IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 94-9167

ORDER OF PROMULGATION AND ADOPTION OF DISCIPLINARY RULES

WHEREAS, this Court's previous Miscellaneous Docket Order No. 94-9076, dated June 15, 1994, noted that certain proposed amendments and rules were still under consideration and were not promulgated by that order; and,

WHEREAS, this Court has now fully considered these proposals, as well as certain objections thereto, and has now revised the proposals;

The Court hereby promulgates the amendments to Parts VII and VIII, as revised in the attachment hereto, and the adoption of Part IX of the Texas Disciplinary Rules of Professional Conduct and the proposed Rule 7.07, as revised in the attachment hereto, of the Texas Disciplinary Rules of Professional Conduct.

In Chambers, this 4th day of November, 1994.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

Craig Enoch, Justice

Rose Spector, Justice

Misc. Docket No. 94-9167

VII. INFORMATION ABOUT LEGAL SERVICES

RULE 7.01 FIRM NAMES AND LETTERHEADS

(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain "P.C.," "P.A.," "L.L.P.," "P.L.L.C.," or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.

(b) A firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.

(e) A lawyer shall not advertise in the public media or seek professional employment by written communication under a trade or fictitious name, except that a lawyer who practices under a trade name as authorized by paragraph (a) of this Rule may use that name in such advertisement or such written communication but only if that name is the firm name that appears on the lawyer's letterhead, business cards, office sign, fee contracts, and with the lawyer's signature on pleadings and other legal documents.

(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).

RULE 7.02 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(a) A lawyer shall not make a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:

> (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (2) 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 these rules or other law;

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;

(4) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

(5) designates one or more specific areas of practice in an advertisement in the public media or in a written solicitation unless the advertising lawyer is competent to handle legal matters in each such area of practice.

(b) Rule 7.02(a)(5) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(5) with respect to the area(s) of practice in which such lawyer is certified.

(c) A lawyer shall not advertise in the public media that the lawyer is a specialist, except as permitted under Rule 7.04.

(d) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or writing with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

RULE 7.03 PROHIBITED SOLICITATION AND PAYMENTS

(a) A lawyer shall not by in-person or telephone contact seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02(a); or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to any lawyer or firm except that, a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Article 320d, Revised Statutes.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by paragraph (b) of this Rule.

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Article 320d, Revised Statutes.

RULE 7.04 ADVERTISEMENTS IN THE PUBLIC MEDIA

(a) A lawyer shall not advertise in the public media that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:

> (1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms. A lawyer engaged in the trademark practice may use the designation "Trademark," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself or herself out as specializing in "Intellectual Property Law," "Patent, Trademark, Copyright Law and Unfair Competition," or any of those terms.
>
> (2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Article 320d, Revised Statutes, according to the areas of law in which the lawyer will accept referrals.
>
> (3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

> (1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement;

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, [area of specialization] -- Texas Board of Legal Specialization;" and

(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, "Certified [area of specialization] [name of certifying organization]," but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

(3) shall state with respect to each area advertised in which the lawyer has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, "Not Certified by the Texas Board of Legal Specialization." However, if an area of law so advertised has not been designated as an area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, "No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area."

(c) Separate and apart from any other statements, the statements referred to in paragraph (b) shall be displayed conspicuously with no abbreviations, changes, or additions in the quoted language set forth in paragraph (b) so as to be easily seen or understood by an ordinary consumer.

(d) Subject to the requirements of Rule 7.02 and of paragraphs (a), (b), and (c) of this Rule, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, or television.

(e) All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm.

(f) A copy or recording of each advertisement in the public media and relevant approval referred to in paragraph (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.

(g) In advertisements utilizing video or comparable visual images, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised. In advertisements utilizing audio recordings, any person who narrates an advertisement as if he or she were a lawyer whose services or whose firm's services are being advertised, shall be one or more of the lawyers whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) A lawyer or firm who advertises in the public media must disclose the geographic location, by city or town, of the lawyer's or firm's principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:

(1) that other office is staffed by a lawyer at least three (3) days a week; or

(2) the advertisement discloses the days and times during which a lawyer will be present at that other office.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan, or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer's association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Article 320d, Revised Statutes.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

(1) states that the advertisement is paid for by the cooperating lawyers;

(2) names each of the cooperating lawyers;

(3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;

(4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and

(5) does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.

(p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:

(1) ensuring that each advertisement does not violate this Rule; and

(2) complying with the filing requirements of Rule 7.07.

RULE 7.05 PROHIBITED WRITTEN SOLICITATIONS

(a) A lawyer shall not send or deliver, or knowingly permit or cause another person to send or deliver on the lawyer's behalf, a written communication to a prospective client for the purpose of obtaining professional employment if:

(1) The communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) The communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04 (a) through (c), and (h) through (o) that would be applicable to the communication if it were an advertisement in the public media; or

(3) The communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) Except as provided in paragraph (e) of this Rule, a written solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall conform to the provisions of Rule 7.04(a) through (c);

(2) shall be plainly marked "ADVERTISEMENT" on the first page of the written communication, and the face of the envelope also shall be plainly marked "ADVERTISEMENT." If the written communication is in the form of a self-mailing brochure or pamphlet, the word "ADVERTISEMENT" shall be: (a) in a color that contrasts sharply with the background color; and (b) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger.

(3) shall not be made to resemble legal pleadings or other legal documents;

(4) shall not contain a statement or implication that the written communication has received any kind of authorization or approval from the State Bar of Texas or from the Law Advertisement and Solicitation Review Committee;

(5) shall not be sent in a manner, such as by registered mail, that requires personal delivery to a particular individual;

(6) shall not reveal on the envelope used for the communication, or on the outside of a self-mailing brochure or pamphlet, the nature of the legal problem of the prospective client or nonclient; and

(7) shall disclose how the lawyer obtained the information prompting such written communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s).

(c) All written communications to a prospective client for the purpose of obtaining professional employment must be reviewed and either signed by or approved in writing by the lawyer or a lawyer in the firm.

(d) A copy of each written solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name and address to which each such communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination.

(e) The provisions of paragraph (b) of this Rule do not apply to a written solicitation communication:

(1) directed to a family member or a person with whom the lawyer had or has an attorney-client relationship;

(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;

(3) if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(4) that is requested by the prospective client.

RULE 7.06 PROHIBITED EMPLOYMENT

A lawyer shall not accept or continue employment when the lawyer knows or reasonably should know that the person who seeks the lawyer's services does so as a result of conduct prohibited by these rules.

RULE 7.07 FILING REQUIREMENTS FOR PUBLIC ADVERTISEMENTS AND WRITTEN SOLICITATIONS

(a) Except as provided in paragraph (d) of this Rule, a lawyer shall file with the Lawyer Advertisement and Solicitation Review Committee of the State Bar of Texas, either before or concurrently with the mailing or sending of a written solicitation communication:

(1) a copy of the written solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes in which the communications are enclosed; and

(2) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such solicitations.

(b) Except as provided in paragraph (d) of this Rule, a lawyer shall file with the Lawyer Advertisement and Solicitation Review Committee of the State Bar of Texas, either before or concurrently with the first dissemination of an advertisement in the public media, a copy of each of the lawyer's advertisements in the public media. The filing shall include:

(1) a copy of the advertisement in the form in which it appears or is or will be disseminated, such as a videotape, an audiotape, a print copy, or a photograph of outdoor advertising;

(2) a production script of the advertisement setting forth all words used and describing in detail the actions, events, scenes, and background sounds used in such advertisement together with a listing of the names and addresses of persons portrayed or heard to speak, if the advertisement is in or will be in a form in which the advertised message is not fully revealed by a print copy or photograph;

(3) a statement of when and where the advertisement has been, is, or will be used; and

(4) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such advertisements.

(c) A lawyer who desires to secure an advance advisory opinion concerning compliance of a contemplated written solicitation communication or advertisement may submit to the Lawyer Advertisement and Solicitation Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a) or (b) of this Rule, including the required fee; provided however, it shall not be necessary to submit a video tape if the videotape has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement. An advisory opinion of the Lawyer Advertisement and Solicitation Review Committee of noncompliance is not binding in a disciplinary proceeding or disciplinary action but a finding of compliance is binding in favor of the submitting lawyer if the representations, statements, materials, facts and written assurances received in connection therewith are true and are not misleading. The finding constitutes admissible evidence if offered by a party.

(d) The filing requirements of paragraphs (a) and (b) do not extend to any of the following materials:

(1) an advertisement in the public media that contains only part or all of the following information, provided the information is not false or misleading:

(i) the name of a lawyer or firm and lawyers associated with the firm, with office addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm;"

(ii) the fields of law in which the lawyer or firm advertises specialization and the statements required by Rule 7.04(a) through (c);

(iii) the date of admission by the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;

(iv) technical and professional licenses granted by this state and other recognized licensing authorities;

(v) foreign language ability;

(vi) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c);

(vii) identification of prepaid or group legal service plans in which the lawyer participates;

(viii) the acceptance or nonacceptance of credit cards;

(ix) any fee for initial consultation and fee schedule;

(x) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;

(xi) any disclosure or statement required by these rules; and

(xii) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

(2) an advertisement in the public media that:

(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and

(ii) contains no information about the lawyers or firm other than names of lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

(3) a listing or entry in a regularly published law list;

(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;

(5) a newsletter mailed only to:

(i) existing or former clients;

(ii) other lawyers or professionals; and

(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;

(6) a written solicitation communication that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;

(7) a written solicitation communication if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(8) a written solicitation communication that is requested by the prospective client.

(e) If requested by the Lawyer Advertisement and Solicitation Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written solicitation.

VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.05 JURISDICTION

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined in this state for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

IX. SEVERABILITY OF RULES

RULE 9.01 SEVERABILITY

If any provision of these rules or any application of these rules to any person or circumstances is held invalid, such invalidity shall not affect any other provision or application of these rules that can be given effect without the invalid provision or application and, to this end, the provisions of these rules are severable.

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

November 7, 1994

Mr. Charles L. Babcock
Jackson & Walker, L.L.P.
Post Office Box 4771
Houston, Texas 77210-4771

RE: Proposed Rules on Lawyer Advertising (your ltr, 9-15-94).

