COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

October 4, 2019, 9:00 a.m.
2 East 14th Ave., 3rd Floor, Court of Appeals Full-Court Conference Room
Call-in number: 720-625-5050 or (toll free) 1-888-604-0017
Access Code: 63467546#
WiFi Access Code: To be provided at the meeting

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1. Approval of minutes for January 11, 2019 meeting [pp. 1-10]

2. Report re: Supreme Court's adoption of new Rule 8.4(i) [Marcy Glenn, pp. 11-14]

3. Report from Rule 8.4(c) Subcommittee [Tom Downey, pp. 15-37]

4. Report from Contingent Fee Subcommittee [Alec Rothrock, pp. 38-39]

5. Report from ABA Advertising Amendments Subcommittee [Eli Wald, pp. 40-178]

6. Administrative matters:

   a. Discuss committee membership

   b. Select next meeting date

7. Adjournment (before noon)

Marcy G. Glenn, Chair
Holland & Hart LLP
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These submitted minutes have not
yet been approved by the Committee

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of the Full Committee
On January 11, 2019
(Fifty-third Meeting of the Full Committee)

The fifty-third meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on January 11, 2019, by Chair Marcy G. Glenn. The meeting was held at 2 East 14th Avenue, Conference Room 1-B.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justices Monica Màrquez and William Hood, were Committee members Judge Michael H. Berger, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Margaret Funk, John M. Haried, Judge Lino S. Lipinsky de Orlov, David C. Little, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Eli Wald, Judge John R. Webb, Frederick R. Yarger, and Jessica E. Yates. Also present were Supreme Court staff attorney Jennifer J. Wallace and visitor Matthew Morrissey.

Present by conference telephone were members Lisa Wayne, Anthony van Westrum, and Tuck Young.

Members Gary Blum, Nancy Cohen, Judge William R. Lucero, Boston Stanton, and James S. Sudler were excused.

Announcements

Chair Glenn announced that Lino S. Lipinsky de Orlov had been sworn in and started his duties as a judge on the Court of Appeals. She introduced new member Noah Patterson and announced that member Fred Yarger has gone into private practice, and member Dick Reeve would be retiring from the full-time practice of law—but not from the Committee—next week.

Approval of Minutes

The minutes of the fifty-second meeting of the full Committee, held October 19, 2018, were approved.

Report from Rule 8.4(g) Subcommittee (Co-Chairs Jessica Yates and Judge John Webb)

Chair Glenn explained that the committee was not considering the Model Rule language that the committee had previously declined to recommend.

Ms. Yates stated that her office had received a complaint about a request for information about alleged sexual misconduct by a judge, which had been the subject of a disciplinary investigation but was now no longer available. This triggered an inquiry about Rule 8.4(g). [Secretary note: Rule 8.4(g) provides that it is professional misconduct for a lawyer to engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process].

It may be argued that sexual harassment, particularly in the workplace, may not quite fit within the strictures of Rule 8.4(g), which requires the conduct to have occurred "in the representation of a client." Likewise, Rule 8.4(h) provides that it is professional misconduct to "engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law." In some cases, Rule 8.4(h) also does not get to the issue of sexual harassment by an attorney. OARC would like to have a rule that specifically mentions sexual harassment to make clear its ability to address non-criminal harassment outside of the context of representation of a client. The subcommittee's report, including the following two versions of a recommended new Rule 8.4(i) and a comment thereto, was provided with the Committee materials:

> Shorter version:
>
> (i) Engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment that is directed at any person with whom the lawyer has a professional relationship.
>
> Longer version:
>
> (i) Engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment that is directed at any person with whom the lawyer has contact through the practice of law or with whom the lawyer otherwise has a professional relationship.

The subcommittee also unanimously recommended the following new comment:

> [_] Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is reasonably interpreted as unwelcome. "Professional relationship" is not limited to the attorney-client relationship. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide application of paragraph (i).

Judge Webb noted that four of the six subcommittee members were present, and should chime in. He stated that sexual harassment is primarily an employment law concept. In the attorney regulation context, there are two issues: (1) enforcement and (2) notice to the bar. It would be helpful to have sexual harassment addressed specifically in the Rules.

The subcommittee members all agreed that sexual harassment is a serious concern. It concluded unanimously that sexual harassment should be addressed in a rule rather than a comment but was divided on the language of a new rule. One view, not accepted by the subcommittee, is that sexual harassment is more about personal conduct than professional conduct, has a lot of vagaries, and should not be the subject of professional discipline. The other end of the spectrum is the notion that there should be a rule that applies in every instance of sexual harassment whether or not it occurs in a professional context. This would be similar to Rule 8.4(b), which prohibits criminal conduct regardless of whether it occurs in the practice of law.

The subcommittee debate centered on the question whether there should be some nexus between the lawyer's conduct and the lawyer's "professional context." The subcommittee considered conduct arguably at the margins of the "professional context":

(1) When a lawyer sexually harasses employees (should be covered by rule);
(2) When a lawyer sexually harasses a non-employee who is tangentially related to the lawyer's professional context, such as one who provides janitorial services to the lawyer's office;
(3) When a lawyer is not acting as a lawyer, but rather in another context, such as a law professor, legislator, or lobbyist.

The majority of the subcommittee favors the shorter version of proposed Rule 8.4(i) as being more discrete and less subject to nuanced interpretation. Some subcommittee members thought the longer version better reached the "margins" of the professional context. The subcommittee as a whole recommends that sexual harassment be addressed in a rule; that there be some limitations on the applicability of the rule; and that the proposed comment be adopted.

A member asked if the subcommittee had considered the Washington state language "in connection with the lawyer's professional activities"?

Judge Webb replied that the ABA language is "related to … professional activities." He would not object to the Washington language.

Another member asked if the subcommittee intended that the Colorado rule be consistent with the Washington rule, and what the overall intent of the proposed rule is.

Judge Webb stated that the intent of the rule is to be sure egregious conduct is covered. The concern is how and at what "margin" to draw the line. For example, if the rule says "in connection with the lawyer's professional activities," would the rule apply and should it apply to

a lawyer who attends a professional function and develops a personal relationship that later deteriorates into sexual harassment?

A member stated that he preferred the Washington language because it doesn't require a "professional relationship," which can be hard to define. "Professional activities" better covers the janitor situation.

Judge Webb, Chair Glenn and the member discussed various permutations of the language.

Chair Glenn requested that the committee discuss the rule itself first. Should "knows or reasonably should know" stay in?

A member told the committee that the Washington rule is tied to an existing body of law regarding discrimination, which is broader than sexual harassment. He asked if sexual harassment is a subset of discrimination. Judge Webb noted that the body of law regarding sexual harassment has developed in the employment context.

The member stated he believed we should have a rule that tracks with the law of sexual harassment. The proposed rule does not tie to any body of law or past conduct of OARC. The question is "professional relationship" vs. "in connection with the lawyer's professional activities." The standard should be tied to an existing body of law rather than be made up as we go.

Judge Webb stated that it may not be feasible to define sexual harassment in a rule.

The member stated that it was not necessary to define sexual harassment in a rule, but it should be tied into existing law.

Another member said that the idea of the rule was to be able to go beyond existing law.

Member Yates stated that the subcommittee report contains summaries of case law in the disciplinary context that go beyond existing law. For example, propositioning a court clerk is unethical although it may not be prohibited by law.

A member noted that the reach of the rule would be shorter if it is tied to Colorado law. Judge Webb agreed.

The member who first discussed the Washington law noted that his point was that he preferred the phrase "professional activities." He does not think the rule should be limited to Colorado law regarding sexual harassment.

Chair Glenn redirected the discussion to the proposed versions of Rule 8.4(i), starting with a discussion of the desired scope of the rule.

A member asked if the longer version was intended to capture the propositioned court clerk example. Judge Webb said that it was intended to capture that example and also the example of the office janitor.

A member noted that the Washington language is likely as broad as the ABA language. The ABA rule was also disapproved because it covered more than sexual harassment.

A member of the subcommittee stated that the subcommittee thought Rule 8.4(g) was too narrow. Should 8.4(g) be more limited than 8.4(i)?

Judge Webb stated that the subcommittee thought a new Rule 8.4(i) was better than trying to fold it into existing Rule 8.4(g).

A member expressed concern that limiting the context to "professional activities" would be misunderstood to mean that the rule is limited to activities in connection with the client-lawyer relationship.

Another member moved to adopt the shorter version with a revision to say "in connection with a lawyer's professional activities" rather than "with whom the lawyer has a professional relationship". Motion seconded.

Another member asked if the phrase was used elsewhere in the Rules and was advised that it is.

A member asked if the proposed language was the same as "related to the practice of law" (used by the ABA). If so, should we just go with the ABA language?

A member stated that so far, only one state has gone with the ABA proposal. Two states use the phrase "professional activities." This member thinks the Washington language is clear and concise.

A member asked what the difference in scope was between the shorter version with the requested revision and the longer version.

The member who made the motion said he thinks the Washington language is shorter and more concise, and does not require construing the phrase "having a professional relationship with..." He also thinks this language would cover the office janitor example.

Another member said that there is a substantial body of law regarding "in connection with," a very broad concept that would cover all of the examples.

A member asked if the motion on the floor was about the shorter version, because there has also been discussion of the longer version.

Judge Webb stated that the motion was to replace "with whom the lawyer has a professional relationship" with "in connection with the lawyer's professional activities." This language could go in either version.

A member asked if the motion was intended also to delete "directed at any person." The movant said it was not.

Another member preferred "in connection with the lawyer's professional activities" in both versions. He suggested that in the longer version, we should delete "with whom the lawyer has contact through the practice of law or ..." That concept is subsumed in the change.

The subcommittee co-chairs expressed their view that. with the change to "in connection with the lawyer's professional activities," the longer version is not needed.

The movant confirmed that "professional activities" would include both the court clerk and the janitor examples.

The Committee voted on this language change, and the change was approved.

The Chair read the shorter version as revised.

The committee then turned to the phrase "knows or reasonably should know," which appears in both versions.

Judge Webb stated that this language was taken from the ABA Model Rule and is also found in other states' rules.

A member said that an objective standard is needed. A comment should clarify that conduct prohibited by the rule goes beyond what the law prohibits as "sexual harassment." The member suggested that the draft comment should be revised to include "professional activities" to be consistent with the now-revised proposed rule, and the last sentence of the comment should be changed to clarify that substantive law provides a floor but not a ceiling.

Judge Webb noted that the first sentence of the comment is derived from the Code of Judicial Conduct and the second sentence could be revised to say that "professional activities" are not limited to those that occur in the client-attorney relationship.

A member suggested that the Committee vote on the rule first, and then move on to the comment. The Chair did not want to vote yet on the rule, noting that "sexual harassment" may become a point of discussion,

Another member reiterated that the phrase "that is directed at any person" should be deleted from the rule.

Another member noted that the Washington rule says "where the act is committed..."

A member moved to revise the motion to change "directed at any person" to "where the act is committed in connection with the lawyer's professional activities." Seconded. Another member recommended the word "conduct" should be used instead of "act."

The motion is to approve the following revision: "…. should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities." Motion carries.

The Chair directed the discussion to the proposed comment, with the penultimate sentence to be revised to read "Professional activities are not limited to those that occur in the attorney-client relationship."

The Chair next directed the discussion to the phrase "sexual harassment."

A member said the last sentence of the comment should make clear that it is broader than the substantive law. Judge Webb suggested revising: "Although sexual harassment is broader, the substantive law …"

Another member raised the question of "reasonably interpreted as unwelcome" vs. "unwelcome." He noted that the Colorado Code of Judicial Conduct does not include "reasonably interpreted as." It is unclear whether "reasonably interpreted" refers to the interpretation of the target of the activity, or the interpretation of a third party. He recommends removing "reasonably interpreted" entirely.

A member suggested "is unwelcome or that a target would reasonably view as unwelcome." Another member suggested "is unwelcome or that a reasonable person would interpret as unwelcome." Another member stated that there should be a reasonableness standard. A member suggested: "that a reasonable person would interpret as unwelcome" or "a person would reasonably interpret as unwelcome" or "is unwelcome."

Another member suggested "that the lawyer knows or reasonably should know" is unwelcome. The committee discussed other language revisions for this concept. A motion was made to revise the first sentence of the comment, as follows: "…of a sexual nature that a reasonably prudent person would perceive as unwelcome." Motion carried.

The committee voted that the "professional activity" sentence be put at the end of the comment.

The committee discussed the "substantive law" sentence, with a member commenting that there are two concepts: what is sexual harassment and whether it applies in a non-employment context. The committee discussed whether the substantive law should "guide," "guide but not limit" or "inform" application of Rule 8.4(i).

A member moved that the last sentence of the comment read, "The substantive law of employment discrimination … may guide but does not limit application of paragraph (i)." Motion carried.

A motion was made to recommend to the Supreme Court approval of a new Rule 8.4(i) and comment that read as follows:

> *(i) Engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities.*
>
> *Comment: Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide, but does not limit, application of paragraph (i). "Professional activities" are not limited to those that occur in the attorney-client relationship.*

A member asked if the rule requires a victim. The answer is "yes."

A member asked about a lawyer who tells a dirty joke at a CLE program, and was advised by another member that that the EEOC doesn't find a one-off action like that to be worth pursuing. Member Yates responded that the OARC would consider the context of this sort of complaint.

A member stated that "directed at any person" does not add anything and is not necessary.

Another member said that we need to be able to discuss with lawyers what is and is not sexual harassment. This rule doesn't go as far as the ABA rule.

Another member expressed concern about removing "directed at any person." He noted that removing this language could raise the question whether a bystander could claim sexual harassment even if the target is not offended.

A member asked if the committee could vote on the rule and the comment separately.

Motion to approve the rule carried.

Motion to approve the comment carried.

The Chair said she would send the Supreme Court the rule and redline to the subcommittee proposal, with the statement that the Court had requested the Committee to look at this issue, and that the recommended version varies from the subcommittee proposal. She will also send the subcommittee report and accompanying handout and explain that the recommended version emerged from the committee meeting. No changes will be made to the subcommittee report.

Report from Rule 8.4(c) Subcommittee (Chair Tom Downey)

[Secretary's note: The Supreme Court amended Rule 8.4(c) in 2017 to state that it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, *or* investigators, who participate in lawful investigative activities." (Emphasis added.) The subcommittee was formed to consider whether a comment on the phrase "lawful investigative activities" was necessary and to consider whether the word "or" shown in italics should be replaced with the word "and."]

Member Downey reported that the subcommittee was great and represented a large diversity of practice areas. It recommends no new comment to Rule 8.4(c). If there is to be a comment, it should be very brief, and should say "lawful" is determined on a case-by-case basis, and should note the potential to violate other rules.

The subcommittee's report lists reasons for not recommending a comment, including the fact that the committee had previously rejected a comment proposed by then-attorney general Cynthia Coffman, and that the general sentiment of the committee was to see how interpretations of the new rule may develop.

Member Downey also noted that the CBA Ethics Committee is working on a formal ethics opinion on this rule. He was authorized by the Chair of the Ethics Committee to receive a draft of that opinion and noted that it follows the concepts the subcommittee evaluated in considering whether to recommend a comment. The Ethics Committee, which must approve a formal opinion at two meetings, will be considering it for the second time tomorrow (January 12, 2019).

A member moved to table further discussion of this until after the Ethics Committee opinion is published. Motion carried.

Report from Contingent Fee Subcommittee (Chair Alec Rothrock)

Member Rothrock reported that he had circulated materials to the subcommittee and it will be meeting later in January.

Report from ABA Advertising Amendments Subcommittee (Chair Eli Wald)

Member Wald reported that the subcommittee is large and diverse, including members from the CTLA and the Young Lawyers Division of the CBA. The subcommittee has met and is underway.

Next Meeting Date

The committee agreed to hold the next meeting in mid-April. It will be scheduled by email.

The meeting adjourned at 11:02 a.m.

Respectfully submitted

Cynthia F. Covell

Cynthia F. Covell, acting secretary

[These minutes have not been approved by the Committee.]

RULE CHANGE 2019(14)
THE COLORADO RULES OF PROFESSIONAL CONDUCT

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) – (f) [NO CHANGE]

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; ~~or~~

(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law~~.~~; or

(i) engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities.

COMMENT

[1]-[5] [NO CHANGE]

[5A] Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide, but does not limit, application of paragraph (i). "Professional activities" are not limited to those that occur in a client-lawyer relationship.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) – (f) [NO CHANGE]

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process;

(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law; or

(i) engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities.

COMMENT

[1]-[5] [NO CHANGE]

[5A] Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide, but does not limit, application of paragraph (i). "Professional activities" are not limited to those that occur in a client-lawyer relationship.

Amended and Adopted by the Court, En Banc, September 19, 2019, effective immediately.

By the Court:

Monica M. Márquez
Justice, Colorado Supreme Court

Report of R.P.C. 8.4(c) Comment Subcommittee

The Rule 8.4(c) Comment Subcommittee respectfully submits the following report.

I. SUMMARY

This subcommittee was formed at the October 27, 2017 meeting of the full Committee and tasked to consider whether a comment on the phrase "lawful investigative activities" was necessary, and to consider changing the wording of Rule 8.4(c) to eliminate the word "or", which appears before the word "investigators," and replace it with the word "and".

The following individuals served as members of the subcommittee: Andrea Anderson, David Stark, Dick Reeve, Fred Yarger, Jamie Sudler, Jan Zavislan, John Haried, John Posthumus, the Hon. John Webb, Marcus Squarrell, Margaret Funk, Matthew Kirsch, the Hon. Michael Berger, the Hon. Ruthanne Polidori, Adam Scoville and Tom Downey

The subcommittee recommended replacing the word "or" with the word "and" as it appears before the word "investigators," in the text of Rule 8.4(c). This recommended change was adopted by the full Committee at its meeting on January 26, 2018.

The subcommittee does not recommend the adoption of a comment to address the meaning of the words "lawful investigative activities" as it appears in the rule.

Should the full Committee disagree with the subcommittee's recommendation not to add a comment, the subcommittee has prepared language for a proposed comment to Rule 8.4(c).

II. BACKGROUND

In September, 2017, the Colorado Supreme Court conducted a public hearing on proposed amendments to the language of Rule 8.4(c) and subsequently adopted the proposed amendments to that rule which now reads as follows:

It is professional misconduct for a lawyer to:

...

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

III. NO COMMENT NEEDED

At each meeting of the subcommittee, a preliminary vote was taken on whether the subcommittee felt a comment was needed. The majority of the subcommittee voted for no comment each time such a vote was taken. Some of the reasons articulated for the belief that no comment is needed are as follows:

1. The Supreme Court's original notification of proposed amendments to Rule 8.4(c) listed only proposed language changes to the Rule itself and did not propose any comment to the Rule.

2. After its announcement of proposed amendments to Rule 8.4(c) and prior to the public hearing on the proposed amendments, the Supreme Court did not propose any comments to accompany the proposed rule changes or request any assistance of the Standing Committee to consider any proposed comments.

3. The recorded proceedings from the September, 2017 public hearing on the proposed amendments to the Rule do not indicate any concern by the Supreme Court of the need for a comment to accompany the proposed language changes to Rule 8.4(c).

4. The amended language of Rule 8.4(c) is relatively new. Many on the subcommittee suggested that adoption of comment language be delayed until issues with the amended language of the Rule have arisen and dictate the need for a comment.

5. Subcommittee members noted that the Final Report Of Pretexing Subcommittee dated December 19, 2011 did contain some proposed comment language.

6. Subcommittee members also noted that the Ethics Committee of the Colorado Bar Association is working on a proposed opinion addressing the amended language of Rule 8.4 (c).

IV. PROPOSED COMMENT

Notwithstanding the subcommittee's opinion that a comment is not needed, the subcommittee nevertheless continued its work and developed a proposed comment for the full Committee's consideration. The subcommittee's guide in drafting a proposed comment was that the comment should be brief and reiterate that the exception in Rule 8.4(c) does not allow a lawyer to directly participate in lawful investigative activities that involve dishonesty, fraud, deceit, or misrepresentation.

The subcommittee ultimately agreed on the following language:

PROPOSED COMMENT TO RPC 8.4(c)

> The exception in Rule 8.4(c) allowing advice, direction or supervision does not allow a lawyer to directly participate in lawful investigative activities that involve dishonesty, fraud, deceit, or misrepresentation. Conduct that is "lawful" could, if engaged in by a lawyer directly, also violate other rules, such as Rule 4.1 (Truthfulness in Statements to Others). What is "lawful" is determined on a case-by-case basis by reference to other law, including constitutional principles, legislation, and the common law.

V. CONCLUSION

The Rule 8.4(c) Comment subcommittee does not recommend the adoption of a comment to the rule addressing the phrase "lawful investigative activities". Should the Committee disagree with the subcommittee's recommendation and wish to adopt a comment, the subcommittee recommends that any such comment be brief and reiterate that the exception to Rule 8.4(c) does not allow a lawyer to directly participate in lawful investigative activities that involve dishonesty, fraud, deceit or misrepresentation.

Respectfully Submitted,

Thomas E. Downey, Jr.

137

Advising, Directing, and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation

Adopted May 2019

I. Introduction and Scope

In September 2017, the Colorado Supreme Court amended Rule 8.4(c) of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) adding this exception:

> It is professional misconduct for a lawyer to:
>
> . . .
>
> > (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities.

(Emphasis added.) No comment accompanied this change.

This opinion discusses the implications of this exception, the permissible limits of a lawyer's involvement in investigative activities, the exception's effect on other Rules, and some commonly recurring situations in which the exception may apply.

II. Syllabus

Revised Rule 8.4(c) permits a lawyer to "advise, direct, or supervise others," including clients, law enforcement officers, and investigators, who participate in lawful investigative activities involving dishonesty, fraud, deceit, or misrepresentation. Left unchanged is the ethical

prohibition against a lawyer personally participating in activities involving dishonesty, fraud, deceit, or misrepresentation, regardless of the lawfulness of those activities.

Whether an investigative activity is "lawful" is a mixed question of fact and law. While this opinion provides some guidance regarding this question, a lawyer asked to advise, direct, or supervise an investigative activity should conduct independent research based on the facts and circumstances of a particular case.

In general, criminal investigations are likely to be considered "lawful investigative activities" even if they involve dishonesty, fraud, deceit, and misrepresentation, provided those activities are not designed to mislead courts or other tribunals. In civil matters, investigative activities are likely to be considered lawful if they are designed to ferret out violations of constitutional, statutory, or common law. This is especially true if the conduct involves posing as customers or other members of the public and does not involve attempts to induce or coerce a subject into making statements or taking action that the subject would not otherwise have taken.

