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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

In re: Petition to Amend the Rules Regulating The Florida Bar	Case No. 70,366

RESPONSE TO THE PETITION
TO AMEND THE RULES
REGULATING THE FLORIDA BAR

The Federal Trade Commission staff is pleased to submit this statement of our views on the petition to amend the Rules Regulating The Florida Bar.[1] Our comments focus on the proposed rules regarding fees and advertising, and on the existing rules regarding fees, practice with nonlawyers, advertising, and solicitation. The proposed rules would relax the restrictions on fees and should permit more price competition than do the existing rules. We therefore support this change. We are concerned, however, that some of the other proposed rules may harm consumers by discouraging referrals and associations between attorneys, and by unnecessarily limiting the information available to consumers. We are also concerned that no amendments have been proposed for certain existing rules that may also be harmful to consumers. Such rules include those restraining price competition, hindering the development of innovative and potentially more efficient forms of legal practice, and prohibiting truthful, nondeceptive advertising and solicitation.

As is discussed in more detail below, we support proposed Rule 4-1.5(a) to the extent that it would relax restrictions on fees. In addition to that change, however, we also recommend that the Court: (1) delete Rule 4-1.5(D)(4)b.1 and b.2 to remove the ceilings on contingent fees; (2) delete proposed Rule 1.5(f)(2), (f)(4)d, and (g) so as not to discourage referrals and

[1] These comments represent the views of the Federal Trade Commission's Bureaus of Competition, Consumer Protection, and Economics, and not necessarily those of the Commission itself. The Commission has, however, voted to authorize us to submit these comments for your consideration.

associations of attorneys in different law firms for particular cases; (3) eliminate the restrictions in Rule 4-5.4 on practice with nonlawyers; (4) amend Rule 4-7.1 to clarify that truthful, nondeceptive endorsements and experience, success, and comparison claims are permitted; (5) delete Rule 4-7.2(a); (6) modify Rule 4-7.2(c) to allow the payment of referral fees to attorneys; (7) delete portions of the comment accompanying Rule 4-7.2 to eliminate the requirement that advertisements comport with the dignity of the profession and to permit the use of advertising techniques such as slogans and soundtracks; (8) delete proposed Rule 4-7.3 so as not to discourage advertising of legal services in tort cases; (9) modify Rule 4-7.3 to remove the broad ban on solicitation; (10) modify Rule 4-7.4 to allow express and implied claims of specialty and certification; and (11) delete Rule 4-7.6(a)(2) so as not to discourage participation in lawyer referral services.

Proposed Rule 4-1.5(a)(1): Reasonableness of Fee

Existing Rule 4-1.5(B) prohibits attorneys from charging a fee in excess of a reasonable fee and subparagraph (3) provides that the "fee customarily charged in the locality for similar legal services" is to be considered in determining reasonableness. Proposed Rule 4-1.5(a)(1) would prohibit only fees that exceed a reasonable fee "to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney . . . ." We do not believe that consumers of legal services benefit from price regulation, whether a minimum or maximum price is imposed. Setting a minimum price may increase prices and setting a maximum price may reduce the quality of services offered. While both the existing and the proposed rules set limits on fees, the maximum provided in the proposed rule appears to be higher, which would allow consumers more flexibility to pay the price necessary to employ the attorney of their choice. The proposed rule would, at the same time, prevent possible abuse of consumers, without regulating fees as stringently as does the existing rule. We therefore support the proposed rule to the extent that it would allow consumers and attorneys more latitude in negotiating fees for legal services than does the existing rule. We do, however, caution that any price regulation raises the possibility that it could be interpreted so broadly as to stifle legitimate price competition.

Rule 4-1.5(D)(4)b: Ceiling on Contingent Fees

Rule 4-1.5(D)(4)b.1 provides that in a tort action in which a contingent fee is charged, the fee is presumed to be clearly excessive if it is greater than the percentages of the recovery set forth in the rule. This rule thus sets a ceiling on fees,

which may have harmful effects on competition. Attorneys will not offer services that cost more to provide (including the opportunity cost of the attorney's time) than the fees they are permitted to charge. In addition, a consumer with a claim for which the possibility of recovery is small may not be able to retain an attorney because attorneys may not want to bear the risk of litigating such a case unless they can earn a greater percentage of the recovery than the ceiling would allow. Also, if the total amount of recovery in personal injury cases is reduced, as through legislation that sets a cap on judgments, the ceilings established by a percentage rule may become too low. Rule 4-1.5(D)(4)b.2 does permit a circuit court to authorize a higher fee but that would impose on the consumer the expense of preparing and filing a petition with the court. For these reasons, we recommend that the Court consider deleting Rule 4-1.5(D)(4)b.1 and b.2.