Dear Mr. Babcock,

Please find enclosed for your information, a copy of an order of the Supreme Court of Texas of November 4, 1994.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

cc: Mr. James M. McCormack
Gen. Counsel, State Bar

Mr. Antonio Alvarado
Exec. Dir., State Bar

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
BOB GAMMAGE
CRAIG ENOCH
ROSE SPECTOR

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
NADINE SCHNEIDER

November 7, 1994

Office of the
Secretary of State
Statutory Filings Division
Rudder Building
Austin, Texas 78701

Please find enclosed for filing, a copy of an order of the Supreme Court of Texas of November 4, 1994.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

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Charles L. Babcock
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ORIGINAL

September 15, 1994

BY FEDERAL EXPRESS

Mr. John T. Adams, Clerk
Texas Supreme Court
201 West 14th Street, Room 104
Austin, Texas 78701

RE: Proposed Rules on Lawyer Advertising

Dear Mr. Adams:

I am writing on behalf of Texans Against Censorship ("TAC") to provide the Court with additional information regarding the Proposed Rules on Lawyer Advertising (the "Proposed Rules") currently before the Court. Two recent federal cases demonstrate the heavy burden that a state must overcome to justify its restrictions on commercial speech. In addition, we have concluded, after further reflection, that the filing fee required by the Proposed Rules may very well be unconstitutional. Finally, we respectfully suggest that the Court may find it helpful to request an opinion from the Federal Trade Commission regarding the Proposed Rules.

1. In MD II Entertainment, Inc. v. City of Dallas, Texas, No. 93-1703, 1994 WL 387968 (5th Cir. August 11, 1994),[1] the Fifth Circuit recently struck down a city zoning ordinance regulating establishments that advertised as topless, gentlemen's club, adult entertainment, x-rated, or by any other term calculated to attract patrons with nudity, seminudity, or simulated nudity. The Fifth Circuit affirmed summary judgment for the plaintiff, holding that the ordinance violated the free speech clause of the First Amendment. The Court evaluated the ordinance under the Central Hudson test, noting that the city presented no evidence that forbidding use of those terms in commercial advertising was narrowly tailored to prevent erosion of property values or reduce crime rates.

The Second Circuit also recently underscored the need for hard, as opposed to anecdotal, evidence, in New York State Association of Realtors, Inc. v. Shaffer, 27 F.3d 834 (2d Cir. 1994). There, a New York statute banning solicitation of residential property owners by brokers in designated geographic areas was deemed an impermissible restriction on commercial speech.

[1] I am attaching a copy of the opinion for the Court's convenience.

Importantly, the court required empirical data to justify restrictions on commercial speech. The court explained:

> The state produced no evidence that it has adjudicated a single case of blockbusting against a licensed real estate broker. ... Central Hudson requires us to evaluate not merely the existence of a particular type of harm but the scope of the restriction in light of the degree of the harm. ... To prevail, the state must affirmatively establish the reasonable fit required under Central Hudson. The record indicates that the state has not affirmatively established such a fit. Particularly troubling is the Secretary's failure to determine empirically whether less restrictive measures ... would provide an alternative means for effectively combatting the level of blockbusting evidenced by the record.

Id. at 844.

The State Bar has produced no evidence that lawyer advertising in Texas presents a problem, or presents a problem that cannot be solved through existing rules. Furthermore, the Bar has failed to determine empirically whether less restrictive measures would provide an alternative means of fulfilling the Bar's objectives. In fact, as far as TAC knows, the Bar conducted no studies to determine the necessity of the Proposed Rules or the possibility of utilizing less restrictive measures rather than the broad and unconstitutional set of rules now before this Court.

2. The Proposed Rules establish a scheme whereby an attorney who wishes to send a written solicitation communication or advertise in the public media must pay an as-yet unspecified fee. The United States Supreme Court held long ago that a state may not impose a charge for the enjoyment of a right granted by the federal constitution. Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 113 (1943). The Fifth Circuit, more recently, also has held that exaction of fees for the privilege of exercising First Amendment rights is impermissible. Fernandes v. Limmer, 663 F.2d 619, 633 (5th Cir. 1981). Indeed, the court found that even the $6 permit fee charged to Krishnas to distribute literature and solicit funds at DFW International Airport was an unconstitutional tax on rights guaranteed by the free exercise clause. The filing fee in the Proposed Rules, especially when considered in light of the fact that, in certain instances, the rules regulate pure political speech, is an unconstitutional tax or fee for the exercise of a constitutional right.

If the fee to be set by the Bar is sought to be justified as an administrative cost, it cannot be excessive or geared to raising revenue. Sentinel Communications Co. v. Watts, 936 F.2d 1189, 1205 (11th Cir. 1991)(holding that it is well established that a licensing fee is permissible only if a state or municipality charges no more than the amount needed to cover the

administrative costs). This Court cannot decide whether the fee structure is constitutional until it knows the basis and procedure for the fee determination.

3. Finally, TAC respectfully requests that this Court may wish to seek an opinion from the Federal Trade Commission ("FTC") regarding the impact of these rules on consumers and competition. The FTC has had a long-standing interest in such effects of lawyer advertising. To that end, the FTC has issued several opinions regarding proposed regulations regarding lawyer advertising in several states and to the American Bar Association.[2] The FTC may be able to provide valuable information to assist this Court in making its determination regarding the constitutionality and impact of the Proposed Rules.

I hope this letter provides sufficient analysis of the additional issues. If further briefing is required, I would be pleased to provide it.

Very truly yours,

JACKSON & WALKER, L.L.P.

BY: Charles L. Babcock (by permission MMD)
Charles L. Babcock

Attorneys for Texans Against Censorship

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[2] See, e.g., Comments to Supreme Court of Mississippi, January 14, 1994, a copy of which is attached hereto. The FTC also has issued opinions on proposed regulations of lawyer advertising in Alabama, Florida, Georgia, Ohio, New Jersey, New Mexico, and to the American Bar Association.

Citation 28 F.3d 492 (CITE AS: 28 F.3D 492, 1994 WL 387968 (5TH CIR.(TEX.)))
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MD II ENTERTAINMENT, INC., d/b/a The Fare West, Plaintiff-Appellee-Cross-Appellant,
v.
CITY OF DALLAS, TEXAS, et al., Defendants-Appellants-Cross-Appellees.

No. 93-1703.
United States Court of Appeals,
Fifth Circuit.
Aug. 11, 1994.

Operator of topless bar sued city, challenging city ordinance regulating such establishments. The United States District Court for the Northern District of Texas, Barefoot Sanders, Chief Judge, upheld portions of ordinance, but struck down others. City appealed, and operator cross-appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) ordinance regulated speech; (2) portions of ordinance regulating commercial advertising violated First Amendment's free speech clause; and (3) operator lacked standing to assert claims on behalf of its dancers.

Affirmed.

Edith H. Jones, Circuit Judge, issued concurring opinion.

[1] CONSTITUTIONAL LAW k90.4(1)
92k90.4(1)
For First Amendment free speech purposes, ordinance defining "Class D Dance Hall" as any place that advertises as, inter alia, topless, gentleman's club, adult entertainment, or as x-rated, and which imposed restrictions on such establishments, "regulated speech"; under that ordinance, businesses that use certain terms in their advertising were required to close and relocate, while businesses that did not use those terms were unaffected. U.S.C.A. Const.Amend. 1.
See publication Words and Phrases for other judicial constructions and definitions.

[2] CONSTITUTIONAL LAW k90.4(1)
92k90.4(1)
City ordinance placing zoning restrictions on establishments that advertised as topless, gentleman's club, adult entertainment, x-rated, or by any other term calculated to attract patrons with nudity, seminudity, or simulated nudity, violated First Amendment's free speech clause; despite correlation between presence of topless dancing establishments, depressed property values, and increased crime, city relied on no studies showing link between advertising and property values or crime, and city presented no evidence that forbidding use of those terms in commercial advertising was narrowly tailored to prevent erosion of property values or reduce crime rates. U.S.C.A. Const.Amend. 1.

[2] ZONING AND PLANNING k76
414k76
City ordinance placing zoning restrictions on establishments that advertised as topless, gentleman's club, adult entertainment, x-rated, or by any other term calculated to attract patrons with nudity, seminudity, or simulated nudity,

violated First Amendment's free speech clause; despite correlation between presence of topless dancing establishments, depressed property values, and increased crime, city relied on no studies showing link between advertising and property values or crime, and city presented no evidence that forbidding use of those terms in commercial advertising was narrowly tailored to prevent erosion of property values or reduce crime rates. U.S.C.A. Const.Amend. 1.

[3] CONSTITUTIONAL LAW k42.2(2)
92k42.2(2)
Owners of topless club that challenged city ordinance regulating such clubs lacked standing to litigate its dancers' rights under state law to be free from sex discrimination; equal protection clause of Texas Constitution protected dancers, not owners, against sex discrimination, and no dancers joined as plaintiffs in suit. Vernon's Ann.Texas Const. Art. 1, s 3a.
*493 Sangeeta S. Kuruppillai, Asst. Co. Atty., Dallas, TX, for appellants.
Steven H. Swander, Ft. Worth, TX, for appellee.
Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM and JONES, Circuit Judges, and COBB, [FN*] District Judge.

FN* District Judge of the Eastern District of Texas, sitting by designation.

WISDOM, Circuit Judge:
**1 In this case we must decide whether the restrictions imposed by the defendant/appellant, the City of Dallas ("the City"), on the advertising of "Class D Dance Halls" are consistent with the First and Fourteenth Amendments. We conclude, as did the district court, that the restrictions imposed by the City are not allowable under the First Amendment, and accordingly, we AFFIRM the district court's summary judgment for the plaintiff. We also AFFIRM the district court's judgment on the plaintiff's cross-appeal.

I.

On January 22, 1992, the City amended its Dance Halls Ordinance to create a new category of business called a "Class D Dance Hall". The ordinance defined a Class D Dance Hall as any place

(A) where dancing is permitted one day a week or more by a person in a state of semi-nudity or simulated nudity; or
(B) that is advertised either on or off the premises:
(i) as topless;
(ii) as a gentleman's club, bar, or saloon;
(iii) as adult entertainment;
(iv) as x-rated; or
(v) by any other term calculated to attract patrons with nudity, semi-nudity, or simulated nudity. [FN1]

FN1. Dallas City Code, ch. 14, s 14-1(5).

