



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

Office of Policy Planning
Bureau of Consumer Protection
Bureau of Economics

May 11, 2007

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Re: Proposed Amendments to Indiana Rules of Court Concerning

¹ This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Consumer Protection, 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 The Proposed Amendments are available at [http://www.in.gov/judiciary/rules/proposed/2007/pcr-isba\(jan\).pdf](http://www.in.gov/judiciary/rules/proposed/2007/pcr-isba(jan).pdf).

³ Federal Trade Commission Act, 15 U.S.C. § 45.

⁴ Specific statutory authority for the FTC's advocacy program is found in Section 6 of the FTC Act, under which Congress authorized the FTC "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce," and "[t]o make public from time to time such portions of the information obtained by it hereunder as are in the public interest." *Id.* § 46(a), (f).

⁵ *See, e.g.*, Letter from FTC Staff to the Florida Bar (Mar. 23, 2007),

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¹¹ See Rule 7.2(c). We note that “special circumstances” as used in the rule is unclear; we recommend that the Bar provide guidance as to what such special circumstances would rebut the presumption imposed by the rule.

¹² See Rule 7.3(b)(1).

¹³ See Rule 7.3(b)(2).

¹⁴ See Rule 7.3(b)(3). We note that, unlike the other restrictions contained in 7.3(b), to withstand Constitutional scrutiny, the state would likely need to demonstrate that this provision advances a state interest in a direct and material way. See *Florida Bar v. Went For It*, 515 U.S. 618, 626 (1995). In *Went for It*, the Court upheld a restriction nearly identical to 7.3(b)(3) because the Florida Bar demonstrated a non-speculative state interest in preventing a specific consumer harm, which it illustrated with a report containing substantiated data showing that Florida consumers opposed solicitations in the immediate wake of an accident. *Id.* at 626-27.

¹⁵ See Rule 7.3(b)(4) & (5)

¹⁶ See Rule 7.3(e)(1)-(4).

¹⁷ See, e.g., Letter from the Federal Trade Commission to the Professional Ethics Committee of the Texas State Bar, May 2006, available at <http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf>. Although not all services are identical, many share the same general business model. See, e.g., LexisNexis/Martindale Hubbel’s Attorney Match (,

¹⁸ We understand that in some of these programs member attorneys may prepare a web page that may disclose preferred areas of practice, years of experience, bar affiliations, and any other pertinent information.

¹⁹ Several economists have developed models that predict firms will be able to charge higher prices when consumers face high costs in obtaining marketplace information. *See, e.g.*, Dale O. Stahl, *Oligopolistic Pricing with Sequential Consumer Search*, 79 AM. ECON. REV. 700 (1989); Kenneth Burdett & Kenneth L. Judd, *Equilibrium Price Dispersion*, 51 ECONOMETRICA 955 (1983); John Carlson & R. Preston McAfee, *Discrete Equilibrium Price Dispersion*, 91 J. POL. ECON. 480 (1983); Steven C. Salop & Joseph E. Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUDIES 293 (1977). Using these models as a theoretical framework, several authors have found evidence that the Internet has led to lower prices by reducing consumers' costs of comparing prices. *See, e.g.*, Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481 (2002); Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 49 MGMT SCIENCE 563 (2000); James C. Cooper, *Price Levels and Dispersion in Online and Offline Markets for Contact Lenses*, FTC Bureau of Economics Working Paper (2006), available at <http://www.ftc.gov/be/workpapers/wpa0603.pdf> A C

restrictive alternatives than effectively barring such types of legal matching programs. For example, a legal matching service working with Indiana attorneys could be required to disclose to consumers the number of attorneys and firms that participate in the program, the number to whom the consumer's request was sent, and how the service generated the list of attorneys to whom the request was sent. Further, the service could be required to explain how, if at all, it limited attorney participation. Unless consumer harm has been demonstrated from legal matching and referral services, the FTC Staff recommends that the Bar consider revising Rule 7.3 to clarify that attorneys may participate in these types of services.

The Substantiation Requirement for All Comparative
Advertisements May Prohibit Some Useful, Non-Deceptive Advertising

The FTC Staff is concerned about the effect of the Proposed Amendments' presumption that comparative claims are not misleading only if such claims can be "factually substantiated."²² Requiring that material claims be substantiated can, of course, serve consumers by helping to ensure that claims are not misleading. But if substantiation is demanded for representations that, although not misleading, concern subjective qualities that are not easy to measure and for which substantiation may not normally be expected, then messages that consumers may find useful may be barred. The broad prohibition might be based on a concern that unsubstantiated comparative claims could mislead consumers about the results lawyers can achieve. But if that is the concern, then it would be better addressed by a rule directed more narrowly to claims that could be construed as having some bearing on likely outcomes, such as Proposed Amendments 7(c)(2) and 7(c)(6).

Conclusion

In conclusion, the FTC Staff believes that the Proposed Amendments are likely to promote effective attorney advertising regulation by prohibiting deceptive and misleading attorney advertising without imposing blanket prohibitions on forms of speech. We are concerned, however, that while some restraints on solicitation may serve consumer interests, others may impede consumer access to efficient attorney-matching programs, and that the substantiation requirement on comparative advertisements may prohibit some useful, non-deceptive advertising. Accordingly, we urge the Bar to modify the Proposed Amendments to facilitate consumer access to useful information about legal services.

²² See Rule 7.2(c)(5).

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Respectfully submitted,

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