Proposed Rule 4-1.5(f) and (g): Fee-Splitting

Proposed Rule 4-1.5(f) and (g) would impose certain requirements when attorneys in different firms divide a client's fee because they have both provided legal representation in a particular case or because one compensates the other for a referral. The requirements vary depending on whether or not the case involves a contingent fee. Proposed Rule 4-1.5(f)(2) provides that in a contingent fee case, every lawyer who receives compensation must assume joint responsibility for performance of the legal services. Proposed Rule 4-1.5(f)(4)d provides, in addition, that in a tort case in which a contingent fee is charged and lawyers in different firms provide legal services to the plaintiff, the lawyer assuming primary responsibility for the legal services must receive a minimum of 75% of the fee and the lawyer assuming secondary responsibility may receive no more than 25% of the fee, unless there is "substantially equal active participation." Proposed Rule 4-1.5(g) provides that, in non-contingent fee cases, a fee may be divided either (1) in proportion to the services performed by each lawyer or (2) by any other mutually agreeable method, provided that a written agreement with the client requires each lawyer to assume joint responsibility for the representation. Paragraph (f) requires that the client agree in writing that the fee may be divided, as does paragraph (g) if the lawyers choose the alternative of accepting joint responsibility. We are concerned that these proposed rules might unnecessarily discourage both referrals and associations between lawyers in different law firms under circumstances in which such activity would likely benefit consumers.

Division of fees may provide incentives for attorney referrals and associations that are desirable for the client.

Referrals by one lawyer to another may help consumers identify a lawyer with the relevant expertise and whose caseload allows prompt attention to their particular case. Absent a referral, consumers might have to use less efficient means of engaging the services of an attorney qualified to handle their matter. In addition, a referral to a lawyer with particular expertise, even if based in part on the financial interest of the referring lawyer, may serve the client's interest better than retention of the case by a lawyer who lacks the requisite expertise.

Proposed Rule 4-1.5(f) and (g) might inhibit such referrals by lawyers. First, paragraph (f)(2) would require that lawyers assume joint responsibility for performance of the services. In order to protect himself or herself from the potential liability for malpractice that joint responsibility could entail, the referring attorney might feel compelled to review the other attorney's work. This could result in costly duplication of effort. Second, the additional requirement in proposed Rule 4-1.5(f)(4)d, that fees must be divided on the basis of the degree of responsibility that the lawyers assume for the legal services, might be interpreted to prohibit referral fees. It is unclear whether giving a prospective client the name and telephone number of another lawyer competent to handle that client's legal problems constitutes "assuming secondary responsibility for the legal services."[2] Even if this provision were interpreted to permit referral fees, it might be interpreted to allow only nominal fees. Attorneys may be reluctant to make referrals if they can earn only a nominal fee, particularly if they must assume joint liability for the legal representation. Third, the requirements established by paragraph (g) for fee division in non-contingent fee cases (i.e., that the referring attorney either assume joint responsibility or share in the fee in proportion to the services he or she performs) might discourage referrals for the same reasons that (f)(2) and (f)(4)d might discourage them in contingent fee cases.

Two justifications have been offered to support bans on referral fees. First, it has been argued that permitting such fees would tempt some lawyers to refer legal matters to the lawyer who paid the highest referral fee, rather than to the best

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[2] According to case law and ABA Opinions, a mere referral does not constitute a legal service and therefore an attorney is not entitled to any portion of the fee when he has merely referred a client to another. See Corti v. Fleisher, 417 N.E.2d 764, 772 (Ill. App. Ct. 1981); Palmer v. Breyfogle, 217 Kan. 128, 535 P.2d 955, 958 (1975); McFarland v. George, 316 S.W.2d 662 (Mo. 1968); Note, Referral Fees and the Effect of Disciplinary Rule 2-107, 8 J. Legal Prof. 225, 228-29 (1983); Note, Division of Fees Between Attorneys, 3 J. Legal Prof. 179, 186 (1978) (citing ABA Opinions).

qualified lawyer. In personal injury and other cases that are taken on a contingent fee basis, however, the referring lawyer typically receives one-third of any fee recovered by the lawyer who handles the case.[3] Thus, it is probable that the referring attorney will select the lawyer who he or she believes is the most likely to recover the largest award for the prospective client. Clearly, 20% of an attorney's recovery in a contingent fee case is better than 40% of nothing; to this extent, the attorney's and the client's interests are the same. In addition, a lawyer referring a client to a specialist has every incentive to make good referrals in order to maintain client goodwill, in the interest of obtaining repeat business and of preserving his or her professional reputation.

