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UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
DALLAS REGIONAL OFFICE

V 710018

**COMMISSION AUTHORIZED**  
Office of the Regional Director

July 29, 1991

Rose Marie Alderete  
Clerk of the Supreme Court  
State of New Mexico  
P.O. Box 848  
Supreme Court Building  
Santa Fe, NM 87504-0848

Dear Ms. Alderete:

The staff of the Federal Trade Commission is pleased to respond to the request from the New Mexico Supreme Court for comments on the proposed amendments to the New Mexico Code of Professional Conduct.<sup>1</sup> These amendments would generally establish more restrictive standards than now exist in the areas of attorney advertising and client solicitation. We believe that several of these proposals may restrict the flow of truthful and useful information to consumers, and thus impede competition or increase costs, to a greater extent than is necessary to achieve the consumer benefits envisioned by the drafters of the amendments.

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. We then present a statement of our general conclusions. 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) self-laudatory statements and representations of quality; (2) claims that cannot be factually substantiated; (3) solicitation in personal injury cases; and (4) a caution to consumers against exclusive reliance on advertising. This comment takes no position on other proposed amendments.<sup>2</sup>

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<sup>1</sup> These comments are the views of the staff of the Dallas Regional Office and the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

<sup>2</sup> We recognize that the deadline for submitting comments was July 1, 1991. However, it is my understanding based upon our conversation that these FTC staff comments will be considered by the Court if they are submitted before the Court takes final action.

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 acts or practices in or affecting commerce.<sup>3</sup> Pursuant to this statutory mandate, the Commission and its staff seek to encourage competition among members of the licensed professions to the maximum extent compatible with other legitimate goals.<sup>4</sup> 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.<sup>5</sup>

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<sup>3</sup> 15 U.S.C. Sec. 41 et seq.

<sup>4</sup> 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 State Bar of Arizona, submitted to Bruce Hamilton, Executive Director, State Bar of Arizona (April 17, 1990); Comments of the Federal Trade Commission Staff on the Rules of Professional Conduct of the Florida Supreme Court, submitted to William 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).

<sup>5</sup> 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)

General Conclusions

Our experience in this area confirms that advertising informs consumers of options available in the marketplace, and encourages competition among firms seeking to meet consumer needs. And, while these procompetitive functions of advertising can be significant regardless of a firm's size or age, they may be especially important in facilitating the entry of new firms, enabling 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 professional services tend to be lower where advertising exists than where it is restricted or prohibited.<sup>6</sup> 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.<sup>7</sup> These relationships among price,

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-- accords with the reasoning of recent Supreme Court decisions involving professional regulations. See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990) (holding that state's total prohibition of attorney's use on letterhead of statement of bona fide specialty certification violates the First Amendment); Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988) (holding that nondeceptive 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) (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 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).

<sup>6</sup> 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).

<sup>7</sup> 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, in Frech, ed., Regulating Doctors' Fees (1990); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

quality, and advertising have been found to exist in the provision of certain legal services as well as in the provision of other professional services.<sup>8</sup>

This is not, of course, to say that advertising is invariably benign. As noted by the State Bar Task Force that drafted the proposed rules, advertising 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 Supreme Court of the State of New Mexico should impose restrictions on advertising only if those rules are narrowly tailored to prevent unfair or deceptive acts or practices, or otherwise to serve consumers.<sup>9</sup>

The remaining sections of the letter will apply these general principles to the proposed Rules of Professional Conduct.

Restrictions on Advertising Content: Rule 16-701 B.(4), (9), and (10)

The proposed rules would prohibit "self-laudatory" statements, claims concerning "the quality of legal services," and any claims that cannot be factually substantiated. As discussed below, while these categories of advertising could be employed to deceive consumers, each of the prohibitions could also inhibit the provision of truthful and useful information. They may thus be unnecessarily broad.

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<sup>8</sup> See Jacobs et al., Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); 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); Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979).

<sup>9</sup> The published comments of the State Bar Task Force that drafted the proposed amendments themselves recognize the importance of not "impeding the flow of useful, meaningful, and relevant information to the public," while also noting the State's concern with "protecting the public from false, deceptive, or misleading advertisements by lawyers." The reservations we note concerning the Bar's proposals do not arise from disagreement with these stated concerns, but rather as different judgments as to how best to balance these principles.

A. Representations of Quality and Self-Laudation: Rule 16-701 B.(4) and (10)

On their face, these proposed rules would apparently ban all assertions relating to the quality of services offered other than those expressly permitted by other, narrower rule provisions.<sup>10</sup> Many instances of ordinary, non-deceptive, and useful advertising could thereby be prohibited. Notably, most advertisements are self-laudatory to some extent, explicitly or implicitly. And even subjective, self-laudatory assertions of the quality of services offered, though understood by consumers as "puffery" in some part, can also convey information of some value -- if only that the firm believes that, for example, courtesy and attentiveness are particularly important aspects of the delivery of legal services to the public. A ban of this nature may also harm consumers by affecting the incentives that shape lawyers' conduct of their practices. Without the ability to call attention to subjective features as desirable aspects of his or her practice, the incentive to provide them is likely to be reduced.

