a claim implies some basis for it, and consumers would be deceived if a reasonable level of support were lacking.[12] However, "puffery" and subjective claims do not similarly imply that substantiation exists, and therefore may be employed without it.

We therefore urge the Court to modify proposed Rule 7.1(c) to require only that an attorney have a reasonable basis for any material, objective claims, and that such claims be truthful and nondeceptive.

Proposed Rule 7.2: Advertising

Proposed Rule 7.2(a): Permissible Advertising Media

Attorneys may interpret the list of media in proposed Rule 7.2(a) as exclusive and conclude that advertising in media not listed is prohibited. The listing of specific media that may be used in advertising could discourage innovation in ways not intended by the Court, especially since the phrase "public media" is ambiguous. For example, the rule might be interpreted to prohibit sponsorship of museum exhibits or youth sports teams. In addition, the specificity of the rule fails to anticipate changing technologies. Thus, for example, the rule might be

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[11](...continued)
manner as it evaluates all other advertising techniques . . . . [I]nterpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate and should be revised. 16 C.F.R. 14.15(c)(2) (1986).

[12] See FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984).

interpreted to exclude advertising in computer bulletin boards, on-line directories, or similar media that may become increasingly important as electronic communication becomes more common. Therefore, we recommend that the Court delete proposed Rule 7.2(a).

Proposed Rule 7.2(c): Lawyer Referral Services

Proposed Rule 7.2(c) appears to preclude the use of for-profit lawyer referral services or other legal service organizations. Such organizations enable lawyers to pool their advertising resources while maintaining independent practices. Consumers in need of legal advice on a particular subject may benefit from the knowledge such services possess about the particular expertise of each member attorney. A for-profit referral service may be able to provide more useful information to consumers than a nonprofit bar association referral service, which may be obliged to give referrals on an equal basis to all attorneys.

Proposed Rule 7.2(c) also appears to prohibit the payment of fees to lawyers who refer prospective clients to other lawyers. As we mentioned in our discussion of proposed Rule 1.5(e), such a prohibition could have substantial anticompetitive effects. For these reasons, we urge the Court to delete the requirements in proposed Rule 7.2(c) that lawyers not pay referral fees to other lawyers, and that lawyer referral services and similar legal service organizations be not-for-profit.

Proposed Rule 7.3: Direct Contact With Prospective Clients

Proposed Rule 7.3 would generally prohibit all forms of direct client solicitation[13] because, according to the Comment to the proposed rule, there is a "potential for abuse inherent in direct solicitation." We believe that solicitation can provide consumers with helpful information about the nature and availability of legal services, and that any potential abuses can be effectively prevented through more limited and specific regulatory provisions. We urge the Court, therefore, to delete proposed Rule 7.3 and its accompanying comment and to adopt more limited restrictions on solicitation.

Written communications from lawyers may provide useful information to prospective clients. For example, by targeting

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[13] The proposed rule would not apply to the solicitation of family members or former clients, or where pecuniary gain was not a significant motive for the solicitation.

letters to a particular audience, the lawyer can provide information to those consumers who are most likely to need legal services and to benefit from information about what services are available, Spencer v. Honorable Justices of the Supreme Court of Pennsylvania, 579 F. Supp. 880, 891 (E.D. Pa. 1984), aff'd mem., 760 F.2d 261 (3d Cir. 1985), and who may need to have a lawyer take action expeditiously on their behalf. As the court stated in Koffler v. Joint Bar Association, 51 N.Y.2d 140, 146, 412 N.E.2d 927, 931, 432 N.Y.S.2d 872, 875-76 (1980), cert. denied, 450 U.S. 1026 (1981):

> To outlaw the use of letters . . . addressed to those most likely to be in need of legal services . . . ignores the strong societal and individual interest in the free dissemination of truthful price information as a means of assuring informed and reliable decision making in our free enterprise system . . . .

The Seventh Circuit reasoned similarly in Adams v. Attorney Registration and Disciplinary Commission, 801 F.2d 968, 973 (7th Cir. 1986), that "[p]rohibiting direct mailings to those who might most desire and might most benefit from an attorney's services runs afoul of the concerns for an informed citizenry that lay at the heart of Bates." Without truthful information, consumers are not able to select the quality and price of legal services that best suit their needs.

Lawyers may be able to communicate with prospective clients more efficiently by using targeted mailings and telegrams than by using other forms of advertising. Targeted mailing and telegrams may be costly. Because they are sent to consumers who have the greatest need for legal services, however, they are likely to have a higher response rate than other forms of advertising. Consumers who choose to respond to such written communications incur lower search costs because they need not contact numerous lawyers to find one able to handle a legal problem.

Targeted mail and telegraph advertising, as long as it is truthful and nondeceptive, poses little danger of consumer harm. Although it is not impossible, it is unlikely that written communications will be intrusive or coercive, or involve intimidation or duress. In re Von Wiegen, 63 N.Y.2d 163, 170, 470 N.E.2d 838, 841, 481 N.Y.S.2d 40, 43 (1984), cert. denied sub nom. Committee on Professional Standards v. Von Wiegen, 105 S. Ct. 2701 (1985); Koffler, 51 N.Y.2d at 149, 412 N.E.2d at 933, 432 N.Y.S.2d at 877-78. A letter or a telegram from an attorney offering legal services requires no immediate response. The

consumer can give the communication careful consideration and make a reasoned decision about selecting a lawyer.

In-person contact may also provide consumers with truthful, nondeceptive information that will help them select a lawyer. As the Supreme Court stated in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 457 (1978), in-person contacts can convey information about the availability and terms of a lawyer's legal services and, in this respect, serve much the same function as advertising.

