

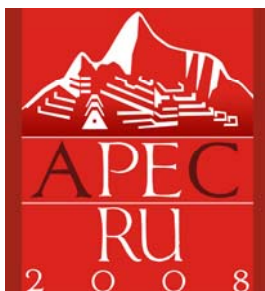


**Asia-Pacific
Economic Cooperation**

2008/SOM3/GOS/CONF/007

Regulation and Competition in Legal Services in the United States

Submitted by: United States



**APEC-IDRC Conference on Competition Policy
Issues in Services Sectors
Lima, Peru
17 August 2008**

REGULATION AND COMPETITION IN LEGAL SERVICES IN THE UNITED STATES¹

*Presented by
Janice Charter
Federal Trade Commission – United States*

There is no national license to practice law in the United States. Instead, each of the 50 states and the District of Columbia separately license attorneys. Historically, this has been to ensure that attorneys practicing law within any given state know the law of that state, since that is the law which typically pertained to the advice they were giving. In an age of multi-national corporations that frequently transfer their attorneys within the United States and even around the world, some have called for more flexibility and reciprocity by state regulators. But we will leave that argument for other venues and focus on the regulation of attorneys in the 50 states as it exists today.

Depending on the state, the regulation of attorneys may be the province of the legislature, the bar association, the highest court, or a combination of these. In addition to requirements designed to ensure competence, all states have a number of requirements meant to promote integrity and ethics in the legal profession. At one time, these requirements included an absolute prohibition on advertising by attorneys in most, if not all, state jurisdictions, the theory being, in part, that such advertising would detract from the dignity of the profession. Although it has been many years since that sort of ban was held unconstitutional by the United States Supreme Court,² there are those who continue to push for restrictions on advertising by attorneys.

Indeed, many states, although they cannot prohibit advertising, do restrict it to some extent. If these restrictions are imposed pursuant to a state policy and actively supervised by the state, they may not be subject to antitrust scrutiny. As a result, the Federal Trade Commission has had an active advocacy program for a number of years, in which we analyze restrictions of this type and encourage state regulators to limit their regulations to the minimum necessary to ensure the protection of consumers seeking legal services.

During the course of this program, we have seen state courts, legislatures, and bar associations consider advertising regulations of various types: restrictions on references to quality; prohibitions on comparative advertising; restrictions on the use of testimonials or endorsements; prohibitions on references to past successes or results; regulation of the style and content of media advertising such as the prohibition of voiceovers, images of recognizable non-attorney spokespersons, depictions of courtrooms or courthouses, portrayals of judges and lawyers by non-lawyers, portrayals of clients by non-clients, showing images resembling legal documents, and re-enactments of events or scenes that are not actual; requirements that a lawyer appear only in front of a solid-color background, in front of a bookcase, or in his or her office; prohibitions on the use of slogans, jingles, nicknames, monikers, mottos or trade names that imply an ability to obtain results, and oversized signs; and requirements that advertising be “dignified” or “non-sensational.” We have also seen provisions requiring attorneys to file advertisements for review by a committee composed of competitors.

Debate about attorney advertising involves important policy concerns, such as preventing statements that would mislead lay people and thereby undermine public trust in lawyers and the legal system. FTC staff believes, however, that it is best for consumers if concerns about misleading advertising are addressed by adopting restrictions on advertising that are tailored to prevent unfair or deceptive acts or practices. By contrast, imposing overly broad restrictions that prevent the communication of truthful and non-deceptive information is likely to inhibit competition and to frustrate informed consumer choice. In addition, research has indicated that overly broad restrictions on truthful advertising are likely to lead to higher prices for legal services,³ and there is little evidence that restricting attorney

¹ The views expressed in this paper are those of the staff of the Federal Trade Commission and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner.

