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

BUREAU OF COMPETITION

COMMISSION APPROVED

February 18, 1987

Hon. Nathan S. Heffernan
Chief Justice
Supreme Court of Wisconsin
231 East State Capitol
Madison, WI 53701-1688

Dear Chief Justice Heffernan:

The Federal Trade Commission staff is pleased to submit these comments respecting the Court's consideration of a modified version of the American Bar Association's Model Rules of Professional Conduct.[1]

The proposals before the Court would in some respects permit more attorney communication with prospective clients than the existing Supreme Court Rules permit, and should, therefore, assist consumers in making informed choices about legal services. Some of the proposed rules, however, may harm consumers by restraining price competition, restricting the development of innovative and potentially more efficient forms of legal practice, and limiting unnecessarily the information available to consumers.

As is discussed in more detail below, we urge the Court to (1) delete proposed Rule 1.5(a) and retain the existing prohibition on excessive fees; (2) eliminate the restrictions in proposed Rule 5.4 on practice with nonlawyers; (3) modify proposed Rule 7.1 to make clear that endorsements by clients and nonclients, and experience, success and comparison claims are all permitted; (4) change proposed Rule 7.2 to allow the use of novel advertising media and for-profit referral services; (5) modify proposed Rule 7.3 to eliminate the broad ban on telephone solicitation and to permit in-person contact for the purposes of obtaining professional employment with all but those who, because of their particular circumstances, are vulnerable to undue influence; and (6) alter proposed Rule 7.4 to allow express and implied claims of specialty.

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[1]This letter represents the views of the FTC's Bureaus of Competition, Consumer Protection, and Economics, and not necessarily those of the Commission. The Commission has, however, authorized submission of these comments.

Proposed Rule 1.5(a): Fees

Proposed Rule 1.5(a) states that "[a] lawyer's fee shall be reasonable," and subparagraph (3) provides that "the fee customarily charged in the locality for similar legal services" is to be considered in determining reasonableness. The substitution of this language for Supreme Court Rule 20.12, which prohibits "a clearly excessive fee," may lead lawyers to infer that the new rule bars "unreasonably low" fees. Such an interpretation could tend to discourage price competition among traditional practitioners; it could also be used to restrain competition from legal clinics and other non-traditional providers of legal services. We therefore suggest that the Court not adopt proposed Rule 1.5(a) and that the existing prohibition on excessive fees be retained. Alternatively, accompanying commentary should make clear that only excessively high fees could be deemed unreasonable within the meaning of proposed Rule 1.5(a).

Proposed Rule 5.4: Professional Independence of a Lawyer

Proposed Rule 5.4 prohibits a lawyer from forming a partnership or sharing legal fees, except under limited circumstances, with a nonlawyer, or from practicing in an organization authorized to practice law for a profit if a nonlawyer owns an interest in the organization or is an officer or director. This proposed rule limits the ability of lawyers to establish multidisciplinary practices with other professionals, such as psychologists 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 potentially 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. Proposed Rule 5.4 similarly limits potentially procompetitive professional ventures, novel business formats, and perhaps some forms of prepaid legal services. Paragraphs (c) and (d)(3) alone should adequately preserve the lawyer's independent professional judgment. We

therefore urge the Court to delete all of proposed Rule 5.4, except paragraphs (c) and (d)(3).[2]

Proposed Rule 7.1: 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.[3] In a Wisconsin Bar Association survey, most Wisconsin residents attributed the failure to call an attorney when needed to a fear that the legal services would cost too much, and to the inability to locate a lawyer sufficiently skilled at handling a particular problem.[4] Empirical studies suggest 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[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]

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[2]While there may be statutory limitations on forms of practice, we urge the Court to refrain from adopting rules that compound or go beyond these restrictions.

[3] 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).

[4]Wisconsin Bar Association, Survey 2 (1979).

[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.

We fully endorse the view that false and deceptive advertising should be prohibited. Nonetheless, we are concerned that the definition of "false or misleading" contained in proposed Rule 7.1 may prohibit much truthful, nondeceptive advertising, as set forth below.

"Unjustified Expectations": Proposed Rule 7.1(b)

First, the ABA comments with respect to proposed Rule 7.1, apparently adopted by the Code of Professional Responsibility Review Committee ("CPR Review Committee"), 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 comment suggests that such information "may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances." The ABA's construction of the prohibition of advertising "likely to create an unjustified expectation" is so broad that it could chill the use of much truthful advertising that is beneficial to consumers. 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 likelihood that advertisements containing client endorsements or information about past successes will create unjustified expectations is small, and is clearly outweighed by the potential benefits of this information to consumers. Indeed, the CPR Review Committee recognized this in recommending that the Court adopt proposed Rule 7.1(d) to permit client endorsements. We therefore urge the Court to disavow the ABA commentary with respect to proposed Rule 7.1(b).

