



Suite 800
The Mall Building
118 St. Clair Avenue
Cleveland, Ohio 44114
(216) 523-4887

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
CLEVELAND REGIONAL OFFICE

**COMMISSION
APPROVED**

February 27, 1987

The Honorable Ralph J. Erickstad
Chief Justice
Supreme Court of North Dakota
State Capitol
Bismarck, North Dakota 58505

Dear Chief Justice Erickstad:

The Federal Trade Commission staff is pleased to comment on the proposed Rules of Professional Conduct recommended to the Court for review by the State Bar Association of North Dakota.¹ Our comments are limited to proposed Rule 5.4, which concerns business associations between lawyers and nonlawyers, and proposed Rule 7.1, which governs advertising and solicitation. We believe that these proposed rules will benefit consumers by removing unnecessary restrictions on the business practices of attorneys. With the very limited exceptions noted below, we urge the Court to adopt these rules.

INTEREST AND EXPERIENCE OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission is empowered under 15 U.S.C. § 41 et seq. to prevent unfair or deceptive acts or practices in or affecting commerce. Under its statutory mandate, the Commission encourages competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has had an ongoing program examining the competitive effects of public and private

-
1. These comments represent the views of the Cleveland Regional Office and the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Commission itself or of any individual Commissioner. The Commission has, however, voted to authorize the staff to submit these comments.

restrictions on the business practices of dentists, optometrists, lawyers, physicians, and other state-licensed professionals. Our goal is to identify and seek the removal of restrictions that impede competition or increase costs without providing countervailing benefits to consumers.

As part of the Commission's efforts to foster competition among licensed professionals, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in truthful, nondeceptive advertising and solicitation.² Studies show that where truthful advertising by lawyers is permitted, prices for legal services are lower than where advertising is restricted.³ Empirical evidence indicates that removing restrictions on lawyer advertising does not decrease the quality of legal services available.⁴ The Commission has also examined the effects of restrictions on business relationships between professionals and non-professionals, and has found them to be anti-competitive.⁵ As noted below, the evidence suggests that such restrictions increase prices, but do not affect the quality of services provided.

For these reasons, we believe that restrictions on associations between lawyers and nonlawyers should be eliminated, that only false and deceptive advertising by lawyers should be prohibited, and that in-person solicitation should be allowed except in limited circumstances.

-
2. American Medical Ass'n, 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).
 3. 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).
 4. 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).
 5. American Medical Ass'n, supra n.1.

RULE 5.4

Proposed Rule 5.4 permits lawyers to associate with nonlawyers in providing legal services to consumers, except where prohibited or restricted by law. We support the lifting of traditional ethical limitations on the forms of business practice that lawyers may adopt, and believe that Rule 5.4 will benefit consumers by permitting potentially more efficient organization of professional practice.

The Federal Trade Commission considered restrictions on associations between professionals and non-professionals in American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2nd Cir. 1980) aff'd mem by an equally divided Court, 455 U.S. 676 (1982). In that case, the Commission found that AMA rules prohibiting physicians from working on a salaried basis with hospitals or other lay entities and from entering into partnerships or similar arrangements with non-physicians unreasonably restrained competition in violation of Section 5 of the Federal Trade Commission Act. The Commission concluded that such restrictions prevented physicians from adopting business formats that might be more economically efficient and precluded competition from organizations not completely and directly under the control of physicians. The Commission found no countervailing justifications for these restrictions.

Proponents of restrictions on employment, partnership or other business relationships between professionals and non-licensees have often justified such restrictions as necessary to maintain a high level of quality in the professional services market. Some argue that the profit motive of lay persons will lead to interference with the independent exercise of professional judgment, causing a decline in the quality of services rendered. Empirical evidence, however, suggests that restrictions on business relationships between professionals and non-professionals do not improve the quality of professional services, but do tend to increase prices.⁶

