COMMISSION APPROVED

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
ATLANTA REGIONAL OFFICE

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March 31, 1987

Robert G. Esdale
Clerk of the Supreme Court
P. O. Box 157
Montgomery, Alabama 36101

Dear Mr. Esdale:

The Federal Trade Commission staff is pleased to submit these comments concerning proposed amendments to the Code of Professional Responsibility of the Alabama State Bar.[1] Proposed Rules 2-101(D) and 2-112 would restrict lawyers in advertising the fact that they hold a certificate from a professional certifying organization, even if advertising the certification would provide truthful, nondeceptive information to consumers. We believe that such information is generally helpful to consumers in making purchase decisions, and we therefore urge the Court to eliminate these restrictions.

The Federal Trade Commission seeks to promote competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the effects of restrictions on the business practices of professionals, including lawyers, optometrists, dentists, physicians, funeral directors, and others. Our goal is to identify and seek removal of restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

The Clerk of the Court indicated that we may also submit comments on other Code provisions with respect to which we could give a useful perspective. We therefore recommend that the Court:

(1) modify the definition of false and misleading communications in Temporary DR 2-101 (B) and (C) to avoid prohibiting truthful, nondeceptive testimonials, endorsements, statements about a lawyer's experience, and comparisons of particular lawyers and their services;

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[1] This letter represents the views of the FTC's Atlanta Regional Office and the Bureaus of Competition, Consumer Protection, and Economics, and not necessarily those of the Commission. The Commission has, however, voted to authorize the staff to submit these comments to you.

(2) modify Temporary DR 2-102(A) to eliminate the list of approved "public media" that lawyers may use to advertise;

(3) delete the requirement in Temporary DR 2-102(E) that every communication contain a disclaimer as to quality or expertise;

(4) modify Temporary DR 2-103 to eliminate (a) the broad ban on telephone solicitation except for false and deceptive solicitation and solicitation of persons who have expressed their wish not to be contacted and (b) the restrictions on in-person solicitation except for false and deceptive solicitation and solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence or who have expressed their wish not to be contacted;

(5) modify Temporary DR 2-104 to avoid prohibiting truthful, nondeceptive statements about a lawyer's specialty; and

(6) delete Temporary DR 3-102(A) and 3-103(A) and (C)(2) to avoid preventing lawyers from establishing multi-disciplinary practices with other professionals.

I. Temporary DR 2-101(D) and 2-112: Advertising of Certification

Temporary DR 2-101(D) and 2-112(a) prohibit any communication by a lawyer stating that he is certified by an organization unless the General Counsel of the Alabama State Bar has approved advertising of that organization's certification program. Such approval will not be granted under DR 2-112(b) unless the General Counsel finds that the advertising of certification "will provide meaningful information that is not false, misleading, or deceptive, for use of the public in selecting or retaining a lawyer."[2]

We agree that advertising should not be false, misleading, or deceptive. Clearly, it would be deceptive for an attorney to

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[2] Temporary DR 2-112(b) and (c) provide the procedures for approval for advertising of certification. The language of (b) and (c), however, discusses the "approval of certifying organizations." Such language could be interpreted to require the approval of the establishment or existence of certifying organizations. We assume that this interpretation is not intended.

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, but conduct of that sort is already prohibited by the general rule against deceptive advertising. A lawyer, however, should be able to advertise, without prior approval by the state, any truthful, nondeceptive information about any certification that he or she has obtained, regardless of what organization has issued the certificate. The advertising of certification programs can beneficially provide consumers with facts about attorneys' special skills when certification requirements are reasonably related to assuring proficiency in the subject area certified. On the other hand, when certified attorneys are prohibited from truthfully advertising their training and skills, consumers will be deprived of information to help them choose among qualified practitioners who are certified but who cannot advertise such certification. Moreover, consumers could be led to believe erroneously that attorneys are incompetent to handle their legal needs in a particular field. The potential consumer misunderstanding engendered by this rule could lessen competition in fields for which a certificate is available, by reducing the number of practitioners that the public will patronize, and could thereby raise legal services costs in those subject areas.