The ordinance defined "semi-nudity" as "a state of dress in which clothing covers no more than the genitals, pubic region, buttocks, and areolae of the

female breast, as well as parts of the body covered by supporting straps or devices". [FN2] The ordinance defined "simulated nudity" as "a state of dress in which any device or covering, exposed to view, is worn that simulates any part of the genitals, buttocks, pubic region, or areolae of the female breast". [FN3]

FN2. Id. s 14-1(14).

FN3. Id. s 14-1(15).

The amended Class D Dance Halls ordinance imposed zoning restrictions on Class D Dance Halls. Specifically, the ordinance provided that no Class D Dance Hall may operate within 1,000 feet of a church, school, residential area, park, or another Class D Dance Hall. [FN4] After the amendment to the ordinance, every single operating business in the City of Dallas that fitted the definition of a Class D Dance Hall was in violation of the zoning restrictions.

FN4. Id. s 14-2.2.

Plaintiff/appellee MD II Entertainment, Inc. ("MD II") owns and operates The Fare West, a club in Dallas that features topless dancing. By having its dancers dance in a state of "simulated nudity", [FN5] MD II avoided *494 the strictures of the City's Sexually Oriented Business Ordinance. [FN6] MD II did, however, fall within the purview of the City's Class D Dance Halls ordinance. MD II has a Class D Dance Hall license, but The Fare West in its present location violates the zoning restrictions of s 14-2.2 of the ordinance. Accordingly, the ordinance requires The Fare West, as a "nonconforming use", to cease operation as a Class D Dance Hall.

FN5. MD II's female dancers wear opaque latex pasties that cover the areolae of their breasts. The district court noted that these pasties "are clearly designed to simulate female areolae". The dancers also wear opaque bikini bottoms. There is no disagreement that this mode of attire fits the ordinance's definition of "simulated nudity".

FN6. The Sexually Oriented Business ordinance defines "nudity" in a fashion that excludes "semi-nudity" or "simulated nudity".

MD II challenged the ordinance in the district court. On cross-motions for summary judgment, the district court upheld most of the ordinance. [FN7] It upheld the zoning distance requirements of s 14-2.2 and rejected the plaintiffs' vagueness and overbreadth challenges to the definition of "simulated nudity" in s 14-1(15). The district court struck down two provisions: (1) section 14-1(5)(B), which imposes the zoning requirements of s 14-2.2 on businesses only because of terms used in their advertising, and (2) section 14-3(a), which allows the Chief of Police to deny an application for a Class D Dance Hall license to applicants who are not of "good moral character" without providing any standards to protect against an arbitrary denial. The City has appealed to this court only the striking down of s 14-1(5)(B). [FN8] The district court also ruled that MD II has no standing to assert a state-law

sex discrimination challenge to the ordinance. MD II cross-appeals from this ruling. Finally, the district court also awarded MD II its attorneys' fees as a prevailing party, a ruling the City challenges on this appeal.

FN7. MD II Entertainment, Inc. v. City of Dallas, 1993 WL 227774 (N.D.Tex. Apr. 15, 1993).

FN8. Only the constitutionality of s 14-1(5)(B) is before us. The City conceded at oral argument that MD II now has clothed its dancers sufficiently to remove it from the purview of s 14-1(5)(A), but has not altered its advertising. The district court's opinion noted that "MDII ... uses off-premises newspaper and radio advertising which frequently employs the terms 'gentleman's entertainment,' 'gentleman's party complex,' and 'gentleman's club' to attract customers. MDII also uses on-premises signs to advertise its business which include the term 'topless' to describe the entertainment which MDII offers." 1993 WL 227774, at *11 n. 15. Accordingly, there is still a live controversy between the parties, but only so far as s 14-1(5)(B) is involved.

II.

**2 We begin by reviewing the district court's summary judgment holding that s 14-1(5)(B) is unconstitutional. Our standard of review is de novo. There are no disputed issues of fact, so we need only decide whether the district court correctly ruled that MD II was entitled to judgment as a matter of law.

A. The Ordinance Regulates Speech

[1] The city's first argument is that s 14-1(5)(B) is merely a definition that does not regulate speech at all, and accordingly is beyond First Amendment scrutiny. This argument exalts form over substance. Under the ordinance, businesses which use certain terms in their advertising must close and relocate, while businesses which do not use those terms are unaffected. The connection is one of cause and effect: the City says MD II must close The Fare West because of the advertising it employs. Section 14-1(5)(B) plainly is a regulation of speech.

B. Which Test Applies?

Section 14-1(5)(B) of the ordinance is a content-based restriction on commercial advertising. [FN9] The forbidden content is stated *495 expressly in the terms of the ordinance. Accordingly, until very recently it would have been clear that the appropriate test was the four-part intermediate scrutiny analysis laid out by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission. [FN10] More recent cases, however, have questioned the continued vitality of Central Hudson as it applies to content-based restrictions on commercial speech. Our resolution of this case renders it unnecessary to decide which standard applies, but we note the existence of the debate to inform counsel and future panels.

FN9. Because s 14-1(5)(B) regulates the content of protected commercial speech, we need not evaluate it under the "secondary effects" test often applied to content-neutral regulations of nonobscene erotic entertainment. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct.

925, 89 L.Ed.2d 29 (1986), reh'g denied, 475 U.S. 1132, 106 S.Ct. 1663, 90 L.Ed.2d 205 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), reh'g denied, 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976); cf. TK's Video, Inc. v. Denton County, Tex., 24 F.3d 705 (5th Cir.), reh'g denied, 24 F.3d ----, 1994 WL 386339 (5th Cir.1994). We do consider some of the "secondary effects" the City alleges, however, as relevant to the question whether there is a "substantial governmental interest" served by the ordinance. See infra part II.C.2.

Similarly, because s 14-1(5)(B) regulates MD II's advertising, rather than regulating the attire of the dancers at The Fare West, we need not evaluate the restriction under the approach of Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion).

FN10. 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

In R.A.V. v. City of St. Paul, Minnesota, [FN11] the Supreme Court subjected a content-based restriction of "fighting words" to strict scrutiny. The strict scrutiny test requires a regulation of speech to be narrowly tailored to a compelling governmental interest. The Supreme Court in R.A.V. concluded that the municipal ordinance at issue failed the strict scrutiny test, and the Court struck the ordinance down. Because commercial speech traditionally has received greater First Amendment protection than "fighting words", [FN12] some district courts have concluded that the strict scrutiny standard must apply to content-based restrictions of commercial speech as well. [FN13] Of course, it is undisputed that Central Hudson continues to govern content-neutral regulations of commercial speech. [FN14]

FN11. 505 U.S. ----, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

FN12. See R.A.V., 505 U.S. at ----, 112 S.Ct. at 2564-65, 120 L.Ed.2d at 343-44 (Stevens, J., concurring in the judgment); see also Rodney A. Smolla, Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech, 71 Tex.L.Rev. 777, 791 & nn. 56-57 (1993).

FN13. Citizens United for Free Speech II v. Long Beach Township Bd. of Comm'rs, 802 F.Supp. 1223, 1232 (D.N.J.1992); cf. Hornell Brewing Co., Inc. v. Brady, 819 F.Supp. 1227 (E.D.N.Y.1993) (applying both the Central Hudson and R.A.V. tests without deciding which is required).

FN14. See, e.g., Ibanez v. Florida Dep't of Business & Professional Regulation, Bd. of Accountancy, --- U.S. ----, 114 S.Ct. 2084, --- L.Ed.2d ---- (1994); United States v. Edge Broadcasting Co., 509 U.S. ----, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993); Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Comm'n, 24 F.3d 754 (5th Cir.1994).

Because we conclude that, on the record before us, s 14-1(5)(B) does not survive the intermediate scrutiny of Central Hudson, we need not consider whether that test, rather than the strict scrutiny of R.A.V., must guide our

inquiry. [FN15]

FN15. See Hornell Brewing, 819 F.Supp. at 1228 n. 1.

C. Applying the Central Hudson Factors

**3 [2] Central Hudson laid out a four-part test for evaluating a restriction of commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. [FN16]

FN16. Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351.

1. Legality and Truthfulness of the Communication

This issue is not contested. MD II's advertising is related to lawful activity and is not misleading.

2. The Governmental Interest

This part of Central Hudson requires us to "identify with care the interests the [City] itself asserts" for the restriction on speech; we may not "supplant the precise interests put forward by the [City] with other suppositions". *496 [FN17] The chief interest the City asserts to justify its regulation focuses on the deleterious effects topless bars have on the surrounding community. There is a correlation between the presence of topless dancing establishments, depressed property values, and increased crime. The City in formulating its ordinance relied on studies finding these correlations to exist. The district court relied on just these effects in upholding the location restrictions contained in s 14-2.2 of the Class D Dance Halls ordinance. MD II gives us no cause to question the validity and importance of the governmental interest in preserving property values and deterring crime.

FN17. Edenfield v. Fane, 507 U.S. ----, ----, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543, 553 (1993).

3. Direct Advancement of the Governmental Interest

This is the most difficult part of the Central Hudson test for the City. The Supreme Court has repeatedly emphasized the substantial burden this requirement places on the proponent of a restriction on commercial speech. [FN18] The burden is on the City to show that its restrictions on MD II's advertising "will in fact alleviate ... to a material degree" [FN19] the harms identified above. "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose". [FN20]

FN18. See Ibanez, --- U.S. at ----, 114 S.Ct. at 2088-89, --- L.Ed.2d at ----, and cases collected therein.

FN19. Fane, 507 U.S. at ----, 113 S.Ct. at 1800, 123 L.Ed.2d at 555.

FN20. Central Hudson, 447 U.S. at 564, 100 S.Ct. at 2350.

The district court found that "the city has failed to show that its regulation of Plaintiff's use of the term 'gentleman's club' in any way furthers its stated interest" in preserving property values or reducing crime. "[T]he city has made no finding", the district court continued, "that advertising that employs the term 'gentleman's club' produces the deleterious effects which the city seeks to curb". The City has not on this appeal persuaded us that the district court's findings were incorrect. In formulating its ordinance, the city relied on no studies showing a link between advertising and property values or crime. [FN21] We have no doubt that the interests the city seeks to protect merit protection, but like the district court, we are unable to conclude on this record that those interests are served by banning the advertising prohibited by the ordinance. This factor weighs in favor of affirming the district court.