III. Discussion and Analysis

A. Policy Underpinnings of Rule 8.4(c)

Rule 8.4(c) protects against conduct that "jeopardizes the public's interest in the integrity and trustworthiness of lawyers." *In re Conduct of Carpenter*, 95 P.3d 203, 208 (Or. 2004). Colorado's Office of the Presiding Disciplinary Judge has endorsed this view, stating that "dishonesty . . . encompasses fraudulent, deceitful, or misrepresentative conduct evincing 'a lack of honesty or integrity in principle; a lack of fairness and straightforwardness.'" *People v. Katz*, 58 P.3d 1176, 1189 (Colo. OPDJ 2002) (quoting *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990)); *People v. Schmeiser*, 35 P.3d 560, 562, 564 (Colo. OPDJ 2001) (concluding that a violation of Colo. RPC 8.4(c) requires that the statement must be untrue and relate to a material fact). The focus of the Rule is on dishonesty "which encompasses fraudulent, deceitful, or

misrepresentative behavior." *Shorter*, 570 A.2d at 767 (construing prior DR 1-102(A)(4)); *see also Conduct of Carpenter*, 95 P.3d at 208–09 ("[C]onduct involving 'dishonesty' is conduct that indicates a disposition to lie, cheat, or defraud; untrustworthiness; or a lack of integrity" (internal quotations omitted)).

The United States Supreme Court has long recognized the propriety of using undercover agents, pretext, and deception in lawful investigations. *See Lewis v. U.S.*, 385 U.S. 206, 209 (1966) ("the Government is entitled to use decoys and to conceal the identity of its agents"). The Colorado Supreme Court has similarly approved deception in criminal investigations, observing that many crimes simply "could not otherwise be detected unless the government is permitted to engage in covert activity." *People in the Interest of M.N.*, 761 P.2d 1124, 1135 (Colo. 1988); *see also People v. Bailey*, 630 P.2d 1062, 1068 (Colo. 1981) (rejecting entrapment and constitutional challenges to deceptive undercover activities); *People v. Nelson*, 296 P.3d 177, 184 (Colo. App. 2012) (policeman's ruse of falsely identifying himself as "maintenance" causing defendant to open apartment door held not to render subsequent entry unlawful); *People v. Roth*, 85 P.3d 571, 574 (Colo. App. 2003) (police use of fictitious drug checkpoint was lawful and did not require suppression of evidence); *People v. Zamora*, 940 P.2d 939, 943 (Colo. App. 1996) (police pretext in asking to inspect apartment for fictitious crime did not render consent to warrantless search involuntary; whether conduct is lawful turns on whether defendant's consent is voluntary).

The Committee also has recognized that a lawyer's involvement in lawful criminal or civil regulatory investigations can ensure that the investigation complies with constitutional parameters, "as well as high professional and ethical standards." CBA Formal Op. 96, "Ex Parte

Communications with Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings" (rev. 2012) (CBA Op. 96).

The American Bar Association (ABA) instructs prosecutors to "provide legal advice to law enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use," and that ethical rules "should not be read to forbid prosecutors from participating in or supervising undercover investigations, which by definition involve 'deceit.'" *See* ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.3(g) & Commentary to Standard 1.3(g); *see also* H. Morley Swingle & Lane P. Thomasson, Feature: *Big Lies and Prosecutorial Ethics*, 69 J. Mo. B. 84, 85 (Mar.-Apr. 2013) ("A prosecutor would not be doing his job effectively if he or she refused … to help [an] officer prepare to conduct a lawful covert operation[.]").

B. Lawyers May Not Personally Participate in Dishonesty, Fraud, Deceit, or Misrepresentation

While recognizing the value of deception as a tool for law enforcement and of lawyer oversight of such investigations, courts have drawn a clear line between a lawyer advising and supervising covert activities and personally participating in them.

Prior to the revision of Rule 8.4(c), the Colorado Supreme Court refused to recognize any exception that would allow a lawyer to personally engage in deceptive activities, even under the most extenuating of circumstances. In *In re Pautler*, 47 P.3d 1175 (Colo. 2002), a prosecutor was disciplined for impersonating a public defender in an attempt to achieve the peaceful surrender of a barricaded axe murderer who had demanded to speak to a public defender as a condition of his surrender. *Id.* at 1176–77. The Colorado Supreme Court held that then-existing Rule 8.4(c) made no exception for investigatory activities. *Id.* at 1179. Instead, the court repeatedly emphasized that lawyers must not personally engage in behavior "that involves deceit

or misrepresentation" even during investigative activities. *Id.* at 1180; *see also In re Gatti*, 8 P.3d 966 (Or. 2000) (reaching a similar result under an older version of Oregon's counterpart to Rule 8.4(c)).

Revised Rule 8.4(c) does not alter the result in *Pautler*, but makes clear that a lawyer may "advise, direct, or supervise others," including clients, law enforcement officers, and investigators, who participate in "lawful investigative activities" involving dishonesty, fraud, deceit, or misrepresentation.

C. Lawful Investigative Activities

Revised Rule 8.4(c) applies to all Colorado lawyers. Whether the exception created by revised Rule 8.4(c) applies in a particular circumstance turns on a legal question: "What constitutes a lawful investigative activity?" In cases determining whether deception was used in pursuit of "lawful investigative activities," there is a "discernable continuum" of conduct ranging "from clearly impermissible to clearly permissible" actions. *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002).

Existing case law on what constitutes "lawful investigative activities" may be distilled into several guiding principles. Caution must be exercised in applying existing law, however, as material differences exist between revised Rule 8.4(c) and the Rules in other jurisdictions.

First, hiring investigators to pose as customers or consumers is a proper, lawful investigative technique. Such a ruse is designed to ferret out ongoing wrongdoing, such as discrimination or inappropriate use of a product or trademark infringement that would be otherwise difficult, if not impossible, to discover without the deception. Courts traditionally have allowed pretextual or undercover investigations in civil rights cases and, somewhat less consistently, in intellectual property investigations. Lawyers "can employ persons to play the

role of customers seeking services on the same basis as the general public." *Hill*, 209 F. Supp. 2d at 880.

Second, investigators must take care not to induce or coerce the target of an investigation into making statements he or she otherwise would not have made to a member of the public. Investigators "cannot trick employees into doing things or saying things they otherwise would not do or say." *Id.* A proper investigation should merely "note or reproduce" a witness's usual behavior. An operation designed to induce someone into doing or saying something he or she would otherwise not do or say, would likely not qualify as a lawful investigation. *In re Curry*, 880 N.E.2d 388, 405 (Mass. 2008).

Third, any deception should not *impede* a lawful investigation. *See In re Malone*, 105 A.D.2d 455, 457–58 (N.Y. App. Div. 1984) (censuring a prosecutor who instructed an officer to lie to an investigative panel); *accord In re Friedman*, 392 N.E.2d 1333, 1339–40 (Ill. 1979) (finding an ethics violation where a prosecutor instructed police officers to testify falsely to catch lawyers involved in a bribery scheme).

Fourth, lawyers may not affirmatively mislead a court or other tribunal. *See People v. Reichman*, 819 P.2d 1035, 1036 (Colo. 1991) (holding that a lawyer may not knowingly deceive the judicial system by filing false criminal charges to bolster an undercover investigator's credibility); *see also* Colo. RPC 3.3(a).

Fifth, relevant considerations in a civil investigation include whether the investigation was a "straightforward effort to gather evidence"; whether the investigation is "designed to reproduce the subject's usual behavior" or was designed to "trick" the subject into doing something atypical; whether the investigation is gathering information "readily available to the public"; the degree of intrusiveness of the investigation (with less intrusive investigations less

likely to run afoul of constraints on permissible lawful investigative activities or ethical rules); whether those targeted by the investigation are "suspected wrongdoers"; whether there are other ways to collect evidence of the wrongdoing; and whether a supervisory lawyer has reviewed and approved the investigation. *See* Judy Z. Kalman & Mariya Treisman, *Pretextual Investigative Techniques and the Rules of Professional Conduct*, NAGTRI J., Vol. 3, Issue 1 (Feb. 2018) (collecting cases).

Finally, a number of states have defined the scope and contours of "covert activity" for purposes of lawful investigations. For example, Oregon has specifically stated that "lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights" is acceptable, "provided the lawyer's conduct is otherwise in compliance" with the Rules. Or. RPC 8.4(b). Further, Oregon permits covert activity to be commenced "only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place[,] or will take place in the foreseeable future." *Id.*; *accord* Iowa RPC 32:8.4, cmt. [6] (same).

Revised Colorado. RPC 8.4(c) is not so explicit and was adopted without any comment providing guidance to lawyers, government or private. In drawing guidance from Oregon, Iowa, and other states that have adopted variants of ABA Model Rule 8.4(c), it is important to keep in mind that the express language of such variants and their comments circumscribe the ethical boundaries of a lawyer's involvement in investigative activities in those jurisdictions. Lawyers practicing in Colorado who are consulted regarding investigative activities must analyze each situation on a case-by-case basis, and exercise their own sound professional judgment, informed by legal research.

D. Relationship to Other Rules

While revised Rule 8.4(c) may seem to be a significant departure from previous standards, it is better viewed as a narrow governing exception. This section considers other Rules potentially affected by revised Rule 8.4(c), starting with those that, at least on their face, are most likely to be affected. After analysis, however, the Committee concludes that many of these Rules are unaffected, or largely unaffected, by revised Rule 8.4(c).

1. Rule 8.4(a) (Misconduct)

Rule 8.4(a) provides: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Revised Rule 8.4(c) provides a narrow exception to this anti-circumvention rule. It is a settled rule of statutory construction that "a specific statutory provision prevails over a general provision." *Colo. Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218, 1236 (Colo. 1996). The Committee believes that revised Rule 8.4(c)'s express authorization for a lawyer to "advise, direct, or supervise others" "in conduct involving dishonesty, fraud, deceit or misrepresentation" controls over application of the general anti-circumvention rule, so long as the advice, direction, or supervision occurs in furtherance of a "lawful investigative activit[y],".

Further, it is the opinion of the Committee that, even before the enactment of revised Rule 8.4(c), subsection (a) did not prohibit a lawyer from advising a client concerning action the client is legally entitled to take, even if such action involves conduct involving dishonesty, fraud, deceit, or misrepresentation. For example, in Colorado and other states that have adopted a "unilateral consent" rule, it is generally lawful for a nonlawyer to surreptitiously record a conversation to which he or she is a party, though a lawyer may not. *See People v. Selby*, 606 P.2d 45, 47 (1979) (holding a lawyer may not secretly record a conversation with another lawyer or person); CBA Formal Op. 112, "Surreptitious Recording of Conversations or Statements"

(2003). Even before the adoption of revised Rule 8.4(c), a lawyer could have advised a nonlawyer client of his or her legal right to engage in such a surreptitious recording.

2. Rule 4.1 (Truthfulness in Statements to Others)

Rule 4.1 provides:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Because revised Rule 8.4(c) does not permit a lawyer to personally engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, Rule 4.1 and the result in *Pautler* are unaffected. *See* Colo. RPC 4.1, cmt. [1].

3. Rule 4.2 (Communication with Person Represented by Counsel)

Rule 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Although revised Rule 8.4(c) permits a lawyer to "advise, direct, or supervise" a nonlawyer where the investigative activity in question is a "lawful investigative activity," the Committee believes that revised Rule 8.4(c) does not otherwise alter Rule 4.2's requirements. Investigation is prohibited once the lawyer knows a party is represented by counsel in a matter unless one of Rule 4.2's exceptions applies. Rule 4.2's "authorized by law" exception, however, may include "lawful investigative activity" as referenced in revised Rule 8.4(c). *See generally* CBA Op. 96.

4. Rule 4.3 (Dealing with Unrepresented Person)

Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Because Rule 4.3 applies to personal contact by a lawyer with an unrepresented party, it is unaffected by revised Rule 8.4(c), which does not authorize a lawyer to personally engage in deceitful conduct.

5. Rule 4.4(a) (Respect for Rights of Third Persons)

Rule 4.4(a) states, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

The Committee believes that conduct in accordance with revised Rule 8.4(c) would not violate the "substantial purpose" clause of Rule 4.4(a). The Committee further believes that, so long as the requirements of revised Rule 8.4(c) are observed, advising, directing, or supervising others in the use of covert or deceitful methods in the course of "lawful investigative activities" cannot be construed to be a violation of another's "legal rights."

6. Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

Rule 5.3 provides:

> With respect to nonlawyers employed or retained by or associated with a lawyer:
>
> . . .
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct *if engaged in by a lawyer* if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(Emphasis added.)

Private investigators hired by a lawyer, whether on a full-time or project basis, as well as government investigators and staff employed by the lawyer, are "nonlawyers employed or retained by or associated with a lawyer."[1] Rule 5.3 requires a lawyer to make "reasonable efforts to ensure that [such] person's conduct is compatible with the professional obligations of the lawyer."

The Committee believes that Rule 5.3's requirement that a lawyer make "reasonable efforts to ensure . . . conduct is compatible with the professional obligations of the lawyer" includes the determination of whether the conduct the lawyer is recommending, directing, or advising is in furtherance of a lawful investigative activity. Such reasonable efforts may include reviewing the substantive law bearing on whether an investigative activity is lawful, consulting with others on this issue when appropriate, and providing guidance to those the lawyer is advising regarding how to lawfully conduct the activity. For the reasons described in Section III.D.1, revised Rule 8.4(c) provides a narrow exception to Rule 5.3(c) and allows a lawyer to "advise, direct, or supervise" a nonlawyer engaged in "conduct involving dishonesty, fraud,

[1] Process servers, skip tracers, and others hired by a lawyer also fall within the ambit of Rule 5.3, and may fall within the purview of revised Rule 8.4(c) if their tasks include "dishonesty, fraud, deceit or misrepresentation."

deceit or misrepresentation" so long as that conduct is in furtherance of "lawful investigative activities."

7. Rule 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer)

Rule 1.2(d) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

As discussed above, revised Rule 8.4(c) permits lawyers to advise, direct, and supervise clients in lawful investigative activities that involve "fraud." To that extent, the revised Rule controls over Rule 1.2(d)'s prohibition on counseling a client to engage in *fraudulent* conduct, but it does not alter the prohibitions on counseling a client to engage or assisting a client to engage in *criminal* conduct.

8. Rule 3.3 (Candor Toward the Tribunal)

As noted above in Section III, revised Rule 8.4(c) does not modify a lawyer's duty of candor to the tribunal under Rule 3.3.

IV. Illustrations

Certain issues regarding investigative activities may arise frequently in a lawyer's practice, even on a daily basis, such as the supervision of undercover law enforcement investigations.

A. Private and Government Investigators – Pretextual Investigations

As noted above, undercover investigations and deceptive investigative techniques are an accepted practice in the detection and prevention of crime. *M.N.*, 761 P.2d 1124, 1135; *People v. Morley*, 725 P.2d 510, 514–15 (Colo. 1986); *Bailey*, 630 P.2d at 1068. A lawyer's involvement

in an investigation can ensure that the investigation complies with constitutional standards. CBA Formal Op. 96. Revised Rule 8.4(c) clarifies that a lawyer may advise, direct, or supervise others in lawful criminal investigations, even if those investigations are covert or use deceptive investigative techniques. *See also* ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.3(g) & Commentary to Subdivision 1.3(g).

Revised Rule 8.4(c) also applies in contexts other than criminal investigations. For example, an investigator may pretend to be a homebuyer or renter in order to detect discrimination in housing, pose as a job-seeker to gather evidence of employment discrimination, or purport to be a consumer of certain goods in order to gather evidence of consumer fraud or evidence of trademark or copyright infringement. Pursuant to revised Rule 8.4(c), a lawyer may ethically advise, direct, or supervise such a lawful, albeit deceptive, investigation by an investigator retained by the lawyer or by the lawyer's client. However, the investigation must be "lawful," and the lawyer may not personally participate in conduct involving dishonesty, fraud, deceit, or misrepresentation.

B. Surreptitious Recordings

The Committee is aware that in certain situations a lawyer's client or other persons (such as investigators) might wish to record a conversation surreptitiously. For example, a client may want to gather evidence to support a claim for employment discrimination or sexual harassment by recording statements that are being made to the employee in the work place. A party in a dissolution of marriage action may wish to record statements made by the other party that indicate the other party is hiding assets or presents a risk to the safety of the children of the marriage. Or a client may want to record threats of physical harm so that the client can seek a restraining order, support criminal prosecution, or establish evidence to support a civil claim for

intentional infliction of emotional distress. In these situations, it seems unlikely that the person to be recorded would continue to make the statements if they knew they were being recorded.

As previously noted in Section III.D.1., in Colorado it is generally lawful for a nonlawyer client to record a conversation to which he or she is a party without the other party's knowledge, even though a lawyer may not do so. A lawyer, however, should advise a client that any recording should not violate state or federal computer crime, wiretap, or eavesdropping statutes. *See*, e.g., 18 U.S.C. §2511; C.R.S. § 18-5.5-102; C.R.S. § 18-9-303; C.R.S. § 18-9-304.

Although a lawyer may not communicate with a party who is represented in a matter by another lawyer (unless the other lawyer consents), "[p]arties to a matter may communicate directly with each other." Colo. RPC 4.2, cmt. [4]. Revised Rule 8.4(c) specifically includes "clients . . . who engage in lawful investigative activities" among those persons that the lawyer may advise, direct, or supervise. Therefore, as long as the recording is lawful, revised Rule 8.4(c) permits a lawyer to advise, direct, or supervise other persons with respect to such recordings, even if made surreptitiously.[2]

C. Public Records and Social Media

Our society increasingly stores data electronically and uses the Internet to gather information. In addition, social media have become so commonplace it is easy to compile a large amount of information about someone from that person's and the person's friends' and colleagues' postings on social media. In short, public records and social media provide fertile ground for investigating a person or organization.

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[2] The Committee recognizes this conclusion is contrary to the holding in *McClelland v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074, 1079-80 (D. Colo. 2009). However, that opinion, issued several years ago, was based on Colo. RPC 8.4(c) before its amendment in 2017. The court in *McClelland* relied in part on CBA Formal Op. 112, "Surreptitious Recording of Conversations or Statements" (2003), which also was based on the pre-amendment Rule. *See also* ABA Comm. on Ethics and Prof. Resp., Formal Op. 11-461, "Advising Clients Regarding Direct Contacts with Represented Persons" (2011).

Important information often can be obtained by investigating through public records and social media without deception. For example, no dishonesty, fraud, deceit, or misrepresentation is required to view and record public postings made by a potential criminal defendant about a crime he or she has committed, or by a personal injury plaintiff showing photos of his or her weekend activities which refute claims of pain and physical disability. These examples involve information that has been made public and is available for anyone to see. Therefore, an investigator or a lawyer may gather such information. *See* CBA Formal Op. 127, "Use of Social Media for Investigative Purposes" (2015).

However, in some instances, information cannot readily be obtained without some form of deception or misrepresentation. One example is law enforcement officers pretending to be someone they are not in order to catch sexual predators using the Internet to lure their victims, or to detect human trafficking, drug smuggling, or other illegal activities. In such instances, information may be obtained only by gaining access to a restricted portion of a social media site by misrepresenting one's identity or the reason for wanting such access, for example, when an investigator asks to "friend" someone on Facebook without revealing the investigation. Revised Rule 8.4(c) clarifies that a lawyer may advise, supervise, or direct law enforcement in such investigations that involve deception or misrepresentation, but may not personally engage in them.

With regard to situations not involving law enforcement, such as investigating witnesses or gathering information about a party to a case, the Committee believes that revised Rule 8.4(c) now permits a lawyer to ethically advise, supervise, or direct others, including investigators or clients, with respect to use of deceptive means to gather information from a restricted portion of a social media profile or website, as long as it is in the course of a lawful investigative activity,

and as long as the lawyer does not personally engage in such conduct. *See* CBA Formal Op. 127, *supra*.

Addendum: Useful References

Case Law

Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) (tester has standing to bring Fair Housing Act claim even though "the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home").

Lewis v. United States, 385 U.S. 206, 209 (1966) (the "government is entitled to use decoys and to conceal the identity of its agents").

Hoffa v. United States, 385 U.S. 293, 300 (1966) (discussing witness's failure to disclose his role as a government informer in context of illegal search and seizure under the Fourth Amendment).

United States v. Szycher, 585 F.2d 443, 447 (10th Cir. 1978) (prohibiting pretextual investigation activities "where the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction").

McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074, 1080 (D. Colo. 2009) (private investigator's conduct in surreptitiously recording defendant's employee was improper).

In re Pautler, 47 P.3d 1175, 1179 (Colo. 2002) (pre-amendment Colo. RPC 8.4(c) applied to prosecutor's conduct in impersonating a public defender).

People v. Reichman, 819 P.2d 1035, 1038-39 (Colo. 1991) (pre-amendment Colo. RPC 8.4(c) prohibition against deception applied to criminal prosecutors).

People v. Smith, 778 P.2d 685, 686 (Colo. 1989) ("the undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound").

People in the Interest of M.N., 761 P.2d 1124, 1130 (Colo. 1988) ("Unlawful activities performed by a government agent in the course of undercover law enforcement do not necessarily subject the officer to prosecution.").

People v. Morley, 725 P.2d 510, 514–15 (Colo. 1986) (undercover investigator's action in surreptitiously recording a lawyer setting up a prostitution ring in Denver was not prohibited).

People v. Bailey, 630 P.2d 1062, 1068 (Colo. 1981) (rejecting entrapment and constitutional challenges to deceptive undercover activities).

People v. Vandiver, 552 P.2d 6, 10 (Colo. 1976) (rejecting claim of entrapment "[a]bsent outrageous conduct by the officers violating fundamental standards of due process").

People ex rel. Attorney Gen. v. Ellis, 70 P.2d 346, 347 (Colo. 1942) (attorney suspended for clandestinely installing espionage paraphernalia in the Governor's office).

People v. Nelson, 296 P.3d 177, 184 (Colo. App. 2012) (policeman's ruse of falsely identifying himself as "maintenance," causing defendant to open apartment door, did not render subsequent entry unlawful).

People v. Roth, 85 P.3d 571, 574 (Colo. App. 2003) (defendant's plain-view disposal of drug paraphernalia in reaction to police ruse of fictitious drug checkpoint did not require suppression of evidence).

People v. Zamora, 940 P.2d 939, 943 (Colo. App. 1996) (police pretext for asking to inspect apartment did not render consent to warrantless search involuntary).

People v. Schmeiser, 35 P.3d 560, 562, 564 (Colo. OPDJ 2001) (concluding that a violation of pre-amendment Colo. RPC 8.4(c) requires that the statement must be untrue and relate to a material fact).

Other Jurisdictions

Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 695 (8th Cir. 2003) (where information "could have been obtained properly through the use of formal discovery techniques," doing so using undercover, pretextual investigation was unlawful).

Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 879–80 (N.D. Ill. 2002) (rejecting challenge to evidence obtained by undercover investigators investigating racial discrimination in gasoline sales).