Temporary DR 2-112 places a restraint on the development of private certifying organizations. Such restraint may also discourage attorneys from taking any training offered by those organizations whose certification programs have not been approved for advertising by the State Bar. The inefficiency and injury to competition would be particularly acute where the requirement of Bar approval for purposes of advertising is not reasonably related to attaining proficiency in the specialized field.[3]

Further, the standard for approval in DR2-112(b), based on whether the advertising of certification provides "meaningful information . . . for use of the public in selecting or retaining a lawyer," is unnecessarily vague. Such a standard requires the General Counsel to determine what kinds of information the public as a whole will find "meaningful" when, in fact, individual consumers may place different values on different kinds of information.

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[3] 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" advertising.

We therefore recommend that the Court eliminate the restrictions in DR 2-101(D) and 2-112 so that lawyers who have taken training programs culminating in receipt of a certificate be allowed to communicate that fact. We also recommend that the Court delete the provision for Bar approval of the advertising of certification programs.

II. 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 attorney, even when they had serious legal problems.[4] 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 to lower prices, thereby improving consumer access to the legal system.[5] 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.[6]

False and deceptive advertising, however, can have significant negative effects on both competition and consumer welfare. Therefore, we fully endorse the view that such

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[4] For example, a nation-wide survey in 1974 by the American Bar Foundation and the American Bar Association found that only 9 percent of the people who had a property damage problem, 10 percent of those with landlord problems, and 1 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).

[5] 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).

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

advertising should be prohibited. We are concerned, however, that Temporary DR 2-101(B) and 2-101(C) may impede the flow of truthful information to consumers without providing any countervailing benefits. Subsection 2-101(B) prohibits communication that:

> Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law.

Similarly, subsection 2-101(C) prohibits communication that:

> Compares the quality of the lawyer's services with the quality of other lawyers' services, except as provided in Temporary DR 2-104.

(a) Temporary DR 2-101(B): Endorsements and Attorney's Results

Temporary DR 2-101(B) could be read to prohibit client endorsements and truthful communications about an attorney's record of favorable verdicts. The ABA committee comments accompanying ABA Model Rule 7.1, from which DR 2-101(B) is derived, suggest that such information is "likely to create an unjustified expectation about results the lawyer can achieve" and should be prohibited. The ABA's interpretation appears to be unnecessarily restrictive and may discourage truthful, nondeceptive communications. For example, consumers may wish to use an attorney's past results as one of several factors to consider in choosing a representative. "[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, 433 U.S. 350, 374 (1977).

We believe the possibility that advertisements containing client endorsements or information about past successes will create unjustified expectations is small and is probably outweighed by the potential benefits of this information to consumers. At the very least, such endorsements may enhance audience attention and retention and, consequently, increase the effectiveness of the advertisement. Many law firms list references and major clients in the Martindale-Hubbell Law Directory. The choice of the listed clients probably reflects a judgment that the representation of a major bank or corporation will suggest to potential clients that the firm can handle complicated legal problems, or cases in which large sums of money may be at risk.

To permit such major clients to endorse in an advertisement that they use a firm's legal services simply gives the general public the same information that is available to users of legal directories. Similarly, when a famous athlete or actor appears in a commercial to say truthfully that he uses a particular firm or attorney, it tells 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.

Of course, many attorneys do not have large corporate or famous individual clients. But we are not aware of any reason to believe that it would be harmful for an average consumer to appear in a commercial and to say truthfully that he received prompt and satisfactory service from a particular attorney. Although many factors other than an attorney's skill can affect the outcome of a case, there is no reason to believe that consumers naively expect that the future will always resemble the past. Accordingly, we urge the Court to delete Temporary DR 2-101(B).

(b) Temporary DR 2-101(C): Comparison Claims

Temporary DR 2-101(C) prohibits any comparison of the quality of a lawyer's services with that of any other lawyer. If the term "quality" is interpreted broadly, comparisons of any kind may be prohibited or, at the least, discouraged. Information that accurately compares the particular qualities of competing law firms, however, may foster improvement and innovation in the delivery of services and may assist consumers in making rational purchase decisions. Indeed, in one sense, such consumer comparisons are the essence of competition.[7] Of course,

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[7] 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 manner as it evaluates all other advertising techniques... [I]nterpretations that impose a higher standard of substantiation for comparative claims than for

comparisons containing false or deceptive statements of fact, either about the advertiser or a rival, provide no benefit to consumers and can be harmful. However, such statements are already prohibited by Temporary DR 2-101(A).