FN21. See Fane, 507 U.S. at ----, 113 S.Ct. at 1800, 123 L.Ed.2d at 555.
After the district court granted summary judgment for MD II, the City submitted a motion for reconsideration. Attached to the City's motion was the affidavit of James Moncrief, an employee of a real estate consulting firm. Moncrief's affidavit for the first time asserted a link between advertising and depressed property values, and attached a one-page "asset performance monitor" report. The district court, however, refused to consider the new evidence and denied the city's motion. Thus, Moncrief's affidavit is not properly part of the record before this Court. The district court also ruled that "even if admitted, this [new] evidence would not be sufficient to alter the Court's decision ...". We note for the sake of completeness that the "asset performance monitor" provides decidedly mixed support for the City's argument, because it shows a higher property value and revenue growth rate for the area around MD II's property than for "comparable properties". Cf. Fane, 507 U.S. at ----, 113 S.Ct. at 1801, 123 L.Ed.2d at 556, rejecting affidavit "which contains nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications". In any event, Moncrief's affidavit (dated July 1, 1993) plainly was not considered by the City when it amended the Dance Halls Ordinance on January 22, 1992.

4. Narrow Tailoring
**4 Finally, Central Hudson requires that a regulation of commercial speech "extend only as far as the interest it serves". [FN22] In this respect, too, the ordinance is deficient. Section 14-1(5)(B)(v) is particularly broad, forbidding the use of any "term calculated to attract patrons with nudity, semi-nudity, or simulated nudity". The City conceded at oral argument that the literal wording of this provision reaches the advertising of events that have never been shown to harm property *497 values or promote crime. [FN23] The City has put no evidence in the record that forbidding the use of any "term calculated to attract patrons with nudity, semi-nudity, or simulated nudity" in commercial advertising is narrowly tailored to prevent the erosion of property

values or reduce crime rates. Therefore, this factor also supports the district court's judgment.

FN22. Central Hudson, 447 U.S. at 565, 100 S.Ct. at 2350.

FN23. In response to a question from the panel, the City's attorney acknowledged that advertising of "regular performances" of the musical Oh! Calcutta would fall within the prohibition in s 14-1(5)(B).

On balance, we conclude that application of the Central Hudson factors supports affirmance of the district court. There has been a failure of proof on this record. [FN24] Because the burden of justifying its speech regulation is on the City, the district court's summary judgment for the plaintiff was correct.

FN24. Cf. Ibanez, --- U.S. at ----, 114 S.Ct. at 2091, --- L.Ed.2d at ---- ("We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here.").

Because we uphold the district court's summary judgment for the plaintiff, we reject the City's challenge to the district court's award of attorneys' fees to MD II.

III.

[3] We turn next to MD II's cross-appeal. MD II attempted in the district court to assert a state-law sex-discrimination challenge to s 14-1(14) and (15) of the ordinance. MD II argued that the definitions contained in those sections define "semi-nudity" and "simulated nudity" differently for males and females. Wearing an opaque covering designed to simulate the areolae of the female breast constitutes "simulated nudity", but the same definition does not apply to the male breast. [FN25]

FN25. Cf. SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1279-80 (5th Cir.), reh'g denied, 841 F.2d 107 (5th Cir.1988), cert. denied, 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989), rejecting a similar sex-discrimination challenge against a sexually oriented business ordinance.

The district court ruled that MD II lacked standing to assert a sex-discrimination challenge. Although the district court acknowledged the existence of Article III standing, it rejected MD II's standing under the prudential rules of Warth v. Seldin. [FN26] Specifically, the district court ruled that MD II may not rely on jus tertii--the rights of its employees to be free from sex discrimination. [FN27] We review a district court's rulings on standing to sue de novo. [FN28]

FN26. 422 U.S. 490, 499-502, 95 S.Ct. 2197, 2205-2207, 45 L.Ed.2d 343 (1975).

FN27. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the

plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties". Id. at 499, 95 S.Ct. at 2205 (citations omitted).

FN28. United States v. $38,570 U.S. Currency, 950 F.2d 1108, 1111 (5th Cir.1992).

Article I, section 3a of the Texas Constitution provides:

Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

This provision obviously protects MD II's dancers, not MD II itself, against sex discrimination. None of MD II's dancers have joined as plaintiffs in this lawsuit, however. MD II gives us no reason to think that there is any practical obstacle to its dancers asserting their own rights to freedom from sex discrimination if they wish to do so. Granting standing to MD II may, however, result in the unnecessary litigation of a question those parties most immediately affected may not dispute. [FN29] Accordingly, we see no error in the district court's ruling that prudential considerations prevent MD II from litigating its dancers' rights.

FN29. See generally 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure s 3531.9 (2d ed. 1984 & supp. 1994).

**5 MD II's reliance on SDJ, Inc. v. City of Houston [FN30] is misplaced. Although it is true that we addressed the merits of a sex-discrimination *498 challenge brought by the owners of topless clubs in SDJ, we did not hold that club owners always must be allowed to raise their dancers' rights. We note also that the sex-discrimination challenge in SDJ was unsuccessful, suggesting that MD II likely would lose on the merits even if we did consider its jus tertii argument.

FN30. 837 F.2d 1268 (5th Cir.), reh'g denied, 841 F.2d 107 (5th Cir.1988), cert. denied, 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989).

IV.

We AFFIRM the district court's judgment in all respects.

EDITH H. JONES, Circuit Judge, concurring:

I concur in the majority opinion in this case with two additional observations. First, one must step back in wonder occasionally and ask, as to some areas of law, what have judges wrought? It makes little practical sense to say that the Fare West has to relocate if it permits certain forms of adult entertainment but not if, clothing its "dancers" with minuscule additional amounts of tape, it advertises--truthfully--that the entertainment has not changed. This is a silly consequence of first amendment jurisprudence that results from categorizing "zoning" regulations differently from "content-based" advertising regulations.

Second, the City of Dallas could have avoided this adverse ruling if it had adopted regulations such as that for "simple signs," SDJ, Inc. v. City of

CONCURRING OPINION
Houston, 837 F.2d 1268, 1278 (5th Cir.1988), or that upheld in In re Town of Islip v. Caviglia, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989).
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V940007

IN THE SUPREME COURT OF MISSISSIPPI COMMISSION AUTHORIZED

IN THE MATTER OF AMENDMENTS TO THE MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

MISC. NO. 89-R-99018

COMMENTS OF THE STAFF OF THE FEDERAL TRADE COMMISSION

The staff of the Federal Trade Commission offers these comments in response to the Court's Order of October 22, 1993 concerning amendments to the Mississippi Code of Professional Conduct that have been proposed by the state bar. These comments are the views of the staff of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.

These amendments would generally establish more restrictive standards governing attorney advertising and client solicitation. Several of these proposals may restrict the flow of truthful and useful information to consumers, and thus impede competition or increase costs, more than is necessary to achieve the consumer benefits envisioned by the drafters of the amendments. Specific provisions of the proposed amendments that raise serious concerns about adverse effects on consumers include those that (1) bar self-laudatory statements, representations of quality, and comparative claims; (2) restrict the content and style of media advertising; and (3) require a strong disclaimer about reliance on advertising. Except as noted, these comments take no position on other proposed amendments.

I. Interest and Experience of the Federal Trade Commission.

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[1] Pursuant to this statutory mandate, the FTC encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal goals. For several years the FTC and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals.[2] In addition, the staff has submitted comments about these issues to state

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[1] 15 U.S.C. Sec. 41 et seq.

[2] See, e.g., American Medical Ass'n, 94 F.T.C. 701 (1979); Iowa Chapter of American Physical Therapy Ass'n, 111 F.T.C. 199 (1988) (consent order); Wyoming State Bd. of Chiropractic Examiners, 110 F.T.C. 145 (1988) (consent order); Connecticut Chiropractic Ass'n, C-3351 (consent order issued November 19, 1991, 56 Fed. Reg. 65093 (December 13, 1991)); American Psychological Ass'n, C-3406 (consent order issued December 16, 1992, 58 Fed. Reg. 557 (January 6, 1993)); Texas Bd. of Chiropractic Examiners, C-3379 (consent order issued April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)); National Ass'n of Social Workers, C-3416 (consent order issued March 3, 1992, 58 Fed. Reg. 17411 (April 2, 1993)); and California Dental Ass'n, D-9259 (administrative complaint issued July 9, 1993).

legislatures and administrative agencies and others.[3] As one of the two federal agencies with principal responsibility for enforcing antitrust laws, the FTC is particularly interested in restrictions that may adversely affect the competitive process and raise prices (or decrease quality) to consumers. As an agency charged with a broad responsibility for consumer protection, the FTC is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception. As part of this effort, the FTC has examined the effects of public and private restrictions limiting the ability of professionals to contact prospective clients and to advertise truthfully.[4]

[3] The Commission's staff has previously submitted comments to state governments and professional associations on the regulation of professional advertising, including advertising by attorneys. See, e.g., comments to Supreme Court of New Mexico, July 29, 1991; State Bar of Arizona, April 17, 1990; Florida Bar Board of Governors, July 17, 1989; American Bar Association, November 22, 1988; New Jersey Supreme Court, November 9, 1987; Supreme Court of Alabama, March 31, 1987; New Jersey Board of Medical Examiners, September 7, 1993; South Carolina Legislative Audit Council, January 8, 1993 (medical boards); Missouri Board of Chiropractic Examiners, December 11, 1992; Texas Sunset Advisory Commission, August 14, 1992 (medical boards).

[4] See, e.g., 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). The thrust of the AMA decision--"that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011)--accords with the reasoning of Supreme Court decisions applying the First Amendment to professional regulation. See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990) (attorney's letterhead may use statement of bona fide specialty certification); Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988) (nondeceptive targeted mail solicitation is protected); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (upholds seeking business through printed advertising containing truthful and nondeceptive information and advice about legal rights and nondeceptive illustrations or pictures); Bates v. State Bar of

II. Description of the Proposed Rule.

The basic principle of the proposed rule is that a lawyer may not make, or permit to be made, communications about the lawyer or the lawyer's services that are false, misleading, deceptive, or unfair.[5] The subparts of this rule and the comments on it indicate several more specific rules and intended applications. A communication that "is likely to create an unjustified expectation about results the lawyer can achieve" would violate the rule; the comment says this would preclude communicating a lawyer's actual results or endorsements from satisfied clients.[6] Comparisons with other lawyers' services, regardless of whether they are false, misleading, deceptive, or unfair, would be banned unless they can be factually substantiated; the comment makes clear that the intention is to ban claims of superiority.[7] Testimonials would be banned explicitly, on the grounds that they are inherently misleading to laymen and constitute an implied claim about the results the lawyer could obtain.

