



¹ This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, Bureau of Competition and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

² We understand that the original deadline of November 24, 2006 for comments has been lifted, and that the Committee has not set a new deadline.

³ The Proposed Rules are available at <http://www.lsba.org/committees/ethicrulescomments.asp>.

⁴ Federal Trade Commission Act, 15 U.S.C. § 45.

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⁵ Specific statutory

certain selected forms of advertising including actor portrayals, depictions and similar dramatic techniques;⁸ comparative claims;⁹ statements about endorsements and testimonials;¹⁰ communications that create an expectation of results an attorney is likely to achieve;¹¹ and advertisements that look like legal pleadings.¹² The FTC Staff submitted comments to the New York Office of Court Administration in September, 2006, in which we recommended eliminating or modifying such rules.¹³ We advised generally that, although such broad prohibitions might be based on a concern that such advertising could mislead consumers about the results lawyers can achieve, it would be better addressed by a rule directed more narrowly to claims that could be construed as having some bearing on likely outcomes. On January 4, 2007, the New York Unified Court system promulgated revised rules, which incorporated nearly all of the FTC Staff's recommendations.¹⁴

In addition to our concerns with restrictions similar to those proposed in New York, the FTC Staff has a particular concern with provisions requiring attorneys to file advertisements for review by a committee composed of competitors.¹⁵ First, a requirement that ads be filed with the Committee will likely raise the cost of doing business for attorneys and thus likely result in higher prices that consumers must pay.

Second, the Proposed Rules allow the review committee to issue opinions of non-compliance. Although under the terms of the Proposed Rules, Committee opinions of non-compliance would not carry the weight of law, such finding must be reported to the Bar's Office of Disciplinary Counsel (unless the advertising attorney agrees in writing that she will not

⁸ See provisions contained in §§ 7.2(c)(1) and 7.5(b)(1) of the Proposed Rules.

⁹ See *id* at § 7.2(c)(1)(G).

¹⁰ See *id* at §§ 7.2(c)(1)(D) and, to the extent applicable, 7.2(c)(14).

¹¹ See *id* at § 7.1(c)(1)(L), and to other portions of § 7.1(c) as applicable.

¹² See *id* at § 7.2(c)(1)(K).

¹³ See Letter from FTC Staff to the Office of Court Administration, Supreme Court of New York (Sept. 14, 2006), available at <http://www.ftc.gov/os/2006/09/V060020-image.pdf>. Because these parts of the Proposed Rules are nearly identical to the New York Proposed Amendments, Maureen Ohlhausen, Director of the FTC Office of Policy Planning, supplied a copy of our New York comments to the Louisiana Bar in November, 2006.

¹⁴ The revised Rules of the Unified Court System of New York (with red-lined changes comparing the initial draft) are available at http://www.nycourts.gov/rules/attorney_ads_amendments.shtml. Among the changes, New York would allow claims regarding past success, if they are substantiated and accompanied by a brief disclosure, and removed several of the other proposed restrictions. We note that the FTC Staff does not endorse the new rules entirely as many of the rules require disclosures that may not be necessary. Unnecessary disclosures can have a deterrent effect on advertising and increase costs to consumers. See generally Letter from Federal Trade Commission to the New Jersey Supreme Court's Committee on Attorney Advertising (November 9, 1987) available at 1987 WL 874590.

¹⁵ See § 7.7 of the Proposed Rules.

disseminate the advertisement), and will be given evidentiary weight if the matter is prosecuted.¹⁶ In this manner, the Proposed Rules likely would compel substantial compliance by Louisiana attorneys because non-complying attorneys would face serious risks to their livelihoods.

The FTC supports legitimate and fair industry self regulation because, when implemented properly, it can provide efficiencies and other benefits to consumers.¹⁷ However, there are risks to competition when one group of competitors is charged with regulating another. For example, attorneys on the advertising committee may have the incentive, and would have the ability, to limit advertising by competitors to soften competition rather than to protect consumers.¹⁸

The FTC Staff recommends that the Committee forego the filing and screening components of the Proposed Rules in favor of enforcing the general prohibition against deceptive and misleading claims through sanctions for violations. If0.0000 cm0.005-4.3200 he01sclj3ba he01sclj3ba herv

¹⁶ See *id.* at §§ 7.7(g) & (h).

¹⁷ See Deborah Platt Majoras, “Self Regulatory Organizations and the FTC,” Address to the Council of Better Business Bureaus (April 11, 2005), available at <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>.

¹⁸ Indeed, several prominent Supreme Court cases have involved state bar ethics rules and opinions that were found to restrain competition. See generally *Bates v. State Bar of Arizona*, 433 U.S. 350, 372-74 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); and *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

¹⁹ Due to the risk of anticompetitive behavior, a leading antitrust treatise advocates subjecting any governmental agency made of members of the profession that it regulates to direct and active governmental supervision. See AREEDA & HOVENKAMP, I ANTITRUST LAW ¶227a, at 500 (2d ed. 2000) (“Without reasonable assurances that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required.”).

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