-
6. Bureaus of Economics and Consumer Protection, Federal Trade Commission, A Comparative Analysis of Cosmetic Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980). The Presiding Officer in the Federal Trade Commission's Rulemaking Proceeding, 50 Fed. Reg. 598 (1985), was critical of certain aspects of these studies. Although he found that such restrictions raise prices to consumers and limit access to ophthalmic services, he did not believe that the evidence

With regard to the legal profession, there may be a concern that associations with non-professionals will compromise the confidentiality of the lawyer-client relationship. Proposed Rule 5.4 adequately addresses legitimate concerns by reaffirming the lawyer's professional responsibility to the client. Under the rule, an association between a lawyer and a nonlawyer may not interfere with the confidentiality of client communications, with the lawyer's professional judgment, or with the lawyer-client relationship. With these safeguards in place, an outright ban on associations with nonlawyers is not necessary.

We are aware that certain provisions of North Dakota law may still limit the extent to which lawyers may associate with non-professionals and the business forms they may adopt. Therefore, adoption of the rule would not lead to complete flexibility of organizational forms. We believe, however, that proposed Rule 5.4 may ultimately benefit consumers by removing one barrier to the development of potentially innovative and efficient forms of legal practice.

RULE 7.1

Proposed Rule 7.1 differs in several respects from provisions governing advertising and solicitation contained in the ABA Model Rules of Professional Conduct. We believe that Rule 7.1 represents a significant step forward in permitting the free flow of truthful information, while protecting consumers from deception and overreaching.

cited in these studies provided an adequate basis for reaching conclusions as to the quality of care issue. Federal Trade Commission, Report of the Presiding Officer on Proposed Trade Regulation Rule: Ophthalmic Practice Rules (1986). The staff of the Bureau of Consumer Protection has recently published a report analyzing the rulemaking record. They found that the studies are valid and that they provide reliable evidence concerning the effects of such restrictions. Bureau of Consumer Protection, Federal Trade Commission, Ophthalmic Practice Rules: State Restrictions on Commercial Practice (1986). Both reports will be reviewed by the Commission soon.

The "False or Misleading" Standard

Proposed Rule 7.1(a) adopts a standard for false or misleading lawyer communications. False or misleading communications are defined in the subsections of the rule. Subsection (1) restates an appropriate standard for determining what is misleading. Under subsection (2) a communication is misleading if it contains "an assertion that cannot be substantiated." We assume that this provision is intended to prohibit only objective claims that lack a reasonable basis and that are material to consumers. On its face, however, this provision applies to all "assertions", whether or not they are material.⁷ As written, it may prohibit some truthful statements and deter the use of attention-getting language, without providing any countervailing benefit to consumers. We suggest that subsection (2) be modified to require substantiation of material, objective claims only, and that the comment to the rule indicate that a reasonable basis for making a claim constitutes substantiation.

We fully endorse the application of a straightforward "false or misleading" standard for all communications by lawyers. In particular we are pleased to see that, under proposed Rule 7.1(a), this standard will govern communications about fields of practice and specialization, which are regulated under more restrictive provisions in the ABA Model Rules. Information that a lawyer has limited his or her areas of practice, concentrates in particular fields, or specializes in certain matters is likely to be extremely useful to consumers. Such information may assist consumers in locating lawyers who are experienced in particular areas of law or who have expertise in particular matters or problems. We also note that the comment to proposed Rule 7.1 specifically allows client endorsements and statements concerning damage awards and the lawyer's record in obtaining favorable verdicts, which we fully support.

-
7. The Federal Trade Commission has defined materiality as follows: "A 'material' misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers." Letter from James C. Miller, III, Chairman, Federal Trade Commission, to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (October 14, 1983). See also Southwest Sunsites, Inc., 105 F.T.C. 7 (1985); Thompson Medical Co., Inc., 104 F.T.C. 660 (1984).

Direct Mail

If adopted, Rule 7.1 would allow the mailing of truthful, nondeceptive letters to persons known to need legal services. We fully endorse this proposal. Targeted direct mailings can provide important information to those persons who are most likely to need legal services and to benefit from information about what services are available. Further, by targeting mailings, lawyers are able to supply information to prospective clients in an efficient manner. Lawyers can focus such mailings to provide specific information on a particular type of legal problem or area of law and send them only to those consumers who may have a need for such information.