We urge the Court to modify Temporary DR 2-101(C) to require only that an attorney have a reasonable basis for any material, objective claims.

(c) Temporary DR 2-102(A): Permitted Media

We are concerned that attorneys may interpret the listing of permitted media in Temporary DR 2-102(A) as exclusive and conclude that advertising media not listed are prohibited. The list of specific media that may be used in advertising could discourage innovation and the use of novel forms of expression in ways not intended by the Court, especially since the term "public media" is ambiguous. For example, the rule might be interpreted to prohibit sponsorship of museum exhibits or youth sports teams. Moreover, the specificity of the rule fails to anticipate changing technologies. If "written communication" is interpreted to refer only to physically permanent writings, advertising in computer bulletin boards, on-line directories, or similar media may be prohibited. We urge the Court to delete Temporary DR 2-102(A).

(d) Temporary DR 2-102(E): Disclaimer

Temporary DR 2-102(E) requires inclusion of a disclaimer in all advertisements that no representation is made about the quality of services or the expertise of the lawyer. The value of advertising is to help consumers to make judgments about quality and expertise, which will assist them in choosing a lawyer. As long as truthful, nondeceptive statements are made, however, no such disclaimer is necessary to protect the consumer. Almost any information in an advertisement could be interpreted as a representation about quality or expertise. The disclaimer would greatly diminish the effectiveness of advertising, and lawyers may be discouraged from advertising at all. In addition, consumers, who may want to use the information in the advertisement to make a judgment about quality and expertise, may be confused by the disclaimer as to what the information in the advertisement really means.

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unilateral claims are inappropriate and should be revised." 16 C.F.R. 14.15(c)(2) (1986).

Moreover, any disclosure requirement increases advertising costs. Advertising space or media time is limited and any disclosure reduces the net amount of time or space available to the advertiser for communicating the primary message of the advertisement. Disclosure requirements, therefore, should be used sparingly, and should not be required by the state unless there exists evidence of deception. We urge that Temporary DR 2-102(E) be eliminated.

III. Temporary DR 2-103: Direct Contact with Prospective Clients

Temporary DR 2-103 prohibits solicitation of a prospective client by telephone or in person, when a significant motive is the lawyer's pecuniary gain. The interest in pecuniary gain is legitimate and is not intrinsically harmful to consumers. Because almost any contact could include or be interpreted as including pecuniary gain as one significant motive, this prohibition is overly broad. When viewed in conjunction with DR 2-102(A), moreover, this rule could also be interpreted to prohibit targeted mailings to consumers.

More personalized forms of contact may provide many of the same benefits as advertising. Truthful, nondeceptive mail, 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 all forms of solicitation is unnecessarily broad and may harm consumers. In the paragraphs that follow, we will set out our views on the proper standard to apply to different forms of solicitation.

(a) Targeted Mailings

First, lawyers should be permitted to use targeted mailings as they see fit. Written communications 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. 880 (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 who may need to have a lawyer take action expeditiously on their behalf. Those consumers are most likely to benefit from information about what services are available.

Spencer, 579 F. Supp. at 891. As the court stated in Koffler v. Joint Bar Ass'n, 51 N.Y. 2d 140, 146, 412 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." Moreover, 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 specific 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 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 and, if unwanted, the letter can easily be discarded. Such letters, however, may also communicate important information that consumers can carefully consider in making a reasoned decision about selecting a lawyer." Therefore, we believe that targeted written communication should be governed by the same false and misleading standard used for other advertising. We also have no objection to prohibiting mailings to persons who have made known to the lawyer that they do not wish to receive communications from the lawyer.

" See Standing Committee on Ethics and Professional Responsibility and Commission on Advertising, American Bar Association, 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.