Holdren v. General Motors Corp., 13 F. Supp. 2d 1192 (D. Kan. 1998) (recognizing a fine line between advising and suggesting that a client engage in direct contact with a represented party, but concluding the attorney had violated Rule 4.2 via the anti-circumvention prohibition of Rule 8.4(a)).

In re Friedman, 392 N.E.2d 1333, 1339–40 (Ill. 1979) (finding ethics violation where a prosecutor instructed police officers to testify falsely to catch lawyers involved in a bribery scheme).

In re Curry, 880 N.E.2d 388, 408 (Mass. 2008) (lawyer sanctioned for his and his investigator's dishonest conduct in attempting to coerce a judge's law clerk to implicate the judge in a corruption scandal).

Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475 (D. N.J. 1998) ("a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations").

Cartier v. Symbolix, Inc., 386 F. Supp. 2d 354, 357 (S.D.N.Y. 2005) (investigator pretending to buy a fake Cartier not ethically proscribed).

Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 125 (S.D.N.Y. 1999) ("hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation").

In re Malone, 105 A.D.2d 455, 457–58 (N.Y. App. Div. 1984) (censuring a prosecutor who instructed an officer to lie to an investigative panel).

Disciplinary Counsel v. Brockler, 48 N.E.3d 557, 560 (Ohio 2016) (district attorney's conduct in personally creating a fictitious Facebook account to contact witnesses improper).

In re Conduct of Carpenter, 95 P.3d 203, 208-09 (Or. 2004) ("[C]onduct involving 'dishonesty' is conduct that indicates a disposition to lie, cheat, or defraud; untrustworthiness; or a lack of integrity.").

In re Gatti, 8 P.3d 966, 973 (Or. 2000) (lawyer's conduct in misrepresenting he was a chiropractor seeking employment to medical record company warranted public reprimand and constituted conduct involving dishonesty, fraud, deceit, or misrepresentation).

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BFW ATTORNEYS BURNS FIGA & WILL

Memorandum

TO: Marcy Glenn, Chair, Colorado Supreme Court Standing Committee on the Rules of Professional Conduct

FROM: Alec Rothrock, Chair, Contingent Fee Subcommittee

DATE: September 25, 2019

SUBJECT: Status Report, Contingent Fee Subcommittee

The Contingent Fee Subcommittee has made considerable progress toward drafting a new Rule to present to the Committee along with associated forms. This Committee formed the Subcommittee to modernize and improve the Rules Governing Contingent Fees, which are now forty years old. The salient features of the Subcommittee's work thus far can be summarized as follows:

1. Move the Rules Governing Contingent Fees from Chapter 23.3 of the Rules of Civil Procedure to Colo. RPC 1.5(c) of the Rules of Professional Conduct, which requires contingent fee agreements to comply with Chapter 23.3. With the adoption of Colo. RPC 1.5(h) (flat fees) and the related form flat fee agreement, Colo. RPC 1.5 may have to be reorganized to avoid becoming unwieldly.

2. Eliminate the Disclosure Statement and move necessary disclosures to the portion of Rule listing mandatory contents of contingent fee agreements.

3. Leave undisturbed the substantial compliance standard for enforceability of contingent fee agreements and the disclosures necessary to preserve the lawyer's eligibility to recover attorney fees on a quantum meruit basis if the attorney-client relationship ends before the event triggering a right to a fee.

4. Eliminate formalistic requirements such requiring duplicate contingent fee agreements listing the client's postal address, one of which must be sent to the client within fourteen days.

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5. Protect clients by, for example, (a) prohibiting provisions requiring clients to reimburse the lawyer for all sanctions awarded against the lawyer, and (b) requiring lawyers to inform clients that they may disapprove the hiring of associated counsel and discharge associated counsel if one is hired.

6. Borrow language from ABA Model Rule 1.5(c) and its Comments to expand the body of legal authority available to interpret common provisions.

7. Encourage lawyers to consider language clarifying the lawyer's rights and obligations, such as whether the defense of counterclaims and the handling of appeals fall within the scope of representation; who receives money awarded by the court as sanctions against an opposing party; and the possibility that the lawyer will be ethically required to decline a client's request to receive funds in which a third party claims an interest.

8. Clarify that contingent fee agreements may be appropriate when the contingency does not involve the recovery of money, such as reverse contingent fees on the amount of money the lawyer saves the client as compared to the client's potential liability.

Colorado Supreme Court Standing Committee for the Colorado Rules of Professional Conduct

ABA Rules 7.1–7.5 Subcommittee Report

I. Introduction: lawyer advertising and solicitation rules for the 21st century

In August 2018 the American Bar Association ("ABA") House of Delegates revised Chapter 7, Rules 7.1-7.5 of the ABA Model Rules of Professional Conduct ("Rules"), regulating advertisement and solicitation. The ABA amendments were adopted following two years of intensive study, after receiving a proposal from the Association of Professional Responsibility Lawyers (APRL) in 2016.

In Spring 2019 the Colorado Supreme Court Standing Committee for the Colorado Rules of Professional Conduct ("Committee") appointed the ABA Rules 7.1–7.5 Subcommittee ("Subcommittee") to review the ABA amendments and report back to the Committee. Professor Eli Wald chaired the Subcommittee; also serving on Subcommittee were Nancy Cohen, Cynthia Covell, Thomas E. Downey, Jr., the Honorable Adam Espinosa, Margaret Funk, Casey Kannenberg, Cecil Morris, Noah Patterson, Saul Sarney, Marcus Squarrell, David Stark and Jamie Sudler.

The Subcommittee's work included the formation of a broad-based working group, holding numerous meetings and reaching broad consensus. Throughout, the Subcommittee's process has been transparent, open, and welcoming, including inviting representatives from the Colorado Attorney General's Office, Colorado Trial Lawyers Association, Colorado Bar Association Young Lawyers Division and the Office of Attorney Regulation Counsel.

Because the Subcommittee generally recommends adoption of the ABA changes, it incorporates by reference the ABA's description of its process and timetable, see, ABA Report, pp. 7-13. In particular, the Subcommittee notes the ABA's compelling summary of APRL's proposal (pp. 7-8),[1] and agrees with the ABA's background analysis (pp. 10-13) which demonstrates why the ABA changes are timely and necessary.

The cornerstone of Chapter 7 of the Rules and of the Colorado Rules of Professional Conduct ("Colo. RPC") has long been ensuring client access to accurate information about lawyers and legal services. The ABA revisions uphold this guiding principle yet note three trends warranting updating the Rules. First, increased competition in the market for legal services and the nationalization of law practice render uniformity and consistency across states' rules of professional conduct imperative for the effective representation of clients, yet lawyer advertising and solicitation rules feature a "dizzying number of state variations."[2] Thus, the first

[1] APRL proposal included two reports, authored in 2015 and 2016, attached as Exhibits A and B.
[2] ABA Standing Committee on Ethics and Professional Responsibility Report ("ABA Report"), August 2018, at 1, attached as Exhibit C.

objective of the ABA's changes is to increase uniformity across states' advertising and solicitation rules by offering a model suited for the 21st century.[3]

Second, the widespread use of social media and the internet has changed the landscape of lawyer advertising and solicitation allowing greater and faster flow of information about lawyers and legal services in the market for legal services, making some of the current rules antiquated.[4] The second objective of the ABA's changes is to update the Rules, closing the gap between technological advancements and lawyer regulation.

Finally, developments in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about lawyers and legal services may be unlawful, violating lawyers' right of commercial free speech and ability to freely compete in the market for legal services. The third aim of the ABA changes is to continue to ensure client access to accurate information about lawyers and legal services while respecting First Amendment and antitrust law.[5]

Having carefully reviewed the ABA changes to Chapter 7, the Subcommittee generally finds them compelling for the above stated reasons and recommends revising the Colo. RPC rules 7.1-7.5 to conform to the Rules. In five instances, however, the Subcommittee believes that ensuring client access to accurate information about lawyers and legal services calls for retaining current provisions of the Colo. RPC or Comments. These five instances are highlighted in the attached redlined version of the recommended rule changes and in this summary. The balance of the redlining in the attached Colo. RPC reflects the ABA amendments that the Subcommittee also recommends.

II. Brief Summary of the Recommended Changes

Following the ABA changes, the Subcommittee recommends amendments to the Colo. RPC, Rules 7.1 through 7.5 and their related Comments.

These amendments:[6]

• Streamline and simplify the rules while adhering to constitutional limitations on restricting commercial speech, protecting the public, and permitting lawyers to use new technologies to inform consumers accurately and efficiently about the availability of legal services.

• Combine the provisions on false and misleading communications into Rule 7.1 and its Comments. The black letter of Rule 7.1 is greatly reduced, resulting in a

[3] *Id*.
[4] *Id*.
[5] *Id*. at 1-2.
[6] This brief summary tracks the ABA's. *See*, ABA Report, p. 15.

short and concise general principle prohibiting false and misleading communications. Provisions of Rule 7.5, which largely relate to misleading communications, are moved into Comments to Rule 7.1.

• Consolidate specific rules for advertising into Rule 7.2, change "office address" to "contact information" (to accommodate technological advances) and delete unrelated or superfluous provisions. Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and its Comments. Lawyer referral services remain limited to qualified entities approved by an appropriate regulatory authority.

• Add a new subparagraph to Rule 7.2(b) as an exception to the general provision against paying for recommendations. The new provision would permit only nominal "thank you" gifts and contains other restrictions.

• Define solicitation as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter." With some exceptions, live person-to-person solicitation continues to be prohibited. This includes in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication.

• Broaden slightly the exceptions in Rule 7.3(b)(2) and (3) to permit live person-to-person solicitation of routine "users of the type of legal services involved for business matters," and of "persons with whom a lawyer has a business relationship." Additional Comments offers guidance on the new terms.

III. Discussion of the Proposed Amendments

A. Rule 7.1: Communications Concerning a Lawyer's Services

Rule 7.1 continues to prohibit false or misleading communications about lawyers and legal services, upholding the guiding principle of providing clients access to accurate information. Reflecting the trend of increased flow of information as well as increased client familiarity with information about law and lawyers, and respecting lawyers' First Amendment rights, however, the revised rule deletes unnecessary restrictions and moves others to the Comments.

Following the ABA changes, the Subcommittee recommends renumbering current rule 7.1(a)(1), stating the basic prohibition against false or misleading communications, as Rule 7.1.

Current subsections 7.1(a)(2) and 7.1(a)(3), offering examples of the basic principle are deleted because they have become unnecessary and are replaced with revised Comments [2] and [3].

Current subsection 7.1(b) is deleted and replaced with revised rule 7.2(b).

Current subsection 7.1(c) (and corresponding current Comment [9]), mandating the use of regular U.S. mail for certain communications, is deleted because it is antiquated given recent technological advancements.

Current subsections 7.1(e) and 7.1(f) are deleted as unnecessary and redundant, given the general principle stated in revised rule 7.1, as well as current Rules 1.17 (sale of law practice), 5.1 (responsibilities of a supervising lawyer), 5.3 (responsibilities regarding nonlawyer assistants), and 8.4(c) (conduct involving dishonesty). All of these changes are consistent with the ABA changes and will ensure greater uniformity in advertising and solicitation rules.

The Subcommittee recommends retention of the substance of current subsection 7.1(d), regarding accuracy of information about contingency fees, because the provision is consistent with the guiding principle of ensuring client access to accurate non-misleading information. Consistent with the new structure of Chapter 7, designed to offer concise overall guidance about accuracy of communications in Rule 7.1 and relegating details to the Comments and to Rules 7.2 and 7.3, the Subcommittee recommends moving current subsection 7.1(d) to the Comment, renaming it Comment [3A].

Consistent with the ABA changes, current Comments [2]-[6] are deleted because they are unnecessary, redundant, and may infringe on lawyers' First Amendment commercial free speech rights.

Following the ABA changes, additional guidance is inserted in revised Comment [2] to explain that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required.[7]

In revised Comment [3], the Subcommittee recommends replacing "advertising" with "communication" to make the Comment consistent with the title and scope of the rule. Comment [4] offers additional guidance, explaining that an "unsubstantiated claim" may also be misleading. Comment [5] recommends that lawyers review Rule 8.4(c) for additional guidance regarding acting honestly.[8]

Revised Comments [5] through [8] have been added by incorporating the black letter concepts from current Rule 7.5. Current Rule 7.5(a) restates and incorporates Rule 7.1, and then provides examples of misleading statements. The ABA has concluded and the Subcommittee agrees that Rule 7.1, with the guidance of new Comments [5] through [8], better addresses the issues.[9]

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[7] ABA Report, at 3.
[8] *Id*.
[9] *Id*.

B. Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules[10]

Specific Advertising Rules: Specific rules for advertising are consolidated in Rule 7.2, similar to the current structure of Rule 1.8, which provides for specific conflict situations.

Following the ABA changes, the Subcommittee recommends amendments to Rule 7.2(a) parallel to its recommendations for changes to Comments to Rule 7.1, specifically replacing the term "advertising" with "communication" and replacing the identification of specific methods of communication with a general statement that any media may be used.[11]

Gifts for Recommendations: Rule 7.2(b) continues the existing prohibition against giving "anything of value" to someone for recommending a lawyer. Following the ABA changes, new subparagraph (b)(5), however, contains an exception to the general prohibition. This subparagraph permits lawyers to give a nominal gift to thank the person who recommended the lawyer to the client. The new provision states that such a nominal gift is permissible only where it is not expected or received as payment for the recommendation. The new words "compensate" and "promise" emphasize these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e. not "compensation."[12] The ABA notes and the Subcommittee agrees that this is not a change but rather a clarification of existing rules. As to employees, the ABA has concluded that lawyers ought to be permitted to give nominal gifts to non-lawyers, e.g. paralegals who may refer friends or family members to a firm, marketing personnel and others. Rule 5.4 continues to protect against any improper fee sharing. Rule 7.3 protects against solicitation by, for example, so-called "runners," which are also prohibited by other rules, e.g. Rule 8.4(a).[13]

Specialization: Provisions of Rule 7.4 regarding certification are moved to a new subsection 7.2(c) and Comments. Amendments also clarify which entities qualify to certify or accredit lawyers. The remaining provisions of Rule 7.4 are moved to Comments [9] through [11] of Rule 7.2. Finally, Comment [9] adds guidance on the circumstances under which a lawyer might properly claim specialization by adding the phrase "based on the lawyer's experience, specialized training or education."[14]

Contact Information: In provision 7.2(d) [formerly subdivision (c)] the term "office address" is changed to "contact information" to address technological advances on how a lawyer may be contacted and how advertising information may be presented. Examples of contact information are added in new Comment [12]. All "communications" about a lawyer's services must include the firm name (or lawyer's name) and some contact information (street address, telephone number, email, or website address).

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[10] The Subcommittee recommends following the ABA changes to Rule 7.2 and closely follows the ABA Report's summary of the proposed changes.
[11] ABA Report, at 3.
[12] *Id*. at 4.
[13] *Id*.
[14] *Id*.

Changes to the Comments: Statements in Comments [1] and [3] justifying lawyer advertising are deleted. Advertising is constitutionally protected speech and needs no additional justification. These Comments provide no additional guidance to lawyers.[15]

New Comment [2] explains that the term "recommendations" does not include directories or other group advertising in which lawyers are listed by practice area.

New language in Comment [3] clarifies that lawyers who advertise on television and radio may compensate "station employees or spokespersons" as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with advertising that are listed in the Comment, i.e. "employees, agents and vendors who are engaged to provide marketing or client development services."

New Comment [4] explains what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive recommendations or to make future recommendations. These small and token gifts are not likely to result in the harms addressed by the rule: that recommendation sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more recommendations for which they might be paid.

Comment [6] continues to address lawyer referral services, which remain limited to qualified entities approved by an appropriate regulatory authority. Description of the ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous.

The last sentence in Comment [7] is deleted because it is identical to the second sentence in Comment [7] ("Legal services plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules.") (emphasis added).[16]

C. Rule 7.3: Solicitation of Clients[17]

The black letter of the current Rules and Colo. RPC does not define "solicitation;" the definition is contained in Comment [1]. For clarity, a definition is added as new paragraph (a). The definition of solicitation is adapted from Virginia's definition. A solicitation is:

> a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs

[15] *Id*.
[16] *Id*. at 4-5.
[17] The Subcommittee recommends following most of the ABA changes to Rule 7.3 and generally follows the ABA Report's summary of the proposed changes.

> legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.[18]

Paragraph (b) continues to prohibit direct, in-person solicitation for pecuniary gain, but clarifies that the prohibition applies solely to live person-to-person contact. Comment [2] provides examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication. Language added to Comment [2] clarifies that a prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.[19]

The Rule no longer prohibits real-time electronic solicitation because real-time electronic communication includes texts and Tweets. These forms of communication are more like a written communication, which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter.[20]

Exceptions to live person-to-person solicitation are slightly broadened in Rule 7.3(b)(2). Persons with whom a lawyer has a business relationship—in addition to or separate from a professional relationship—may be solicited because the potential for overreaching by the lawyer is reduced.[21] This new exception respects the principle of providing clients with accurate information and preserving lawyers' free speech rights, allowing solicitation of persons who are not vulnerable to overreaching.

Exceptions to prohibited live person-to-person solicitation are slightly broadened in Rule 7.3(b)(3) to include a "person who routinely uses for business purposes the type of legal services offered by the lawyer." Similarly, Comment [5] to Rule 7.3 is amended to explain that the potential for overreaching, which justifies the prohibition against in-person solicitation, is unlikely when the solicitation is directed toward experienced users of the legal services in a business matter.[22]

The amendments retain Rule 7.3(c)(1) and (2), which prohibit solicitation of any kind when a target has made known his or her desire not to be solicited, or the solicitation involves coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations. Comment [6] identifies examples of persons who may be most vulnerable to coercion or duress, such as the elderly, those whose first language is not English, or the disabled.[23]

After much discussion, the Subcommittee recommends retaining current subsection 7.3(c), to be renumbered 7.3(d). The Subcommittee notes that the current Colorado subsection is consistent with First Amendment law, and strikes an appropriate balance between providing

[18] *Id*. at 5.
[19] *Id*. at 5-6.
[20] *Id*. at 6.
[21] *Id*.
[22] *Id*.
[23] *Id*.

clients access to information about lawyers and legal services while protecting vulnerable persons from undue pressure and overreaching by lawyers.

The statement that the Rules do not prohibit communications about legal services authorized by law or by court order is moved from Comment [4] of Rule 7.2 to new paragraph (e) of Rule 7.3.[24]

After much discussion, the Subcommittee recommends retaining current subsection 7.3(d), to be renumbered 7.3(f). The Subcommittee notes that the ABA deleted the requirement that targeted written solicitations be marked as "advertising material," concluding that the requirement is no longer necessary to protect the public. The Subcommittee respectfully disagrees. Even if consumers have become accustomed to receiving advertising materials from nonlawyers, receipt of such materials from lawyers presents a higher risk of misleading consumers. Moreover, current subsection 7.3(d) strikes an appropriate balance between respecting lawyers' First Amendment commercial speech rights and protecting vulnerable persons from undue pressure by allowing targeted solicitation, subject only to the truthful and accurate labeling of such solicitation as "advertising material."

Amendments were made to Rule 7.3(g) to make the prohibition language consistent with the solicitation prohibition and to reflect the reality that prepaid and group legal service plans enroll members and sell subscriptions to a wide range of groups. They do not engage in solicitation as defined by the Rules.[25]

New Comment [8] to Rule 7.3 adds class action notices as an example of a communication that is authorized by law or court order.[26]

D. Rule 7.4: Communication of Fields of Practice

Consistent with the ABA Changes, current rule 7.4 is deleted, with the bulk of its substance moved to Rule 7.2, Comments [9]-[11].

Given that Colorado does not certify lawyers as specialists, the Subcommittee recommends retaining the substance of current subsection 7.4(e), alerting Colorado clients to that effect. The Subcommittee recommends moving current subsection 7.4(e) to rule 7.2, Comment [11A]. Current Comment [4] to rule 7.4 is deleted as redundant.

[24] *Id*. at 7.
[25] *Id*.
[26] *Id*.

E. Rule 7.5: Firm Names and Letterheads

Consistent with the ABA Changes, current Rule 7.5 is deleted, with the bulk of its substance moved to Rule 7.1, Comments [5]-[8].

In particular, the first sentence of current subsection 7.5(b) has been moved and renumbered as Comment [6] to Rule 7.1. The Subcommittee recommends retaining the second sentence of current subsection 7.5(b), and moving it to Rule 7.1, to become the second sentence of Comment [6] to Rule 7.1.

Respectfully submitted,

Eli Wald

Chair, Colorado Supreme Court Standing Committee for the Colorado Rules of Professional Conduct, ABA Rules 7.1–7.5 Subcommittee

September, 2019

Proposed Changes to Colo. RPC, Chapter 7, Rules 7.1-7.5

This redline version compares the current Colo. RPC and the proposed ABA changes recommended by the Subcommittee, using track changes. The five instances in which the Subcommittee recommends retention of current subsections of the Colo. RPC or their comments contrary to the ABA changes are highlighted in yellow.