Arizona, 433 U.S. 350 (1977) (state prohibition on advertising struck down; opinion recognizes role of advertising in the efficient functioning of the market for professional services).

[5] Proposed Rule 7.1. These comments deal only with aspects of Proposed Rule 7.

[6] Proposed Rule 7.1(b) and Comment.

[7] Proposed Rule 7.1(c) and Comment.

One subpart, aimed specifically at advertising, sets out restraints on content and style for advertisements in different media. Advertisements may not use dramatizations and may only use illustrations that present information that "can be factually substantiated and is not merely self-laudatory."[8] More generally, a lawyer may not make statements that are "merely self-laudatory" or that describe or characterize the quality of the lawyer's services.[9] In electronic media advertising, no background sound would be permitted, except instrumental music.[10] Only a single voice could be used, and the voice must be that of a full-time employee of, or a lawyer affiliated with, the firm whose services are advertised. In a television advertisement, that individual must appear on-screen.[11] Use of professional announcers, as well as celebrity endorsers, would thus be prohibited. These constraints are intended to ensure that advertising provides "only useful, factual information" in a "nonsensational" manner; the rule would ban sound effects, "sound tracks," slogans and jingles, because those techniques "fail to meet these standards and diminish public confidence in the legal system."[12] The comment states that the rule is intended to permit advertisements in which "the lawyer

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[8] Proposed Rule 7.2(e), (f).

[9] Proposed Rule 7.2(j); such statements would be permitted to existing clients or to prospective clients who request them.

[10] Proposed Rule 7.2(b) and comment.

[11] Proposed Rule 7.2(b).

[12] Comment to Proposed Rule 7.2.

personally appears to explain a legal right, the services the lawyer is available to perform, and the lawyer's background and experience."[13]

A prescribed disclaimer would be required on all advertising, except print advertising that contains only specified items of information and carries no illustrations.[14] The disclosure reads, "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Mississippi." The disclaimer must be recited orally at the loudest volume level and slowest speed as the rest of the advertisement;[15] it takes about 15 seconds. In a print advertisement or other written communication, it must appear in the largest and boldest type.[16] Television and radio advertisements must also include a further disclosure that additional information about the lawyer's

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[13] Id.

[14] Proposed Rule 7.2(d). The items that may be included in a print advertisement without triggering the disclosure requirement are: the names of the firm and its lawyers, addresses, phone numbers and office hours, dates of bar admission and jurisdictions where licensed, foreign language ability, participation in prepaid legal service plans, acceptance of credit cards, fee for initial consultation, and information about sponsorship of public service announcements or charitable, civic, or community programs. Proposed Rule 7.2(n).

[15] Proposed Rule 7.2(d)(i).

[16] Proposed Rule 7.2(d)(ii).

services is available free on request; this may be displayed, rather than narrated.[17]

Advertising would be permitted in most public media, but not through motion pictures or video cassettes because, according to the comment, information on those media may rapidly become outdated and hence misleading.[18] Advertisements (and all written communications) must contain the name of a lawyer or referral service responsible for their content, and must disclose the geographic location of the office whose lawyers will actually perform the services.[19] Advertisements that mention fees must include disclosures about how fees are computed and possible liability for expenses,[20] and specific advertised fees must be honored for at least 90 days.[21]

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[17] Proposed Rule 7.4(e)(1). This rule would require any firm that advertises to make available, free, in written form "a factual statement detailing the background, training and experience of each lawyer or law firm"; if the lawyer or firm claims special expertise or limits its practice to special types of cases, the statement must set out "the factual details of the lawyer's experience, expertise, background, and training in such matters." Proposed Rule 7.4(a). This statement must be included with all advertisements by written communication, and an announcement of its availability must be included in all print or display advertising. Proposed Rules 7.4(b), 7.4(e)(2), 7.4(e)(3).

[18] Proposed Rule 7.2(a) and Comment.

[19] Proposed Rules 7.2(c), 7.2(l).

[20] Proposed Rule 7.2(h).

[21] Proposed Rule 7.2(j); fees advertised in publications that appear infrequently, such as yellow pages, must be honored for a year.

Specialization or limitation of practice may be announced, but only for areas of practice that have occupied more than 30 percent of the lawyer's time (or 300 hours annually).[22] The rule lists the 31 areas of practice and the intellectual property specialties that may be identified and prohibits using other descriptions of the kinds of cases a lawyer handles.[23] Lawyers who accept cases outside of their specialties may not be listed under specialty classifications in telephone directories and their advertisements must appear together with a prescribed disclaimer.[24]

Use of trade or fictitious names (except those of deceased partners) would be prohibited. The term "legal clinic" or "legal services" could be used in conjunction with a lawyer's own name, but only for practices that provide routine services for fees lower than the prevailing rates.[25]

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[22] Proposed Rule 7.6(a)(4).

[23] Proposed Rule 7.6(a)(1), 7.6(a)(2), 7.6(c).

[24] Proposed Rule 7.6(a)(3)(b). The disclaimer reads,

> A description or identification of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more experienced or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by Rule of the Supreme Court of Mississippi.

[25] Proposed Rule 7.7(b).

III. Effects of the Proposed Rules.

Advertising, by professionals as well as by other kinds of businesses, informs consumers of options available in the marketplace and encourages competition among firms seeking to meet consumer needs. These procompetitive functions of advertising can be significant regardless of a firm's size or age. They may be especially important in facilitating the entry of new firms, by making them known to potential clients and helping them reach more quickly an efficient competitive size. Studies indicate that prices for professional services tend to be lower where advertising exists than where it is restricted or prohibited.[26] Empirical evidence also indicates that while certain restrictions on professional advertising tend to raise prices, the restrictions studied do not generally increase the quality of available goods and services.[27] These relationships among price, quality, and advertising have been found to exist in the provision of certain legal services as well as in the provision of other professional

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[26] Bond, Kwoka, Phelan & Whitten, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham & Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

[27] Bond et al., Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980). See also Benham, Licensure and Competition in Medical Markets, in Frech, ed., Regulating Doctors' Fees (1990); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

services.[28]

Advertising is not, of course, invariably benign. Advertising may sometimes be unfair or deceptive or may violate other legitimate goals of public policy. But truthful advertising is generally beneficial and procompetitive. The comments that accompany the proposed rules recognize the importance of "not interfering with the free flow of useful information to prospective users of legal services," while also noting concerns about potential interference with the fair and proper administration of justice and concerns that practices that are misleading or overreaching can create unjustified expectations and "adversely affect the public's confidence and trust in our judicial system."[29] The staff's reservations about some aspects of the proposals do not arise from disagreement that these are important issues. We suggest that the Supreme Court of the State of Mississippi can balance the matters at stake by imposing restrictions on advertising that are tailored to prevent unfair or deceptive acts or practices or otherwise to serve consumers, rather than imposing

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[28] See Jacobs et al., Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Calvani, Langenfeld & Shuford, Attorney Advertising and Competition at the Bar, 41 Vand. L. Rev. 761 (1988); Schroeter, Smith & Cox, Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 35 J. Indus. Econ. 49 (1987); Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. Bar Found. Research J. 179 (1979).

[29] Comments on Proposed Rule 7.2.

restrictions that tend chiefly to dampen competition.

The ban against all assertions relating to the quality of services offered, except for items of information that are expressly permitted by other, narrower provisions,[30] may be unnecessarily broad. "Self-laudatory" statements and claims concerning "the quality of legal services," which the rules would prohibit, are not necessarily either unfair or deceptive. While advertising fitting these descriptions could be employed to deceive consumers, many instances of non-deceptive, useful advertising could fit these descriptions as well. Most advertisements are self-laudatory to some extent, explicitly or implicitly. And even subjective, self-laudatory assertions about the quality of services offered, such as the importance a firm places on courtesy and attentiveness in the delivery of legal services to the public, can also convey information of some value.

Similarly, the proposed rules prohibiting comparative claims and illustrations that "cannot be factually substantiated" could be applied too broadly. Requiring that some kinds of claims be substantiated can, of course, serve consumers by helping to ensure that claims are not misleading; however, if substantiation is demanded for representations that, although not misleading, concern

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[30] See Proposed Rule 7.2(n). These specific enumerations of permissible quality-related claims would apparently take precedence, as a matter of rule interpretation, over the broader prohibition of Rule 7.2(j).

qualities that are not easy to measure, messages that consumers may find useful may be barred. Claims or assertions about aspects of service might be understood as at least implicitly comparative, and thus subject to the requirement of factual substantiation. Such claims as that the firm provides "friendly," "diligent," "prompt," or "convenient" service, while probably not susceptible to objective substantiation, may nonetheless communicate useful information, indicating qualities that the firm seeks to emphasize in its practice. The illustration that the comment specifically disapproves, a clenched fist, could similarly represent a feature that a firm could legitimately seek to emphasize about its practice, such as tenacity, that would probably not be susceptible to objective substantiation.[31] The commentary on the proposed rule shows a concern that the forbidden claims could mislead consumers about the results lawyers can achieve. But the proposed rule would ban all non-substantiable comparative claims and illustrations, regardless of whether they had any particular bearing on likely outcomes.

The rules may have been proposed as a response to a limited class of claims, namely overreaching and potentially misleading claims on which consumers could be expected to place serious reliance, such as unfounded or misleading claims about a lawyer's ability to secure relief for clients or about the relative quality

[31] The Comment interprets this illustration as a (prohibited) self-laudatory claim about the lawyer's ability to achieve results.

of a lawyer's work product. If so, such claims could be disciplined through narrower prohibitions that did not present as great a risk of chilling potentially useful communications. For example, rather than banning endorsements and testimonials outright, the court might consider an approach, similar to that taken by the Commission's guides on this subject, that seeks to ensure that client testimonials are truthful and not misleading.[32] More generally, the rules might target those claims that make insupportable representations about particular results or that inaccurately imply the existence of objective substantiation.[33]

The constraints on the style and content of broadcast advertisements could discourage competition in the legal profession. The comment on these restraints states that they are intended to ensure that advertising is limited to what is "useful," "factual," and "informational," presented in a manner that is "nonsensational." But the restraints will prohibit communications that are not deceptive, misleading, or unfair, and that are likely to be "useful" to consumers by helping them identify suitable providers. Both the style and the content of a provider's advertisement may help consumers decide whether the provider is

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[32] Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255. A copy of these guides is attached. These guides explicate and illustrate the application of the Federal Trade Commission Act's legal standards of unfairness and deception.

