COMMISSION AUTHORIZED

Federal Trade Commission

Office of the Regional Director

26 Federal Plaza, 22nd Fl.
New York, New York 10278
(212) 264-1200

I V880004

November 9, 1987

Harold L. Rubenstein, Esq.
Secretary
New Jersey Supreme Court's Committee
on Attorney Advertising
Administrative Office of the Courts
Hughes Justice Complex - C.N. 037
Trenton, New Jersey 08625

Dear Mr. Rubenstein:

The Federal Trade Commission staff is pleased to submit these comments regarding the Rules of Professional Conduct governing advertising by lawyers in New Jersey.[1] We understand that the Committee on Attorney Advertising is assessing the likely effect of these rules on the availability of information to consumers and on the cost and quality of legal services. We also understand that, based on this evaluation, the Committee may recommend modification of the rules to the New Jersey Supreme Court.

In this letter, we focus on Rules of Professional Conduct ("RPC") 7.1 through 7.5. These rules cover advertising, communications regarding a lawyer's services, personal contact with prospective clients, referrals and multi-disciplinary practice, communication of fields of practice, and use of firm names and letterheads. We are concerned that some of the rules may harm consumers by restraining price and service competition, discouraging referrals and associations between attorneys, restricting the development of innovative and efficient forms of legal practice, and unnecessarily limiting the information available to consumers. These restrictions do not appear to have countervailing benefits that outweigh these undesirable effects.

---

[1] This letter presents the comments of the Federal Trade Commission's New York Regional Office and the Bureaus of Competition, Consumer Protection, and Economics. The views expressed are not necessarily those of the Commission or of any individual Commissioner, although the Commission (Commissioners Bailey and Azcuenaga dissenting) has voted to authorize the presentation of these comments to you.

As discussed in more detail below, the Committee may wish to recommend that the New Jersey Supreme Court: (1) clarify and amend RPC 7.1(a) to permit truthful, non-deceptive endorsements and experience, success, and comparison claims, as well as non-deceptive communications regarding legal fees; (2) clarify and amend RPC 7.2(a) to permit advertising in any media and to ensure that attorneys will not be unnecessarily deterred from advertising; (3) modify RPC 7.2(c) to allow the payment of referral fees to attorneys and the use of for-profit referral services; (4) modify RPC 7.3(a), (b), and (c) to remove unnecessary restrictions on solicitation; (5) clarify or modify RPC 7.3(d) so as not to discourage referrals and associations of attorneys in different law firms for particular cases; (6) eliminate the restrictions in RPC 7.3(e) on practice with non-lawyers and on lawyers influencing the professional judgment of other lawyers; (7) modify RPC 7.4 to allow non-deceptive claims of certification and express and implied claims of specialty; (8) modify RPC 7.5 to allow the use of non-deceptive trade names and to eliminate unnecessary requirements associated with firm names and letterheads.

We note that the Committee has been authorized by the New Jersey Supreme Court to render advisory opinions and formulate guidelines with respect to the rules. In this connection, we further suggest that the Committee consider adopting the least restrictive interpretation of the rules consistent with facilitating truthful, non-deceptive advertising and fair competition.

Interest and Experience of the Federal Trade Commission

For more than a decade, the Commission's staff has conducted investigations concerning the effects of restrictions on the business practices of state-licensed professionals, including lawyers, accountants, dentists, physicians, non-physician health-care providers, and others. The goal of the Commission has been to identify and seek the removal of restrictions that prevent professionals from advertising or providing services desired by consumers without providing countervailing benefits. We believe that the existing Rules of Professional Conduct governing promotional activity by lawyers in New Jersey may result in such adverse effects.

The Benefits of Advertising

The beneficial effects of advertising and promotion are widely recognized. Truthful, non-deceptive promotional activity communicates information about firms offering the services that consumers may wish to purchase. Such information helps consumers make decisions that reflect their true preferences and promotes the efficient delivery of services. Before advertising by attorneys was permitted, many Americans may have failed to obtain the services of an attorney, even when they had serious legal problems,[2] because they feared that legal representation would cost too much or because they were unable to locate a lawyer sufficiently skilled at handling their particular problems.[3] 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.[4]

Because the free flow of commercial information is vital to a market economy, restrictions on that flow may undermine economic efficiency. The use of advertising has the effect of facilitating entry into the different markets for professional services and ultimately leads to lower prices. See American Medical Association, 94 F.T.C. 701, 1005 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). In the legal profession, advertising is most

---

2 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).