Rule ~~7.1.~~7.1: Communications Concerning a Lawyer~~'~~'s Services

~~(a)~~ A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. 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) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or~~

~~(3) is likely to create an unjustified expectation about results the lawyer can achieve;~~

~~(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.~~

~~(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and shall not resemble legal pleadings or other legal documents.~~

~~(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.~~

~~(e) A lawyer shall not knowingly permit, encourage or assist in any way employees, agents or other persons to make communications on behalf of the lawyer or the law firm in violation of this Rule or Rules 7.2 through 7.4.(f) In connection with the sale of a private law practice under Rule 1.17, an opinion of the purchasing lawyer's suitability and competence to represent existing clients shall not violate this Rule if the lawyer complies with Rule 1.17(d)~~.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising ~~permitted by Rule 7.2 and solicitations governed by Rule 7.3.~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

~~[2] The touchstone of this Rule, as well as Rules 7.2 through 7.4, is that all communications regarding a lawyer's services must be truthful. Truthful communications regarding a lawyer's services provide a valuable public service and, in any event, are constitutionally protected. False and misleading statements regarding a lawyer's services do not serve any valid purpose and may be constitutionally proscribed.~~

~~[3] It is not possible to catalog all types and variations of communications that are false or misleading. Nevertheless, certain types of statements recur and deserve special attention.~~

~~[4] One of the basic covenants of a lawyer is that the lawyer is competent to handle those matters accepted by the lawyer. Rule 1.1. It is therefore false and misleading for a lawyer to advertise for clients in a field of practice where the lawyer is not competent within the meaning of Rule 1.1.~~

~~[5] Characterizations of a lawyer's fees such as "cut-rate", "lowest" and "cheap" are likely to be misleading if those statements cannot be factually substantiated. Similarly, characterizations regarding a lawyer's abilities or skills have the potential to be misleading where those characterizations cannot be factually substantiated. Equally problematic are factually unsubstantiated characterizations of the results that a lawyer has in the past obtained. Such statements often imply that the lawyer will be able to obtain the same or similar results in the future. This type of statement, due to the inevitable factual and legal differences between different representations, is likely to mislead prospective clients.~~

~~[6] Statements that a law firm has a vast number of years of experience, by aggregating the experience of all members of the firm, provide little meaningful information to prospective clients and have the potential to be misleading.~~

[~~7] Statements such as "no recovery, no fee" are misleading if they do not additionally mention that a client may be obligated to pay costs of the lawsuit. Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs.~~2] Misleading truthful statements are prohibited by this Rule. A

truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[~~8] An advertisement~~3] A communication that truthfully reports a lawyer~~'~~'s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client~~'~~'s case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer~~'~~'s or law firm's services or fees with ~~the services or fees~~those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[3A] Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

[~~9] Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.~~4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

~~**Rule 7.2. Advertising**~~

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation 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.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules

(a) ~~Subject to the requirements of Rules 7.1 and 7.3, a~~A lawyer may ~~advertise~~communicate information regarding the lawyer's services through ~~written, recorded or electronic communication, including public~~any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer~~'~~'s services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service ~~or legal service organization.~~;

(3) pay for a law practice in accordance with Rule 1.17 ; ~~and~~

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive~~,~~; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made ~~pursuant to~~under this Rule ~~shall~~must include the name and ~~office address~~contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] ~~To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use~~

~~of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.[2]~~ This Rule permits public dissemination of information concerning a lawyer~~'~~'s ~~name~~ or law firm's name, address, ~~e-mail~~email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer~~'~~'s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer~~'~~'s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communications are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. See Rule 7.3 (a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.~~

~~[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~

Paying Others to Recommend a Lawyer

[~~5~~2] Except as permitted under paragraphs (b)(1)-(b)(~~4~~5), lawyers are not permitted to pay others for recommending the lawyer~~'~~'s services ~~or for channeling professional work in a manner that violates Rule 7.3.~~. A communication contains a recommendation if it endorses or vouches for a lawyer~~'~~'s credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1)~~, however,~~ allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees,

agents and vendors who are engaged to provide marketing or client- development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers. ~~Moreover, a~~

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4 (a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. ~~Such~~Qualified referral services are ~~understood by the public to be~~ consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public . See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act ~~(requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may~~

~~be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service)~~.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. ~~See Rule 5.3.~~ Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. ~~Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.~~

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer~~'~~'s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(~~d~~e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[11A] In any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify lawyers as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

Rule ~~7.3. Direct Contact with Prospective~~7.3 Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not ~~by in-person, live telephone or real-time electronic contact~~ solicit professional employment ~~from a prospective client~~by live person-to-person contact when a significant motive for the lawyer~~'~~'s doing so is the lawyer~~'~~'s or law firm's pecuniary gain, unless the ~~person contacted~~contact is with a:

(1) ~~is a~~ lawyer; ~~or~~

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(~~b~~c) A lawyer shall not solicit professional employment ~~from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact~~ even when not otherwise prohibited by paragraph (~~a~~b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(~~d~~c) A lawyer shall not solicit professional employment ~~from a prospective client believed to be in need of legal services~~ , which arise out of the personal injury or death of any person by ~~written, recorded, or electronic communication~~any media. This Rule 7.3(~~d~~c) shall not apply if the lawyer has a family or prior business or professional relationship with the ~~prospective client~~person or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) no such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter; and

(2) if a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(ed) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(fd) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall:

(1) include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (ab)(1), (b)(2) or (ab)(23);

(2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective clientperson's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(ge) Notwithstanding the prohibitions in paragraph (a)this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in live person or telephone-to-person contact to solicit memberships orenroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internetelectronic searches.

[2] There is a potential for abuse when a solicitation involves direct "Live person-to-person contact" means in-person, face-to-face, live telephone or real-time electronic contact by a lawyer with someoneand other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a

lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. ~~These forms~~This form of contact ~~subject~~subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully ~~to~~ evaluate all available alternatives with reasoned judgment and appropriate self~~-~~-interest in the face of the lawyer~~'~~'s presence and insistence upon ~~being retained immediately~~an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and ~~over-reaching~~overreaching.

[3] ~~This~~ The potential for ~~abuse~~overreaching inherent in ~~direct in-person, live telephone or real-time electronic solicitation~~live person-to-person contact justifies its prohibition, ~~particularly~~ since lawyers have alternative means of conveying necessary information ~~to those who may be in need of legal services~~. In particular, communications can be mailed or transmitted by ~~e-mail~~email or other electronic means that do not ~~involve real-time contact and do not~~ violate other laws ~~governing solicitations~~. These forms of communications ~~and solicitations~~ make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to ~~direct in-~~live person~~, telephone, or real-time electronic~~-to-person persuasion that may overwhelm a person~~'~~'s judgment.

[4] The ~~use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact between a lawyer and a prospective client~~contents of live person-to-person contact can be disputed and may not be subject to third~~-~~-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in ~~abusive practices~~overreaching against a former client, or a person with whom the lawyer has a close personal ~~or~~, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer~~'~~'s pecuniary gain. Nor is there a serious potential for ~~abuse~~overreaching when the person contacted is a lawyer~~. Consequently, the general~~

prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to itstheir members or beneficiaries.

[6] But even permitted forms of A solicitation can be abused. Thus, any solicitation whichthat contains information which is false or misleading information within the meaning of Rule 7.1, whichthat involves coercion, duress or harassment within the meaning of Rule 7.3 (bc)(2), or whichthat involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b)c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule isdoes not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. .Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] The requirement in Rule 7.3(d)(1) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional

~~employment from a client known to be in need of legal services within the meaning of this Rule.~~ Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to ~~solicit~~enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the ~~in-~~person~~-or telephone~~-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations ~~also~~ must not be directed to a person known to need legal services in a particular matter, but ~~is to~~must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3~~(b). See Rule 8.4(a~~ (c).

Rule 7.4. Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or that the lawyer is a specialist in particular fields of law. Such communication shall be in accordance with Rule 7.1.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(e) In any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify lawyers as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty" or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[4] A claim of certification contained in a lawyer's letterhead does not require the disclaimer in Rule 7.4(c) unless the letterhead is used in an advertisement.

Rule 7.5. Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation 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 holding a public office shall not be used in the name of a law 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) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE

June 22, 2015

EXHIBIT A

STANDING COMMITTEE 066

ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

REGULATION OF LAWYER ADVERTISING COMMITTEE

2014-2015 MEMBERS AND LIAISONS

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George R. Clark

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James Coyle, Liaison, National Organization of Bar Counsel

Dennis A. Rendleman, Liaison, American Bar Assn. Center for Professional Responsibility

Report of the APRL Regulation of Lawyer Advertising Committee

I. Executive Summary

The rules of professional conduct governing lawyer advertising in effect in most jurisdictions are outdated and unworkable in the current legal environment and fail to achieve their stated objectives. The trend toward greater regulation in response to diverse forms of electronic media advertising too often results in overly restrictive and inconsistent rules that are under-enforced and, in some cases, are constitutionally unsustainable under the Supreme Court's *Central Hudson* test. Moreover, anticompetitive concerns, as well as First Amendment issues, globalization of the practice of law, and rapid technology changes compel a realignment of the balance between the professional responsibility rules and the constitutional right of lawyers to communicate with the public.

In 2013, the Association of Professional Responsibility Lawyers ("APRL")[1] created the Regulation of Lawyer Advertising Committee to analyze and study the ABA Model Rules of Professional Conduct and various state approaches to regulating lawyer advertising and to make recommendations; the goal being to bring rationality and uniformity in the regulation of lawyer advertising and disciplinary enforcement. The Committee consists of both former and current bar regulators, law school professors, authors of treatises on the law of lawyering, and lawyers who are experts in the field of professional responsibility and legal ethics. The Committee also received valuable input from Committee liaisons from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel ("NOBC").[2]

The Committee's fundamental premise is that the proper and constitutional purpose of regulating advertising is to assure that consumers of legal services receive factually accurate, non-misleading information about available services. The Committee obtained, with NOBC's assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules by state disciplinary authorities. The Committee received survey responses from 34 of 51 jurisdictions. The Committee also considered consumer surveys, state bar reports, and other materials regarding the attitudes of consumers toward lawyer advertising, and the effects of advertising regulations on the public's understanding about legal services. It gave particular attention to the impact of evolving technology and innovations in the marketing of legal services. The Committee considered the constitutional standards for regulating commercial speech, the proliferation of legal ethics opinions, and the paucity of disciplinary decisions on lawyer advertising. The Committee analyzed the legitimate public policies underlying lawyer advertising regulations and the effectiveness of current enforcement efforts in achieving these policy objectives.

Based on the survey results, anecdotal information from regulators, ethics opinions, and case law, the Committee concludes that the practical and constitutional problems with current state regulation of lawyer advertising far exceed any perceived benefits associated with protecting the public or maintaining the integrity of the legal profession, and that a practical solution to these problems is best achieved by having a single rule that prohibits false and misleading communications about a lawyer or the lawyer's services. The Committee

[1] APRL is a national association of lawyers who provide advice and representation in all aspects of legal ethics and professional responsibility. APRL's members include practicing lawyers, academics, judges, corporate counsel, risk management attorneys, and government lawyers. For the past two decades, APRL has taken public positions on the rules governing lawyers, as well as professional discipline regulations, legal malpractice statutes, and other developments in professional responsibility matters, including holding twice yearly conferences on ethics topics, submitting public statements, reports and amicus curiae briefs in pending state and federal litigation and rule amendment proceedings.

[2] Attachment 1 is a brief biographical statement of the members of the Committee and the Committee liaisons.

believes that state regulators should establish procedures for responding to complaints regarding lawyer advertising through non-disciplinary means. Professional discipline should be reserved for violations that constitute misconduct under ABA Model Rule 8.4(c).[3] The Committee recommends that violations of an advertising rule that do not involve dishonesty, fraud, deceit, or misrepresentation under Rule 8.4(c) should be handled in the first instance through non-disciplinary means, including the use of advisories or warnings and the use of civil remedies where there is demonstrable and present harm to consumers.

The Committee decided to focus initially on advertising activities regulated under ABA Model Rules 7.1 ("Communications Concerning a Lawyer's Services"), 7.2 ("Advertising"), 7.4 ("Communications of Fields of Practice and Specialization") and 7.5 ("Firm Names and Letterheads"). The proposed revisions to these rules are set forth in Attachment 2. The proposed revisions to ABA Model Rules 7.1., 7.2, 7.4, and 7.5 retain the standard of prohibiting "false and misleading" communications in Rule 7.1 as the all-encompassing criterion for the regulation of lawyer advertising. Commentary from Rules 7.2, 7.4, and 7.5 has been merged into the Comments in Rule 7.1 to provide additional guidance to practitioners about what types of communications involving advertising, marketing, use of the terms "certified specialist," and firm names do and do not comport with the Rule 7.1 standard. The remainder of Rules 7.2, 7.4, and 7.5 were deleted, given the consensus that Rule 7.1 establishes a sufficient basis for the regulation of legal services advertising. The Committee reserved consideration, for a later time, of issues related to the regulation of direct solicitation of clients (Model Rule 7.3) and communications transmitted in a manner that involves intrusion, coercion, duress, or harassment.[4] The Committee also deferred consideration regarding the effect of certain forms of lawyer advertising and marketing on the regulation of lawyer referral services.[5]

In submitting these recommendations, the Committee is not advocating that states abdicate their regulators' authority over lawyer advertising. Instead, the proposed amendments to the ABA Model Rules on advertising and the proposed enforcement procedures are a common sense response to the major practical and constitutional problems that the Committee has identified with the current approach to regulating lawyer advertising.

II. Identifying the Problem and the Need for Change

[3] ABA Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

[4] The U.S. Supreme Court has identified other considerations related to direct solicitation that are outside the scope of this report. *E.g.* The Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (holding that Florida's 30-day ban on direct mail solicitation in accident or disaster cases materially advances, in a manner narrowly tailored to achieve the objectives, the state's substantial interest in protecting the privacy of potential recipients and in preventing the erosion of public confidence in the legal system); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (holding that a state may not totally prohibit targeted direct mail to prospective clients known to face specific legal problems where the state's interest in preventing overreaching or coercion by an attorney using direct mail can be served by restrictions short of a total ban); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding a total ban of in-person solicitation when the primary motivation behind the contact is the attorney's pecuniary gain); *In re* Primus, 436 U.S. 412 (1978) (holding that direct in-person solicitation is entitled to greater constitutional protection against state regulation when the attorney is motivated by the desire to promote political goals rather than pecuniary gain). *See also* The Fla. Bar v. Herrick, 571 So.2d 1303 (1990) (holding that a state can constitutionally regulate and restrict direct-mail solicitations by requiring personalized mail solicitation to be plainly marked as an "Advertisement."); "*Commercial Speech Doctrine,*" THE FLORIDA BAR, https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3BC6699A524B477B85257283005D415D/$FILE/Information%20on%20the%20Commercial%20Speech%20Doctrine.pdf?OpenElement.

[5] See, e.g., Geeta Kharkar, *Googling for Help: Lawyer Referral Services and the Internet*, 20 GEO. J. LEGAL ETHICS 769 (2007).

Simply stated, current regulations of lawyer advertising are unworkable and fail to achieve their stated objectives. Survey results show that there are too many state deviations from the ABA Model Rules, actual formal lawyer discipline imposed for advertising violations is rare, lawyers are disheartened by the burden of attempting to determine which regulations apply to the ever-changing technological options for advertising, and consumers of legal services want *more*, not less, information about legal services. The basic problem with the current state patchwork of lawyer advertising regulations lies with the increasingly complex array of inconsistent and divergent state rules that fail to deal with evolving technology and innovations in the delivery and marketing of legal services. The state hodge-podge of detailed regulations also present First Amendment and antitrust concerns in restricting the communication of accurate and useful information to consumers of legal services.

Lawyer advertising rules in most jurisdictions are overly restrictive and, in some instances, are incapable of compliance given today's technology and sophisticated methods of marketing and advertising. The jurisdictions do not uniformly enforce many regulations and sometimes do not enforce them at all. This inconsistent or non-existent enforcement gives a competitive disadvantage to law firms that do not violate the rules. Moreover, the rules vary significantly from state to state on both substantive and technical (if not hyper-technical) issues. The ABA Model Rules have not been uniformly adopted and ABA Ethics 20/20's recent effort to modernize the advertising rules has been enacted by only a few states.[6] Conflicting state advertising regulations create a significant barrier to practice and unreasonably impede innovation in marketing and delivering legal services.

The realities of on-line and other forms of electronic media advertising reflect the advent of e-commerce, competition, and changes in market forces. Innovations in technology that enhance the speed of communication, as well as increasing globalization, have resulted in ineffective regulation of lawyer advertising by state regulatory agencies. The legal profession today is an integral part of the Internet-based economy, and advertising regulations should enable lawyers to effectively use new on-line marketing tools and other innovations to inform the public.[7] The sharp increase in mobile technology and Internet marketing options have resulted in borderless forms of marketing and advertising. Virtual law practice and web-based delivery of legal services, as well as the public's increased reliance on and use of the Internet and mobile technology, mandate a reexamination of how the legal profession views lawyer advertising and what can or should be effectively regulated.

A realignment of the balance between the core values of professional responsibility and effective lawyer advertising designed to communicate accurate information about the availability of legal services for consumers in the twenty-first century is essential. In the Committee's view, the overarching goals are two-fold: (1) establishing a uniform and simplified rule that prohibits false and misleading advertisements; and (2) ensuring that consumers have access to accurate information about legal services while not being deceived by members of the Bar.

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[6] Arkansas, Delaware, Idaho, Iowa, Kansas, North Carolina, Pennsylvania, West Virginia and Wyoming have adopted the Ethics 20/20 advertising rule amendments. ABA CPR Policy Implementation Comm.,*Variations of the ABA Model Rules of Prof'l Conduct: Rule 7.1*, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_1.authcheckdam.pdf (last updated May 4, 2015).

[7] Statistics and available data indicate that there is a serious disconnect between the way lawyers are expected to communicate with their clients in accordance with existing rules and the way that clients are communicating with everyone else and seeking information about legal services.

III. A Brief History of the Regulation of Lawyer Advertising

A. How We Got to Where We Are

Over the years, the regulation of lawyer advertising has swung from one extreme to another and come to a sudden halt at its current position where it ambivalently hovers between the two. At the one extreme, the regulation once consisted of a longstanding blanket prohibition on *all* lawyer advertising. At the other extreme, and with the blink of an eye, the nationwide ban was lifted and the U.S. Supreme Court expressed its decisive recognition of lawyer advertising as commercial free speech protected under the First Amendment. Nevertheless, the Supreme Court left the authority in the states' hands to continue regulating lawyer advertising, and the state regulators have pursued that mandate without much consistency. With ever-changing technologies, which allow for instantaneous and global communication, regulation has become challenging for regulators and practicing attorneys alike who strive to assure that attorney advertising is compliant under both evolving rules and new technology. Lawyers wanting to embrace these new technologies have been reluctant to do so out of concern that they will not comply with lawyer advertising regulation.

B. Regulation Prior to *Bates v. Arizona*

The regulation of lawyer advertising goes as far back as the nineteenth century in Great Britain, where it was a rule of etiquette, not of ethics, based on the view that law was a form of public service and not a means of earning a living.[8] As such, lawyers looked down on advertising as unseemly.[9] This "rule" was neither enforced nor considered "law" in the general sense of the word; instead, it was merely understood.

In 1908, the American Bar Association (the "ABA") adopted the *Canons of Professional Ethics* (the "Canons") and established a general prohibition of all advertising.[10] The logic behind this categorical ban was that advertising was unprofessional; and therefore, lawyer advertising would threaten the requisite of professionalism in lawyering.[11] As Robert Boden, Dean and Professor of Law at Marquette University states, "[h]igh standards and advertising did not mix."[12] Thus began a half-century-long tradition as three generations of lawyers in the United States deemed advertising to be unprofessional and therefore strictly prohibited.

In 1969, the ABA enacted its 1969 *Code of Professional Responsibility* (the "Code"), which maintained the general prohibition of attorney advertising.[13] However, shortly thereafter the adherence to a blanket ban on advertising began to unravel. In 1975, the U.S. Supreme Court decided *Goldfarb v. Virginia State Bar*, and posited that lawyers provide services in exchange for money and thus engage in "commerce."[14] Though this case did not deal directly with the question of lawyer advertising, it nonetheless suggested that the practice of law is not just a profession—it is also a business. As the Court explained, "[i]t is no disparagement of the

[8] Bates v. State Bar of Ariz., 433 U.S. 350, 371 (1977).

[9] *Id.*

[10] The general prohibition contained a few limited exceptions called a "laundry list" of permitted advertising activity. Robert F. Boden, *Five Years After* Bates*: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 549 (1982).

[11] *Id.* at 554.

[12] *Id.* at 550.

[13] *Id*.

[14] Goldfarb v. Va. State Bar, 421 U.S. 773, 787-88 (1975).

practice of law as a profession to acknowledge that it has this business aspect, . . . [i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse."[15]

One year later in *Virginia State Pharmacy Board. v. Virginia Citizens Consumer Council*, the U.S. Supreme Court recognized that the First Amendment protects advertising, referred to as "commercial speech," based on the public's right to receive the free flow of commercial information.[16] The Court held that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another" and, "speech likewise is protected even though it is carried in a form that is 'sold' for profit . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money."[17]

Finally, in 1977, the U.S. Supreme Court directly upheld the legitimacy of lawyer advertising in *Bates v. State Bar of Arizona*.[18] In this case, two Arizona lawyers, John R. Bates and Van O'Steen, opened a law office with the aim of providing "legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid."[19] After two years of conducting their practice with this goal in mind, the lawyers came to the stark realization that their concept was unattainable unless they did something to attract clients.[20] Accordingly, they placed an advertisement in their local daily newspaper, announcing that they were offering "legal services at very reasonable fees" and listing their fees for certain routine legal services.[21] The State Bar of Arizona found that the advertisement violated the rule in Arizona's Code of Professional Responsibility banning lawyer advertising and, consequently, the Arizona Supreme Court censured the lawyers for their conduct.[22]

On appeal to the U.S. Supreme Court, Justice Blackmun held that lawyer advertising, as a form of commercial speech, could not be subjected to blanket suppression and that the specific advertisement at issue was protected under the First Amendment.[23] The Court carefully considered and dismissed each of the State Bar of Arizona's claims—namely, that (i) advertising will have an adverse effect on the legal profession; (ii) advertising of legal services will be misleading; (iii) advertising will have the undesirable effect of stirring up litigation; (iv) advertising will increase the overhead costs of the profession which will in turn be passed along

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[15] *Id.* at 788.

[16] In this case, there was a challenge against a state statute that prohibited pharmacists from advertising prescription drug prices. Though *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* did not deal directly with advertising in the professional practice of law, it looked at the state of advertising in the professional practice of pharmacy, where the concern was similarly focused on the preservation of high professional standards in a professional services industry. Va Pharmacy Bd. v. Va Consumer Council, 425 U.S. 748, 765 (1976).

[17] *Id.* at 761 (internal citations omitted). Accordingly, in holding that commercial speech is protected and could not be absolutely prohibited, the Court overturned *Valentine v. Christensen*, 316 U.S. 52, 55 (1942), which was the then-existing precedent holding that commercial speech was *not* constitutionally protected.

[18] *Bates*, 433 U.S. at 384.

[19] *Id.* at 353-54.

[20] *Id.* at 354.

[21] *Id.*

[22] *Id*. at 356-58.

[23] *Id.* at 383. It is interesting to note that Justice Blackmun, the author of *Bates*, later said, "I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 574 (1980) (Blackmun, J., concurring, joined by Brennan, J.) (citing Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. LAW FORUM 1080, 1080–83 (1976)).

to consumers in the form of increased fees; (v) advertising will lead to poor quality of service; and (vi) the problems of enforcement justify wholesale restrictions.[24] The Court rejected the "highly paternalistic" approach that the state must protect citizens from advertising because it potentially could manipulate them, and concluded that barring lawyer advertising only "serves to inhibit the free flow of commercial information and to keep the public in ignorance."[25] The Court explained that even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that *some* accurate information is better than *no* information at all.[26] Put differently, the Court stated that "the preferred remedy is more disclosure, rather than less."[27] Thus, out of this decision came the birth of a revolutionary concept that lawyers may have a general constitutional right to advertise.