² *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

³ See, e.g., Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising, June 24, 1994, at 5-6 (available online as attachment to Letter from FTC Staff to Robert G. Esdale, Clerk of the Alabama Supreme Court (Sept. 30, 2002), available at <http://www.ftc.gov/be/v020023.pdf>). See also Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 SUP. CT .

advertising is likely to raise the quality of legal services.⁴ Instead, truthful, non-deceptive advertising communicates information about individuals or firms offering the services that consumers may wish to obtain. Such information helps consumers make purchasing decisions that reflect their true preferences and promotes the efficient delivery of services. Before advertising by attorneys was permitted in the United States, many people failed to obtain the services of an attorney, even when they had serious legal problems,⁵ primarily 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.⁶

In addition to these thoughts about the benefits of advertising by attorneys generally, FTC staff has addressed the specific restrictions we have encountered in our advocacy program. For example, we believe that comparative advertising can encourage improvement and innovation in the delivery of services and benefit consumers with assistance in making rational purchase decisions. Requiring that comparative 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.

Testimonials and information about previous representations can convey valuable information to consumers and help spur competition. Accordingly, FTC Staff recommends that they be prohibited only if the endorsement, testimonial, or other information deceives consumers. As explained in the FTC's Endorsement Guides, a consumer testimonial is likely to be deceptive if the experience described is not the consumer's actual experience or is not representative of what consumers generally experience.⁷

In terms of past successes, many lawyers and law firms post on website homepages, for example, announcements, press releases, and other stories that involve client representations that consumers may find informative. Similarly, lawyers often announce their achievements via e-mail and web-log ("blog") reporting. Such communications may be truthful and non-misleading and can help consumers in assessing the caliber or personal style of a lawyer or law firm.

When discussing the issue of dignity in advertising, FTC staff has urged careful examination of the basis for concerns that such advertising would undermine the confidence in the justice system. It is possible that some consumers are most effectively reached by advertising that may be considered

ECON. REV. 265, 293-304 (2000) (discussing the empirical literature on the effect of advertising restrictions in the professions and citing, among others: James H. Love & Frank H. Stephen, *Advertising, Price and Quality in Self-regulating Professions: A Survey*, 3 INT'L J. ECON. BUS. 227 (1996); J. Howard Beales & Timothy J. Muris, *State and Federal Regulation of National Advertising* 8-9 (1993); R.S. Bond, J.J. Kwoka, J.J. Phelan & I.T. Witten, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980); J.F. Cady, *Restricted Advertising and Competition: The Case of Retail Drugs* (Washington, D.C.: American Enterprise Institute, 1976); J.F. Cady, *An Estimate of the Price Effects on Restrictions on Drug Price Advertising*, 14 ECON. INQ. 490, 504 (1976); James H. Love, et al., *Spatial Aspects of Competition in the Market for Legal Services*, 26 REG. STUD. 137 (1992); Frank H. Stephen, *Advertising, Consumer Search Costs, and Prices in a Professional Service Market*, 26 APPLIED ECON. 1177 (1994)); *In the Matter of Polygram Holdings, Inc.*, FTC Docket No. 9298, at 38 n.52 (F.T.C. 2003), available at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>, *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). See also Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1 AMERICAN BAR FOUND. RES. J. 179, 184 (1979) (attorney advertising results in the phenomena of increased consumer requests for legal services coupled with lower prices and higher quality of services, particularly in specialized areas of the law); Frank H. Stephen & James H. Love, *Regulation of the Legal Professions*, 5860 ENCYCLOPEDIA OF L. & ECON. 987, 997 (1999), available at <http://encyclo.findlaw.com/5860book.pdf> (empirical studies demonstrate that restrictions on attorney advertising have the effect of raising fees).

⁴ Love & and Stephen, 3 INT'L J. ECON. BUS. at 237 ("There is very little evidence that advertising lowers the quality of service offered to the public, or that restricting its use by professionals is likely to raise quality.").

⁵ 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 those who felt that they were the victims of employment discrimination sought the services of an attorney after the most recent occurrence. Barbara A. Curran, *The Legal Needs of the Public: The Final Report of a National Survey* 135 (1977).

⁶ *Id.* at 228, 231.

⁷ See generally Federal Trade Commission, Guide Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

undignified. The interest of effectively communicating the availability of legal services to such consumers should not be ignored.

FTC staff supports legitimate industry self regulation because, when implemented properly, it can benefit consumers and competition.⁸ However, there are risks to competition when one group of competitors regulates another. For example, attorneys reviewing advertisements and solicitations may have the incentive, and would have the ability, to limit advertising by competitors to soften competition rather than to protect consumers.