[33] This might be done by deleting Rule 7.2(j) and recasting Rule 7.1(c)'s substantiation provision.

suitable for their needs. The constraints would prevent the use of common methods that advertising firms have used for generations to make their messages memorable. These methods are unlikely to hoodwink unsuspecting consumers, because consumers are thoroughly familiar with them. Whether a slogan, musical tag, or illustration is misleading, deceptive, or unfair to consumers would depend on what it says and how it is understood, not on whether it is catchy and effective.

The ban against dramatizations is apparently intended to eliminate risks of distortion or of creating legal problems rather than solving them. The comment shows that the rule is intended to limit advertisements to identification of providers and explanations of the law. But dialogue and demonstration may be effective ways to explain the law, particularly to consumers who do not already know how legal terminology corresponds to their experiences and problems. And requiring on-screen or on-microphone appearances by the lawyers presenting the explanations is likely to discourage many professionals from using broadcast advertising. Perhaps the permitted format, of the lawyer talking into the camera about the law, would be effective for some lawyers, but for others it would not, and the difference in effectiveness may have little to do with differences in the quality of their legal services. The proposed rule could reward the telegenic, for others could not hire on-the-air professionals to help them put their message out.

The disclaimer and other disclosure obligations will tend to increase advertising costs, by requiring that messages be longer or by forcing advertisers to displace other information. Disclosure obligations may also discourage advertising if advertisers believe consumers will take the disclosure to reflect negatively on the advertiser, regardless of whether that imputation is justified. And the disclaimer would occupy a large fraction of a spot broadcast announcement and a prominent place in a printed display--unless the display were limited to the "tombstone" information that the rule permits. Because of these effects, disclosure requirements that are unnecessary can reduce the amount of useful information available to consumers.[34] Accordingly, it is important in evaluating disclosure requirements to weigh such costs against the expected benefits.

The proposed ban on advertising through video cassettes and movies is said to be required because information in these media would become outdated and hence misleading. But if that is the case, it may be better to enforce a standard against misleading advertising or to ensure that outdated material is withdrawn from use, rather than to ban outright the use of media that might be cost-effective alternatives to other forms of advertising.

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[34] There is some evidence that longer, more elaborate disclosures are no more effective than shorter ones in alerting consumers to issues that are otherwise undisclosed in an advertisement. See Murphy and Richards, Investigation of the Effects of Disclosure Statements in Rental Car Advertisements, 26 J. Cons. Aff. 351 (1992).

Some other features that would also make advertising more difficult should be considered carefully. Requiring advertisements to list each particular location where services will be provided will increase costs and may make cooperative advertising arrangements difficult or infeasible. The concern is evidently that consumers might be misled if the office that provides services is not the one identified in the advertising. But uncertainty about particular locations would probably be cleared up the moment the consumer called to set up an appointment. In any event, such problems could be dealt with by applying a general rule against deception, without the burdensome disclosure obligation that the rule would impose. Requiring that only certain phrases be used in describing the kinds of cases a lawyer takes, and preventing the use of other terms regardless of whether they are deceptive, may deprive consumers of particularly important information they need in choosing a lawyer. Consumers may understand their problems by rubrics that do not appear on the list of approved labels.

Finally, banning trade or fictitious names, regardless of whether there has been any showing of deception, may deprive consumers of valuable information, increase consumer search costs, and lessen competition. In other contexts, the FTC has found that restrictions on the use of non-deceptive trade names hinder the growth and development of firms and make it difficult for them to

advertise multiple outlets.[35] In some professional fields trade names can be essential to the establishment of large group practices that can offer lower prices. Trade names can be chosen that are easy to remember and, in addition, convey useful information, such as the location or other characteristics of a business. Over time, trade names can come to be associated with a certain level of quality, service and price, thus aiding consumers' search and promoting competition.

The proposed regulations would permit the use of two kinds of trade names. The rules would condone the long-standing pattern in the legal profession of retaining the names of former partners in the "institutional" name of a practice. And they would permit calling a practice a "clinic," if it was a low-price provider of routine services.[36] In each case, the words used, even though not the name of any particular lawyer who would provide services, convey information about the practice that consumers may find

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[35] Ophthalmic Practices Rule, Statement of Basis and Purpose, 54 Fed. Reg. 10285, 10289 (March 13, 1989).

[36] Care should be taken that enforcement of this rule does not lead to reductions in price competition. On the one hand, standardizing terminology can benefit consumers: if the word "clinic" applies only to providers whose fees are relatively low, then those consumers who are concerned most about price could find a suitable provider quickly by narrowing their search to "clinics." But determining whether a firm is in compliance with this regulation will require comparing its fees with those prevailing in the community. The processes of determining the prevailing fees and judging whether the firm's fees are enough lower to justify the use of the "clinic" label should not be used by attorneys or law firms to develop or maintain collusive, standard fee levels or schedules in violation of federal or state antitrust laws.

valuable, in a way that is memorable and thus effective as a marketing tool. Other words could serve the same informative function without being deceptive or misleading. Restrictions on trade names are often intended to ensure identification and accountability of individual practitioners. But this goal may be achieved by other means, without losing the competitive benefits of trade names.

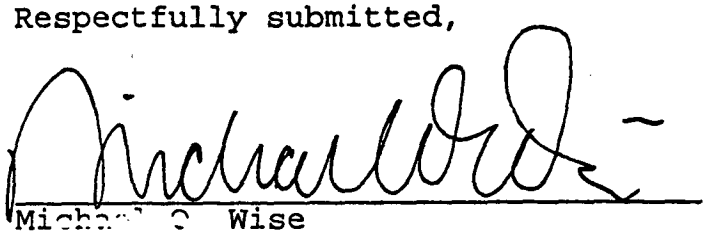
IV. Conclusion.

Some parts of the proposed rule to regulate attorney advertising may give insufficient weight to the contributions that nondeceptive advertising can make to informed consumer choice. We therefore suggest that you consider modifying the rules to permit a wider range of truthful communications and to narrow their prohibitions to target only those representations that pose a clear likelihood of consumer injury through material unfairness or

deception, or that otherwise violate significant public policy objectives in a way that threatens to cause injury to consumers.

We appreciate this opportunity to provide our views.

Respectfully submitted,



Michael O. Wise
Acting Director
Office of Consumer and Competition Advocacy
Federal Trade Commission
Sixth Street and Pennsylvania Avenue, N. W.
Washington, D. C. 20580
January 14, 1994

Representations (Part 251 of this chapter). [Guide 8]

§ 254.9 Deceptive or unfair collection and credit practices.

(a) An industry member should not use any deceptive representations or deceptive means to collect or attempt to collect tuition or other charges from its students. For example, an industry member should not represent that a delinquent account has been or will be referred to an independent collection agency or to an attorney unless such is the fact.

(b) An industry member should not seek to enforce or obtain a judgment or otherwise attempt to collect on any contract or other instrument between itself and a student, or transfer or assign such contract or other instrument to a third party for the purpose of collection or of enforcing or obtaining a judgment on said contract or instrument, if the member or its employees or representatives misrepresented the nature or the terms of said contract or instrument at the time or prior to the time the contract or instrument was signed.

NOTE: The Commission's Guides Against Debt Collection Deception (Part 237 of this chapter) afford further guidance in this area.

[Guide 9]

§ 254.10 Affirmative disclosure prior to enrollment.

Before obtaining the signature of a prospective student or of his parent or guardian on an enrollment contract or contract of sale, an industry member should furnish in writing to that person or persons the following information:

(a) The member's policy and regulations relative to make-up work, delay or delinquency in meeting course requirements, and standards required of the student for achieving satisfactory progress, including class attendance if applicable.

(b) If the member recommends, suggests, or requires that the student have or secure any additional texts, equipment, or materials other than usual student supplies such as paper and pencils, or utilize any supplementary services offered by the member, and the cost thereof is not included in the contract price of the course, an itemized list of such items and services showing the price thereof.

(c) In the case of courses to be taught in residence, a description of the school's physical facilities, and equipment to be used in teaching the class, and the usual class size.

(d) If the member represents that it offers a placement service to its graduates or will otherwise secure or assist them to find employment, a detailed and explicit description of the extent and nature of this service or assistance.

(e) Any other material facts concerning the school and the program of instruction or course which are reasonably likely to affect the decision of the student to enroll therein. [Guide 10]

PART 255—GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

AUTHORITY: 38 Stat. 717, as amended; 15 U.S.C. 41-58.

§ 255.0 Definitions.

(a) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term *endorsements* is therefore generally used hereinafter to cover both terms and situations.

(b) For purposes of this part, an *endorsement* means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group or institution.

(c) For purposes of this part, the term *product* includes any product, service, company or industry.

(d) For purposes of this part, an *expert* is an individual, group or institution possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

Example 1: A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement since it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor or exhibitor. Therefore, any alteration in or quotation from the text of the review which does not fairly reflect its substance would be a violation of the standards set by this part.

Example 2: A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family's clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

Example 3: In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. Such an advertisement would not be an endorsement.

Example 4: A manufacturer of automobile tires hires a well known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesman or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he/she actually believed in what he/she was saying and had personal knowledge sufficient to form that belief. Hence they would think that the advertising message reflects the driver's personal

views as well as those of the sponsoring advertiser. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 5: A television advertisement for golf balls shows a prominent and well-recognized professional golfer hitting the golf balls. This would be an endorsement by the golfer even though he makes no verbal statement in the advertisement.

[40 FR 22128, May 21, 1975, as amended at 45 FR 3872, Jan. 18, 1980]

§ 255.1 General considerations.

(a) Endorsements must always reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, they may not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser. [*See* Example 2 to Guide 3 (§ 255.3) illustrating that a valid endorsement may constitute all or part of an advertiser's substantiation.]