We recognize that abuses may result from in-person solicitation by lawyers. Injured or emotionally distressed people may be vulnerable to the exercise of undue influence when face to face with a lawyer, as the Supreme Court reasoned in Ohralik, 436 U.S. at 465. We do not believe, however, that this justifies a broad prohibition on all in-person solicitation. The Federal Trade Commission considered the concerns that underlie the Ohralik opinion when it decided 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). After weighing the possible harms and benefits to consumers, the FTC ordered the AMA to cease and desist from banning solicitation, but permitted it to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence.

In-person solicitation by lawyers in many instances does not involve coercion or the exercise of undue influence. Lawyers often encounter prospective clients at meetings of political and business organizations and at social events. Indeed, many lawyers traditionally have built their law practices through such contacts. Under such circumstances, the possibility of abuse seems minuscule. Similarly, lawyers present speeches and seminars to prospective clients that establish goodwill and help attendees to understand the law and identify situations in which they might need a lawyer. 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. Since lay persons might find aggressive solicitation to be offensive, lawyers have an incentive not to engage in such solicitation.

Telephone solicitation similarly can convey useful information to consumers, and it may present even less risk of abuse than does in-person solicitation. In most circumstances, telephone solicitation appears unlikely to result in consumer harm. Consumers are accustomed to telephone marketing. They receive calls from persons offering the sale of various goods and

services, conducting surveys about products and services, seeking contributions to charities, and requesting support for political candidates. Consumers can easily terminate offers of legal services communicated by telephone.

Thus, we oppose the proposed ban on solicitation. We would not oppose more limited regulation directed at actual abuses. For example, we believe it would be appropriate for the Court to prohibit false or deceptive solicitation[14] 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 Court may wish to prohibit solicitation involving, in the language of the comment to proposed Rule 7.3, "undue influence, intimidation, [or] overreaching." If the Court concludes that such a prohibition is necessary, we urge that its terms be interpreted narrowly. Some licensing boards and private associations in other professions have interpreted these or similar terms broadly and have applied them to ban solicitation under circumstances that pose no danger of abuse. So long as these terms are interpreted fairly and objectively,[15] such a provision would adequately protect consumers and simultaneously allow them to receive helpful information about legal services.

Proposed Rule 7.4: Communication of Field of Practice

Proposed Rule 7.4 and its accompanying comment would prohibit the use of the term "specialist" in making truthful claims that an attorney has developed skills or focused his or her practice on a specific area of the law. The use of this term, however, may be the clearest, most efficient way to communicate such information. We are unaware of any evidence supporting the comment's conclusion that the term "specialist" "has acquired a secondary meaning implying formal recognition as a specialist . . . in accordance with procedures in the state

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[14] Proposed Rule 7.1 already prohibits false or deceptive communications.

[15] 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 in-person contact. As noted above, written communication seems to present less danger of coercion or undue influence than telephone or in-person solicitation. Telephone solicitation may also present less potential for abuse than in-person solicitation because telephone calls are easier to terminate than face-to-face conversations.

where the lawyer is licensed to practice." Because West Virginia has no formal program for the certification of "specialists," it seems unlikely that the claim that one is a specialist will be interpreted by lay persons as implying that a lawyer has obtained formal recognition or certification as a specialist from the state.

The proposed rule also prohibits an attorney from merely implying that he or she is a specialist. This part of the rule could be interpreted to prohibit a wide variety of truthful statements about experience and special training. For example, a true statement that an attorney is a member of an organization of trial lawyers might be interpreted by some as an implied claim of specialization, yet such a statement can benefit consumers by informing them that the attorney has sufficient interest in trial advocacy to join the organization and has access to the organization's training and materials. There are many ways to obtain expertise, and information that an attorney has special experience or skills in a particular field is clearly useful to consumers needing help in that field. Nor do we believe that advertising as a "specialist" would create an unjustified expectation about the results that a lawyer can achieve, any more than identifying oneself as a surgeon generates an expectation that every procedure that the surgeon performs will be a success. We recommend that the Court remove all prohibitions against truthful, nondeceptive claims, express or implied, that a lawyer is a specialist.

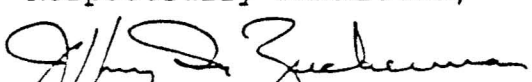
Conclusion

While the proposed Rules of Professional Conduct of the West Virginia State Bar would benefit consumers by relaxing certain existing restrictions, they nonetheless may injure consumers by imposing unnecessary restrictions on price competition, referrals and associations, potentially more efficient forms of practice, and dissemination of information about legal services. We urge that the Court eliminate unnecessary restrictions on competition among attorneys by: (1) clarifying in the commentary to proposed Rule 1.5(a)(3) that only fees that are so high as to suggest a breach of the fiduciary duty to the client would be unreasonable; (2) deleting proposed Rule 1.5(e)(1) in order not to discourage attorney referrals and associations of attorneys in different firms for particular cases; (3) eliminating the restrictions in proposed Rule 5.4 on practice with nonlawyers; (4) modifying proposed Rule 7.1 to make clear that truthful, nondeceptive endorsements and success and experience claims are permitted, and to require only that an attorney have a reasonable basis for any material, objective claims; (5) deleting proposed Rule 7.2(a), and modifying proposed Rule 7.2(c) to allow the payment of

referral fees to attorneys and the use of for-profit referral services; (6) deleting proposed Rule 7.3 and adopting instead more limited restrictions on solicitation; and (7) altering proposed Rule 7.4 to allow express and implied claims of specialty.

We hope that this letter will be of assistance in pointing out ways in which particular rules may restrict competition and injure consumers, and we appreciate having had the opportunity to present these views.

Respectfully submitted,



Jeffrey I. Zuckerman
Director