In addition to advertising restrictions, we have seen various restrictions on participation in referral services. For example, one state barred such participation unless the referral service was affiliated with a public defender, an approved not-for-profit program, a bar association, or a military legal assistance office. Another state restricted participation in Internet-based attorney/client matching services. We understand that currently several businesses provide Internet-based attorney/client matching platforms.⁹ Generally, measures are taken to ensure that only attorneys in good standing participate, that consumers can specify certain criteria about the attorney they are seeking, and that the anonymity of the consumer is maintained, allowing the consumer to initiate contact after receiving information from attorneys interested in representing the consumer.

In the same way that advertising has been shown to benefit consumers of professional legal services, online legal matching services are likely to make it less expensive for consumers to evaluate providers of legal services.¹⁰ The information sent to inquiring clients is likely to allow consumers to compare the price and quality among several competing attorneys more cheaply than other methods of comparison. For example, a referral service that assigns the next attorney on a predetermined list to a client requires the client to meet the attorney and then seek a second referral simply to formulate a basis for comparison. Similarly, a directory such as the yellow pages is time-intensive because it requires the client to search for several attorneys and formulate his or her own method to evaluate lawyers. Indeed, these options may be more costly and yield far less relevant information than online lawyer matching services. By lowering consumers' costs of obtaining information about price and quality of legal services, online legal matching services are likely to allow consumers who use them to pay lower prices or obtain higher quality legal services than they would have had they used their next best alternative means for identifying a legal service provider.

Finally, FTC staff is concerned about efforts across the United States to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law rules and opinions by state courts, state bars, and legislatures. For example, some states have required or considered requiring that lawyers represent buyers in almost all aspects of the real estate closing process. FTC staff has recommended that such efforts be guided by the principle that only services requiring the skill or knowledge of a lawyer be reserved as the practice of law.

When non-lawyers compete with lawyers to provide services that do not require formal legal training, consumers may consider all relevant factors in selecting a service provider, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. The use of lay services also can reduce costs to consumers. Limiting the ability of lay

⁸ See, e.g., Deborah Platt Majoras, "Self Regulatory Organizations and the FTC," Address to the Council of Better Business Bureaus (Apr. 11, 2005), (available at <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>).

⁹ Although not all services are identical, many share the same general business model. See, e.g., LexisNexis/ Martindale Hubbel's Attorney Match (<http://www.attorneys.com>); Casepost (<http://www.casepost.com>); Legalconnection (FindLaw) (<http://www.legalconnection.com>); LegalMatch (www.legalmatch.com); and Legal Fish (www.legalfish.com).

¹⁰ A pair of studies finds that consumers who used an online service that sends consumer requests to an affiliate car dealer that sells cars matching the consumer's inquiry paid approximately two percent less for the same car compared to those who did not. Also, the authors found that those who were likely to be poor negotiators were more likely to use these services to increase their bargaining power. See Fiona Scott Morton et al., *Internet Car Retailing*, 49 J. INDUS. ECON. 501 (2001); Florian Zettelmeyer et al., *Cowboys or Cowboys: Why are Internet Car Prices Lower?* (2005), available at <http://www.nber.org/papers/w8667.pdf>.

persons to provide such services in competition with lawyers would eliminate or reduce many of these benefits, potentially harming consumers. One effect may be that consumers who would not otherwise hire a lawyer may be forced to do so. Businesses and individuals that rely on accountants, bankers, advocacy organizations, or other lay people for advice and information related to the services that these professionals provide arguably would be required to hire attorneys instead. Such outcomes increase costs for all consumers who might prefer the combination of price, quality, and service that a non-lawyer provider offers. For example, although accountants and tax preparers do not typically itemize the legal-related functions included in their services, it is probable that the cost of retaining an attorney for those same services would often be higher. Advice and information about the laws from tenants' associations and other individual and organizational advocates are often provided at substantially lower cost than an attorney would charge. Will-writing and other legal form-fill software packages can be significantly less expensive than hiring an attorney to draft the will or other legal document.¹¹ Further, restricting lay-service providers may hurt consumers by denying them the right to choose a lay service provider that offers a combination of services or form of service that better meets individual consumer needs. For example, consumers may choose to use legal software packages, like the will and trust-writing software, because they are relatively easy and convenient to use.