C. Regulation Since *Bates v. Arizona*

Although the *Bates* court invalidated an absolute prohibition on lawyer advertising, it nonetheless left the door open for states to regulate advertising. For example, states retained the authority to prohibit false, deceptive, or misleading advertising, and to place reasonable restrictions on time, place, and manner of advertising.[28] In declining to consider the full range of potential problems for lawyers when advertising, the Court defaulted to the state bars to apply *Bates* and revise existing regulations accordingly.[29] This undefined scope of regulation bolstered the longstanding reluctance to permit lawyer advertising. Most state bars narrowly construed *Bates* and thereby preserved as much of the traditional view of advertising as unprofessional as could withstand constitutional challenge.[30]

Two years after the decision, the state bars' reaction to *Bates* was "hesitant and inconsistent," as fifteen states had not drafted any new lawyer advertising standards.[31] By 1983, however, the ABA adopted its Model Rules of Professional Conduct ("Model Rules" or "RPCs").[32] In the Model Rules, the ABA expressly permitted advertising, as Rule 7.2(a) stated, "subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication."[33] Many states then followed suit, enacting various advertising regulations and attempting to straddle the fine line between advertising as a constitutionally protected speech and misleading advertising.[34]

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[24] *Id*. at 368-79.

[25] *Id*. at 365.

[26] *Id*. at 374-75.

[27] *Id*. at 375.

[28] *Id*. at 383-84.

[29] "Underlying all of the post-*Bates* amendments is the theory that *Bates* declared a general right to advertise, leaving to the states a regulatory power to prescribe the form, content, and forum of lawyer advertising." Boden, *supra* note 10, at 555.

[30] *Id.*; *see also In re* R.M.J., 455 U.S. 191, 200 (1982) ("the decision in *Bates* nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated.").

[31] Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1086.

[32] *Id.* at 1087.

[33] MODEL RULES OF PROF'L CONDUCT R. 7.2 (AM. BAR ASS'N 1983).

[34] Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising*, 17 J. TECH. L. & POL'Y 63, 64 (2012); R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO J.
(footnote continued)

D. The *Central Hudson* Standard and Application to Lawyer Advertising Rules

Though the *Bates* court embraced the importance of the "commercial speech" doctrine— "[commercial] speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. . . . [S]uch speech serves individual and societal interests in assuring informed and reliable decisionmaking"[35]—it nonetheless failed to establish a clear standard for assessing the constitutionality of a regulation on commercial speech. In 1980, however, the U.S. Supreme Court articulated a clearer standard in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[36] The question was whether a regulation of the Public Service Commission of the State of New York violated the First and Fourteenth Amendments because the regulation completely banned promotional advertising by an electrical utility.[37] The Court's test included a four-part analysis: if the first two inquiries yield positive answers, the Court then turns to the third and fourth inquiries:

1. whether the expression is protected by the First Amendment because it concerns lawful activity and is not misleading;

2. whether the asserted governmental interest is substantial;

3. whether the regulation directly advances the governmental interests; and

4. whether it is not more extensive than is necessary to serve that interest.[38]

Following the *Central Hudson* decision, several First Amendment cases dealing with individual lawyer advertising and state regulation were decided based upon the *Central Hudson* test. In each of these cases, the regulations in question failed to satisfy *Central Hudson*'s four-part analysis and thus violated the First Amendment. These cases are considered next.

1. Examples of State Regulations That Do Not Satisfy *Central Hudson*

a. *In re R.M.J.*

In 1982, the U.S. Supreme Court decided *In re R.M.J.*, which involved a lawyer's appeal of a disciplinary reprimand based upon "four separate kinds of violation of Rule 4 [of the Missouri Supreme Court]:

ARTS & ENT. L. J. 953 (2007); Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK L. REV. 437 (2006). *See also In re* R.M.J., 455 U.S. at 193 ("the Committee . . . revised that court's Rule 4 regulating lawyer advertising. . . . [and] sought to 'strike a midpoint between prohibition and unlimited advertising,' and the revised regulation of advertising, adopted with slight modification by the State Supreme Court, represents a compromise. Lawyer advertising is permitted, but it is restricted to certain categories of information, and in some instances, to certain specified language.").

[35] *Bates*, 433 U.S. at 363-64.

[36] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[37] *Id*. at 558.

[38] *Id.* at 566. Through application of this four-step analysis for commercial speech to the Commission's arguments supporting its ban on promotional advertising, the Court found that the first three inquiries yielded affirmative answers; turning to the fourth inquiry, however, the Court concluded that the Commission's *complete* suppression of speech was far more extensive than necessary to further the State's interest in energy conservation. As such, the test in its totality could not be satisfied, and the Court held that the Commission's order violated the First and Fourteenth Amendments.

listing the areas of his practice in language or in terms other than that provided by the Rule, failing to include a disclaimer, listing the courts and States in which he had been admitted to practice, and mailing announcement cards to persons other than 'lawyers, clients, former clients, personal friends, and relatives.'"[39] Specifically, the lawyer had listed in his advertisements areas of law not explicitly approved by the Missouri Bar's Advisory Committee, including the words "personal injury" and "real estate" instead of the Bar-approved words, "tort law" and "property law," respectively.[40] He also listed in his advertisements other areas of law, such as "contract" and "zoning & land use" that were not found on the Advisory Committee's list at all.[41] His advertisements in local newspapers and the Yellow Pages also stated that he was licensed in Missouri and Illinois, and contained in large capital letters a statement that he was "Admitted to Practice Before THE UNITED STATES SUPREME COURT."[42]

On the issues of listing the areas of law and licensed jurisdictions, the U.S. Supreme Court found that the lawyer's advertisements were not misleading.[43] The Court also found that the answer to the second inquiry of the *Central Hudson* test—whether the asserted governmental interest was substantial in this case—was no.[44]

The Court determined that the state interest was unclear as to enforcing an absolute prohibition.[45] This led the Court to posit that the fourth factor of the *Central Hudson* test could not be met, as there was room for a "less restrictive path" instead of absolute prohibition.[46] Thus, applying *Central Hudson*, the Court found unconstitutional the Missouri rules that provided an absolute prohibition on the advertising of descriptive practice areas, licensed jurisdictions, and the mailing of announcements to persons other than lawyers, clients, former clients, friends, and relatives.

Notably, in his appeal, the lawyer did not challenge the constitutionality of the rule requiring disclaimers.[47] As such, the Court permitted that requirement to stand and explained that "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."[48] The Court would consider the issue of when disclaimers are too burdensome in later cases.

b. *Zauderer v. Office of Disciplinary Council*

Zauderer v. Office of Disciplinary Council involved two different local newspaper advertisements: the first advertisement stated that the attorney would represent defendants in drunk driving cases and that his clients' "full legal fee would be refunded if they were convicted of DRUNK DRIVING"; and the second

[39] *In re* R.M.J., 455 U.S. at 204.

[40] *Id.* at 197.

[41] *Id.*

[42] *Id.*

[43] *Id*. at 205.

[44] *Id*.

[45] "Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards." *Id.* at 206.

[46] *Id.*

[47] *Id*. at 204.

[48] *Id.* at 201.

advertisement offered representation to women injured by the Dalkon Shield Intrauterine Device.[49] The Dalkon Shield was depicted in the form of a line drawing and the advertisement included legal advice, general information, and the statement that "[i]f there is no recovery, no legal fees are owed by our clients."[50] The Supreme Court of Ohio found First Amendment protection to be inapplicable and reprimanded the attorney for violating Ohio's Disciplinary Rules.[51]

On appeal, the U.S. Supreme Court, citing *Central Hudson*, found that because the statements regarding the Dalkon Shield were not false or deceptive, it was the State's burden to establish that "prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest."[52] The Court also determined that the State's interests—of protecting the public from advertisements that both invade the privacy of the reader and may be subject to claims of overreaching and undue influence, as well as preventing lawyers from stirring up litigation—were not sufficient justifications for the discipline imposed on the lawyer.[53] The Court explained that the State's interest in propounding a prophylactic rule "to ensure that attorneys . . . do not use false or misleading advertising to stir up meritless litigation against innocent defendants"[54] was "in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes."[55] Thus, the Court concluded that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding the legal rights of potential clients.[56]

Regarding the illustration of the Dalkon Shield, the Court noted that the use of illustrations or pictures in advertisements serves an important communicative function, and "[a]ccordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test."[57] The Court found that the illustration at issue was an accurate representation of the Dalkon Shield, bearing no features that were likely to deceive, mislead, or confuse the reader.[58] The burden once again shifted to the State to both present a substantial governmental interest justifying the restriction as applied and to demonstrate that the restriction vindicated the state interest through the least restrictive available means.[59] The State was unsuccessful in carrying its burden, as the State's interest—to ensure that attorneys advertise "in a dignified manner," maintain

[49] Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 629-30 (1985).

[50] *Id.* at 630-31. In full, this advertisement related the following information: "The Dalkon Shield Interuterine [*sic*] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience, do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."

[51] *Id.* at 636.

[52] *Id.* at 641.

[53] *Id.* at 642-43.

[54] *Id.* at 643.

[55] *Id.* at 644.

[56] *Id.* at 647.

[57] *Id.*

[58] *Id.*

[59] *Id.*

their dignity in their communications with the public, and behave with decorum in the courtroom—was not convincingly "substantial enough to justify the abridgment of [the attorneys'] First Amendment rights."[60] Moreover, the Court opined that the State's restrictions amounted to an impermissibly broad prophylactic rule in the form of a blanket ban on the use of illustrations, especially given that the State could police the use of illustrations in advertisements on a narrower, more tailored, case-by-case basis.[61]

Nonetheless, the Court did uphold Ohio's disclosure requirements relating to the terms of contingent fees. The Court found that the State's interest in preventing deception of consumers was substantial because the attorney's advertisement, which stated, "[i]f there is no recovery, no legal fees are owed by our clients," would mislead and deceive the public and potential clients who do not necessarily understand the distinction between the technical meanings of "legal fees" and "costs."[62] The Court concluded that the disclosure requirements were not more extensive than necessary to serve the state interest where Ohio has "not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present."[63] Accordingly, the attorney's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal . . . [as] disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech."[64]

c. *Peel v. Attorney Registration & Disciplinary Commission*

Five years later, in *Peel v. Attorney Registration & Disciplinary Commission*, the U.S. Supreme Court considered whether an Illinois attorney's letterhead, stating that he is a National Board of Trial Advocacy ("NBTA") certified civil trial specialist, was First Amendment protected speech.[65] The Illinois regulations stated that "no lawyer may hold himself out as 'certified' or a 'specialist'" and that "communication shall contain information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive."[66] Accordingly, the Attorney Registration and Disciplinary Commission of Illinois ("Commission") and the Illinois Supreme Court deemed the attorney's letterhead— referring to his NBTA certification and his licensure in three jurisdictions— inherently misleading and thus unprotected by the First Amendment.[67]

However, the U.S. Supreme Court held that the contents of the attorney's letterhead were neither misleading nor deceptive because the certification and licensure were both true and verifiable facts.[68] Rejecting the argument that the attorney's listing of certification constituted an implicit assertion as to the quality of his legal services, the Court reasoned that there is no evidence that a claim of NBTA certification suggests any

[60] *Id.* at 647-48.

[61] *Id.* at 649.

[62] *Id.* at 652.

[63] *Id.* at 650.

[64] *Id.* at 651 (Emphasis Added).

[65] Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 93-94 (1990).

[66] *Id.* at 97.

[67] *Id.* at 98-99.

[68] *Id.* at 101.

greater degree of professional qualification than reasonably may be inferred from an evaluation of its rigorous requirements.[69]

Moreover, the Court recognized that information about certification and specialties "facilitates the consumer's access to legal services and thus better serves the administration of justice."[70] Thus, the attorney's statements on his letterhead were protected under the First Amendment.[71] The Court also concluded that the State's concern about the *possibility* of deception was "not sufficient to rebut the constitutional presumption favoring disclosure over concealment . . . [which, in this case] both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys."[72]

d. Recent Federal Court Cases

Since *Peel*, federal courts have continued to apply the *Central Hudson* test to balance a lawyer's First Amendment rights with the state's interest in regulating lawyer advertising and preventing deception of the public. Five notable cases have been brought in the last decade: *Alexander v. Cahill*,[73] *Public Citizen v. Louisiana Attorney Disciplinary Board*,[74] *Harrell v. The Florida Bar*,[75] *Searcy et al. v. The Florida Bar*,[76] and *Rubenstein v. The Florida Bar*.[77]

In *Alexander v. Cahill*, the advertisements at issue were those of a personal injury firm that contained dramatizations, comical scenes, jingles, special effects like wisps of smoke and blue electrical currents

[69] *Id.* at 102.

[70] *Id.* at 110.

[71] The Court limited this holding by stating: "A lawyer's truthful statement that 'XYZ Board' has 'certified' him as a 'specialist in admiralty law' would not necessarily be entitled to First Amendment protection if the certification was a sham." *Id.* at 109. In 1990, the Florida Supreme Court addressed unsolicited letters in *The Florida Bar v. Herrick*, where an attorney mailed an unsolicited letter to a couple upon learning that the couple had an interest in a vessel that had been seized by customs and, in the letter, stated: "Our law firm *specializes in* Customs laws relating to vessel seizures. If you have any questions, please call." 571 So.2d 1303, 1304 (1990) (emphasis added). In *Herrick*, the attorney was not certified or designated in any area of law, let alone Customs Law as the advertisement stated because it was not even an area recognized under the Florida Certification Plan or the Florida Designation Plan. The Supreme Court of Florida ruled that permitting Herrick to state that he is a specialist in Customs law "runs the risk of misleading the public into believing that he has been qualified under the Bar's designation or certification program. The state's interest here in preventing the public from being misled is strong and the regulation is narrowly drawn. This is not a case where the attorney truthfully advertises that he has been certified as having met the standards of a recognized organization which tests the proficiency of lawyers in certain areas of the law." *Id.* at 1307 (citing *Peel*).

[72] *Peel*, 496 U.S. at 111. The Court also stated that even if it assumed for the sake of argument that the attorney's letterhead was *potentially* misleading to some consumers, "that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.* at 109. The Court pointed out that the State's complete ban on statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA, were far too extensive, and therefore, did not meet the *Central Hudson* test, where the State could have imposed lesser restrictions such as "screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty." *Id.* at 110.

[73] 598 F.3d 79 (2d Cir. 2010) (New York Bar Rules).

[74] 632 F.3d 212 (5th Cir. 2011) (Louisiana Bar Rules).

[75] 915 F. Supp. 2d 1285, 1311 (M.D. Fla. 2011) (Florida Bar Rules).

[76] Complaint, No. 4:13CV00664, 2013 WL 6493683 (N.D. Fla. Dec. 11, 2013). (Florida Bar Rules). *See also Florida Law Firm Challenges Bar's New Advertising Restrictions*, 23 NO. 8 WL J. PROF'L LIAB. 4 (Jan. 23, 2014).

[77] No. 14-CIV-20786, 2014 WL 6979574 (S.D. Fla. Dec. 9, 2014) (Florida Bar Rules).

surrounding the firm's name, and slogans such as "heavy hitters" and "think big," among other gimmicks.[78] After New York's Appellate Division adopted "content-based" lawyer advertising rules to regulate *potentially* misleading advertisements consisting of "irrelevant, unverifiable, and non-informational" statements and portrayals, the attorney filed a complaint, contending that the new rules infringed upon his First Amendment rights because the rules prohibited "truthful, nonmisleading communications that the state ha[d] no legitimate interest in regulating."[79]

The Second Circuit agreed after scrutinizing the regulation's categorical bans on (i) the endorsement of or testimonial about a lawyer or law firm from a client regarding a matter that is still pending, (ii) the portrayal of a judge, (iii) the irrelevant "attention-getting techniques unrelated to attorney competence,"[80] such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and (iv) the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter. The court found that this type of information is not inherently misleading or even likely to be misleading.[81] Therefore, this kind of advertising did not warrant the State's general sweeping prohibition contained in the new rules and so the regulations failed the *Central Hudson* test and were adjudged unconstitutional.[82]

Public Citizen v. Louisiana Attorney Disciplinary Board presented the Fifth Circuit with issues similar to those decided upon in *Alexander v. Cahill*. Here, six subparts of the Louisiana Supreme Court's new attorney advertising Rule 7.2(c) faced constitutional attack: (i) the prohibition of communications that contain references or testimonials to past successes or results obtained; (ii) the prohibition of communications that promise results; (iii) the prohibition of communications that include a portrayal of a client by a non-client, or the depiction of any events or scenes or pictures that are not actual or authentic, without disclaimers; (iv) the prohibition of communications that include the portrayal of a judge or a jury; (v) the prohibition of communications that employ a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter; and (vi) the requirement of disclosures and disclaimers that are clear and conspicuous and of a certain format, size, and visual/auditory display.[83] The Fifth Circuit found that these subparts of the rule, with the exception of

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[78] *Alexander*, 598 F.3d at 84.

[79] *Id*. at 84-86.

[80] *Id.* at 93. This categorical ban was similar in substance to several of the Florida Bar's advertising rules at issue in *Harrell v. The Florida Bar*: Rule 4-7.1, which was a "general prefatory rule, the comment to which limits permissible advertising content to 'only useful, factual information presented in a nonsensational manner,'" Rule 4-7.2(c)(3), which prohibited the use of '"visual and verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events' that are 'manipulative, or likely to confuse the viewer,"' and Rule 4-7.5(b)(1)(A), which similarly prohibited "any television or radio advertisement that was '"deceptive, misleading, manipulative, or that is likely to confuse the viewer."' *Harrell v. Fla. Bar*, 608 F.3d 1241, 1250 (11th Cir. 2010). There, on remand, the district court struck down these rules on the ground that they were impermissibly vague, indeterminate, and exerted a chilling effect on a lawyer's proposed commercial speech that had a right to constitutional protection. *Harrell*, 915 F. Supp. 2d 1285, 1311 (M.D. Fla. 2011). *See also* Jacobowitz & Hethcoat, *supra*, note 34, at 72-73.

[81] *Alexander*, 598 F.3d at 96.

[82] *Id*.

[83] This subpart of the rule provided:

> "Any words or statements required by these Rules to appear in an advertisement or unsolicited written communication must be clearly legible if written or intelligible if spoken aloud. All disclosures and disclaimers required by these Rules shall be clear and conspicuous. Written disclosures and disclaimers shall use a print size at least as large as the largest print size used in the advertisement or unsolicited written communication, and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and read the disclosure or disclaimer. Spoken disclosures and disclaimers shall be plainly audible and spoken at the same or slower rate of speed as the other spoken

(footnote continued)

the prohibition of communications that promise results,[84] were capable of being communicated in a non-deceptive and non-misleading way and were therefore not *inherently* likely to deceive.[85]

Applying the *Central Hudson* analysis, the court found that the Louisiana Attorney Disciplinary Board had at least two substantial government interests: protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession.[86] The Fifth Circuit then aligned with the Second Circuit and found that the categorical prohibitions of communications that contain references or testimonials to past successes or results obtained, or that include the portrayal of a judge or a jury, were not directly advancing or reasonably related to the State's interests, and were more extensive than was reasonably necessary.[87]

On the other hand, the Fifth Circuit departed from the Second Circuit precedent by finding that the prohibition of communications that employ a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter, was materially advancing the State's interests and narrowly tailored to meet those ends.[88] It distinguished *Alexander v. Cahill* because, in that case, this same rule was struck down due to '"a dearth of evidence in the present record' to support a 'prohibition on names that imply an ability to get results."'[89] Here, the court held, the State "provided the necessary evidence . . . that the Second Circuit found to be absent from *Alexander*."[90]

The court applied the lower standard of rational basis review upon the requirement for disclaimers when communications include a portrayal of a client by a non-client, or depict any events, scenes, or pictures that are not actual or authentic.[91] It concluded that the requirement was reasonably related to the substantial governmental interests and thus, constitutional.[92] Upon considering the requirement for disclosures of a certain format and style, however, the court again applied the lower standard of rational basis review, but held that this requirement was overly burdensome and therefore violated the First Amendment.[93]

> content of the advertisement. All disclosures and disclaimers used in advertisements that are televised or displayed electronically shall be both spoken aloud and written legibly."

Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 228 (5th Cir. 2011).

[84] The court explained that "[a] promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results. Because these communications are necessarily misleading, LADB may freely regulate them and [this] Rule . . . is not an unconstitutional restriction on commercial speech." *Id.* at 218-19. *See also Harrell*, 915 F. Supp. 2d at 1299 (prohibiting statements that "promise results" is facially valid because it is not impermissibly vague).

[85] *Pub. Citizen, Inc.*, 632 F.3d at 19.

[86] *Id*. at 220.

[87] *Id*. at 224.

[88] *Id*. 225-26.

[89] *Id.* at 226.

[90] *Id.*

[91] *Id*. at 227.

[92] *Id.* at 228.

[93] *Id.* at 229.

In *Harrell v. The Florida Bar*, the United States District Court for the Middle District of Florida examined "as-applied" First Amendment challenges to an attorney's marketing campaign featuring the slogan, "Don't settle for less than you deserve." [94] The Bar initially advised him to change the slogan to, "don't settle for anything less," explaining that his slogan would create unjustified expectations.[95] The Bar, however, later revoked acceptance of any version of the new slogan, finding that it improperly characterized his services in violation Rule 4-7.2(c)(2), which bans all "statements describing or characterizing the quality of the lawyer's services."[96] The attorney then filed suit challenging this rule, as well as other Florida advertising rules that allegedly prohibited various marketing strategies and chilled commercial speech in violation of his First and Fourteenth Amendment rights.[97] Specifically under review, in addition to Rule 4-7.2(c)(2), was Rule 4-7.5(b)(1)(C), which contained the Florida Bar's categorical ban on all background sounds.[98] The prohibition included all background sounds in television and radio advertisements except instrumental music: such as the background noises caused by the attorney-plaintiff's dogs, gym equipment, and other activities in his law firm that were part of his proposed advertisements.[99]

Applying the *Central Hudson* test, the district court concluded that the two advertising rules impermissibly restricted the attorney's First Amendment rights.[100] First, the court found that both the slogan and intended use of background sounds were neither actually nor inherently misleading.[101] Next, the court concluded that the State had two substantial interests: first, an interest in "ensuring that the public has access to information that is not misleading to assist the public in the comparison and selection of attorneys," and second, an interest in "preventing the erosion of the public's confidence and trust in the judicial system and curbing activities that negatively affect the administration of justice."[102]

Finally, upon applying the third prong of *Central Hudson*, the court found that neither rule directly or materially advanced the Bar's asserted interests.[103] In particular, the court found that there was insufficient concrete evidence to justify the Bar's categorical ban on background sounds, stating that "[i]n the absence of any evidence that prohibiting the type of innocuous non-instrumental background sounds as those proposed by Harrell here will protect the public from being misled or prevent the denigration of the legal profession, the Bar has failed to satisfy the third prong of the *Central Hudson* test."[104] Thus, the regulations as applied to Harrell were deemed unconstitutional.

Florida's amended regulations are currently facing another First Amendment challenge under the *Central Hudson* test. In *Searcy et al. v. The Florida Bar*, a personal injury law firm filed a lawsuit against the Florida Bar, attacking regulations that prohibit statements of quality and past results unless such statements are

[94] Harrell v. Fla. Bar, 915 F. Supp. 2d 1285, 1289 (M.D. Fla. 2011).