Second, some have argued that the attorney to whom the case is referred will increase the total fee paid by the client in order to recoup the referral fee. This does not appear to be a valid concern. First, in a genuinely competitive market for legal services--that is, one in which information about services and fees is easily available to consumers--attorneys cannot raise their fees without losing some clients who are price-sensitive. If competition is less than perfect, attorneys will charge supra-competitive prices whether or not they are paying referral fees. In addition, by facilitating referrals to attorneys with expertise, referral fees may actually reduce the total fees charged to clients. Experts, because of their more predictable and more specialized workload, may be able to reduce costs and pass such savings on to clients. If referral fees were not an efficient means of attracting clients, lawyers would not pay them but would instead use alternative marketing tools.

An association of two or more lawyers from different firms may also benefit consumers. As is stated in the comment to proposed Rule 4-1.5, entitled "Division of Fee," such associations may benefit a client in cases in which neither attorney alone could serve the client as well. One lawyer may not have sufficient time, resources, or expertise to handle all aspects of a particular client's case.

Proposed Rule 4-1.5 might discourage such associations. The requirement in paragraph (f)(2) that the associating lawyer assume joint responsibility appears likely to deter associations for the same reasons that it would deter referrals. The additional requirement in paragraph (f)(4)d that the lawyer who assumes primary responsibility receive at least 75% of the fee would tightly constrain allocation of the fee. If associating lawyers were allowed to negotiate their respective shares of the total fee, they could allocate the fee according to other

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[3] Referral Fees: Everybody Does It, But Is It OK?, ABA J., Feb. 1985, at 40.

factors, such as prior knowledge of the facts, relationship with the client, reputation, degree of expertise, or the relative amount of work each would perform. They might also choose a ratio other than 75/25, such as 65/35. Finally, the provisions of paragraph (g) that the division be in proportion to services performed or, alternatively, be based on assumption of joint legal responsibility, might deter associations of attorneys in non-contingent fee cases for the same reasons that paragraphs (f)(2) and (f)(4)d might do so in contingent fee cases.

The requirements in paragraphs (f) and (g) that there be a written agreement with the client concerning the division of fees appear to be based on a concern that clients know of and consent to a division of fees. If consumers are not generally aware of the practice of paying referral fees, the Court may deem such disclosure necessary so that consumers can use that information to judge the quality of the referral. Care should be taken, however, to avoid disclosure requirements that impose unnecessary costs on consumers.

For the reasons stated above, we urge the Court to delete proposed Rule 4-1.5(f)(2),(f)(4)d, and (g).[4] It is not clear that there is any need to regulate the division of fees. If some such regulation is deemed necessary, the less restrictive alternative of requiring disclosure to the client of the existence of the fee division arrangement might be imposed.

Rule 4-5.4: Professional Independence of a Lawyer

Rule 4-5.4 prohibits a lawyer from forming a partnership or sharing legal fees with a nonlawyer, except under limited circumstances, or from practicing in an organization authorized to practice law for a profit if a nonlawyer owns an interest in the organization or is an officer or director. This rule may limit the ability of lawyers to establish multi-disciplinary practices with other professionals, such as psychologists or accountants, to deal efficiently with both the legal and nonlegal aspects of specific problems. Rule 4-5.4 also would appear to prohibit lawyers from including any lay persons, such as marketing directors, as partners in their law firms. Finally, such a restriction would appear to prohibit corporate practice, and thereby prevent the use of potentially efficient business formats.

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[4] We object to the comparable provisions in Rule 4-1.5(D)(2) and (E) on the same grounds and urge that they be deleted if the Court chooses to retain the existing rule rather than adopting the proposed rule.