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may neither be presented out of context nor reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only as long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) In particular, where the advertisement represents that the endorser uses the endorsed product, then the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as he has good reason to believe that the endorser remains a bona fide user of the product. [*See* § 255.1(b) regarding the "good reason to believe" requirement.]

Guide 1, Example 1: A building contractor states in an advertisement that he specifies the advertiser's exterior house paint because of its remarkable quick drying properties and its durability. This endorsement must comply with the pertinent requirements of Guide 3. Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisment portrays a woman seated at a desk on which rest five unmarked electric typewriters. An announcer says "We asked Mrs. X, an executive secretary for over ten years, to try these five unmarked typewriters and tell us which one she liked best."

The advertisement portrays the secretary typing on each machine, and then picking the advertiser's brand. The announcer asks her why, and Mrs. X gives her reasons. Assuming that consumers would perceive this presentation as a "blind" test, this endorsement would probably not represent that Mrs. X actually uses the advertiser's machines in her work. In addition, the endorsement may also be required to meet the standards of Guide 3 on Expert Endorsements.

[Guide 1]

[45 FR 3872, Jan. 18, 1980]

§ 255.2 Consumer endorsements.

(a) An advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve. The Commission's

[*See* § 255.1(b) regarding the "good reason to believe" requirement.]

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(b) Advertisements presenting endorsements by what are represented, directly or by implication, to be "actual consumers" should utilize actual consumers, in both the audio and video or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

(c) Claims concerning the efficacy of any drug or device as defined in the Federal Trade Commission Act, 15 U.S.C. 55, shall not be made in lay endorsements unless (1) the advertiser has adequate scientific substantiation for such claims and (2) the claims are not inconsistent with any determination that has been made by the Food and Drug Administration with respect to the drug or device that is the subject of the claim.

Guide 2, Example 1: An advertisement presents the endorsement of an owner of one of the advertiser's television sets. The consumer states that she has needed to take the set to the shop for repairs only one time during her 2-year period of ownership and the costs of servicing the set to date have been under $10.00. Unless the advertiser possesses and relied upon adequate substantiation for the implied claim that such performance reflects that which a significant proportion of consumers would be likely to experience, the advertiser should include a disclosure that either states clearly and conspicuously what the generally expectable performance would be or clearly and conspicuously informs consumers that the performance experienced by the endorser is not what they should expect to experience. The mere disclosure that "not all consumers will get this result" is insufficient because it can imply that while all consumers cannot expect the advertised results, a substantial number can expect them. [See the cross reference in Guide 2(a) regarding the acceptability of disclaimers or disclosures.]

Example 2: An advertiser presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers probably represents a promise to consumers that this is the typical result that ordinary consumers can expect from the advertiser's cake mix.

Example 3: An advertisement purports to portray a "hidden camera" situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though the words "hidden camera" are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be disclosed.

[Guide 2]

[45 FR 3872, Jan. 18, 1980]

255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give him the expertise that he is represented as possessing with respect to the endorsement.

(b) While the expert may, in endorsing a product, take into account factors not within his expertise (e.g., matters of taste or price), his endorsement must be supported by an actual exercise of his expertise in evaluating product features or characteristics with respect to which he is expert and which are both relevant to an ordinary consumer's use of or experience with the product and also are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. Where, and to the extent that, the advertisement implies that the endorsement was based upon a comparison such comparison must have been included in his evaluation; and as a result of such comparison, he must have concluded that, with respect to those features on which he is expert and which are relevant and available to an ordinary consumer, the

endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority.

Example 1: An endorsement of a particular automobile by one described as an "engineer" implies that the endorser's professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: A manufacturer of automobile parts advertises that its products are approved by the "American Institute of Science." From its very name, consumers would infer that the "American Institute of Science" is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. Even if the American Institute of Science is such a bona fide expert testing organization, as consumers would expect, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 3: A manufacturer of a non-prescription drug product represents that its product has been selected in preference to competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the choice of the manufacturer's product, convenience of packaging, is neither relevant nor available to consumers.

Example 4: The president of a commercial "home cleaning service" states in a television advertisement that the service uses a particular brand of cleanser in its business. Since the cleaning service's professional success depends largely upon the performance of the cleansers it uses, consumers would expect the service to be expert with respect to judging cleansing ability, and not be satisfied using an inferior cleanser in its business when it knows of a better one available to it. Accordingly, the cleaning service's endorsement must at least conform to those consumer expectations. The service must, of course, actually use the endorsed cleanser. Additionally, on the basis of its expertise, it must have determined that the cleansing ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of competing products with which the service has had experience and which remain reasonably available to it. Since in this example, the cleaning service's president makes no mention that the endorsed cleanser was "chosen," "selected," or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having to have performed side-by-side or scientific comparisons.

Example 5: An association of professional athletes states in an advertisement that it has "selected" a particular brand of beverages as its "official breakfast drink". As in Example 4, the association would be regarded as expert in the field of nutrition for purposes of this section, because consumers would expect it to rely upon the selection of nutritious foods as part of its business needs. Consequently, the association's endorsement must be based upon an expert evaluation of the nutritional value of the endorsed beverage. Furthermore, unlike Example 4, the use of the words "selected" and "official" in this endorsement imply that it was given only after direct comparisions had been performed among competing brands. Hence, the advertisement would be deceptive unless the association has in fact performed such comparisons between the endorsed brand and its leading competitors in terms of nutritional criteria, and the results of such comparisons conform to the net impression created by the advertisement.

[Guide 3]

[40 FR 22128, May 21, 1975]

§ 255.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors which vary from individual to individual. Therefore an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under § 255.3 of this part (Expert endorsements), it must utilize an expert or experts rec-

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Example: A mattress seller advertises that its product is endorsed by a chiropractic association. Since the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an expert evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the particular attributes of the advertised mattress in mind. (See also § 255.3, Example 5.)

[Guide 4]

[40 FR 22128, May 21, 1975]

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience) such connection must be fully disclosed. An example of a connection that is ordinarily expected by viewers and need not be disclosed is the payment or promise of payment to an endorser who is an expert or well known personality, as long as the advertiser does not represent that the endorsement was given without compensation. However, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit, such as an appearance on TV, would be extended to the endorser.

Example 1: A drug company commissions research on its product by a well-known research organization. The drug company pays a substantial share of the expenses of the research project, but the test design is under the control of the research organization. A subsequent advertisement by the drug company mentions the research results as the "findings" of the well-known research organization. The advertiser's payment of expenses to the research organization need not be disclosed in this advertisement. Application of the standards set by Guides 3 and 4 provides sufficient assurance that the advertiser's payment will not affect the weight or credibility of the endorsement.

Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must of course comply with § 255.1; but even though the compensation paid the endorser is substantial, neither the fact nor the amount of compensation need be revealed.

Example 3: An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his "spontaneous" opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein "steak". This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the "hidden camera" only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

[Guide 5]

[45 FR 3873, Jan. 18, 1980]

PART 256—GUIDES FOR THE LAW BOOK INDUSTRY

Sec.

V 11C018

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
DALLAS REGIONAL OFFICE

100 N. Central Expressway
Suite 500
Dallas, TX 75201
(214) 767-5503

COMMISSION AUTHORIZED
Office of the Regional Director

July 29, 1991

Rose Marie Alderete
Clerk of the Supreme Court
State of New Mexico
P.O. Box 848
Supreme Court Building
Santa Fe, NM 87504-0848

Dear Ms. Alderete:

The staff of the Federal Trade Commission is pleased to respond to the request from the New Mexico Supreme Court for comments on the proposed amendments to the New Mexico Code of Professional Conduct.[1] These amendments would generally establish more restrictive standards than now exist in the areas of attorney advertising and client solicitation. We believe that several of these proposals may restrict the flow of truthful and useful information to consumers, and thus impede competition or increase costs, to a greater extent than is necessary to achieve the consumer benefits envisioned by the drafters of the amendments.

The discussion of these issues will be divided into a number of sections. The first of these describes the FTC staff's interest and previous experience in this field. We then present a statement of our general conclusions. The remaining sections then take up the specific provisions of the proposed amendments that raise the most serious concerns about adverse effects on consumers, including the provisions governing: (1) self-laudatory statements and representations of quality; (2) claims that cannot be factually substantiated; (3) solicitation in personal injury cases; and (4) a caution to consumers against exclusive reliance on advertising. This comment takes no position on other proposed amendments.[2]

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[1] These comments are the views of the staff of the Dallas Regional Office and the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

[2] We recognize that the deadline for submitting comments was July 1, 1991. However, it is my understanding based upon our conversation that these FTC staff comments will be considered by the Court if they are submitted before the Court takes final action.

The Interest and Experience of the Staff of the Federal Trade Commission

Congress has empowered the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[3] Pursuant to this statutory mandate, the Commission and its staff seek to encourage competition among members of the licensed professions to the maximum extent compatible with other legitimate goals.[4] For several years the Commission and its staff, through law enforcement proceedings and analysis, have been evaluating the competitive effects of public and private restrictions on the business practices of lawyers, dentists, optometrists, physicians, and other state-licensed professionals. Our goal has been to identify restrictions that impede competition or increase costs without providing countervailing benefits to consumers. As part of this effort, the Commission has examined the effects of public and private restrictions limiting the ability of professionals to contact prospective clients and to advertise truthfully.[5]

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[3] 15 U.S.C. Sec. 41 et seq.

[4] The Commission's staff has previously submitted comments to state governments and professional associations on the regulation of professional advertising, particularly advertising by attorneys. See, e.g., Comments of the Federal Trade Commission Staff on the Rules of Professional Conduct of the State Bar of Arizona, submitted to Bruce Hamilton, Executive Director, State Bar of Arizona (April 17, 1990); Comments of the Federal Trade Commission Staff on the Rules of Professional Conduct of the Florida Supreme Court, submitted to William Blews, Member, Florida Bar Board of Governors (July 17, 1989); Comments of the Federal Trade Commission Staff on the American Bar Association Model Rules of Professional Conduct (November 22, 1988); Comments of the Federal Trade Commission Staff on the Rules of the Idaho State Board of Chiropractic Physicians (December 7, 1987); Comments of the Federal Trade Commission Staff on the Rules of Professional Conduct of the New Jersey Supreme Court, submitted to the Committee on Attorney Advertising of the New Jersey Supreme Court (November 9, 1987); Comments of the Federal Trade Commission Staff on the Code of Professional Responsibility of the Alabama State Bar, submitted to the Supreme Court of Alabama (March 31, 1987); Comments of the Federal Trade Commission Staff on the rules of the South Carolina Boards of Optometry and Opticianry, submitted to the Legislative Audit Council of the State of South Carolina (February 19, 1987).