(b) Telephone and In-Person Solicitation

Second, we urge that the Court modify Temporary DR 2-103 to permit telephone and in-person solicitation. Like media 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 ordered the AMA to cease and desist from banning solicitation, but permitted the 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 often encounter potential clients at meetings of political and business organizations and at social events. Indeed, many 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 Temporary DR 2-103 be modified to prohibit (1) uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence and (2) solicitation of persons who have made known to the lawyer that they do not want to be contacted by the lawyer. False or deceptive solicitation, as already indicated, 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.

On the other hand, telephone solicitation is in some respects similar to in-person solicitation in that a verbal exchange takes place; a lawyer might be able to persuade a vulnerable person to hire the lawyer when a non-vulnerable person would not hire him or her under the same circumstances. Moreover, there may be reasons why restrictions on telephone solicitation not appropriate for other professionals may appropriately be applied to lawyers. Certainly, false and deceptive telephone solicitation and telephone solicitation of persons who have made known to the lawyer that they do not want to receive calls from the lawyer may appropriately be prohibited. Although the standard for uninvited, in-person solicitation may also be appropriate here, we are not yet ready to conclude that it should be applied to telephone solicitation. But certainly the broad ban on telephone solicitation contained in Temporary DR 2-103 is unnecessarily restrictive.

IV. Temporary DR 2-104: Communication of Fields of Practice

Temporary DR 2-104 prohibits a lawyer from stating or implying that he or she is a specialist. Such a rule would prevent a lawyer from using the word "specialist" in making a truthful claim that he or she has developed skills or focused his or her practice on an area of the law. Yet use of this term may be the clearest, most efficient way to communicate that information. It is not clear that a claim that one is a "specialist" would be understood by lay persons to imply that a lawyer has obtained formal recognition as a specialist. The prohibition of false claims of certification further diminishes the likelihood of such a public misunderstanding. Temporary DR 2-104 could also 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, even though it also informs consumers 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 cardiovascular surgeon generates an expectation that every operation will be a success. We recommend that the Court remove all prohibitions against truthful and nondeceptive claims, express or implied, that a lawyer is a specialist.

V. Temporary DR-3-102(A) and 3-103(A) and (C)(2): Professional Independence of a Lawyer

Temporary DR 3-102(A) and 3-103(A) and (C)(2) prohibit a lawyer from forming a partnership or sharing legal fees, except under limited circumstances, with a nonlawyer, or from practicing in a professional corporation or other business organization authorized to practice law for a profit if a nonlawyer owns an interest in the organization or is an officer or director. The rules limit the ability of lawyers to establish multidisciplinary practices with other professionals, such as psychologists, nurses, or accountants, to deal efficiently with both the legal and nonlegal aspects of specific problems.

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 economically 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. Temporary DR 3-102(A) and 3-103(A) and (C)(2) similarly limit potentially procompetitive professional ventures and innovative business formats. Temporary DR 3-103(B) and (C)(1) alone should adequately preserve the lawyer's independent professional judgment. Therefore, we recommend that the Committee delete Temporary DR 3-102(A) and 3-103(A) and (C)(2).

VI. Conclusion

The Temporary Rules approved by the Court in October 1985 gave lawyers a greater opportunity to disseminate information about legal services to consumers than previously. We urge that the Court eliminate other unnecessary restrictions on competition among lawyers by:

(1) deleting Temporary DR 2-101(D) and 2-112;

(2) deleting Temporary DR 2-101(B);

(3) modifying Temporary DR 2-101(C) to require only that an attorney have a reasonable basis for any material, objective claims;

(4) deleting Temporary DR 2-102(A);

(5) deleting Temporary DR 2-102(E);

(6) modifying Temporary DR 2-103 to eliminate (a) the broad ban on telephone solicitation except for false and deceptive solicitation and solicitation of persons who have expressed a desire not to be contacted and (b) the restrictions on in-person solicitation except for false and deceptive solicitation and solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence or who have expressed their wish not to be contacted;

(7) modifying Temporary DR 2-104 to allow express and implied claims of specialty; and

(8) deleting Temporary DR 3-102(A) and 3-103(A) and (C)(2).

We appreciate having had the opportunity to present these views.

Sincerely yours,

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