In American Medical Association, 94 F.T.C. 701, 1017-18 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982), the Federal Trade Commission found that the AMA's ethical restrictions on the formation of professional associations with nonphysicians had an adverse effect on competition. The AMA's form of practice restrictions precluded a wide variety of professional ventures and potentially efficient business formats, such as health maintenance organizations and prepaid health care plans. The Commission concluded that the prohibitions were much broader than needed to prevent nonphysician influence over medical procedures or consumer deception about the skills of a nonphysician partner or associate.

The staff of the Federal Trade Commission's Bureau of Economics concluded from a study of the optometric profession that the price of optometric services is lower in jurisdictions in which business associations between professionals and lay persons are permitted.[5] Restrictions on such business associations impede the formation of chain firms and other volume operations and may make it difficult to achieve economies of scale.

Rule 4-5.4 may limit potentially procompetitive professional ventures, innovative business formats, and perhaps some forms of prepaid legal services. Paragraphs (c) and (d)(3) alone should adequately preserve the lawyer's independent professional judgment. We therefore urge the Court to delete all of Rule 4-5.4, except paragraphs (c) and (d)(3).

Rule 4-7.1: Communications Concerning a Lawyer's Services

The beneficial effects of advertising are widely recognized. Truthful, nondeceptive advertising communicates information about individuals or firms offering the services that consumers may wish to obtain. Such information helps consumers make purchase decisions that reflect their true preferences and promotes the efficient delivery of services. Before advertising by attorneys was permitted, many Americans failed to obtain the services of an attorney, even when they had serious legal problems,[6] primarily

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

[6] For example, a nationwide survey in 1974 by the American Bar Foundation and the American Bar Association found that only nine percent of the people who had property damage problems, ten percent of those who had landlord problems, and one percent of

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because they feared that legal representation would cost too much or they were unable to locate a lawyer sufficiently skilled at handling their particular problems.[7] A recent empirical study suggests that the removal of restrictions on the dissemination of truthful information about lawyers and legal services will tend to enhance competition and lower prices.[8] Although some have voiced concern that advertising may lead to a lower quality of legal services, the empirical evidence suggests that the quality of legal services provided by firms that advertise is at least as high as, if not higher than, that provided by firms that do not advertise.[9]

We fully endorse the view that false and deceptive advertising should be prohibited. Nonetheless, as set forth below, we are concerned that the definition of "false or misleading" contained in Rule 4-7.1 may prohibit much truthful, nondeceptive advertising.

Rule 4-7.1(b): "Unjustified Expectations"

Rule 4-7.1(b) defines "false or misleading communications" to include those that are "likely to create an unjustified expectation about results the lawyer can achieve." The accompanying comments appear to be derived from comments drafted by the American Bar Association with respect to the identical provisions in ABA Model Rule 7.1. The ABA comments state:

> The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and

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[6](...continued)
those who felt that they were the victims of employment discrimination sought the services of an attorney after the most recent occurrence. B. Curran, The Legal Needs of the Public: The Final Report of a National Survey 135 (1977).

[7] Id. at 228, 231.

[8] Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984).

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

advertisements containing client endorsements.

The comments go on to suggest that such information "may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances." This interpretation of the phrase "likely to create an unjustified expectation" is so broad that it could chill the use of much advertising that is truthful and beneficial to consumers. For example, consumers may wish to consider an attorney's past results as one of several factors in selecting a lawyer. While it may be impossible to provide complete information about prior cases in an advertisement, there is no reason to believe an advertisement of prior experience could not be presented in a way that is not deceptive. Information that is less than complete may nonetheless not be misleading as long as it does not omit material facts. "[I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision." Bates v. State Bar of Arizona, 433 U.S. 350, 374 (1977).

Advertising by means of testimonials and endorsements has traditionally been recognized as effective by sellers of goods and services. For example, the listing of certain clients such as major banks or corporations in the Martindale-Hubbell directory suggests that a firm can handle complicated legal problems in which large sums of money may be at risk. Advertising in which clients attest truthfully that they use a firm's legal services gives the general public the same information that is available to users of legal directories. Advertising in which clients discuss their reasons for satisfaction with a law firm conveys even more information than do legal directories. An advertisement in which a famous athlete or actor states truthfully that he or she uses a particular firm or attorney indicates to consumers that someone who can spend a substantial sum to find a good attorney, and who may have significant assets at stake, believes a particular lawyer to be effective. Testimonials are not necessarily misleading and may be effective in attracting and retaining consumer interest in the advertiser's message.