[95] Harrell v. Fla. Bar, 608 F.3d 1241, 1249 (11th Cir. 2010)..

[96] *Id.*

[97] *Id*. at 1250.

[98] *Id*.

[99] *Id.* at 1251.

[100] *Harrell*, 915 F. Supp. 2d at 1309-10.

[101] *Id*.

[102] *Id.* at 1302.

[103] *Id*. 1308-10.

[104] *Id.* at 1310.

"objectively verifiable."[105] Searcy Denney Scarola Barnhart & Shipley PA ("Searcy Denney") had advertisements on its website, blog, and social media accounts containing statements of opinion, such as "the days when we could trust big corporations . . . are over," and truthful but subjective descriptions of the firm's services and record, such as, "we have 32 years of experience resulting in justice for clients . . ."[106] The Bar held that these statements and descriptions violated the "objectively verifiable" requirement in Florida's lawyer advertising rules.[107] Searcy Denney then challenged the rules in federal court, claiming that the "objectively verifiable" requirement violates the First Amendment because the requirement prohibits commercial speech for which there is no evidence that it is misleading or harmful to consumers, and Florida has no legitimate interest in prohibiting the speech.[108] The firm further asserted that the rules do not directly advance, and are far more extensive than necessary to serve, any interest Florida might claim.[109]

Finally, *Rubenstein v. The Florida Bar* involved yet another personal injury law firm that similarly confronted the "objectively verifiable" requirement in Florida's lawyer advertising rules;[110] but Rubenstein distinguished itself by focusing on the requirement as applied to past results, and the Florida Bar's Guidelines interpreting the requirement. At the time, the lawyer advertising rules permitted attorney advertisement of past results where "objectively verifiable," but the Bar had interpreted and enforced the rules, as stated in its Guidelines, to prohibit all reference to past results on indoor and outdoor display, television and radio media, because these "specific media . . . present too high a risk of being misleading."[111] On the plaintiff's motion for summary judgment, the court found that the plaintiff was challenging "only that narrow and specific blanket prohibition" as violating its First Amendment rights.[112] Applying *Central Hudson*, the court first found that the State had three substantial governmental interests in promulgating the Rules and Guidelines: (i) to protect the public from misleading or deceptive attorney advertising, (ii) to promote attorney advertising that is positively informative to potential clients, and (iii) to prevent attorney advertising that contributes to disrespect for the legal system and thereby degrades the administration of justice.[113] The court then stated, however, that the Bar had presented "no evidence to demonstrate that the restrictions it has imposed on the use of past results in attorney advertisement support the interests its Rules were designed to promote."[114] The court concluded its *Central Hudson* analysis by expressing that the Bar additionally failed to demonstrate how the restrictions on attorney speech, which amounted to a blanket restriction on the use of past results in attorney advertising in certain mediums, were no broader than necessary to serve the interests they purported to advance.[115] The court emphasized that the Bar never demonstrated that "lesser restrictions—e.g., including a disclaimer, or required

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[105] Complaint, *Searcy v. Fla. Bar*, No. 4:13CV00664, 2013 WL 6493683, at *12 (N.D. Fla. Dec. 11, 2013), *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/D0EE8F4E3167003D85257C58005BDD01/$FILE/131211%20Complaint%20-%20Orig.pdf?OpenElement.

[106] *Id.* at *17.

[107] *Id*.

[108] *Id.*at *20.

[109] *Id*.

[110] No. 14-CIV-20786, 2014 WL 6979574, at *2 (S.D. Fla. Dec. 14, 2014).

[111] *Id.* at *20.

[112] *Id.* at *23.

[113] *Id.* at *23-24.

[114] *Id.* at *25.

[115] *Id.* at *29.

language—would not have been sufficient."[116] Thus, Rubenstein succeeded on the merits of its First Amendment challenge.

The clear direction in which the United States Supreme Court has taken the regulation of commercial speech emphasizes that government must prove that the regulation it is defending does in fact advance an important regulatory interest, refusing to accept mere "common sense" or speculation as a sufficient basis for restrictions on advertising.[117] In other words, the government must present objective evidence to support a ban or restriction on truthful commercial speech and cannot simply ban or restrict speech by fiat grounded in subjective intuition that the advertising is "potentially misleading." For example, in *Florida Bar v. Went For It, Inc.*,[118] the Court went out of its way to compare the empirical evidence presented to support a thirty-day ban on targeted direct mail solicitation of accident victims to the lack of similar data in *Edenfield v. Fane*,[119] in which the Court invalidated a Florida ban on in person solicitation by certified public accountants.

In sum, there is no shortage of cases in which lawyer advertising regulations has failed the *Central Hudson* test, leading the Committee to conclude that attorney advertising regulations are, in many cases, unconstitutional and unsustainable.

IV. The Diverse Forms of Electronic Communication &The Explosion of Social Media

According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet:

- 52% of online adults now use two or more social media sites;
- 71% are on Facebook;
- 70% engage in daily use;
- 56% of all online adults 65 and older use Facebook;
- 23% use Twitter;
- 26% use Instagram;
- 49% engage in daily use;

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[116] *Id.* at *30.

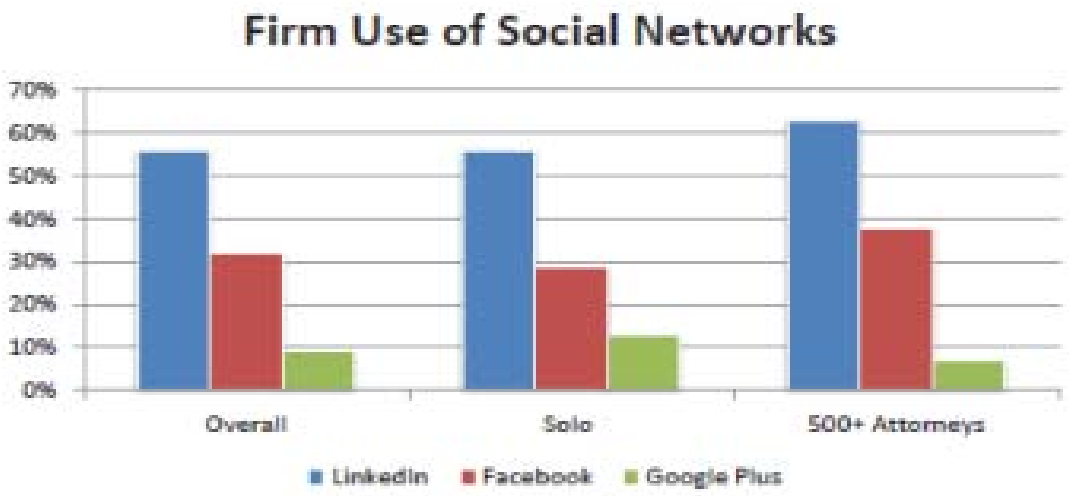
[117] *See, e.g.*, *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 503 (1996) ("Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."); *Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 147 (1994) (striking down requirement of a disclaimer because the state failed "to back up its alleged concern that the [speech] would mislead rather than inform."); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (rejecting state's asserted harm because the state had presented no studies nor even anecdotal evidence to support its position); *Peel v Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) (rejecting a claim that lawyer's truthful claim of specialization certification was potentially misleading for lack of empirical evidence); and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985) (striking down restrictions on attorney advertising where "[t]he State's arguments amount to little more than unsupported assertions.").

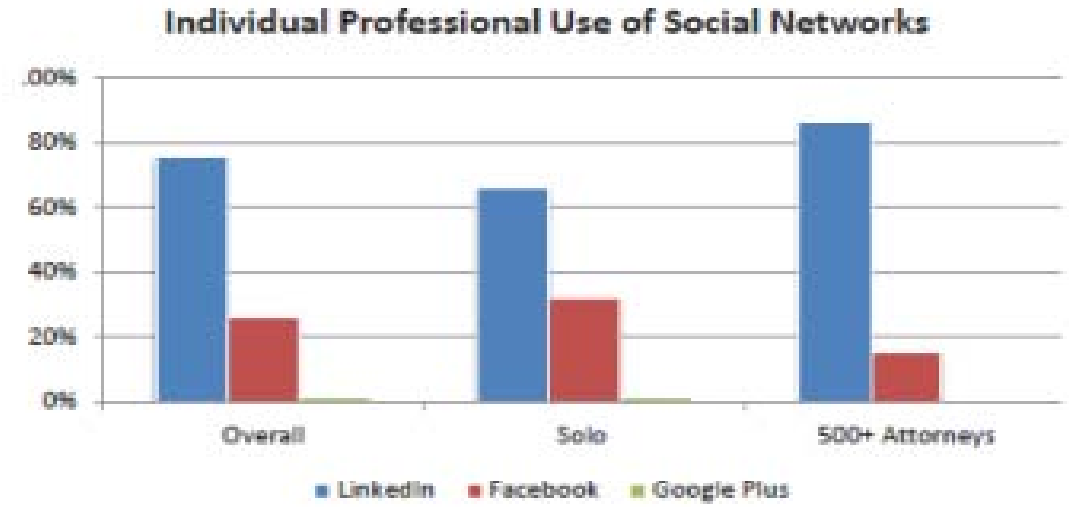
[118] 515 U.S. 618 (1994).

[119] 507 U.S. 761 (1993).

- 53% of online young adults (18-29) use Instagram; and
- 28% use LinkedIn.

Given these statistics that reflect the general population's use of social media, it is not surprising that in recent years there has been a vast increase in diverse forms of communication regarding lawyers and lawyer services. These include websites, attorney blogs, microblogs (such as Twitter), YouTube® infomercials, webinars, postings on social media such as Facebook and LinkedIn, online review sites, text messaging, the use of smart phones, "apps", links, video technology and tag lines. The graphs below illustrate the increasing use of LinkedIn and Facebook by lawyers and law firms.[120]





[120] Images supplied by Allison Shields, *Blogging and Social Media*, ABA TECHREPORT 2014, *available at* http://www.americanbar.org/publications/techreport/2014/blogging-and-social-media.html.

Additionally, in response to innovation and increased competition, lawyers and law firms are engaging in much more sophisticated forms of marketing and advertising, including "advertorials," cooperative lawyer ads, retargeting, search engine optimization, online referral and lead-sharing sites, and "pay-per-click" or "pay-per-deal" arrangements.[121] For example, Google's AdWords (one of Google's advertising services) gives lawyers an opportunity to capitalize on Google's vast market. The Google AdWords process is a highly efficient marketing device where lawyers may choose keywords in creating text advertisements. When an Internet user types these keywords into Google's search engine, the lawyer's advertisement appears in a list of "sponsored links" on the results page.[122]

Lawyers are also increasingly involved, either voluntarily or involuntarily, in online lawyer rating services, such as Avvo.com, Yelp, "Super Lawyers," and "Best Lawyers." These online companies post ratings and reviews of lawyers and offer consumers help in finding lawyers. Avvo.com, for example, posts ratings and reviews for lawyers in every state and offers a free legal Q&A service for finding the right lawyer. Justia.com offers free case law, legal resources, and a "Find a Lawyer" feature. Premium services provide websites, blogging, and on-line marketing to law firms. LegalMatch.com helps users find prescreened lawyers, and offers attorneys leads that match their legal specialty. Pro-se-litigation.com connects self-represented litigants with lawyers who offer unbundled legal services. Upcounsel.com helps businesses connect with lawyers to an on-line bidding service where users post requests for specific work and attorneys respond with quotes for fixed fees or hourly rates.

There is also a growing number of social networking websites for lawyers, including Avvo, JD Oasis, Legal OnRamp, WireLawyer, and Foxwordy. Social networking sites for lawyers typically include discussion boards, private messaging, profiles, connections, document libraries, and ratings. Even further, large law firms frequently use marketers, public relations personnel, and sales forces to develop leads and pursue business opportunities.

V. Other Deficiencies in Current Regulations Warranting Change

In addition to the foregoing, there are other difficulties with the current approach to regulating lawyer advertising that further demonstrate the need for change.

A. Many Current Rules are Outdated

State rules on lawyer advertising are largely based on print and other forms of traditional advertising such as announcements, business cards, mailers, newsletters, yellow pages, billboards, television and radio ads, newspaper advertisements, and listings in Martindale Hubbell or other print directories. Lawyer advertising

[121] The ABA Commission on Ethics 20/20 studied the issue of the use of the Internet in client development in a paper entitled "Issues Paper Concerning Lawyer's Use of Internet Based Client Development Tools" in September 2010. For more information see http://www.americanbar.org/content/dam/aba/migrated/2011_buildethics_2020/clientdevelopment_issuespaper.authcheckdam. LinkedIn is a social media network that is fast becoming an indispensible tool used by legal professionals and those with whom they communicate. As a social networking website, LinkedIn allows people in professional occupations of all kinds to list their work experience and educational background and share that information, or in other words, "connect" with other professionals, in an effort to obtain employment. LinkedIn currently has approximately 300 million users, with a geographical reach of 200 countries and territories, and it continues to grow. A blog is an Internet-based forum that offers opinions or information, sometimes on a particular issue, and is usually freely accessible by anyone with an operating Internet connection. Many lawyers and law firms have taken to blogging to showcase their knowledge, explore legal issues, and voice their perspectives on specific areas of law.

[122] Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835, 838 (2007).

regulations have even been applied to law firm give-away items such as coffee mugs and baseball hats. A number of states are attempting to apply existing rules to new methods of electronic advertising.[123] For example, Maryland Rule 7.2(b) requires that "[a] copy or recording of an advertisement or such other communication shall be kept for at least three years after its last dissemination along with a record of when and where it was used." For lawyers that use websites, blogs, and other social media, compliance with the rule is problematic because the content of such media is not static, but constantly changing. Lawyers and law firms, as well as bar regulators, frequently raise questions about whether or how to apply pre-electronic era standards to continuously evolving technologies.[124]

Twitter is a prime example of the struggle to apply old rules to new technology. For example, in Florida, Rule 4-7.12 governs required content of advertisements and stipulates that, among other things, all advertisements for legal employment must include the lawyer's or law firm's full name and office location.[125] Perhaps at first blush this rule does not appear burdensome; however, the rule "makes [a lawyer's or law firm's] use of Twitter an impossibility because there is a limit of 140 characters."[126] Peter Joy, an ethics professor at the Washington University School of Law in St. Louis, caustically remarked, "Pity the lawyer trying to use Twitter in . . . Little Harbor on the Hillsboro, Fla."[127] Similarly, lawyers could not use Twitter to announce a specific case outcome in states that require a disclaimer to accompany the statement.[128]

B. The Spread of Over-Regulation

The trend in recent years has been toward greater regulation in an effort to respond to (or perhaps dampen) lawyer advertising in the electronic age. California, for example, now regulates lawyer advertising more than at any time in the past. In addition to an elaborate rule on advertising and solicitation that includes fifteen "advertising standards" that are presumptive violations of the rule,[129] California's State Bar Act restricts the use of certain forms of lawyer advertising, including "computer networks" and provides for injunctive and

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[123] Some states single out electronic media for special treatment or significantly restrict advertising in electronic media. *See e.g.*, NYSBA, *Social Media Ethics Guidelines* (Mar. 18, 2014), *available at* https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html [hereinafter *Social Media Ethics Guidelines*].

[124] A number of states have found that advertising rules apply to an attorney's activity on the Internet, including law firm websites. *See, e.g.*, Cal. State Bar Formal Op. 2001-155, N.Y. State Bar Formal Op. 709, Ala. State Bar Formal Op. 1996-07, N.C. Ethics Comm. RPC 239, N.D. Bar Ass'n Formal Op. 1999-02, R. REGULATING FLA. BAR 4-7.11.

[125] R. REGULATING FLA. BAR 4-7.12(a).

[126] David L. Hudson Jr., *Firm Challenges Florida Bar Over Website Ad Limits*, ABA JOURNAL (Mar. 1, 2014, 9:49 AM), http://www.abajournal.com/magazine/article/firm_challenges_florida_bar_over_website_ad_limits/; *You Cannot Be Serious, Law Firm Tells Florida Bar*, COURTHOUSE NEWS SERVICE (December 13, 2013, 7:25 AM), http://www.courthousenews.com/2013/12/13/63717.htm.

[127] Hudson, *supra* note 126.

[128] VA. R. OF PROF'L CONDUCT 7.1(b): "A communication violates this rule if it advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results."

[129] CAL. R. OF PROF'L CONDUCT 1-400.

declaratory relief, civil penalties, attorney's fees and discipline for violations.[130] Other California statutes and rules provide additional regulation of lawyer advertising.[131]

As in California,[132] the trend in many states has been toward greater micromanagement of on-line advertising to ensure technical compliance with traditional rules. For instance, Model Rule 7.2(c)'s requirement that all advertising contain an "office address" causes more confusion than clarity when lawyers practice through "virtual" offices that do not have a "bricks and mortar" location. By requiring a physical office address, regulations may inadvertently cause more confusion to consumers who then travel to that physical address only to find a post office box or executive suite where the advertising lawyer receives his/her mail.

Another example of over-regulation is the Florida Bar's adoption of new attorney advertising rules in May 2013 that specifically apply to *all* forms of communication in any print or electronic forum.[133] Whereas lawyer websites, blogs, and social media sites such as LinkedIn, Facebook, and Twitter were previously exempt from the rules as "information provided upon request,"[134] social media advertising is now subject to the advertising regulations.[135] The Florida Supreme Court issued an opinion approving the revised rules, but the dissenting opinions questioned whether applying the rules to websites was an "improvement" to the regulatory scheme. Justice Pariente rejected what she categorized as a "one-size-fits-all approach," and explained, "I would exempt websites and information upon request from advertising restrictions, and I question whether the entire revamped approach to regulating traditional forms of advertising is a beneficial change."[136] Similarly, Justice Canady expressed that he found the new rules "unduly restrictive" and explained, "I am particularly concerned about the impact of the application of the advertising rules to lawyer websites."[137] Nonetheless, the Florida Bar embraced and continues to embrace the application of the rules to a panoply of communication mediums and specifically requires disclaimers and disclosures in all advertisements where testimonials and past results are used.

In addition to increased regulation, some states issued ethics opinions that apply existing rules to social media, attorney blogs, and other Internet communications.[138] While these opinions may be technically correct, they often pose impractical obligations on lawyers and can deter lawyers from making communications that are not fraudulent or deceptive.

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[130] CAL. BUS. & PROFESSIONS CODE §§6157-6159.2.

[131] *See, e.g.*, CAL. INS. CODE §1871.7 (unlawful solicitation of business), CAL. LABOR CODE §§139.45, 5430-5434 (advertisements with respect to workers' compensation, CAL. PENAL CODE §549 (penalties for certain solicitations and referrals).

[132] *See* Cal. State Bar Formal Interim Op. 12-0006 (discussing the circumstances under which "blogging" is regulated under the attorney advertising rules).

[133] R. REGULATING FLA. BAR 4-7.11(a). This includes but is not limited to "newspapers, magazines, brochures, flyers, television, radio, direct mail, *electronic mail and Internet, including banners, pop-ups, websites, social networking, and video sharing media*. *Id.* (emphasis added).

[134] *In re Amendments to the Rules Regulating the Fla. Bar – Subchapter 4-7, Lawyer Adver. Rules*, 108 So. 3d 609, 612-13 (2013) (Pariente, J., dissenting). *See also* Hudson, *supra* note 126; *You Cannot Be Serious*, *supra* note 126.

[135] *See, e.g.*, *In re Amendments*, 108 So. 3d at 611, 616 (Appendix).

[136] *Id.* at 612 (Pariente, J., dissenting).

[137] *Id.* at 616 (Canady, J., dissenting).

[138] *See, e.g.*, Cal. State Bar Formal Op. 2012-186 (2012) (characterizing various innocuous Facebook communications as commercial speech subject to California's advertising rules); N.Y. Cnty. Bar Ass'n Formal Op. 748 (2015) (warning lawyers that certain features of LinkedIn present risks of ethics violations); N.C. Formal Op. 2013-10 (2013) (contrasting group lawyer ads and lawyer referral services).

LinkedIn is one example where regulations have caused difficulty and dissension. A central feature of LinkedIn has long been that (i) users can list their abilities and areas of practice in a preset and pre-defined section entitled, "Specialties," or "Skills and Expertise," and, (ii) users probably *should* do so if they want to stay current with the social networking platform, enhance their professional profiles, and get discovered for more opportunities. According to some ethics opinions, however, these headings constitute potentially misleading advertising in violation of the rules. In Florida, for example, Rule 4-7.14 provides "[a] lawyer may not engage in potentially misleading advertising."[139] This means that a lawyer may not state that he or she is "board certified, a specialist, an expert, or other variations of those terms" because it could be potentially misleading to prospective clients.[140] Rule 4-7.14 has thus made attorney participation on LinkedIn seem unduly difficult.

On September 11, 2013, however, the Florida Bar issued an advisory opinion stating that a lawyer may not list his or her practice area under the "Skills & Expertise" heading on LinkedIn unless he or she is board certified in that practice area.[141] The New York State Bar Association ("NYSBA") used similar reasoning in advising that a lawyer or law firm may not use the LinkedIn heading, "Specialties," to describe its areas of practice because such activity would inappropriately allow that lawyer or law firm to claim recognition as a "specialist" without certification.[142] Moreover, the NYSBA recently released Social Media Ethics Guidelines, and Guideline No. 1.B discusses the "prohibited use of 'Specialists' on social media."[143] The Comment focused on LinkedIn in particular, stating, "if the social media network, such as LinkedIn, does not permit otherwise ethically prohibited 'pre-defined' headings, such as 'specialist,' to be modified, the lawyer shall *not* identify herself under such heading unless appropriately certified."[144]

Because LinkedIn's headings raised serious concerns for various state bars and caused uncertainty for lawyers, LinkedIn, agreed to modify its website and headings.[145] LinkedIn first removed the "Specialties" heading; then, in early 2014, LinkedIn changed the "Skills and Expertise" heading to, "Skills and Endorsements," removing the problematic, potentially misleading word, "Expertise"; and today, the heading, "Skills and Endorsements," has been amended so that it now simply reads, "Skills."

The new heading, "Skills," contains none of the problematic words like "Expertise," or "Specialties," or other variations thereof. However, LinkedIn may have simply taken the problem and put it in another place and format: upon editing an account, LinkedIn still asks the user the problematic question, "[d]o you have any of

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[139] R. REGULATING FLA. BAR 4-7.14.

[140] R. REGULATING FLA. BAR 4-7.14(a)(4). The Comments add that "a lawyer can only state or imply that the lawyer is "certified," a "specialist," or an "expert" in the actual area(s) of practice in which the lawyer is certified."