3 Id. at 228, 231.

4 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) [hereinafter Consumer Access to Legal Services].

often used by newly-licensed lawyers who lack the client base of established firms.[5] The effective use of advertising helps firms in the legal profession to achieve a sufficient level of output to exploit economies of scale and lower production costs, such as through the use of computerization, standardized forms, and specialization.[6]

Although 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.[7]

RPC 7.1: Communications Concerning a Lawyer's Service

We fully endorse the general view embodied in RPC 7.1 that false and deceptive communications should be prohibited. Nonetheless, as set forth below, we believe that the specific definition of "false or misleading" contained in the rule may prohibit many truthful, non-deceptive communications, which would limit the benefits discussed above.

RPC 7.1(a)(2): "Unjustified Expectations"

RPC 7.1 defines a communication as false and misleading if it "is likely to create an unjustified expectation about

---

5 See McChesney, Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers, 134 U. Pa. L. Rev. 25, 86-92 (1985) (detailing surveys showing that advertising is most often used by smaller firms and younger attorneys).

6 See Consumer Access to Legal Services, supra note 4, at 63-65 (describing operations of high volume legal clinics that advertise). Moreover, firms that are unable to advertise are forced to expend greater resources on less efficient forms of promotion, and thereby increase production costs. See McChesney, supra note 5, at 66-80.

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

results the lawyer can achieve . . . ." An identical provision is contained in ABA Model Rule 7.1. The ABA comments with respect to the provision state: "The prohibition in paragraph (b) of statements that may create 'unjustified 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 record in obtaining favorable verdicts, and advertisements containing client endorsements."

The comments suggest that information about past results "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. Information that is less than complete may, nonetheless, not be misleading as long as it does not omit material facts. As the United States Supreme Court observed in Bates v. State Bar of Arizona, 433 U.S. 350, 374 (1977), "it 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."

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 provides the general public the same information that is available to users of legal directories. Advertising in which clients discuss their reasons for satisfaction with a law firm conveys even more information than do legal directories. 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. 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. The Committee may wish to consider recommending modifications of RPC 7.1(a)(2) that would make it clear that communications containing truthful and non-deceptive endorsements, testimonials, and statements of attorneys' prior results are permitted.

RPC 7.1(a)(3): Comparative Communications

RPC 7.1(a)(3) provides that a lawyer shall not compare "the lawyer's service with other lawyers' services." This broad prohibition precludes communication of information that accurately compares the characteristics of competing lawyers and law firms. If such comparative information were permitted, it 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, either about the advertiser or a competitor, can be harmful. However, such statements already are prohibited by RPC 7.1(a)(1).[8]

We note that ABA Model Rule 7.1(c) would only prohibit comparative claims where the comparison cannot be "factually substantiated." We believe that the ABA's less restrictive

---

[8] RPC 7.1(a)(1) defines a communication as false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

provision is still unnecessarily broad, and that it may in fact preclude or discourage useful comparative information.[9] In this connection, we recognize that some comparative statements may not be readily amenable to empirical verification. Examples of such claims are "friendlier service" or "more convenient hours." Even though such statements are not readily subject to verification, however, they may be truthful and non-deceptive, and indicate qualities that may be important to consumers. Moreover, such communications can attract consumers' attention to the advertising attorney. Even communication that is designed only to attract attention can inform consumers of a lawyer's presence in a community, which is itself useful information.

A requirement of factual substantiation for all such statements would 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.[10] However, subjective claims do not similarly imply that substantiation exists, and so may be made without it.

---

[9] In a 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 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) (1987).

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

Accordingly, the Committee may wish to recommend that the prohibition on comparative claims be removed, and replaced by requirements that an attorney have a reasonable basis for any material objective claims, and that such claims be truthful and non-deceptive.