We recognize that these rules may actually be intended to prohibit only a limited class of overreaching and potentially misleading claims on which consumers could be expected to place serious reliance, such as claims concerning an attorney's ability to secure relief for clients or other indicia of the relative quality of a lawyer's work product.<sup>11</sup> If so, the Court might wish to rely instead on a prohibition of quality claims whose content would suggest that they are supported by objective substantiation, when in fact they are not. Thus, the Court might consider deleting Rules 16-701 B.(4) and (10) entirely and recasting Rule 16-701 B.(9)'s substantiation provision (as discussed below) to secure this objective. This approach could alleviate the chilling of potentially useful communications that the present language may entail.

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<sup>10</sup> See, e.g., Rule 16-701 A.(3) through (5), and Rule 16-702 D generally. We assume that these specific enumerations of permissible quality-related claims take precedence, as a matter of rule interpretation, over the broad prohibitions found in Rule 16-701 B. If so, a firm could advertise, for example, that it accepted credit card payment and offered fixed fees for specific services (as long as it included the seemingly redundant disclosure that the fees were for those specific services); but it is not clear that the firm could characterize the credit-card option as "convenient," or the fees as "low" or otherwise advantageous without running afoul of the 16-701 B prohibitions.

<sup>11</sup> This intent also seems apparent in, for example, Rule 16-701 A.(3) and (4).

B. Claims that Cannot be Factually Substantiated: Rule 16-701 B.(9)

The proposed rules would also preclude advertising claims that "cannot be factually substantiated." As suggested above, however, some claims, such as that the firm provides "friendly," "diligent," "prompt," or "convenient" service, while probably not susceptible to objective substantiation, may nonetheless communicate useful information, indicating qualities that the firm seeks to emphasize in its practice. In this regard, the Court may wish to distinguish between those claims that imply, by their content, the existence of objective substantiation, and those that do not. Only the former should be subjected to the requirement that the advertiser actually possess the implied substantiation, or refrain from making the claim.

Solicitation in Personal Injury Cases: Rule 16-701 C.(3)

The proposed rule would prohibit all solicitations (written, telephonic, or in-person) directed to an injured person or a relative of an injured person when that solicitation relates to an action for personal injury or wrongful death. Direct solicitation by lawyers, like advertising, can be a useful source of information about a consumer's legal rights and remedies, and also can provide information about the terms and availability of legal services. On the other hand, as the Supreme Court reasoned in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), in-person solicitation in particular may disserve the individual's and society's interest in informed and reliable decisionmaking where it discourages persons needing counsel from engaging in a critical and unhurried comparison of available legal services. Id. at 457. The potential for overreaching is significant when a lawyer, "a professional trained in the art of persuasion," personally solicits a prospective client who may be physically or emotionally overwhelmed by the circumstances giving rise to the need for legal services. Id. at 465.

At least one jurisdiction has adopted a rule more narrowly tailored to address the concerns expressed in Ohralik than the rule proposed here.<sup>12</sup> Nevertheless, a broad ban on at least in-person

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<sup>12</sup> The District of Columbia's Rules of Professional Conduct permit uninvited in-person solicitation so long as: (1) the solicitation does not involve false or misleading statements or claims; (2) the solicitation does not involve the use of undue influence; and (3) the potential client's apparent physical or mental condition would not prevent him or her from exercising "reasonable, considered judgment" when selecting a lawyer. Rule 7.1(b), Rules of Professional Conduct, District of Columbia Court of Appeals, adopted March 1, 1990 (effective January 1, 1991).

solicitation of personal injury victims might be justified if a narrower restriction of this sort would be ineffective -- because, for example, direct solicitation "is not visible or otherwise open to public scrutiny" and, as a result, may be "virtually immune to effective oversight." Id. at 466.<sup>13</sup> As to written solicitations, however, the concerns expressed by the Ohralik Court seem less salient, since the communication may normally be considered at leisure by its target. Thus, the Court may wish to evaluate the sufficiency of a prohibition more narrowly targeted than that presently proposed to address this problem.

Cautioning Consumers Against Exclusive Reliance on Advertising:  
Rule 17-701 F.

Another provision of the new rules would require attorneys who advertise to caution consumers against exclusive reliance on advertising. Proposed Rule 17-701 F. would require that all advertisements contain the following disclaimer: "This is a paid advertisement. The choice of a lawyer should not be based upon an advertisement alone."<sup>14</sup>

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.

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 informed consumer choice. We therefore suggest that you consider modifying the rules to permit a wider range of truthful communications, and to narrow

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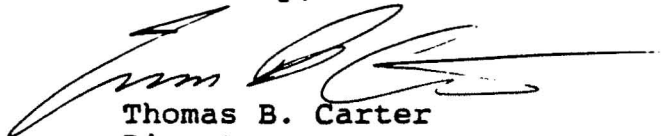
<sup>13</sup> We lack information concerning the prevalence within the Court's jurisdiction of such abusive direct solicitation.

<sup>14</sup> However, proposed Rule 16-701 F.(2) allows attorneys to use print advertisements in the strictly limited business card/legal directory format without the disclosure.

their prohibitions to target only those representations that pose a clear likelihood of consumer injury through material unfairness or deception, or that otherwise violate significant public policy objectives in a way that threatens to cause net injury to consumers.

We appreciate this opportunity to provide our views. Please feel free to contact me if you have any questions, or if we can help in any other way.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tom B. Carter', with a long horizontal flourish extending to the right.

Thomas B. Carter  
Director  
Dallas Regional Office