[141] Fla. Bar Advisory Op. (Sept. 11, 2013), *available at* http://it-lex.org/wp-content/uploads/2013/09/Florida-Bar-Opinion-re-LinkedIn-Redacted.pdf (citing NYSBA Formal Ethics Op. 2013-972 (2013).

[142] NYSBA, Formal Ethics Op. 2013-972 (2013).

[143] *Social Media Ethics Guidelines*, *supra* note 123, at 3. *See also* Pa. Bar Ass'n, Formal Op. 2014-300 (2014) [hereinafter *Ethical Obligations for Attorneys Using Social Media*].

[144] *Social Media Guidelines*, *supra* note 123, at 4 (emphasis added).

[145] The Florida Bar, *Update: Complying with Bar Rules on LinkedIn May be Easier Than Thought*, FLA. BAR NEWS (Jan. 1, 2014), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/0e9ba4af36b1dbb785257c4a004c633e!OpenDocument.

these skills or areas of expertise?" Additionally, LinkedIn permits endorsements and recommendations, but does not allow for the addition of disclaimers to statements that many state bars would no doubt consider to be testimonials—another issue that is far from resolved.[146]

There is a lack of empirical research showing a correlation between the proliferation of regulation and consumer harm. For example, the Florida Bar's survey of Floridians' attitude toward the increased regulation of attorney advertising found that while 22% of the respondents felt that advertisements for professional services were misleading, 22% also believed such advertisements were accurate.[147] Moreover, whereas about 25% of the respondents indicated that after seeing attorney advertising on television and the Internet, their view of the Florida court system had changed, more than 50% of the respondents indicated that their view had not changed, and 10% of the respondents even reported that their view had *improved*.[148] Thus, the survey results fail to show a real harm to the public, as is required to restrict commercial speech.[149]

Additionally, the data collected in 1997 by a Task Force convened by the Florida State Bar revealed that consumers wanted *more* "useful" and "factual" information to help them choose an attorney and the supporting survey results explained that large majorities of consumers were interested in attorney "qualifications," "experience," "competence," and "professional record (i.e. wins/losses)." The supporting survey results also showed that negative attitudes about legal system and lawyers consistently declined over the relevant period, despite the increase in quantity and breadth of attorney advertising. For example, "the number of people who strongly agreed that lawyer advertisements 'play more on people's emotions and feelings than on logic and thoughtfulness' was down from 56% to 43%; the number of people who felt that attorney advertisements 'encouraged people with little or no injury to take legal action' was down from 55% to 35%, and those who thought advertisements increased the propensity to engage in frivolous lawsuits was down from 55% to 35%; those who believed that attorney advertisements were at least somewhat truthful and honest increased from 51% to 69%; and those who strongly agreed that attorney advertisements lessened the respect for the fairness and integrity of the legal process was cut nearly in half, from 32% to 17%."[150]

The jurisdictional differences are more likely to inhibit the spread of important legal information and create barriers to competition than to inform or protect consumers. Rampant dissimilarity exists among state rules that seek to regulate potentially misleading communications or specific content such as past results, listing lawyer specialties, including endorsements and testimonials and use of symbols, dramatizations, rankings, slogans, and even background music (sometimes referred to as "attention getting techniques"). For example, Arkansas, Nevada, Pennsylvania, South Carolina and Wyoming have prohibitions against the use of testimonials and endorsements.[151] Other states allow the use of testimonials and endorsements with appropriate

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[146] *See, e.g., Ethical Obligations for Attorneys Using Social Media*, *supra* note 143.

[147] Jacobowitz & Hethcoat, *supra* note 34, at 77.

[148] *Id.* (emphasis added).

[149] *Id.*

[150] Rubenstein v. Fla. Bar, No. 14-CIV-20786, 2014 WL 6979574, at *26, n. 6 (S.D. Fla. Dec. 14, 2014) (discussing The Florida Bar Joint Presidential Advertising Task Force, *Final Report & Recommendations* (May 1997)).

[151] Am. Bar Ass'n, *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, at 9 (May 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rules_differences_update.authcheckdam.pdf.

disclaimers.[152] Still other states have rules containing no provision governing endorsements and testimonials at all.[153]

In addition to the over-regulation of lawyer advertising that does not serve the legitimate public policy of assuring accurate information about legal services, state regulators (most often Bar associations) spend hundreds of thousands of dollars attempting to defend the regulations in various lawsuits brought by members. The waste of bar dues and licensing fees to defend the regulations without any quantifiable evidence of the need for the regulations to support a legitimate state purpose is yet another reason the current framework of lawyer advertising regulation is failing.

C. The Questionable Objectives of Certain State Regulations

Upholding "professionalism" and "the dignity of the profession" sneak into various state versions of Model Rules 7.1 and 7.2. Justification for these variants include concern on how lawyers hold themselves out to the public, the lack of decorum and respect for the judicial system, the negative image of lawyers and the legal profession, and the loss of respect and lack of trust in lawyers.[154] For example, in the 2011 Report on The Lawyer Advertising Rules, the Florida Bar stated that the primary goals of lawyer advertising regulation include "protection of the public from advertising that contributes to disrespect for the judicial system, including disrespect for the judiciary" and "protection of the public from advertising that causes the public to have an inaccurate view of the legal system, of lawyers in general, or of the legal profession in general."[155]

This purported public policy basis for regulating lawyer advertising needs to be reexamined. The traditional reason for prohibiting lawyer advertising was that it was "unprofessional."[156] Yet, today under the *Central Hudson* test,[157] regulation of taste, dignity, and professionalism is outside the permissive scope of regulation. Nevertheless, many state regulations continue to prohibit tasteless and unseemly content in the name of misleading or potentially misleading advertisements.

Leaving aside the fact that these tests for "tastelessness," "unseemliness," and the like are vague, the reason for forbidding them appears to be the theory that if lawyers advertise the way they want to, the public would think less of us, so we must forbid lawyers from doing that and metaphorically dress them up in a three-piece suit. If that is true, the problem should be self-correcting — it will be the rare client who hires a lawyer that he or she thinks is "tasteless."

D. Anti-Competitive Concerns With Lawyer Advertising Regulation

During the past twenty years, the Office of Public Policy, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics of the Federal Trade Commission also have weighed in on the regulation of lawyer advertising. The FTC submitted advisory letters to several state supreme courts and lawyer regulation

[152] These states include California, Florida, Georgia, Louisiana, Missouri, Montana, New York, Rhode Island, South Dakota, and Wisconsin. *Id*.

[153] *E.g.*, VA. R. OF PROF'L RESPONSIBILITY 7.1.

[154] *See* Jacobowitz & Hethcoat, *supra* note34; Smolla, *supra* note 34.

[155] *Rubenstein*, 2014 WL 6979574, at *4 (discussing the Report on the Lawyer Advertising Rules by the Board Review Committee on Professional Ethics (May 27, 2011)).

[156] ABA CANON ON PROF'L ETHICS, CANON 27 (1908).

[157] For discussion of the *Central Hudson* test, see *supra* Part III.D.

offices when various states considered amending their advertising regulations that the FTC perceived could restrict consumer access to factually accurate information that might be useful in making an informed decision about hiring a lawyer. For example, the FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may not only reduce competition and violate federal antitrust laws, but also restrict truthful information about legal services.[158]

Restrictions on accurate information about legal service, imposed by competing law firms that function as part of the regulatory governing body, restrain trade and hinders the public's access to useful information.[159]

Not all "state actions" are immune from antitrust laws such as the Sherman Act and FTC Act. If the state action has a significant impact on interstate commerce, it will be subject to Sherman Act scrutiny and will be immune from antitrust compliance only if the action protects a sovereign right. Moreover, when a non-sovereign actor comprised of market participants, such as a unified Bar with quasi-governmental functions, engages in anticompetitive conduct, its actions will be immune from antitrust laws *only if* (1) there is a clearly articulated and affirmative state policy (i.e., the state has to anticipate anticompetitive result as necessary consequence of policy goal); and (2) there is active state supervision of the actor.[160] "Active" state supervision of a non-sovereign actor requires that (a) the state supervisor must actually review the anticompetitive decision (not just the policies and procedures used to come to the decision); (b) the state supervisor must have the ability to veto the decision as inconsistent with state policy goals; and (c) the state supervisor cannot be an active market participant.[161]

Thus, state lawyer regulation offices that impose restraints on truthful lawyer advertising restrain competition, hinder the public's access to useful accurate information about legal services, and may run afoul of antitrust laws.The recent U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. F.T.C.* is illustrative.[162] The Supreme Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anticompetitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that the Board was not actively supervised by a state entity because a controlling number of the Board members who were decision makers were "active market participants" (i.e., dentists) and there was no state entity supervision of the decisions of the non-sovereign board.[163] Many lawyer regulatory entities are carefully monitoring the application of this precedent as the same analysis could be applied to lawyer disciplinary authorities – especially if it appears that the lawyers making decisions on "permissible" lawyer advertising are competitors and there are no clearly articulated objective criteria to determine if the advertising of their competitors violates the Rules of Professional Conduct.

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[158] ABA Center for Professional Responsibility, *FTC Letters Regarding Lawyer Advertising* (2015), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html.

[159] *Id.*

[160] F.T.C. v. Phoebe Putney Health System, Inc., 133 S. Ct. 1003, 1010 (2013) (quoting California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)).

[161] North Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct. 1101, 1116 (2015).

[162] 135 S. Ct. 1101 (2015).

[163] *Id.* at 1117.

E The Consequences of Inconsistent Enforcement of Excessive Regulations

The results of APRL's survey and other data demonstrate the lack of consistent enforcement of existing rules and regulations. In particular, state bars have insufficient resources to monitor *all* lawyer advertising and maintain consistent enforcement. Lawyer advertising is viewed by many bar regulators as a low-level problem.[164] There is a general lack of consumer complaints and virtually no empirical data demonstrating actual consumer harm caused by lawyer advertising. Instead, the greater perceived harm is to the profession. Most complaints about lawyer advertising are made by other lawyers.[165] In addition, many regulators acknowledge that compliance with the lawyer advertising rules is better achieved by more effective non-disciplinary measures. Finally, state regulators by and large have had a poor "win" record in the few cases in which enforcement of the advertising rules have been challenged in federal court or sought through discipline.

Inconsistent enforcement of existing rules has significant consequences. A 2002 law review article by Professor Fred C. Zacharias, a former member of APRL, provides a case study of the ramifications of under-enforcement of advertising rules, including engendering confusion and lack of respect and confidence by lawyers and the public.[166] Other articles also discuss the negative consequences of inconsistent enforcement.[167] And the advertising regulations as currently enforced have done little, if anything, to improve the image of the legal profession.

Inconsistent enforcement of inharmonious regulations has also had a negative effect on the dissemination of useful information. Lawyers are unclear as to how to interpret incompatible state regulations and how regulators may apply the rules in the event of a complaint. The effect is to discourage lawyers from communicating with the public in the way that the public (and lawyers themselves) generally communicate with one another.

The time-worn advice that lawyers should comply with the most restrictive rule when faced with competing state regulations is not always practical and does not advance the legitimate goals of regulating lawyer advertising.[168] The requirements of each state may greatly vary such that compliance with each jurisdiction may not be possible.[169]

The deterrent effect of inconsistent advertising rules and enforcement on cross-border practice is well-known. The complex choice of law problems that confront lawyers and state regulators adds to the confusion

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[164] See discussion of APRL's Survey results, *infra*, Part VI.

[165] In the APRL Survey, discussed *infra*, Part VI, one State Bar regulator reported that between 2002 and 2008, only eight complaints about lawyer advertising were opened and all involved lawyers complaining about other lawyers. During the same period, the office received about 4,000 complaints per year and opened roughly over 1,000 investigations.

[166] Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1005 (2002).

[167] *See generally* Nia Marie Monroe, *The Need for Uniformity: Fifty Separate Voices Lead to Disunion in Attorney Internet Advertising*, 18 GEO. J. LEGAL ETHICS 1005, 1015-16 (2005); Fred C. Zacharias, *What Direction Should Legal Advertising Regulation Take?*, 2005 PROF. LAW. SYMP. 45 (2005).

[168] *See* Pa. Bar Ass'n Comm., Legal Ethics and Prof'l Responsibility, Informal Op. 98-85 (1998) (defining the test as the "least common denominator approach."). *See also* Anthony E. Davis, *Ethics and Etiquette of Lawyering on the Internet*, 224 N.Y. L.J. 1, 6 (2000).

[169] Daniel Backer, *Choice of Law in On-Line Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, 70 FORDHAM L. REV. 2409, 2418 (2002); Monroe, *supra* note 167.

and uncertainty.[170] For example, each state has different labeling, disclosure, record-keeping and filing requirements, and the rules "vary greatly as to what materials and information need to be retained, and in what form."[171] The lack of predictability on how a particular bar regulator will view a given advertisement is an increasingly difficult problem for lawyers and law firms. This lack of predictability is further compounded by inconsistent and selective enforcement and constantly evolving state bar policy and ethics advisory opinions as a result of new technologies.

VI. The Committee's Survey

In 2014, the Committee sent questionnaires to fifty-one U.S. lawyer regulation offices requesting information regarding the enforcement of advertising rules in their jurisdiction.[172] With the assistance of James Coyle, the Committee's liaison from NOBC, thirty-six of fifty-one jurisdictions responded to the survey. The responses confirm that:

- Complaints about lawyer advertising are rare;
- People who complain about lawyer advertising are predominantly other lawyers and not consumers;
- Most complaints are handled informally, even where there is a provable advertising rule violation;
- Few states engage in active monitoring of lawyer advertisements; and
- Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c).

In response to the question, "Who are the predominant complainants in lawyer advertising charges," 78% responded that it was other lawyers and only 3% responded that is was consumers.

In regard to how often complaints about lawyer advertising are received: 56% responded, "rarely," 17% responded, "almost never," and 8% responded, "frequently."

The majority of the responding jurisdictions reported that complaints about lawyer advertising that involve a potential advertising rule violation are handled informally, such as through a call or letter requesting changes. Where complaints about lawyer advertising involve a provable advertising rule violation, the majority are still handled informally, in some cases with warning letters, diversion, dismissal of formal charges, changes in advertising language, and other dispositions. Only 17% of the jurisdictions responding reported that they actively monitor lawyer advertisements.

In response to the question – "How often do formal advertising complaints alleging false or misleading communications result in disciplinary sanctions, including diversion and probation?" – 50% responded, "rarely," 36% responded, "almost never," and 6% responded, "frequently."

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[170] Backer, *supra* note 10.

[171] J.T. Westermeier, *Ethics and the Internet,* 17 GEO. J. LEGAL ETHICS 267, 282 (2004).

[172] Attachment 3 is the Committee's questionnaire to state regulators.

The survey showed that formal advertising complaints involving violations of the advertising rules other than false or misleading communications which result in disciplinary sanctions (including diversion and probation) are infrequent: with 50% responding this occurs, "rarely" and 43% responding this occurs, "almost never."

Finally, in response to the question of whether any formal disciplinary cases found consumer or client harm or confusion that did not violate Rule 8.4(c), 67% said "no" and 11% replied "yes."

VII. Other Survey Results

Donald R. Lundberg, a member of APRL and NOBC and a former executive secretary of the Indiana Supreme Court Disciplinary Commission, wrote a paper for the 24th ABA National Conference on Professional Responsibility in 2008 in which he reported the results of an informal survey he conducted among bar counsel on regulating lawyer advertising. The survey confirmed the low-level enforcement of lawyer advertising rules. Of the responses he received from twenty-two jurisdictions, Mr. Lundberg reported that three jurisdictions are at "the non-interventionist extreme," that is, they throw up their hands in resignation, save, perhaps, for rare third-party initiated forays into enforcement in strong meritorious cases. Eight jurisdictions were described as largely "non-interventionists" and yet responsive to highly meritorious consumer-generated complaints; four jurisdictions were neutral, meaning that there was some responsiveness to meritorious, consumer-generated complaints and occasional self-initiated enforcement actions on a selected case basis. Mr. Lundberg reported that two jurisdictions were "moderately interventionist" in being proactive in selectively reviewing advertising in a non-comprehensive way, and five jurisdictions responded that they examined lawyer advertising in some comprehensive fashion. Mr. Lundberg concluded based on his informal survey results that there is clearly no consensus among states about how advertising enforcement should be pursued, although most states align with the "non-interventionist" end of the spectrum. He also concluded that contrary to many other disciplinary actions, it is difficult to draw a straight line between regulation of lawyer advertising and protection of clients from tangible harm. Mr. Lundberg's informal survey also confirmed that one of the defining features of the advertising regulatory situation is a paucity of complaints originating from consumers.[173]

VIII. A Commonsense Approach to Regulating Lawyer Advertising

A. Condensing Model Rules on Advertising Into One Practical Rule

A new approach to regulating lawyer advertising is long overdue. First, the disciplinary rules on lawyer advertising should be standardized. Second, regulators should focus more narrowly on prohibiting false and deceptive advertisements. Lawyers should not be subject to discipline for "potentially misleading" advertisements or advertisements that a regulator thinks are distasteful or unprofessional. Nor should they be subject to discipline for violations of technical requirements in the rules regarding font size, placement of disclaimer, or advertising record retention. Regulators should use non-disciplinary measures to address lawyer advertising and marketing that does not violate Model Rule 8.4(c).

APRL is not advocating a loosening or abandonment of regulating and enforcing strongly meritorious cases. Rather, APRL's solution addresses the inutility of the overregulation and under-enforcement of lawyer

[173] Donald R. Lundberg, *Some Thoughts About Regulating Lawyer Advertising*, 34 ABA Nat'l Conference on Prof'l Responsibility (May 28-31, 2008). Mr. Lundberg's paper includes an appendix of the specific results of the Bar Counsel survey.

advertising rules, the inconsistencies of the current regulatory scheme, and the practical challenges posed by evolving technologies.

Although *Central Hudson* and its progeny affirm the validity of the state's interest in protecting the public and the trustworthiness of the legal system by regulating deceptive and misleading advertising, the opinions also highlight the constitutional concerns when regulations contain restrictions without adequate evidence of a nexus to harm. Restrictions that are subject to inconsistent and subjective interpretation also raise constitutional concerns.

The Committee's proposed revisions to and deletions from ABA Model Rules of Professional Conduct 7.1, 7.2, 7.4, and 7.5, and their comments, set forth in Attachment 2, reflect a policy determination that the ABA should recommend that states adopt uniform regulatory rules for lawyer communications regarding legal services (outside the context of in-person solicitation) founded upon the constitutional limitation set forth in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), and its progeny prohibiting "false and misleading" communications.

Supreme Court authority has left open the possibility that additional limited restrictions on lawyer communications regarding legal services, including advertising and marketing, may pass muster under the First Amendment. However, empirical data about enforcement of and compliance with the existing patchwork of state lawyer advertising regulations shows that the organized bar can better uphold the integrity of the profession with less restrictive rules. These rules will still promote access to justice: which in the modern age includes the dissemination of accurate information about the availability of professional legal services.

The ABA Model Rules in this area also need to reflect the fact that in an age of web-based and electronic communication, jurisdictional differences in regulatory standards simply are impractical and unworkable. Adopting a regulatory line of refraining from "false and misleading" lawyer communications is consistent with the prohibition in Rule 8.4(c), which prohibits lawyers from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," as well as with consumer protection statutory principles prohibiting unfair and deceptive acts and practices enacted in the vast majority of U.S. jurisdictions, as well as under federal law.

A simple "false or misleading" standard for lawyer communications about legal services best balances the important interests of access to justice, protection of the public and clients, integrity of the legal profession, and the uniform regulation of lawyer conduct.

The legitimate public policy considerations discussed above support removing the general prohibition against "giving anything of value to a person for recommending the lawyer's services" contained in Rule 7.2(b). Legitimate professional responsibility concerns regarding referral fees and the division of fees are adequately dealt with in other rules, including Rule 1.5(e) and Rule 5.4.

Specifically, the Committee proposes that the language in Rule 7.1 be retained, and that Rules 7.2, 7.4, and 7.5, and their comments, be deleted in their entirety.[174] The Committee proposes revising the comments to Rule 7.1 to reflect the language and principles contained in Rules 7.2. 7.4, and 7.5, which provide guidance on the general "false and misleading" standard in Rule 7.1. The incorporation into the comments to Rule 7.1 of

[174] As discussed above, APRL's committee deferred consideration of the rules on solicitation thus APRL has not addressed nor is it recommending any changes to Rules 7.3 and 7.6.

many of the concepts explained in the comments to Rules 7.2, 7.4, and 7.5 offers additional direction to lawyers in interpreting how to avoid "false and misleading" communications when describing specific skills (including specialization or expertise), receiving prospective client referrals from third parties, and in naming law firms.

The proposed streamlining of the Model Rules is the most practical approach to bring the Rules in line with technological changes and current enforcement practices, while still protecting consumers from false, misleading, or deceptive practices.

The comments to Rule 7.1 provide lawyers with practical guidance on what conduct or statements may fall within the prohibited category of "false and misleading" and what statements are *not* considered misleading. The proposed amendments set forth objective criteria to determine what constitutes "false and misleading" communications about a lawyer's services, while preserving a lawyer's constitutional right to disseminate accurate commercial speech. These revisions further support the fifty-one U.S. lawyer regulatory entities in enforcing the least restrictive means to achieve the public policies of maintaining confidence in the legal system and assuring consumers have access to accurate information about legal services.

B. Uniform Enforcement Protocols

The primary goal of regulating lawyer advertising is to protect the public and consumers of legal services from deceptive or fraudulent advertising and marketing by lawyers. This is consistent with the primary goal of lawyer discipline as a whole: protection of the public.

To accomplish this goal, the Committee explored whether complaints made about lawyer advertising may be better addressed in a non-disciplinary framework rather than as a disciplinary investigation and prosecution of an alleged advertising rule violation. The Committee considered that members of the general public rarely file a complaint about a lawyer's advertising or marketing. It is believed that the overwhelming majority of complaints about a lawyer advertising are filed by other lawyers, not by clients or members of the general public. Frequently, the motivation for a lawyer to complain about another lawyer's advertising is that the complaining lawyer sincerely believes that all lawyers should be on a "level playing field" as to advertising and solicitation. The complaint often arises from the complaining lawyer's belief that he or she is suffering a competitive disadvantage.

Experience has shown that most of the reported breaches of the advertising rules are technical or minor in nature and do not involve actual deception of a consumer or client. Regulators can best remedy these kinds of breaches quickly and efficiently by diverting lawyer advertising complaints to regulatory staff that will communicate with the noncompliant lawyer on a more informal basis to obtain voluntary compliance. In other words, the regulatory staff should communicate with the lawyer who is the subject of a complaint to provide notice that the lawyer's advertising does not appear to comply with an applicable advertising rules and should be afforded an informal opportunity to address the issue—either by fixing and avoiding the problem or by explaining why no problem is present. Experience has also shown that, with few exceptions, lawyers will take the necessary action to bring their advertising into compliance once when the matter is brought to their attention. If the lawyer makes a satisfactory correction or provides a satisfactory explanation, the public will be protected.