RPC 7.1(a)(4): Fee Advertising

The current Rule limits permissible communications relating to legal fees, and may essentially prohibit communications concerning reduced or promotional prices. For example, RPC 7.1(a)(4) appears to preclude lawyers from making non-deceptive offers of short-term "reduced fees" during periods when they have extra time. A tax attorney might want to offer reduced fees on tax preparation for a few weeks prior to the busiest tax season; an attorney might want to offer for a week a "special low price" on preparation of a will. A new attorney might want to announce the opening of his or her practice with "special introductory fees." Under RPC 7.1(a)(4) attorneys may not be permitted to communicate such information to consumers. They may be precluded or deterred from communicating and employing promotional prices, even where such activity would facilitate efforts to enter the legal market or to introduce new and innovative services.

The Supreme Court has characterized price competition as the "central nervous system" of the marketplace,[11] with price restraints generally regarded as having a "pernicious effect on competition."[12] In this connection, several recent Court decisions articulated policy considerations that appear relevant to the Committee's deliberations. The Court has rejected efforts to justify restrictions on price competition and price advertis-

---

[11] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940).

[12] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

ing by professionals on the ground that such activity is "unprofessional."[13] In its Virginia State Board of Pharmacy decision,[14] the Court, while recognizing the state's authority to protect the public health and welfare, struck down restrictions on prescription drug price advertising by pharmacists.[15] In Bates v. State Bar of Arizona,[16] the Court found that the advertisement of "very reasonable" prices for legal services was not misleading and was within the scope of First Amendment protection. In so ruling the Court made reference to empirical

---

13 See, e.g., National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (ethical restriction on competitive bidding by engineer held anticompetitive "on its face"); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (state supreme court prohibition on attorney advertising condemned); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (restrictions on prescription drug price advertising by pharmacists unjustified).

14 425 U.S. 748 (1976).

15 The contention that price advertising by pharmacists was "unprofessional" and that it might prompt consumers to shop around, thus injuring the pharmacist-customer relationship, was rejected as a basis for depriving consumers of valuable price information. As the Supreme Court stated, the better alternative to this "highly paternalistic approach" is to assume that price information

> is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer.

425 U.S. at 770.

16 433 U.S. 350 (1977).

studies that suggest a strong association between price advertising for certain products and lower retail prices.[17] As noted previously, a recent FTC study resulted in "convincing support for the proposition that greater flexibility to engage in non-deceptive advertising will be associated with lower prices for consumers of legal services."[18]

We suggest that the Committee exercise caution before placing restrictions on price information. Of course, it is well recognized that communications relating to fees that are false or misleading, such as "bait and switch" tactics or similar deceptive practices, should be prohibited because they would harm consumers. RPC 7.1(a)(1) contains such a prohibition. RPC 7.1(a)(4), however, precludes truthful, non-deceptive communications relating to legal fees. This restriction is detrimental to consumers to the extent that it deters lawyers from communicating useful price information and from offering reduced fees.

RPC 7.2: Advertising

Rule 7.2, which regulates attorney advertising, was the subject of the New Jersey Supreme Court's decision in In re Felmeister & Issacs, 104 N.J. 515 (1986). In Felmeister the Court (a) unanimously decided to retain a prohibition against the use of drawings, animations, dramatization, music or lyrics in television advertising, while rejecting this prohibition for non-television advertising; and (b) unanimously rejected a requirement that all attorney advertising be "dignified." A majority of the Court went on to adopt a requirement that all attorney advertising be "predominantly informational." Although the majority decision by Chief Justice Wilentz emphasized that this formulation "is tentative and subject to change based on future experience," 104 N.J. at 518, the Court expressed the view that this standard would serve the state's interest in "assuring that citizens' decisions about their need for counsel and their selection of counsel are rationally rather than emotionally

---

17 Bates, 433 U.S. at 377. The Court cited the following authorities: J. Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976); Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. Law & Econ. 337 (1972).

18 Consumer Access to Legal Services, supra note 4, at 126.

determined." 104 N.J. at 535. A dissent by Justice Handler rejected this "predominantly-rational-informational" standard as unworkable, unnecessary, unwise and constitutionally suspect.