Eliminating competition from non-lawyers also would likely increase the price of lawyers' services because the availability of alternative, lower-cost lay service providers typically restrains the fees that lawyers can charge. Consequently, even consumers who would otherwise choose an attorney over a lay service provider would likely pay higher prices if competition from non-lawyers is eliminated. For example, evidence indicates that, where lay real estate closings are permitted, the costs to consumers of these transactions are considerably reduced.¹²

Although the intent of restrictions against lay providers of certain services may be to ensure that consumers receive advice only from highly-trained individuals, this could result in consumers who now receive assistance from individual advocates and advocacy organizations being unable to hire a lawyer and forced simply to go without assistance altogether. A 1996 American Bar Association task force survey, for example, concluded that low income and middle-income households are severely underserved by the legal system.¹³ Specifically, the ABA found that of the low- and middle-income households in the sample that had legal problems, only one-third of low-income and only 40 percent of middle-income households handled them through the legal system. Though cost was a lesser concern for middle-income households, both low- and middle-income households listed cost as a major reason for avoiding the legal system.¹⁴

Free and unfettered competition is at the heart of the 'American economy. The United States Supreme Court has observed, "[U]ltimately, competition will produce not only lower prices but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'"¹⁵ Competition benefits consumers of both traditional manufacturing industries and services offered by the learned professions.¹⁶ FTC staff has consistently maintained that

¹¹ While the bill for an attorney to draft a will and trust can easily run into the hundreds of dollars or higher, retail software that permits the consumer to draft a simple will is available for less than \$100.

¹² Evidence in New Jersey indicated that, in areas where lay closings were prevalent, buyers represented by counsel paid on average \$350 less for closings and sellers represented by counsel paid \$400 less than in parts where lay closings were not prevalent. See *In re Opinion No. 26*, 654 A.2d 1344, 1348-49 (N.J. 1995). Likewise, in August 2003, the Kentucky Supreme Court concluded that prices for real estate closings for attorneys dropped substantially as a result of competition from lay title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-effectively." *Countrywide Home Loans, Inc.*, 113 S.W.3d 105, 120 (Ky. 2003).

¹³ Am. Bar Ass'n Fund for Justice & Ed., *Legal Needs & Civil Justice: A Survey of Americans* (1996). The most common legal needs reported by respondents were related to personal finances, consumer issues, and housing. For low- and middle-income households, the most common response to a legal problem was "handling the situation on their own." For low-income households, the second most common response was to take no action at all. The second most common response for middle-income households was to use the legal system, including contacts with lawyers, mediators, arbitrators, or official hearing bodies.

¹⁴ *Id.*

¹⁵ *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1950)).

¹⁶ *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *National Society of Professional Engineers*, 435 U.S. at 689.

consumers of legal services benefit from competition among attorneys and between attorneys and lay providers, as well as from the important price and quality information that competition can provide. Rules that unnecessarily restrict that competition or the transmission of truthful and non-deceptive information are likely to harm consumers and should be discouraged.



FEDERAL TRADE COMMISSION

WORKING FOR CONSUMER PROTECTION
AND A COMPETITIVE MARKETPLACE

REGULATION AND COMPETITION IN LEGAL SERVICES IN THE UNITED STATES

*Janice Charter
Federal Trade Commission
Western Region-San Francisco*

About this Presentation

The views I express are those of the staff of the Federal Trade Commission. They do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner.

LICENSING OF ATTORNEYS

- 50 States and District of Columbia

- Within each state:
 - Legislature
 - Bar Association
 - Highest Court
 - Combination

FTC'S EFFECT ON REGULATION OF LEGAL SERVICES

- State action doctrine

- Advocacy program

TYPES OF RESTRICTIONS

- Advertising
- Participation in referral services
- Unauthorized practice of law

ADVERTISING RESTRICTIONS

ADVERTISING RESTRICTIONS

- References to quality
- Comparative advertising
- Use of testimonials or endorsements
- References to past successes or results

ADVERTISING RESTRICTIONS (2)