[5] See, e.g., 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). The thrust of the AMA decision -- "that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011)

General Conclusions

Our experience in this area confirms that advertising informs consumers of options available in the marketplace, and encourages competition among firms seeking to meet consumer needs. And, while these procompetitive functions of advertising can be significant regardless of a firm's size or age, they may be especially important in facilitating the entry of new firms, enabling them to become known to potential clients and to reach an efficient competitive size more quickly than they otherwise might. Studies indicate that prices for professional services tend to be lower where advertising exists than where it is restricted or prohibited.[6] Empirical evidence also indicates that while certain restrictions on professional advertising tend to raise prices, the restrictions studied do not generally increase the quality of available goods and services.[7] These relationships among price,

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-- accords with the reasoning of recent Supreme Court decisions involving professional regulations. See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990) (holding that state's total prohibition of attorney's use on letterhead of statement of bona fide specialty certification violates the First Amendment); Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988) (holding that nondeceptive targeted mail solicitation is protected by the First Amendment); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (holding that an attorney may not be disciplined for seeking legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients or for using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding a state prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding invalid a Virginia prohibition on price advertising by pharmacies).

[6] Bond, Kwoka, Phelan & Whitten, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham & Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

[7] Bond et al., Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980). See also Benham, Licensure and Competition in Medical Markets, in Frech, ed., Regulating Doctors' Fees (1990); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

quality, and advertising have been found to exist in the provision of certain legal services as well as in the provision of other professional services.[8]

This is not, of course, to say that advertising is invariably benign. As noted by the State Bar Task Force that drafted the proposed rules, advertising may sometimes be unfair or deceptive, or may violate other legitimate goals of public policy. We believe, however, that truthful advertising is generally beneficial. Therefore, we suggest that the Supreme Court of the State of New Mexico should impose restrictions on advertising only if those rules are narrowly tailored to prevent unfair or deceptive acts or practices, or otherwise to serve consumers.[9]

The remaining sections of the letter will apply these general principles to the proposed Rules of Professional Conduct.

Restrictions on Advertising Content: Rule 16-701 B.(4), (9), and (10)

The proposed rules would prohibit "self-laudatory" statements, claims concerning "the quality of legal services," and any claims that cannot be factually substantiated. As discussed below, while these categories of advertising could be employed to deceive consumers, each of the prohibitions could also inhibit the provision of truthful and useful information. They may thus be unnecessarily broad.

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[8] See Jacobs et al., Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Calvani, Langenfeld & Shuford, Attorney Advertising and Competition at the Bar, 41 Vand. L. Rev. 761 (1988); Schroeter, Smith & Cox, Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 35 J. Indus. Econ. 49 (1987); Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979).

[9] The published comments of the State Bar Task Force that drafted the proposed amendments themselves recognize the importance of not "impeding the flow of useful, meaningful, and relevant information to the public," while also noting the State's concern with "protecting the public from false, deceptive, or misleading advertisements by lawyers." The reservations we note concerning the Bar's proposals do not arise from disagreement with these stated concerns, but rather as different judgments as to how best to balance these principles.

A. Representations of Quality and Self-Laudation: Rule 16-701 B.(4) and (10)

On their face, these proposed rules would apparently ban all assertions relating to the quality of services offered other than those expressly permitted by other, narrower rule provisions.[10] Many instances of ordinary, non-deceptive, and useful advertising could thereby be prohibited. Notably, most advertisements are self-laudatory to some extent, explicitly or implicitly. And even subjective, self-laudatory assertions of the quality of services offered, though understood by consumers as "puffery" in some part, can also convey information of some value -- if only that the firm believes that, for example, courtesy and attentiveness are particularly important aspects of the delivery of legal services to the public. A ban of this nature may also harm consumers by affecting the incentives that shape lawyers' conduct of their practices. Without the ability to call attention to subjective features as desirable aspects of his or her practice, the incentive to provide them is likely to be reduced.

We recognize that these rules may actually be intended to prohibit only a limited class of overreaching and potentially misleading claims on which consumers could be expected to place serious reliance, such as claims concerning an attorney's ability to secure relief for clients or other indicia of the relative quality of a lawyer's work product.[11] If so, the Court might wish to rely instead on a prohibition of quality claims whose content would suggest that they are supported by objective substantiation, when in fact they are not. Thus, the Court might consider deleting Rules 16-701 B.(4) and (10) entirely and recasting Rule 16-701 B.(9)'s substantiation provision (as discussed below) to secure this objective. This approach could alleviate the chilling of potentially useful communications that the present language may entail.

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[10] See, e.g., Rule 16-701 A.(3) through (5), and Rule 16-702 D generally. We assume that these specific enumerations of permissible quality-related claims take precedence, as a matter of rule interpretation, over the broad prohibitions found in Rule 16-701 B. If so, a firm could advertise, for example, that it accepted credit card payment and offered fixed fees for specific services (as long as it included the seemingly redundant disclosure that the fees were for those specific services); but it is not clear that the firm could characterize the credit-card option as "convenient," or the fees as "low" or otherwise advantageous without running afoul of the 16-701 B prohibitions.

[11] This intent also seems apparent in, for example, Rule 16-701 A.(3) and (4).

B. Claims that Cannot be Factually Substantiated: Rule 16-701 B.(9)

The proposed rules would also preclude advertising claims that "cannot be factually substantiated." As suggested above, however, some claims, such as that the firm provides "friendly," "diligent," "prompt," or "convenient" service, while probably not susceptible to objective substantiation, may nonetheless communicate useful information, indicating qualities that the firm seeks to emphasize in its practice. In this regard, the Court may wish to distinguish between those claims that imply, by their content, the existence of objective substantiation, and those that do not. Only the former should be subjected to the requirement that the advertiser actually possess the implied substantiation, or refrain from making the claim.

Solicitation in Personal Injury Cases: Rule 16-701 C.(3)

The proposed rule would prohibit all solicitations (written, telephonic, or in-person) directed to an injured person or a relative of an injured person when that solicitation relates to an action for personal injury or wrongful death. Direct solicitation by lawyers, like advertising, can be a useful source of information about a consumer's legal rights and remedies, and also can provide information about the terms and availability of legal services. On the other hand, as the Supreme Court reasoned in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), in-person solicitation in particular may disserve the individual's and society's interest in informed and reliable decisionmaking where it discourages persons needing counsel from engaging in a critical and unhurried comparison of available legal services. Id. at 457. The potential for overreaching is significant when a lawyer, "a professional trained in the art of persuasion," personally solicits a prospective client who may be physically or emotionally overwhelmed by the circumstances giving rise to the need for legal services. Id. at 465.

At least one jurisdiction has adopted a rule more narrowly tailored to address the concerns expressed in Ohralik than the rule proposed here.[12] Nevertheless, a broad ban on at least in-person

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[12] The District of Columbia's Rules of Professional Conduct permit uninvited in-person solicitation so long as: (1) the solicitation does not involve false or misleading statements or claims; (2) the solicitation does not involve the use of undue influence; and (3) the potential client's apparent physical or mental condition would not prevent him or her from exercising "reasonable, considered judgment" when selecting a lawyer. Rule 7.1(b), Rules of Professional Conduct, District of Columbia Court of Appeals, adopted March 1, 1990 (effective January 1, 1991).

solicitation of personal injury victims might be justified if a narrower restriction of this sort would be ineffective -- because, for example, direct solicitation "is not visible or otherwise open to public scrutiny" and, as a result, may be "virtually immune to effective oversight." Id. at 466.[13] As to written solicitations, however, the concerns expressed by the Ohralik Court seem less salient, since the communication may normally be considered at leisure by its target. Thus, the Court may wish to evaluate the sufficiency of a prohibition more narrowly targeted than that presently proposed to address this problem.

Cautioning Consumers Against Exclusive Reliance on Advertising: Rule 17-701 F.

Another provision of the new rules would require attorneys who advertise to caution consumers against exclusive reliance on advertising. Proposed Rule 17-701 F. would require that all advertisements contain the following disclaimer: "This is a paid advertisement. The choice of a lawyer should not be based upon an advertisement alone."[14]

Any disclosure obligation tends to increase advertising costs, both because it may increase the length of the message and because it may force advertisers to forego some other portion of the message that would have been delivered had the space not been occupied by the disclosure. Unnecessary disclosure requirements can thus result in a decrease in useful information available to consumers. Moreover, some disclosures may further discourage advertising if consumers are thought likely to understand the disclosure to reflect negatively on the advertiser, even when such an inference is unjustified. Accordingly, it is important in evaluating disclosure requirements to weigh such costs against any benefits that can be clearly identified.

Conclusion

In short, we believe that some of the proposed rules under consideration for regulating attorney advertising and solicitation may not give sufficient weight to the value of informed consumer choice. We therefore suggest that you consider modifying the rules to permit a wider range of truthful communications, and to narrow

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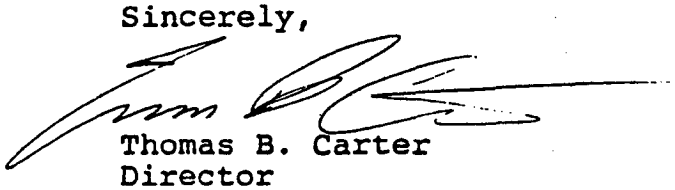
[13] We lack information concerning the prevalence within the Court's jurisdiction of such abusive direct solicitation.

[14] However, proposed Rule 16-701 F.(2) allows attorneys to use print advertisements in the strictly limited business card/legal directory format without the disclosure.

their prohibitions to target only those representations that pose a clear likelihood of consumer injury through material unfairness or deception, or that otherwise violate significant public policy objectives in a way that threatens to cause net injury to consumers.

We appreciate this opportunity to provide our views. Please feel free to contact me if you have any questions, or if we can help in any other way.

Sincerely,



Thomas B. Carter
Director
Dallas Regional Office