We agree with the Court's rejection of the "dignity" standard, but we question the decision to restrict television advertising. We also question the wisdom of the predominantly informational standard for many of the same reasons expressed by the dissent. We discuss below these and other aspects of RPC 7.2 regarding advertising.

RPC 7.2(a): Permissible Advertising Media and Restrictions Relating to Television

RPC 7.2(a) permits, subject to certain qualifications, attorney advertising through "public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through mailed written communication." Attorneys may interpret the list of media in RPC 7.2(a) as exclusive and conclude that advertising in media not listed is prohibited. If so, the listing of specific media that may be used in advertising could discourage innovation in ways not intended, 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 does not appear to anticipate changing technologies. Thus, for example, the rule might be 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, the Committee may wish to consider recommending clarification or modification of RPC 7.1(a) to avoid this problem.

Pursuant to the Felmeister decision, RPC 7.2(a) continues to prohibit the use of drawings, animations, dramatization, music, or lyrics in television advertising. We believe this prohibition may deprive consumers of the benefits of advertising techniques that have proven effective in marketing goods and services. The current prohibition would preclude a vast array of useful television advertising techniques. A musical slogan or an image of animated characters may, for instance, enhance consumer retention of information in an advertisement. In addition, it can serve as a unifying theme for a firm's advertising campaign, linking the firm's various advertisements in the consumer's mind, and thereby increasing the impact of

advertising.[19] A musical soundtrack may draw and retain consumers' interest in an advertisement. A dramatization may convey an image to which consumers in need of legal assistance can relate.

Any danger to consumers that might result from the prohibited advertising appears to be largely speculative. The desirability and need for bringing information to consumers regarding the availability of legal services is, on the other hand, well-documented.[20] Accordingly, we believe the existing restrictions on television advertising are contrary to consumers' interests.

RPC 7.2(a): "Predominantly Informational" Standard Replaces "Dignity" Standard

In replacing the "dignity" standard with a "predominantly informational" standard, the New Jersey Supreme Court in Felmeister stated that "if necessary, we may adopt the dignity standard in the future." 104 N.J. at 548. Advertising that is not false or deceptive, even though viewed by some as lacking in dignity, nonetheless may assist consumers in choosing legal services that best suit their needs. For example, some lawyers consider the advertisement of holiday discounts on legal services to be undignified. However, an advertisement offering a reduced price on legal services provides information that consumers concerned about the cost of legal services might find very useful.

Whether an advertisement is "dignified" is a matter of the viewer's individual standards. It is virtually impossible to write a definition of "dignified" that will encompass every consumer's definition. As the ABA states in its comment to Model Rule 7.2, "[q]uestions of effectiveness and taste in advertising are matters of speculation and subjective judgment." Last year, the ABA's Commission on Advertising considered a proposal to issue guidelines on dignity in lawyer advertising. The Commission rejected the proposal because of the difficulty of defining dignity. Attorneys may not be able to determine whether a particular advertisement could be considered undignified and may therefore abandon a proposed advertisement even though it would be allowed.

---

19 L. Andrew, Birth of A Salesman 34 (1980).

20 See, e.g., discussion of "The Benefits of Advertising" at p. 3, supra, and materials cited therein.

The "predominantly informational" standard embodied in RPC 7.2(a) may be considered less ambiguous than the dignity standard, but it too may prevent or discourage useful, non-deceptive advertising. The New Jersey Supreme Court in Felmeister nonetheless adopted this standard based on what it considered an overriding state interest in ensuring that consumers make "rational" decisions in selecting legal counsel. We believe that the drawbacks associated with the "predominantly informational" standard far outweigh any benefits. The general ambiguity of the "predominantly informational" standard may chill useful, non-deceptive advertising, including advertising that may convey some, albeit not a "predominant" amount of information. In addition, it is recognized that the aspects of advertising that may be regarded by some as non-informational may be most effective in reaching some consumers who might not otherwise obtain needed legal services.