In short, we believe that advertisements containing client endorsements or information about past successes can be presented in ways not likely to create unjustified expectations. We therefore urge the Court to modify the ABA commentary with respect to Rule 4-7.1(b) and make clear that advertisements containing endorsements and testimonials, and attorneys' prior results are permitted.

The comment to Rule 4-7.1 also defines as a "material misrepresentation or misleading omission" communications in which

a "lawyer states or implies certification or recognition as a specialist other than in accord with rule 4-7.4." For the reasons set forth below in our discussion of Rule 4-7.4, we urge the Court to delete this comment.

Rule 4-7.1(c): Comparative Advertising

Rule 4-7.1(c) defines false and misleading communication to include communication that "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." We believe that this rule may unnecessarily inhibit competition. Information that accurately compares the particular qualities of competing law firms may encourage improvement and innovation in the delivery of services and may assist consumers in making rational purchase decisions. Of course, comparisons containing false or deceptive statements of fact, either about the advertiser or a competitor, provide no benefit to consumers and can be harmful. However, such statements already are prohibited by Rule 4-7.1(a).

We are concerned that Rule 4-7.1(c) may deter the use of comparative advertising and preclude truthful, nondeceptive statements merely because they are not amenable to empirical testing.[10] Examples of such statements are "Friendlier service" or "More convenient hours." Even though such statements are not readily subject to verification, they may be truthful and nondeceptive, and indicate the qualities that the advertiser believes are important to consumers. Moreover, such statements can attract consumers' attention to the advertising attorney. Even advertising that is designed only to attract attention can

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[10] In a statement of policy regarding comparative advertising, the Federal Trade Commission recognized the benefits of comparative advertising and indicated concern about standards set by self-regulatory bodies that might discourage the use of such advertising:

> On occasion, a higher standard of substantiation by advertisers using comparative advertising has been required by self-regulation entities. The Commission evaluates comparative advertising in the same manner as it evaluates all other advertising techniques . . . . [I]nterpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate and should be revised.

16 C.F.R. 14.15(c)(2) (1986).

inform consumers of a lawyer's presence in a community, which in and of itself is useful information.

Rule 4-7.1(c)'s requirement of factual substantiation appears to be broader than necessary to prevent deception. The Commission generally requires that advertisers have a "reasonable basis" for any objectively verifiable and material claims that they make, because the act of making such a claim implies some basis for it, and consumers would be deceived if a reasonable level of support were lacking.[11] However, "puffery" and subjective claims do not similarly imply that substantiation exists, and so may be employed without it.

We therefore urge the Court to modify Rule 4-7.1(c) to require only that an attorney have a reasonable basis for any material, objective claims, and that such claims be truthful and nondeceptive.

Rule 4-7.2: Advertising

Rule 4-7.2(a): Permissible Advertising Media

Attorneys may interpret the list of media in Rule 4-7.2(a) as exclusive and conclude that advertising in media not listed is prohibited. The listing of specific media that may be used in advertising could discourage innovation in ways not intended by the Court, especially since the phrase "public media" is ambiguous. For example, the rule might be interpreted to prohibit sponsorship of museum exhibits or youth sports teams. In addition, the specificity of the rule fails to anticipate changing technologies. Thus, for example, the rule might be interpreted to exclude advertising in computer bulletin boards, on-line directories, or similar media that may become increasingly important as electronic communication becomes more common. Therefore, we recommend that the Court delete Rule 4-7.2(a).

Comment to Rule 4-7.2: Dignity of the Profession

The comment to Rule 4-7.2 states that the "content and format of a legal advertisement should comport with the dignity of the profession . . . . Advertisements utilizing slogans, gimmicks, or other garish techniques, or the use of large electrical or neon signs, sound tracks, or other extravagant media, fail to meet these standards . . . ." This comment may deprive consumers of truthful, nondeceptive information about the availability of legal services.

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

Advertising that is not false or deceptive, even though viewed by some as lacking in dignity, nonetheless may assist consumers in choosing legal services that best suit their needs. For example, some lawyers consider the advertisement of holiday discounts on legal services to be undignified. However, an advertisement offering a reduced price on legal services provides information that consumers concerned about the cost of legal services might find very useful.