Comparison Advertising: Proposed Rule 7.1(c)

Second, proposed Rule 7.1(c) provides that a lawyer shall not compare "the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." Information that accurately compares the particular qualities of

competing law firms may encourage improvement and innovation in the delivery of services and assist consumers in making rational purchase decisions. Indeed, in one sense, such consumer comparisons are the essence of competition. Of course, 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 proposed Rule 7.1(a).

We are concerned that proposed Rule 7.1(c) may deter the use of such advertising and preclude truthful, nondeceptive statements merely because they are not amenable to empirical testing.[7] Examples of such statements are "Friendlier service" or "More convenient hours." Such statements are not readily subject to verification, but their benefits may outweigh any possible harms because they indicate the qualities that the advertiser deems important.

We urge the Court to modify proposed Rule 7.1(c), to require only that an attorney have a reasonable basis for any material, objective claims.

Testimonials and Endorsements: Proposed Rule 7.1(d)

We applaud the general thrust of the CPR Review Committee's proposed Rule 7.1(d), permitting the use of testimonials and endorsements in advertising. Such advertising traditionally has been recognized as effective by sellers of goods and services. For example, the choice of the clients listed in the Martindale-Hubbell directory generally reflects an intuition that the representation of a major bank or corporation suggests that a firm can handle complicated legal problems in cases in which

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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. The ultimate question is whether or not the advertising has a tendency or capacity to be false or deceptive. . . . [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) (1986).

large sums of money may be put at risk. Advertising using clients who attest truthfully 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, an advertisement in which a famous athlete or actor states truthfully that he or she uses a particular firm or attorney, 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. At the very least such an endorsement may make the advertising more effective by attracting and retaining consumer attention.

We are concerned, however, about the restrictive effect of some aspects of proposed Rule 7.1(d). First, it is not clear whether proposed Rule 7.1(d) prohibits any testimonial or endorsement by a nonclient, or simply requires disclosure that a testimonial or endorsement is not made by a client. Any requirement that testimonials and endorsements be given only by actual clients is more restrictive than is necessary to protect consumers because it is quite possible to form honest opinions about a lawyer or firm without having been a client. For example, a well-known and respected attorney could state truthfully in an advertisement that he has worked with the advertising attorney and found him to be competent and professional.[8]

In addition, the requirement in proposed Rule 7.1(d) that any payment be disclosed may actually cause consumer confusion by creating a false impression that the testimonial or endorsement was given only because of the payment, and did not reflect the endorser's true beliefs. Consumers are used to seeing this type of advertising for other products and services and could be expected to realize that endorsers are usually paid for their time and effort in appearing. Compelled disclosure of such payment may unnecessarily cast doubt upon the truthfulness of the content of the advertisement.

We urge the Court to modify proposed Rule 7.1(d) to make clear that truthful testimonials and endorsements are not limited

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[8] In its Guide Concerning Use of Endorsements and Testimonials in Advertising, the Federal Trade Commission defines testimonials and endorsements synonymously and broadly, and does not seek to limit endorsements to "actual consumers." The Commission recognizes the validity of expert and celebrity endorsement. Instead of suggesting a limit to the parties who can give endorsements, the Commission suggests that "[e]ndorsements must always reflect the honest opinions, findings, beliefs, or experience of the endorser." 16 C.F.R. 255.1(a) (1986).

to actual clients and to eliminate the requirement that the fact of payment be disclosed.

Proposed Rule 7.2: Advertising

We are concerned about the list of media in proposed Rule 7.2(a) because attorneys may interpret it as exclusive and conclude that advertising in media not listed is prohibited. The listing 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 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 fails to anticipate changing technologies. 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 in these days of office automation.

Proposed Rule 7.2(c) appears to preclude the use of for-profit lawyer referral services or other legal service organizations. Such organizations allow lawyers to pool their advertising resources, yet maintain independent practices. Also, rather than having to make a random, uninformed choice, consumers benefit from the knowledge such services possess about the particular expertise of each member attorney. The profit motive benefits consumers by creating an incentive to refer attorneys who can most competently and efficiently handle the case, because dissatisfied customers will not continue to patronize services giving poor referrals. As a result, the interests of for-profit referral services may coincide with those of consumers to a greater degree than is the case with nonprofit bar association referral services, which may be obliged to give referrals on an equal basis to all attorneys. We urge the Court to delete the requirement in proposed Rule 7.2(c) that lawyer referral services and similar legal service organizations be not-for-profit.

Proposed Rule 7.3: Direct Contact with Prospective Clients

We concur in the CPR Review Committee's conclusion, in proposed Rule 7.3(a), that targeted direct mailings do not unduly invade the privacy of prospective clients and should be permitted. We hope that other states may benefit from the approach suggested by the committee. It is our view, however, that proposed Rule 7.3(b) is too restrictive in prohibiting, except under very limited circumstances, telephone and in-person contact for the purpose of obtaining professional employment. This provision would restrict the flow of information more than is necessary to protect consumers, because it would preclude

truthful, nondeceptive communications in circumstances that pose little or no risk of undue influence.

In-person contact may provide consumers with truthful, nondeceptive information that will help them select a lawyer. As the Supreme Court stated 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 proposed legal services and, in this respect, serve much the same function as print advertising.