RPC 7.2(c): Lawyer Referral Services

RPC 7.2(c) appears to preclude the use of for-profit lawyer referral services. 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. For-profit referral services may be able to provide more useful information to consumers than non-profit bar association referral services, which may be obliged to give referrals on an equal basis to all attorneys.

RPC 7.2(c) also appears to prohibit the payment of fees to lawyers who refer prospective clients to other lawyers. This prohibition is discussed below in connection with RPC 7.3(d), which also prohibits referral fees.

RPC 7.3: Personal Contact with Prospective Clients

RPC 7.3 regulates direct client solicitation and matters that may influence a lawyer's independent judgment. As discussed below, several aspects of this rule appear to be unduly restrictive and may preclude or inhibit useful contacts with prospective clients and various procompetitive practices.

RPC 7.3(a) and (b): Direct Solicitation

RPC 7.3(a) permits direct solicitation of prospective clients subject to restrictions set forth in RPC 7.3(b). The restrictions, which are intended to prevent abusive solicita-

tions, preclude certain written and other contacts with prospective clients. Although RPC 7.3 reflects the benefits of allowing communications between lawyers and potential clients, the restrictions in RPC 7.3(b) appear to be overbroad. Specifically, and as discussed further below, we believe that the rule may not make clear and appropriate distinctions between written, telephone or in-person solicitation. The rule also contains problematic and ambiguous standards which may be subject to unduly restrictive interpretations. In general, we believe that RPC 7.3(b) may deprive consumers of 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.

Written communications from lawyers may provide useful information to prospective clients. For example, 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 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. See also Adams v. Attorney Registration and Disciplinary Commission, 801 F.2d 968, 973 (7th Cir. 1986), and 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).

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.

Telephone solicitation can also provide useful information, and it may present less risk of harm to consumers than does in-person solicitation. We recognize, of course, that telephone sales can be used to injure consumers. However, a simple prohibition of false or deceptive telephone solicitation would seem adequate to protect consumer interests.

In-person contact may also provide consumers with truthful, non-deceptive information that will help them select a lawyer. As the Supreme Court noted 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.

It is recognized, nowever, 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. 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 all solicitation, but permitted it to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence.

In this connection, RPC 7.3(b)(1) prohibits solicitation where "the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer." This rule would appropriately preclude uninvited in-person solicitation where the risk of abuse is substantial. However, the rule appears to be overbroad in that it covers all types of solicitation, including written communication as well as in-person contact, without distinction. Thus, it may be interpreted to preclude or discourage types of solicitation where the danger of undue influence is likely to be minimal and would ordinarily be outweighed by the benefits of providing truthful, non-deceptive information to consumers who may be in need of legal services.

In summary, we believe that the current rule governing solicitation could be interpreted to preclude or discourage useful forms of communication and contact, and that the objective of the rule - to prevent abusive solicitation - would best be served by less restrictive provisions. Accordingly, we believe it would be appropriate for the rule to prohibit: (1) false or deceptive solicitation (RPC 7.1 would appear to cover such contact); (2) solicitation directed to any person who has made known that he or she does not wish to receive any communication

from the lawyer (covered by RPC 7.3(b)(2); and (3) uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence.

In addition, the Committee may wish to recommend retention of the rule prohibiting solicitation involving "coercion, duress, or harassment" (contained in RPC 7.3(b)(3)), provided this provision is not interpreted to prohibit solicitations under circumstances that pose no danger of harm to consumers. We note, however, that 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,[21] such a provision would adequately protect consumers and simultaneously allow them to receive helpful information about legal services.

RPC 7.3(c) through 7.3(f): Referral Fees; Preservation of Professional Independence

RPC 7.3(c) through (f) regulate a lawyer's association with other lawyers as well as with non-lawyers. It also regulates activity to facilitate the use of a lawyer's services, including the payment of referral fees. The apparent objective of these provisions is to guard a lawyer's independent professional judgment against improper influence. We believe, however, that certain of these rules, particularly RPC 7.3(d) and (e), are unnecessary and may preclude or discourage activity that is procompetitive and useful to consumers.