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

The comment to Rule 4-7.2 prohibits the use of advertising techniques that have proven effective in marketing goods and services. A slogan may be easy to remember and may enhance consumer retention of information in an advertisement. In addition, it can serve as a unifying theme for a firm's advertising campaign, linking the firm's various advertisements in the consumer's mind, and thereby increasing the impact of the advertising.[12] A musical soundtrack may draw and retain consumers' interest in an advertisement. Signs can communicate information about the identity and location of attorneys and firms offering legal services. The size of the sign and the use of light in a sign can draw consumers' attention. If attorneys are not permitted to use such techniques, their advertisements may be less effective.

We therefore recommend that the Court delete the portion of the comment that addresses dignity and the use of slogans, gimmicks, garish techniques, signs, soundtracks and extravagant media.

Rule 4-7.2(c): Referral Fees

Rule 4-7.2(c) appears to prohibit the payment of fees to lawyers who refer prospective clients to other lawyers. As we mentioned in our discussion of proposed Rule 4-1.5(f) and (g),

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[12] L. Andrews, Birth Of A Salesman 34 (1980).

such a prohibition could have substantial anticompetitive effects. For these reasons, we urge the Court to delete the requirements in Rule 4-7.2(c) that lawyers not pay referral fees to other lawyers.

Proposed Rule 4-7.3: Legal Service Information

Proposed Rule 4-7.3 requires that a lawyer who advertises legal services in tort cases in which a contingent fee is charged have available a factual statement detailing his or her background, training and experience. The proposed rule requires that the lawyer provide the statement to consumers upon request, and state in all electronic or print advertising substantially the following, "Free written information concerning qualifications and experience available on request." We believe that this rule might result in lawyers providing less, rather than more, information to consumers.

The proposed rule would increase the cost of advertising by requiring lawyers to prepare and print a factual statement and purchase additional advertising time and space to include the prescribed statement. An attorney with a limited advertising budget might find the additional costs imposed by the proposed rule to be significant. Increasing the cost may dissuade lawyers from placing certain advertisements.

The concern expressed in the comment to the proposed rule is that consumers will be exposed to numerous advertisements and not be able to compare the offers of legal services without visiting the lawyers' offices to obtain more information. The resolution of this concern does not appear, however, to require the proposed rule and its attendant costs. Consumers who desire information beyond that contained in advertisements can simply call the attorney. Even in the absence of the proposed rule, an attorney has an incentive to provide adequate information about qualifications to a prospective client. If an attorney refuses to furnish information, the consumer can call another attorney who advertises his or her services.

The Bar has presented in support of its proposal no evidence that consumers have been misled about the ability of personal injury lawyers. Absent such evidence, it would be undesirable to impose requirements that might discourage advertising. We therefore recommend that the Court delete proposed Rule 4-7.3.

Rule 4-7.3: Direct Contact With Prospective Clients

Rule 4-7.3 generally prohibits all forms of direct client

solicitation except written communications[13] because, according to the Comment to the rule, there is a "potential for abuse inherent in direct solicitation." By allowing targeted mailings, subject to some restrictions, as well as general mailings, the rule permits lawyers to use an efficient method of communicating with consumers who are likely to require legal representation. We believe that other forms of solicitation as well can provide consumers with helpful information about the nature and availability of legal services, and that any potential abuses can be effectively prevented through more limited and specific regulatory provisions. We urge the Court, therefore, to modify Rule 4-7.3 and adopt more limited restrictions on solicitation.

Telegrams and other forms of written communication from lawyers may provide useful information to prospective clients. For example, by sending a telegram to a particular audience, the lawyer can provide information to those consumers who are most likely to need legal services and to benefit from information about what services are available, and who may need to have a lawyer take action expeditiously on their behalf.

Telegraph advertising, as long as it is truthful and nondeceptive, poses little danger of consumer harm. Although it is not impossible, it is unlikely that such written communications will be intrusive or coercive, or involve intimidation or duress. A telegram from an attorney offering legal services requires no immediate response. The consumer can give the communication careful consideration and make a reasoned decision about selecting a lawyer.

In-person contact may also provide consumers with truthful, nondeceptive information that will help them select a lawyer. As the Supreme Court stated in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 457 (1978), in-person contacts can convey information about the availability and terms of a lawyer's legal services and, in this respect, serve much the same function as advertising.

We recognize that abuses may result from in-person solicitation by lawyers. Injured or emotionally distressed people may be vulnerable to the exercise of undue influence when face to face with a lawyer, as the Supreme Court reasoned in Ohralik, 436 U.S. at 465. We do not believe, however, that this justifies a broad prohibition on all in-person solicitation. The Federal Trade Commission considered the concerns that underlie the Ohralik opinion when it decided American Medical Association,

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[13] The rule does not apply to the solicitation of family members or those with whom the lawyer had a prior professional relationship, or where pecuniary gain is not a significant motive for the solicitation.