The comment to Rule 7.1 suggests that targeted mailings may be regulated in the future under the more restrictive standards applied to in-person contact, should application of those standards to such mailings be found constitutionally permissible. We would recommend against such a change in Rule 7.1. Unlike in-person contact with prospective clients, targeted mailings do not involve the possible dangers of overreaching or undue influence. Consumers may read materials received in the mail thoroughly or simply choose to throw them away. Further, mailings do not require an immediate response. Consumers can re-read them and consider their contents carefully before deciding whether to contact the attorney. Therefore, we believe that targeted written communications should be governed by the same false and misleading standard applied to other forms of advertising.

In-person Contacts

Proposed Rule 7.1(b) eliminates the existing broad prohibitions on in-person communications with prospective clients. We strongly support this relaxation of traditional bans on in-person solicitation. Like advertising, in-person solicitation can convey useful information about lawyers and the services they provide. In most situations, in-person contacts with prospective clients are unlikely to result in consumer harm. However, in-person solicitation may lead to abuse under certain circumstances. People who are injured or emotionally distressed may be vulnerable to the exercise of undue influence when face to face with an attorney, as noted by the Supreme Court in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 465 (1978).

The Federal Trade Commission considered the concerns that underlie the Ohralik opinion in American Medical Association, 94 FTC 701 (1979), aff'd, 638 F.2d 443 (2nd 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.

We believe proposed Rule 7.1(b)(3) identifies the potential abuses that may arise from in-person contacts and establishes an appropriate standard for such solicitation. That rule prohibits such contacts where the physical or mental state of the potential client is likely to impair the exercise of the client's judgment as to the selection of legal counsel.

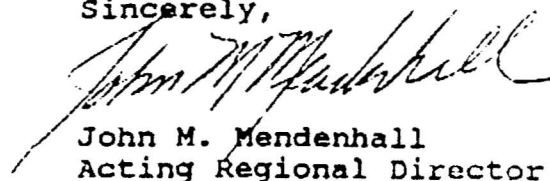
The additional restrictions on in-person solicitation contained in proposed Rule 7.1(b) and 7.1(c) appear to be reasonable. We note that proposed Rule 7.1(b)(2) prohibits in-person contact that involves the use of "undue influence, coercion, duress, compulsion, intimidation, threat, or vexatious or harassing conduct." We believe that potential abuses are adequately addressed by proposed Rules 7.1(b)(3) and 7.1(c). Separately and specifically prohibiting solicitation that involves coercion, harassment and the like may be appropriate, depending upon the interpretation of these terms. Licensing boards and private associations in other professions, however, have sometimes interpreted such terms broadly to ban solicitation under circumstances that pose no danger of harm to consumers. So long as these terms are interpreted fairly and objectively, proposed Rule 7.1(b)(2) and proposed Rule 7.1(d), which employs the same language with respect to organizations that furnish or pay for legal services, will adequately protect consumers, while allowing them to receive truthful information.

In-person contacts with prospective clients by paid representatives of the lawyer are permissible under proposed Rule 7.1. We support this approach and believe that lifting traditional bans on compensating persons that recommend the lawyer's services may provide an efficient means of reaching consumers and providing them with useful information. For instance, under this provision, lawyers could participate in for-profit lawyer referral services that direct consumers to lawyers who are located close by and who provide the particular services that the consumers need. Because solicitation by representatives is governed by the same standards applied to the lawyer's own conduct, little risk of abuse is posed.

CONCLUSION

We believe the proposed rules will benefit both competition and consumer welfare by lifting ethical restrictions on associations with nonlawyers and by removing many unnecessary restrictions on the dissemination of truthful, nondeceptive information by lawyers. We urge the Court to adopt proposed Rule 5.4. We strongly endorse the overall regulatory scheme outlined in Rule 7.1, and support its adoption with the very limited exceptions we have addressed in our comments.

Sincerely,



John M. Mendenhall
Acting Regional Director