RPC 7.3(d) prohibits the payment of referral fees except for usual charges paid to a bar association-approved referral service. Two justifications have been offered to support such restrictions on referral fees. First, it has been argued that permitting referral fees would tempt some lawyers to refer legal matters to the lawyer who pays 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,

---

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

however, the referring lawyer typically receives one-third of any fee recovered by the lawyer who handles the case.[22] Thus, it is probable that the referring attorney will select the lawyer who he or she believes is the most likely to recover the largest award for the prospective client; to this extent, the attorney's and the client's interests are the same. Even when no contingency fee is involved, a lawyer referring a client to a specialist has every incentive to make suitable 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 a case is referred will increase the total fee paid by the client in order to recoup the referral fee. This would generally not appear to be a valid concern. To the extent that some clients are price-sensitive, the risk of losing these clients would likely constrain such fee increases. 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, and their greater familiarity with the subject, experts may be able to reduce costs and pass on such savings to clients.

RPC 7.3(d) could also be problematic if it were interpreted to preclude a division of fees between attorneys. Such division of fee arrangements, however, can provide incentives for attorney referrals and other associations that are desirable for the client and beneficial for consumers generally. Such arrangements may benefit a client in cases in which neither attorney alone could serve the client well. For example, one lawyer may not have sufficient time, resources, or expertise to handle all aspects of a particular client's case. An attorney from Firm X might serve as chief trial attorney, while his or her co-counsel from Firm Y might perform the bulk of the pretrial preparation. The Committee may wish to consider recommending clarification or modification of RPC 7.3(d) to the extent that it may be interpreted to prohibit or discourage such useful arrangements.

RPC 7.3(e) may be interpreted to prohibit a lawyer from forming a partnership or sharing legal fees with a non-lawyer, except under limited circumstances, or from practicing in an organization authorized to practice law for a profit if a non-lawyer owns an interest in the organization or is an officer or

---

22 Referral Fees: Everybody Does It, But Is It OK?, A.B.A.J., Feb. 1985, at 40.

director. If so interpreted, this rule may 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 non-legal aspects of specific problems. The rule also would appear to prohibit 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.

The FTC has examined similar restrictions on associations between physicians and non-physicians and concluded that they restrain competition unnecessarily. 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 Commission found that the AMA's ethical restrictions on the formation of professional associations with non-physicians 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 non-physician influence over medical procedures or consumer deception about the skills of a non-physician partner or associate.

The staff of the FTC'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.[23] Restrictions on such business associations impede the formation of chain firms and other volume operations and may make it difficult to achieve economies of scale.

In summary, RPC 7.3(e) may be interpreted to limit potentially procompetitive professional ventures, innovative business formats, and perhaps some forms of prepaid legal services.

---

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

RPC 7.4: Communication of Fields of Practice

RPC 7.4 states in part that "when the Supreme Court has designated areas of specialty certification, only those attorneys so certified may advertise that they are specialists in or limit their practices to those areas." RPC 7.4 may be interpreted to prohibit statements concerning a lawyer's skills or training. It also may preclude truthful statements that a lawyer practices only in a certain area of the law.

With regard to claims of certification, clearly, it would be deceptive for an attorney to advertise that he or she is "certified" in an area of law if no certification procedure exists or if the attorney has not obtained certification. Conduct of this sort is already prohibited by the general rule against deceptive advertising. We believe, however, that a lawyer should be able to advertise, without prior approval by the state, any truthful, non-deceptive information about any certification that he or she has obtained. The advertising of certification programs can beneficially provide consumers with facts about an attorney's special skills when certification requirements are reasonably related to assuring proficiency in the subject area certified.

In this connection, we caution against any unnecessary restrictions on the nature of the certifying program or organization. For instance, we are aware that some states have considered requiring that such programs be approved by the state bar, making such approval a prerequisite to claims of certification. Such restrictions could discourage attorneys from taking additional training after law school where it might not lead to certification. It could also restrain the development of bona fide private certifying organizations.[24]

Moreover, attorneys who do not hold a "certification" should nonetheless be permitted to truthfully advertise special skills or training, including claims that their practice focuses on a particular area of law. Unnecessary restrictions on such advertising would not only deprive consumers of useful information, but would also inhibit competition between certified and non-certified attorneys in fields for which a certificate is available. Restrictions that would reduce the number of practitioners who could truthfully bring their special skills to the

---

[24] Use of certificates that are not bona fide, or that are issued by programs not related to improving skills in a subject area, would be prohibited under the rule against "false and misleading" communications.

attention of the public are likely to reduce competition and accordingly raise the cost of legal services in those subject areas.