94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). After weighing the possible harms and benefits to consumers, the FTC ordered the AMA to cease and desist from banning solicitation, but permitted it to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, are vulnerable to undue influence.

In-person solicitation by lawyers in many instances does not involve coercion or the exercise of undue influence. Lawyers often encounter prospective clients at meetings of political and business organizations and at social events. Indeed, many lawyers traditionally have built their law practices through such contacts. Under such circumstances, the possibility of abuse seems minuscule. Similarly, lawyers present speeches and seminars to prospective clients that establish goodwill and help attendees to understand the law and identify situations in which they might need a lawyer. Such personal contacts present little risk of undue influence, but do enable prospective clients to assess the personal qualities of attorneys. Since lay persons might find aggressive solicitation to be offensive, lawyers have an incentive not to engage in such conduct.

Telephone solicitation can also provide useful information, and it may present less risk of harm to consumers than does in-person solicitation. We recognize, of course, that telephone sales can be used to injure consumers. Consequently, we would not oppose a prohibition on false or deceptive telephone solicitation. However, the use of the telephone to sell goods and services has become relatively common in our society. It is not clear to us that telephone selling by lawyers is necessarily likely to harm consumers. For example, a lawyer may call an acquaintance who owns a business and offer a legal service, or a lawyer may hire a telephone marketing firm to call all residents of a neighborhood and offer the lawyer's services to write a will. In both cases, consumers will be provided useful information and the likelihood of harm seems small.

Thus, we support Rule 4-7.3 to the extent that it permits targeted mailings, but we oppose the broad ban on other forms of solicitation. We would not oppose more limited restrictions on solicitation directed at actual abuses. For example, we believe it would be appropriate for the Court to prohibit: 1) false or deceptive solicitation;[14] and 2) solicitation directed to any person who has made it known that he or she does not wish to receive communications from the lawyer.

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[14] Rule 4-7.1 (a) already prohibits false or deceptive communications.

In addition, the Court may wish to prohibit all forms of solicitation that involve, in the language of the comment to Rule 4-7.3, "undue influence, intimidation, [or] overreaching."[15] If, on the basis of experience or a reasonable belief that a particular form of solicitation will abuse consumers, the Court concludes that such a prohibition is necessary, we urge that its terms be interpreted narrowly. Some licensing boards and private associations in other professions have interpreted these or similar terms broadly and have applied them to ban solicitation under circumstances that pose no danger of abuse. So long as these terms are interpreted fairly and objectively, such a provision would adequately protect consumers and simultaneously allow them to receive helpful information about legal services.

Rule 4-7.4: Communication of Field of Practice

Rule 4-7.4 limits the circumstances in which an attorney may state that he or she is a "specialist." The use of this term, however, may be the clearest, most efficient way to communicate information that an attorney has developed skills or focused his or her practice on a specific area of the law. Unless there is reason to believe that an attorney's claim to be a "specialist" will imply to lay persons that a lawyer has obtained formal recognition or certification as a specialist, it is undesirable to restrict such claims.

Rule 4-7.4 also prohibits an attorney from merely implying that he or she is a specialist. This provision could be interpreted to prohibit a wide variety of truthful statements about experience and special training. For example, a true statement that an attorney is a member of an organization of trial lawyers might be interpreted by some as an implied claim of specialization, yet such a statement can benefit consumers by informing them that the attorney has sufficient interest in trial advocacy to join the organization and has access to the organization's training and materials. There are many ways to obtain expertise, and information that an attorney has special experience or skills in a particular field is clearly useful to consumers needing help in that field. Nor do we believe that advertising as a "specialist" would create an unjustified expectation about the results that a lawyer can achieve, any more than identifying oneself as a surgeon generates an expectation

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[15] Different kinds of solicitation may present different risks of abuse, so the proper interpretation of these terms may depend on whether the solicitation at issue involves mail, telephone, or in-person contact. Written communications seem to present little danger of coercion or undue influence. Telephone solicitation may present less potential for abuse than in-person solicitation because telephone calls are easier to terminate than face-to-face conversations.

that every procedure that the surgeon performs will be a success.

