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BUREAU OF COMPETITION

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

AMHUKI

February 6, 1987

Member  
House of Delegates  
American Bar Association  
750 N. Lake Shore Drive  
Chicago, Illinois 60611

Dear Delegate:

A number of delegates have indicated that the views of the staff of the Federal Trade Commission would be helpful in considering the proposed amendment to Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct. The Federal Trade Commission's Bureaus of Competition, Consumer Protection and Economics<sup>1</sup> are pleased to submit these comments.

The proposed amendment would eliminate the current broad restrictions on mailing letters to persons known to need legal services. We support this aspect of the proposal because it would allow lawyers to provide truthful, nondeceptive information to consumers who may be in the greatest need of information about the availability of legal services. The proposed amendment would not eliminate the existing restrictions on telephone and in-person solicitation, however. Retaining those restrictions appears undesirable because telephone and in-person solicitation may also be used to disseminate truthful, non-deceptive information in circumstances that pose little risk of harm to consumers. Therefore, we urge the House of Delegates to amend Rule 7.3 to prohibit only: (a) uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence; and (b) communications with prospective clients who have made known to the lawyer a desire not to receive communications from the lawyer.

The beneficial effects of advertising are widely recognized. Truthful, nondeceptive advertising communicates information about the individuals or firms offering services that consumers may wish to purchase. Such information helps consumers make purchasing decisions that reflect their true preferences and promotes the efficient delivery of services. Empirical evidence suggests that the removal of restrictions on the dissemination of truthful information about lawyers and legal services will tend

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<sup>1</sup> This letter represents the views of the Bureaus, and not necessarily those of the Commission. The Commission has, however, authorized submission of these comments.

to enhance competition and lower prices.<sup>2</sup> Although some concern has been voiced 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.<sup>3</sup>

More personalized forms of contact may provide many of the same benefits as advertising. Truthful, nondeceptive telephone and in-person solicitation may assist consumers in learning about the availability of legal services. Both telephone and in-person solicitation may have some potential for abuse if a lawyer contacts an injured or emotionally distressed consumer. In other circumstances, however, such adverse effects are unlikely. Therefore, a comprehensive ban on solicitation is unnecessarily broad and may harm consumers.

#### Targeted Mailings

First, we support the proposal to permit targeted mailings. Written communication with prospective clients known to need legal services may help them select a lawyer. Spencer v. Honorable Justices of the Supreme Court of Pa., 579 F. Supp. 980 (E.D. Pa. 1984), aff'd mem., 760 F.2d 261 (3d Cir. 1985). See In re Von Wiegen, 63 N.Y. 2d 163, 470 N.E. 2d 838, 481 N.Y.S. 2d 40 (Ct. App. 1984), cert. denied sub nom. Committee on Professional Standards v. Von Wiegen, 105 S. Ct. 2701 (1985). By targeting 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, 579 F. Supp. at 891, and who may need to have a lawyer take action expeditiously on their behalf. As the court stated in Koffler v. Joint Bar Ass'n, 51 N.Y. 2d 140, 146, 412

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<sup>2</sup> 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). See also Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and 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>3</sup> Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979).

N.E. 2d 927, 931, 432 N.Y.S. 2d 872, 875-76 (Ct. App. 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 Comm'n, 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 than by using other forms of advertising. Targeted mailings may be costly, but because they are sent to consumers who have the greatest need for legal services they are likely to have a higher response rate than other forms of advertising. And consumers who choose to respond to such mailings incur lower search costs because they need not contact numerous lawyers to find one able to handle a legal problem.

Targeted mail advertising, as long as it is truthful and nondeceptive, poses little danger of consumer harm. It is unlikely that written communications will be intrusive or coercive, or involve intimidation or duress. In re Von Wiegen, 63 N.Y. 2d at 170, 470 N.E. 2d at 841, 481 N.Y.S. 2d at 43; Koffler, 51 N.Y. 2d at 149, 412 N.E. 2d at 933, 432 N.Y.S. 2d at 877-78. When a consumer receives a letter in the mail from an attorney offering legal services, no immediate response is

required. The consumer can give the letter careful consideration and make a reasoned decision about selecting a lawyer.<sup>4</sup>

We urge the Delegates to vote in favor of that portion of the proposed amendment that would remove the prohibition of targeted mail advertising.