Certain claims that might be interpreted as implied claims of specialization may also provide consumers with useful information. For example, a true statement that an attorney is a member of an organization of trial lawyers 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.

In summary, consumers could benefit from modification and clarification of RPC 7.4 so that truthful, non-deceptive specialty claims, express or implied, will not be prohibited or discouraged. The Committee may also wish to consider recommending that attorneys who have successfully completed bona fide certification or other training programs be permitted to communicate that fact.

RPC 7.5: Firm Names and Letterheads

RPC 7.5 prohibits the use of trade names by lawyers and law firms except "nonprofit legal aid or public interest law firms." This restriction appears unnecessary and may deprive advertisers and consumers of the benefits of useful and informative trade names.

A trade name is used to identify particular goods or services. Over time, consumers tend to associate the trade name with attributes of the service, such as quality, price, or type of service. In addition, a trade name by itself can convey information, such as location of the provider or field of practice. As long as a trade name is not inherently confusing or deceptive, it may be more effective than traditional firm names in reaching consumers in need of legal services.

RPC 7.5(a) would deprive most lawyers and law firms of the option of using a trade name in New Jersey, even if that name has been successfully developed and used to identify their

practice in other states. This limitation could result in the sacrificing of advertising efficiencies that might result in lower costs and hence permit lower prices for clients.

A law firm may also wish to use more than one name to create separate identities for different offices if each office practices in a different area of the law, provides a different level of service, attracts a different clientele, or is marketed differently. It may be more efficient for a law firm to have different firm names associated with services with different sets of attributes in order to communicate more easily with potential clients through advertising and reputation. For example, one firm name might be used for complex corporate services while another would be used for more routine individual services.

RPC 7.5(a) appears to unnecessarily sacrifice the advantages that may be associated with the use of non-deceptive trade names. Accordingly, the Committee may wish to consider recommending modification of RPC 7.5 to permit the use of such trade names.

RPC 7.5(b) also contains requirements that may have substantial competitive drawbacks. It provides that "[i]n New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey." In addition, if the firm name includes any attorney not licensed to practice in New Jersey, the name of at least one licensed New Jersey attorney responsible for the firm's New Jersey practice must be included in any advertisement, letterhead, or other communication. These requirements may unnecessarily inflate the cost of law firm advertising, especially to the extent that multi-state law firms may face varying state disclosure requirements. Such increased costs may be passed on to the consumers of legal services.

In addition, the required disclosures are likely to distract consumers from the information the firm wishes to convey through its name. On the other hand, it is unlikely that the disclosures will inform consumers about the quality of service that can be expected or about the attorney likely to handle a particular legal problem. The assignment of counsel, and the need for local counsel, will of course depend on the nature of the legal problem. A consumer will learn the identity of the lawyer who will provide the legal services sought when he or she calls or visits the law firm's local office.

Conclusion

Certain features of the existing New Jersey Rules of Professional Conduct could injure consumers by imposing unnecessary restrictions on price competition, referrals and associations, efficient forms of practice, and dissemination of information about legal services. In the interest of eliminating unnecessary restrictions on competition among attorneys we suggest that the Committee consider the specific suggestions discussed herein.

We hope that this letter will aid the Committee's assessment of the likely effect of the rules on the availability of information to consumers and on the cost and quality of legal services. We also hope our comments will assist the Committee in formulating opinions, interpretations, and guidelines regarding attorney advertising. We appreciate this opportunity to present our views. If you have any questions or would like further information regarding these comments, please contact FTC staff attorney Maria Gambale at (212) 264-1207.

Very truly yours,

James M. Giffin
Acting Regional Director