Rule 4-7.4(c) also provides that a lawyer may inform the public about certification he or she has received only if the lawyer has been certified under the Florida Certification Plan or by a national group whose standards for certification are "substantially the same" as those of the Florida Plan. The advertising of certification can provide consumers with useful facts about attorneys' special skills whenever certification requirements are reasonably related to assuring proficiency in the subject area certified, whether or not they are "substantially the same" as the requirements of the Florida Plan. Conversely, when certified attorneys are prohibited from truthfully advertising their training and skills, consumers will be deprived of information to help them choose among qualified practitioners who are certified but who cannot advertise such certification.

Rule 4-7.4 also appears to prohibit claims of certification by a private organization in any area of the law in which Florida has no certification program. Such claims may, however, be an important source of information for consumers precisely because of the absence of a state certification program. We therefore recommend that the Court remove all prohibitions against truthful, nondeceptive claims,[16] express or implied, that a lawyer is a specialist or has been certified. This would not, of course, prevent the lawyers who have actually obtained Florida certification from advertising that fact.

Rule 4-7.6: Referral Services

By permitting lawyers to accept referrals from for-profit referral services, Rule 4-7.6 helps consumers select an attorney qualified to provide the desired legal services. For-profit referral services enable lawyers to pool their advertising resources while maintaining independent practices. Consumers in need of legal advice on a particular subject may benefit from the knowledge that such services possess about the particular expertise of each member attorney. A for-profit referral service may be able to provide more useful information to consumers than a nonprofit bar association referral service, which may be obliged to give referrals on an equal basis to all attorneys.

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[16] By prohibiting false or misleading communications, Rule 4-7.1 bans claims of certification by attorneys who have not achieved certification or who have been certified by an organization whose standards are not related to assuring skills in the area certified.

Paragraph (a)(2) and the comment appear to prohibit lawyers from compensating a for-profit referral service by any means other than a pre-arranged, fixed payment. Compensation may therefore not be calculated on the basis of the number of referrals received, although that may be a more accurate measure of the value to the lawyer of participation in the service. The rule may therefore result in some lawyers over paying, which could discourage their participation in referral services. The intent of the rule may be to avoid lawyers submitting to pressure from referral services to take on cases that are not meritorious, or that the attorney lacks the skill or time to handle. Rules 4-1.1, 4-1.3, and 4-3.1 prohibit lawyers from doing so, and paragraph (a)(2) is thus unnecessary and could discourage participation in referral services. We therefore recommend that the Court delete paragraph (a)(2).

Conclusion

While the rules proposed by the Florida Bar would benefit consumers by relaxing certain existing restrictions on price competition, they nonetheless may injure consumers by imposing unnecessary restrictions on referrals and associations, and discouraging dissemination of information about legal services. In addition, the existing rules restrain price competition, prohibit efficient forms of practice, and prohibit some forms of truthful, non-deceptive advertising, all of which may be detrimental to consumers. In the interest of eliminating unnecessary restrictions on competition among attorneys, we urge that the Court: (1) delete Rule 4-1.5(D)(4)b.1 and b.2 to remove the ceilings on contingent fees; (2) delete proposed Rule 1.5(f)(2), (f)(4)d and (g) so as not to discourage attorney referrals and associations of attorneys in different firms for particular cases; (3) eliminate the restrictions in Rule 4-5.4 on practice with nonlawyers; (4) modify Rule 4-7.1 to make clear that truthful, nondeceptive endorsements and success and experience claims are permitted, and to require only that an attorney have a reasonable basis for any material, objective claims; (5) delete Rule 4-7.2(a); (6) modify Rule 4-7.2(c) to allow the payment of referral fees to attorneys; (7) delete portions of the comment accompanying Rule 4-7.2 to eliminate the requirement that advertisements comport with the dignity of the profession and to permit the use of advertising techniques such as slogans, soundtracks, etc.; (8) delete proposed Rule 4-7.3 so as not to discourage advertising of legal services in tort cases; (9) modify Rule 4-7.3 to remove the broad ban on solicitation; (10) alter Rule 4-7.4 to allow express and implied claims of specialty and certification; and (11) delete Rule 4-7.6(a)(2) so as not to discourage participation in lawyer referral services.

We hope that this response will be of assistance in pointing out ways in which particular rules may restrict competition and

injure consumers, and we appreciate having had the opportunity to present these views.

Respectfully submitted,

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