- Style and content prohibitions
 - Voiceovers
 - Recognizable non-attorney spokespersons
 - Depictions of courtrooms and courthouses
 - Non-lawyers portraying lawyers or judges
 - Non-clients portraying clients
 - Images resembling legal documents
 - Re-enactments of events or scenes
 - Lawyers appearing in certain formats
 - Use of slogans, jingles, etc.
 - Use of oversized signs

ADVERTISING RESTRICTIONS (3)

- General requirements
 - “Dignified”
 - “Non-sensational”
- Review of advertising by committee of lawyers

IMPORTANT CONSIDERATIONS

- Policy concern
 - Misleading laypeople could undermine trust in legal system
- BUT

IMPORTANT CONSIDERATIONS (2)

- Overly broad restrictions:
 - Lead to higher price
 - Make purchasing decisions harder
 - No evidence they produce better quality services
- Actual data
 - 1974 nationwide survey showed that very few people with property damage, landlord/tenant, or employment discrimination problems hired a lawyer
 - Feared of high expense
 - Unable to locate the right attorney for the problem

FOCUS ON SOME
SPECIFIC
PROHIBITIONS

COMPARATIVE ADVERTISING

- May assist consumers in rational decision-making
- Requiring substantiation can prevent misleading claims, BUT
- Requiring substantiation of hard-to-measure subjective qualities will effectively bar them

TESTIMONIALS

- May convey valuable information
- May spur competition
- Should be prohibited only if likely to deceive
- See FTC Endorsement Guides: E.g.,
 - Make no representation advertiser could not make
 - Endorsement reflecting experience on key attribute must be representative
 - Disclose any material connections

PAST SUCCESSES

- Internet has greatly increased access to such information
- Achievements that are truthful and non-misleading can help consumers
 - Assess caliber
 - Assess personal style of lawyer

DIGNITY IN ADVERTISING

- Professed rationale is that undignified advertising will undermine confidence in the legal system
- Dignity may be in the eye of the beholder
- Some consumers may be more effectively reached by such advertising

PRE-REVIEW OF ADVERTISING

- Legitimate industry self-regulation can benefit consumers BUT
- Pre-review puts lawyers in charge of other lawyers
 - I.e., competitors
 - Incentive AND ability to soften competition

RECOMMENDATION

RELY ON PROHIBITIONS
AGAINST DECEPTIVE AND
UNFAIR ADVERTISING AS IN
OTHER SECTORS OF
SOCIETY

REFERRAL SERVICES

TRADITIONAL REFERRAL SERVICES

- Types
 - Bar associations
 - Other not-for-profit programs
 - Yellow pages

- Drawbacks
 - Time intensive – must visit second attorney to compare
 - Consumer must formulate own evaluation method

INTERNET BASED

- Generally well-run
- Attorney/client matching services easy to use and widespread
- Lowers costs for consumers to evaluate providers
- May result in lower overall prices
- May result in higher quality

RECOMMENDATIONS

- Place the burden on proponents of a restriction on competition to show that it is necessary to prevent significant consumer harm
- If harms are shown, narrowly tailor restrictions, e.g., require online legal matching services to:
 - Disclose the number of attorneys and firms that participate in their service and that only members participate
 - Explain explicitly whether, and if so how, they limit attorney participation

RESTRICTIONS BASED ON THE UNAUTHORIZED PRACTICE OF LAW

TYPES OF RESTRICTIONS

- Specific
 - Real estate settlement procedures
 - Workman's compensation proceedings

- General
 - Could be read to affect services by:
 - Accountants/tax preparers
 - Individual/organizational advocates
 - Legal form-fill software packages

DRAWBACKS OF RESTRICTIONS

- Higher cost
 - Non-lawyers may be cheaper
 - Attorneys may also be cheaper when non-lawyer competition is allowed
- Hinders ability to choose right service combination
- Less service for already under-served populations

RECOMMENDATION

Only services requiring the skill or knowledge of a lawyer be reserved as the practice of law

SOME FINAL THOUGHTS

- When consumers face large costs to obtain information about marketplace prices and quality, businesses have less incentive to compete
- A large amount of empirical research has found that restrictions on advertising in professions lead to higher prices and either a negative or no effect on quality
- Competition, whether among attorneys or between attorneys and lay providers, benefits consumers

THANK YOU FOR
YOUR ATTENTION