#### Telephone and In-Person Solicitation

Second, we urge the delegates to amend Rule 7.3 further to permit a wider range of telephone and in-person solicitation. The proposed modification of Rule 7.3 would retain the existing prohibition of telephone and in-person solicitation of prospective clients with whom the lawyer has no family or prior professional relationship. This provision would still restrict the flow of information more than is necessary to protect consumers, because it would preclude truthful, nondeceptive communications in circumstances that pose little or no risk of undue influence.

Like advertising, in-person solicitation may provide information to consumers that will help them select a lawyer. As the Supreme Court observed in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978), in-person contacts can convey information about the availability and terms of a lawyer's or law firm's legal services and serve the same function in this respect as print advertisements.

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 found in Ohralik, 436 U.S. at 465. We do not believe, however, that this is a justification for a broad prohibition on in-person solicitation. The Federal Trade Commission considered the concerns that underlie the Ohralik opinion when it decided American Medical Ass'n, 94 F.T.C. 701 (1979), aff'd sub nom. American Medical Ass'n v. FTC, 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

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<sup>4</sup> See Standing Committee on Ethics and Professional Responsibility and Commission on Advertising, Report to the House of Delegates 6 (1987) for a discussion of the benefits to consumers and the absence of significant potential for abuse arising from written communications. Pages 7-10 of the Report address the constitutional issues, which we do not discuss.

ordered AMA to cease and desist from banning solicitation, but permitted AMA to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence.

In-person solicitation by lawyers usually does not involve the exercise of undue influence. Lawyers encounter potential clients at meetings of political and business organizations and at social events. Indeed, lawyers traditionally have built their law practices through such contacts. If a lawyer discusses his or her legal services with a potential client under such circumstances, no undue influence is likely to be involved. In such a situation, the potential client need not respond immediately, and can subsequently select a lawyer should a need for legal services arise.

Accordingly, we urge that Rule 7.3 be modified to prohibit only uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence. False or deceptive solicitation should also be prohibited. Such rules would protect consumers while, at the same time, allowing them to receive information about available legal services.

Telephone solicitation similarly can convey useful information to consumers, and it may present even less risk of the exercise of undue influence 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 the products and services consumers use, seeking contributions to charities, and requesting support for political candidates. Consumers can easily terminate such conversations if they wish.

Telephone solicitation is in some respects similar to in-person solicitation; a lawyer might be able to persuade a vulnerable person to hire the lawyer. But there are also differences between the two forms of solicitation. A telephone solicitor may be less able to exercise undue influence than an in-person solicitor, and it may be easier for the recipient of a telephone solicitation to terminate a conversation than it is for a potential client who is solicited in person. Certainly, false and deceptive telephone solicitation may appropriately be prohibited. Although the AMA standard may be appropriate, we are not yet ready to conclude that it should be applied to telephone solicitation. But the broad ban on telephone solicitation contained in Rule 7.3 is unnecessarily restrictive.

New Regulatory Standards for Permissible Communications With Prospective Clients

The proposed amendment would also add new regulatory standards for the forms of solicitation that would be permitted, i.e., written communications with prospective clients and in-person and telephone solicitation of family members and former clients. Even these forms of solicitation would be prohibited if: (1) the prospective client has made known to the lawyer a desire not to receive communications from the lawyer; or (2) the communication involves coercion, duress or harassment. The first restriction is reasonable. Whether the second restriction is reasonable depends upon the interpretation of its terms. Licensing boards and private associations in other professions have sometimes interpreted such terms broadly and have applied them to ban solicitation under circumstances that pose no danger of harm to consumers.

Conclusion

We support that portion of the proposed amendment to Rule 7.3 that would permit lawyers to mail information about legal services to consumers known to need such services. We also urge that the House of Delegates further amend Rule 7.3 to prohibit only in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence, and communications with prospective clients who have made known to the lawyer a desire not to receive communications from the lawyer.

Sincerely,



Jeffrey I. Zuckerman  
Director  
Bureau of Competition