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 U.S. Supreme Court reasoned in Ohralik, 436 U.S. at 465 (1978). 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 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 solicitation, but permitted it 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.[9] Lawyers encounter potential clients at meetings of political and business organizations and at social events. Indeed, lawyers traditionally have built their law practices through such contacts. Under such circumstances, the possibility of undue influence is minuscule, and the potential client need not respond immediately. Similarly, lawyers present speeches and seminars to prospective clients that establish goodwill and help attendees to understand the law and identify situations in which they might need a lawyer. Such personal contacts present little risk of undue influence and provide the benefit of enabling prospective clients to assess the personal qualities of attorneys.

Accordingly, as to in-person contact, we urge that the Court modify proposed Rule 7.3(b) to prohibit only: (1) uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence; (2)

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[9]To the extent that attorneys rely on client goodwill to obtain referrals, a strategy of overreaching to gain clients would seem to be counterproductive.

solicitation involving false or deceptive communications (which are properly prohibited by proposed Rule 7.1); and (3) solicitation of a person who has made known to the lawyer a desire not to receive a communication from the lawyer (as recommended by the CPR Review Committee in proposed Rule 7.3(c)(2)). 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 products and services, seeking contributions to charities, and requesting support for political candidates. Consumers can easily terminate offers of legal services communicated by telephone.

Telephone solicitation is in some respects similar to in-person solicitation; a lawyer might be able to persuade a vulnerable person to hire the lawyer. But there are also differences between the two forms of solicitation. A telephone solicitor may be less able to exercise undue influence than an in-person solicitor, and it may be easier for the recipient of a telephone solicitation to terminate a conversation than it is for a potential client who is solicited in person. Perhaps there are reasons that restrictions on telephone solicitation not appropriate for other professionals could properly be applied to lawyers. Although the AMA standard may be suitable, we are not yet ready to conclude that it should be applied to telephone solicitation. Certainly, telephone solicitation containing false or deceptive communications may appropriately be prohibited, and it is reasonable to prohibit telephone contact with a person who has made known to the lawyer a desire not to receive a communication from the lawyer (as provided in proposed Rule 7.3(c)(2)). But the broad ban on telephone solicitation contained in proposed Rule 7.3 is unnecessarily restrictive.

Proposed Rule 7.3(c)(3): "Coercion, Duress or Harassment"

Proposed Rule 7.3(c)(3) prohibits written communication or telephone or in-person contact if "the communication involves coercion, duress or harassment." Such a prohibition may be appropriate, depending upon the interpretation of its terms. Licensing boards and private associations in other professions have often interpreted these or similar terms broadly and have applied them to ban solicitation under circumstances that pose no

danger of harm to consumers.[10] So long as these terms are interpreted fairly and objectively, the proposed Rule would adequately protect consumers and simultaneously allow them to receive truthful information.[11]

Proposed Rule 7.4: Communication of Fields of Practice

Proposed Rule 7.4 and its accompanying ABA comment would prohibit the use of the terms "specialist," "practice limited to," or "practice concentrated in" particular fields, in making truthful claims that an attorney has developed skills or focused his or her practice on a specific area of the law. The use of such terms may be the clearest, most efficient way to communicate such information. Because Wisconsin has no formal certification program, it is unlikely that the claim that one is a "specialist" will be interpreted by lay persons as implying that a lawyer has obtained formal recognition or certification as a specialist. Such an implication seems even less likely to arise from a claim that an attorney "limits" a law practice or "concentrates" in a field of law.

The proposed rule prohibits an attorney from even implying that he or she is a specialist, and therefore could 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 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 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 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.

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[10]As suggested previously, the potential for abuse may vary among written communication, telephone contact, and in-person contact.

[11]It is likely that proposed Rule 7.3(c)(2) adequately guards against harassment by prohibiting further communication with persons who have made known to the lawyer a desire not to be contacted.

Conclusion

It appears that the proposed rules will allow the dissemination of more information about legal services than the current Wisconsin Supreme Court Rules and will thereby benefit consumers of legal services. We urge that the Court eliminate the remaining unnecessary restrictions on competition among attorneys by: (1) modifying proposed Rule 1.5 to prohibit only excessive fees; (2) deleting all of proposed Rule 5.4, except paragraphs (c) and (d)(3); (3) modifying proposed Rule 7.1 to eliminate disclosure requirements, to make clear that nonclient endorsements and success and experience claims are permitted, and to require only that an attorney have a reasonable basis for any material, objective claims; (4) amending proposed Rule 7.2 to allow use of new advertising media and for-profit referral services; (5) modifying proposed Rule 7.3 to permit in-person contact with all but those who, because of their particular circumstances, are vulnerable to undue influence or have expressed their wish not to be contacted and to eliminate the broad ban on telephone contact; and (6) amending proposed Rule 7.4 to allow express and implied claims of specialty.

Sincerely yours,

Jeffrey I. Zuckerman
Director
Bureau of Competition