In contrast, processing all lawyer advertising complaints through the full lawyer disciplinary system takes far more time and expense. It also siphons bar resources and attention away from the investigation of more serious lawyer misconduct where the interests of the public and clients are at greater risk of injury; the public is less protected.

There will be circumstances in which diversion of a complaint is inappropriate and the machinery of formal discipline should be invoked. This will be true, for example, in situations involving apparent coercion, duress, harassment, or criminal or fraudulent conduct involving a risk of demonstrable harm. This also will include lawyers who have been notified of actual or apparent non-compliance, and who either fail to respond or continue to violate the cited rules. That there will be infrequent cases deserving of more serious consideration and a further expenditure of disciplinary resources does not justify treating all cases that way. This is especially true where, as here, experience shows that the vast majority of cases neither need nor require such efforts.

State regulators should consider a non-disciplinary framework for regulating lawyer advertising in which a lawyer is given notice that a complaint has been made about his or her advertising, including identification of the problem or non-compliance, and an opportunity to remedy the matter or offer an explanation. If the lawyer remedies the problem or provides a sufficient explanation supporting his or her advertising, the matter can be closed. These complaints can be handled on an informal basis without referral of the complaint into the disciplinary system. With rare exceptions, lawyers that are given fair notice of non-compliance will remedy the matter and the file can be closed. If a satisfactory correction and/or explanation of the materials is not received, the complaint should be processed as a standard disciplinary complaint. For five years, the Virginia State Bar has used a non-disciplinary process of this nature for handling lawyer advertising complaints. Formal lawyer advertising complaints received by bar counsel or the intake department of the disciplinary system are referred to Ethics Counsel's office for informal non-disciplinary disposition. Absent extraordinary factors, formal discipline based on RPC violations relating to advertising and marketing materials is limited to situations involving lawyers who continue to violate the RPCs even after being placed on notice of their violations and the need to stop them; situations involving criminal conduct, fraudulent conduct or material and demonstrable harm to identified persons; or situations involving coercion, duress or harassment. Complaints of that nature are processed as standard disciplinary complaints, as the alleged conduct will likely involve the application of Rule 8.4(c). Virginia's model is an example of one that may be refined and adopted by the ABA and state bar associations across the country.

IX. Conclusion

It is long past time for rationality and uniformity to be brought to the regulation of lawyer advertising. The Committee recommends that the ABA Model Rules governing communications about legal services be consolidated into a single disciplinary rule that simply prohibits false or misleading statements. Adopting this approach to advertising regulation, combined with reasonable uniform enforcement policies and protocols by state disciplinary authorities, is in the Committee's view the best way to ensure honest communication by lawyers while at the same time promoting the widest possible access by the public to legal services.

ATTACHMENT 1

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Mr. Tuft is a member of the California State Bar Commission on the Revision of the Rules of Professional Conduct and a former chair of the California State Bar Committee on Professional Responsibility and Conduct. Mr. Tuft is a member of the ABA Center on Professional Responsibility and is a member of the Center's Policy Implementation Committee and Editorial Board. Mr. Tuft is a past president of the Association of Professional Responsibility Lawyers. He has taught courses on legal ethics as an adjunct professor at the University of San Francisco School of Law and is a frequent lecturer and writer on professional responsibility. Mr. Tuft has received several teaching and bar association awards for his work in legal education.

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Mr. Clark is past chair (2009-2012) of the District of Columbia Bar Rules of Professional Conduct Review Committee. He has been selected for inclusion in 2012 through 2015 Washington DC Super Lawyers. He is a 1969 graduate of the University of Notre Dame (B.S. Physics), earned his J.D. from the University of Illinois College of Law (1972), and began his legal career as law clerk to the late Judge William B. Jones of the U.S. District Court in Washington. He is a member of the Center for Professional Responsibility and the Business Law Section (Firm Counsel Connection and Professional Responsibility Committee) of the American Bar Association and Treasurer of the Association of Professional Responsibility Lawyers. He and his wife Mary live in Washington, D.C., where he was chair of the Committee of 100 on the Federal City (2009-2012) and three time past president of the Federation of Citizens Associations of DC.

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Prior to devoting herself to legal education, Ms. Jacobowitz practiced law for over twenty years. She began her career as a Legal Aid attorney in the District of Columbia; prosecuted Nazi war criminals at the Office of Special Investigations of the U.S. Department of Justice; was in private practice with general practice and commercial litigation firms in Washington, D.C. and Miami; and served as in-house counsel for a large Miami based corporation. Ms. Jacobowitz has a J.D. from George Washington University and a B.S. in Speech from Northwestern University. She is admitted to practice in the District of Columbia, Florida, and California, and is a certified civil court mediator.

PETER R. JARVIS

Peter Jarvis is a partner in Holland & Knight's Portland office, where he practices primarily in the area of attorney professional responsibility and risk management. Mr. Jarvis advises lawyers, law firms, corporate legal departments and government legal departments about the law governing lawyers. This includes, but is not limited to, matters relating to conflicts of interest, duties of confidentiality, other legal or professional ethics issues, advice on the avoidance of civil or criminal liability, law firm breakups, and questions relating to law firm or legal department structure and operation. Mr. Jarvis also serves as an expert witness and is an avid lecturer for public and private/in-house continuing legal education seminars.

Mr. Jarvis has decades of experience as a trusted adviser to lawyers and also draws on his substantial background as a civil litigation attorney in matters involving antitrust, appellate, business tort, general contract, insurance, product liability, tax and Uniform Commercial Code concerns. Prior to joining Holland & Knight, Mr. Jarvis was the partner-in-charge of the Portland office of a multistate law firm and was co-leader of that firm's national professional responsibility/risk management practice group. He also served for many years as the in-house ethics counsel for a multistate law firm.

BRUCE E. H. JOHNSON

Bruce E. H. Johnson is a partner in the Seattle office of Davis Wright Tremaine LLP. A member of the Washington State and California Bars, Mr. Johnson's litigation practice focuses on internet, media, and professional liability defense. He also regularly advises lawyers, law firms, and legal departments on legal ethics, professional responsibility, and malpractice matters. He has defended many lawsuits involving social media websites, including *Browne v. Avvo, Inc.*, which held that lawyer evaluations and ratings are statements of opinion absolutely protected by the First Amendment. One of the leading national authorities on First Amendment commercial speech protections, Mr. Johnson is the co-author (with Steven G. Brody) of the Practising Law Institute treatise Advertising and Commercial Speech: A First Amendment Guide.

ARTHUR J. LACHMAN

Arthur J. Lachman practices in Seattle, Washington, focusing on legal ethics, professional liability, and law firm risk management issues. A 1989 graduate of the University of Washington School of Law, he clerked on the Ninth Circuit Court of Appeals, has practiced as a commercial litigation attorney, and has taught civil litigation and ethics subjects at both Puget Sound area law schools. Mr. Lachman has served as president of the Association of Professional Responsibility Lawyers and chair of the ABA Center for Professional Responsibility's National Conference Planning Committee. He is co-author of *The Law of Lawyering in Washington*, published by the Washington State Bar Association, and served as chair of the WSBA Rules of Professional Conduct Committee from 2008 to 2010. Mr. Lachman has also served as chair of the Ethics/Loss Prevention Committee and Director of Professional Development at Graham & Dunn in Seattle. He holds bachelors and graduate degrees in accounting from the University of Illinois at Urbana-Champaign.

JAMES M. McCAULEY

James M. McCauley is the Ethics Counsel for the Virginia State Bar. Mr. McCauley and his staff write the draft advisory opinions for the Standing Committees on Legal Ethics and Unauthorized Practice of law and provide informal advice over the telephone to members of the bar, bench, and general public on lawyer regulatory matters. Mr. McCauley teaches Professional Responsibility at the T.C. Williams School of Law in Richmond, Virginia and served on the American Bar Association's Standing Committee on Legal Ethics and Professionalism from 2008-2011. Mr. McCauley served on the faculty of the Virginia State Bar's Mandatory Professionalism Course from 2004-2010. He is a Fellow of the Virginia Law and the American Bar Foundations. Mr. McCauley also served on the Board of Governors of the Real Property Section of the Virginia State Bar from 2004-2010. Mr. McCauley is a member of the John Marshall Inn of Court in Richmond, Virginia. In 2013, he was appointed by the Chief Justice of the Supreme Court of Virginia to serve on its Special Committee on Criminal Discovery Rules. Mr. McCauley serves on the Board of Directors for Lawyers Helping Lawyers.

RONALD D. ROTUNDA

Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University. He joined the faculty in 2008. Before that, he was University Professor and Professor of Law at George Mason University, and the Albert E. Jenner, Jr. Professor of Law, at the University of Illinois. He is a magna cum laude graduate of Harvard College and a magna cum laude graduate of Harvard Law School, where he was a member of Harvard Law Review. He practiced law in Washington, D.C., and was assistant majority counsel for the Watergate Committee.

He has co-authored the most widely used course book on legal ethics, Problems and Materials on Professional Responsibility (Foundation Press, 12th ed. 2014) and is the author of a leading course book on constitutional law, Modern Constitutional Law (West Academic Co., 11th ed. 2015). He is the co-author of Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (ABA-West/Thompson Reuters Publishing, St. Paul, Minnesota, 2014-15 ed.) (jointly published by the ABA and West/Thompson Reuters Publishing). Mr. Rotunda is also the co-author of the six-volume Treatise on Constitutional Law (West/Thompson Reuters Publishing, 5th ed. 2012), and a one volume Treatise on Constitutional Law (West Academic., 8th ed. 2010). He is also the author of several other books and more than 400 articles in various law reviews, journals, newspapers, and books in this country and in Europe. His works have been translated into French, German, Romanian, Czech, Russian, Japanese, and Korean and have been cited more than 2,000 times by law reviews and state and federal courts at every level, from trial courts to the U.S. Supreme Court. Professor Rotunda was rated in 2014 as one of "The 30 Most Influential Constitutional Law Professors" in the United States.

LYNDA C. SHELY

Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to lawyers and law firms. She also assists lawyers in responding to initial Bar charges, performs law office risk management reviews, trains law firm staff in ethics requirements, and advises on a variety of ethics topics including ancillary business ventures, conflicts of interest, fees and billing requirements, trust account procedures, multi-jurisdictional practice requirements, and ethics requirements for law firm advertising/marketing. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona for ten years. Before she moved to Arizona, Ms. Shely was an intellectual property associate with Morgan, Lewis & Bockius in Washington, DC.

Ms. Shely received her B.A. from Franklin & Marshall College in Lancaster, Pennsylvania and her J.D. from Catholic University in Washington, DC. She was selected as the State Bar of Arizona Member of the Year in 2007 and has received other awards from the State Bar for her contributions to Law Related Education and Outstanding Leadership in Continuing Legal Education. She also received the Scottsdale Bar Association's 2010 Award of Excellence. Ms. Shely is a former chair of the ABA Standing Committee on Client Protection and a past member of the ABA's Professionalism Committee and Center for Professional Responsibility Conference Planning Committee. She is the President-Elect of the Association of Professional Responsibility Lawyers and also serves on several State Bar of Arizona Committees. Ms. Shely was the 2008-2009 president of the Scottsdale Bar Association. She has also been an adjunct professor at all three Arizona law schools, teaching professional responsibility.

JAMES COYLE

Jim Coyle is Attorney Regulation Counsel for the Colorado Supreme Court. In that capacity, Mr. Coyle assists the Supreme Court with regulating the practice of law in Colorado, including attorney admissions, registration, discipline, disability, diversion, mandatory continuing legal and judicial education, unauthorized practice and inventory counsel functions. Mr. Coyle's office also acts as counsel for the Attorneys Fund for Client Protection and the Commission on Judicial Discipline. Mr. Coyle is an active member of the American and Colorado Bar Associations, National Conference of Bar Examiners, National Organization of Bar Counsel, ABA Center for Professional Responsibility, National Client Protection Organization, National Continuing Legal Education Regulators Association, Association of Judicial Discipline Counsel and ABA Commission on Lawyer Assistance Programs.

DENNIS A. RENDLEMAN

Dennis A. Rendleman is Ethics Counsel in the Center for Professional Responsibility at the American Bar Association where he provides expertise and research on legal and judicial ethics and professional responsibility law and professionalism. He is counsel to the ABA Standing Committee on Ethics and Professional Responsibility. Prior to joining the ABA, Mr. Rendleman was Assistant Professor of Legal Studies at the University of Illinois at Springfield and spent twenty-three years at the Illinois State Bar Association, leaving in 2003 as General Counsel. Mr. Rendleman has engaged in the private practice as a consultant and expert witness in professional responsibility and discipline matters. He is a former member of and current liaison to the Illinois Supreme Court's Committee on Professional Responsibility and has been a member of the Illinois Judicial Ethics Committee since its founding in 1998. He is a graduate of the University of Illinois and its College of Law.

ATTACHMENT 2

APRL Proposed Changes to the
ABA Model Rules of Professional Conduct - 2015

[CLEAN VERSION]

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comments

[1] This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional conduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching. [*from MR 7.2 Comments]*

[6] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[7] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. [*from MR 7.2 Comments]*

Areas of Expertise/Specialization

[8] A lawyer may indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services. A lawyer may state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification. [*from MR 7.4 Comments]*

Firm Names

[9] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. [*from MR 7.5 Comments]*

[10] Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. [*from MR 7.5 Comments]*

Rule 7.2 Advertising

Comments (*Comments 1, 2, and 3 moved to MR 7.1 Comments)*

Rule 7.3 Solicitation of Clients

No changes

Rule 7.4 Communication of Fields of Practice and Specialization

Comments (*Comments 1 and 3 were moved to MR 7.1 Comments)*

Rule 7.5 Firm Names And Letterheads

Comments (*Comments moved to MR 7.1 Comments)*

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

No changes

APRL Proposed Changes to the
ABA Model Rules of Professional Conduct - 2015

[REDLINE VERSION]

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comments

[1] This Rule governs all communications about a lawyer's services~~, including advertising permitted by Rule 7.2~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional conduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching. [*from MR 7.2 Comments]*

[6] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[7] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. *[from MR 7.2 Comments]*

Areas of Expertise/Specialization

[8] A lawyer may indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services. A lawyer may state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification. *[from MR 7.4 Comments]*

Firm Names

[9] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. *[from MR 7.5 Comments]*

[10] Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. *[from MR 7.5 Comments]*

Rule 7.2 Advertising

~~(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.~~

~~(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may~~

~~(1) pay the reasonable costs of advertisements or communications permitted by this Rule;~~

~~(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;~~

~~(3) pay for a law practice in accordance with Rule 1.17; and~~

~~(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if~~

~~(i) the reciprocal referral agreement is not exclusive, and~~

~~(ii) the client is informed of the existence and nature of the agreement.~~

~~(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.~~

Comments *(Comments 1, 2, and 3 moved to MR 7.1 Comments)*

~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

~~[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.~~

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to~~

many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false

~~or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.~~

~~[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.~~

Rule 7.3 Solicitation of Clients

No changes

Rule 7.4 Communication of Fields of Practice and Specialization

~~(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.~~

~~(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~

~~(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.~~

~~(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:~~

~~(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and~~

~~(2) the name of the certifying organization is clearly identified in the communication.~~

Comments *(Comments 1 and 3 were moved to MR 7.1 Comments)*

~~[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.~~

~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~

Rule 7.5 Firm Names And Letterheads

~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation 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 holding a public office shall not be used in the name of a law 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) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.~~

Comments *(Comments moved to MR 7.1 Comments)*

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

No changes

ATTACHMENT 3

APRL ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

Two First National Plaza
20 South Clark Street
Suite 1050
Chicago, IL 60603
www.aprl.net

Phone: 312.782.4396
Fax: 312.782.4725
admin@aprl.net

October 17, 2014

Re: **Regulation of Lawyer Advertising**

Dear Bar Counsel:

I am writing to you on behalf of the Committee on the Regulation of Lawyer Advertising created by the Association of Professional Responsibility Lawyers ("APRL"). As you may know, APRL is a national organization of lawyers and law professors specializing in the field of legal ethics and professional responsibility. APRL's committee is currently studying the enforcement of lawyer advertising regulations by bar regulators particularly in reference to the use of technology and electronic media. As you will note from the list below, our committee includes both APRL and non-APRL members.

Courts imposing lawyer discipline typically assert that the purpose of lawyer discipline is not to punish the lawyer but to protect the public. On the assumption that this is also the purpose behind discipline for violation of rules regulating advertising and marketing of lawyer services, the Committee would appreciate it if you could respond to the attached brief survey.

Please also indicate whether there have been any consumer surveys in your jurisdiction regarding lawyer advertising and, if so, whether you can provide us with the results of those surveys.

Thank you for responding to our request. We would appreciate receiving your response by email or letter in the next thirty days. If you have any questions or would prefer instead to discuss these matters over the phone, please let me know so that I can arrange a time and date for a call.

I look forward to hearing from you.

Very truly yours,

Mark L. Tuft
Chair, APRL Committee on the
Regulation of Lawyer Advertising

APRL Committee on the Regulation of Lawyer Advertising

George R. Clark Esq., Washington, D.C.
James M. McCauley, Virginia State Bar, Richmond, VA
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Mark L. Tuft, Cooper, White & Cooper LLP., San Francisco

Liaisons:
Dennis A. Rendleman, Ethics Counsel, ABA Center on Professional Responsibility
James C. Coyle, Attorney Regulation Counsel, Colorado Supreme Court, Denver, CO., NOBC.

ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

2014 ADVERTISING REGULATION SURVEY

1. Who are the predominant complainants in lawyer advertising charges?

   - Other lawyers _____
   - Consumers _____
   - Judges _____
   - Public officials _____
   - Anonymous _____

2. How often do you receive complaints about lawyer advertising?

   - Frequently _____
   - Rarely _____
   - Almost never _____

3. How do you typically handle complaints about lawyer advertising where there is a potential advertising rule violation?

   - Informally _____
     (e.g., call or letter requesting changes)
   - Formal investigation _____
   - Diversion _____
   - Peer Review _____
   - Dismissal with advertising language _____
   - Warning letter _____
   - Not at all addressed _____

4. How do you typically handle complaints about lawyer advertising where there is a provable advertising rule violation?

- Informally _____
  (e.g., call or letter requesting changes)
- Formal charges _____
- Diversion _____
- Dismissal with advertising language _____
- Warning letter _____
- Other disposition (please explain) _____
- Not at all addressed _____

5. Does the disposition of complaints where there is a provable advertising rule violation depend on the particular rule (e.g., ABA Model Rules 7.1 – 7.5)?

- Yes _____
  (please identify the advertising rules that receive the greatest attention)
- No _____

6. Is your jurisdiction engaged in actively monitoring lawyer advertisements?

- Yes (please describe these activities) _____
- No _____

7. How often do formal advertising complaints alleging false or misleading communications result in disciplinary sanctions (including diversion and probation)?

- Frequently _____
- Rarely _____
- Almost never _____

8. How often do formal advertising complaints alleging violations of the advertising rules other than false or misleading communications result in disciplinary sanctions (including diversion and probation)?

- Frequently _____
- Rarely _____
- Almost never _____

9. Are there any reported decisions involving or including violations of advertising regulations in which there is a finding of actual consumer or client harm or actual confusion?

- Yes _____
  (please list names, years, and type of harm/confusion)
- No _____

10. In those circumstances where discipline has been imposed, did the violation involve conduct that was partly or entirely based upon dishonesty, fraud, deceit or misrepresentation, whether by affirmative statement or concealment?
(see ABA Model Rule 8.4(c))

- Yes _____
  (please explain, including what state of mind requirement was applied)
- No _____

11. Have there been any formal discipline cases finding consumer or client harm or confusion that *did not* violate Rule 8.4(c)?

- Yes _____
  (please explain what rule was violated and what harm was identified)
- No _____

Thank you for responding by November 25, 2014

Please address your responses to:

Mark L. Tuft, Chair
APRL Regulation of Lawyer Advertising Committee
201 California Street, 17th Floor
San Francisco, CA 94111
mtuft@cwclaw.com

Association of Professional Responsibility Lawyers

Regulation of Lawyer Advertising Committee
Supplemental Report April 26, 2016

Introduction and Summary

The Committee's initial report, dated June 22, 2015, addressed concerns about overly restrictive and inconsistent state regulation of lawyer advertising, particularly in relation to today's diverse and innovative forms of electronic media advertising. The Committee recommended changes in the advertising rules to achieve greater rationality and uniformity in regulatory enforcement of lawyer advertising and marketing by proposing a new Rule 7.1 in place of ABA Model Rules 7.1, 7.2, 7.4 and 7.5 and by the use of non-disciplinary means to address most complaints about lawyer advertising. The Committee reserved for later consideration issues related to the regulation of direct solicitation of clients and communications transmitted in a manner that involves intrusion, coercion, duress and harassment (Model Rule 7.3). The Committee also deferred consideration of reciprocal referrals (Rule 7.2(b)(4)) and the effect of certain forms of lawyer advertising on the regulation of lawyer referral services.

The Committee has now considered the solicitation rules and has concluded that the legitimate regulatory objectives of preventing overreaching and coercion by lawyers who use in-person solicitation and targeted communications with the primary motivation of pecuniary gain can best be achieved by combining provisions of Model Rules 7.2 and 7.3 in a single rule. The Committee's proposed revisions of Model Rules 7.2 and 7.3 in the form of new Rule 7.2 is set forth in Attachment A.

The Committee's revised rule both defines solicitation and distinguishes solicitations that are prohibited from those that are permitted with appropriate protections.

Overview of the Legal and Constitutional Principles that Support Revising the Current Regulation of In-Person Solicitation, Targeted Communications, and Paying for Referrals

In developing proposed Rule 7.2 and this supplemental report, the Committee analyzed Supreme Court precedent, which identifies specific factors to consider when regulators seek to prohibit or restrict a lawyer's direct solicitation of a potential client.[1] The Committee concluded

[1] *The Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (holding that Florida's 30-day ban on direct mail solicitation in accident or disaster cases materially advances, in a manner narrowly tailored to achieve the objectives, the state's substantial interest in protecting the privacy of potential recipients and in preventing the erosion of public confidence in the legal system); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (holding that a state may not totally prohibit targeted direct mail to prospective clients known to face specific legal problems where the state's interest in preventing overreaching or coercion by an attorney using direct mail can be served by restrictions short of a total ban); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) (upholding a total ban of in-person solicitation when the primary motivation behind the contact is the attorney's pecuniary gain); *In re Primus*, 436 U.S. 412 (1978) (holding that direct in-person solicitation is entitled to greater constitutional protection against state regulation when the attorney is motivated by the desire to promote political goals rather than pecuniary gain). *See also The Fla. Bar v. Herrick*, 571 So.2d 1303 (1990) (holding that a state can constitutionally regulate and restrict direct-mail solicitations by requiring personalized mail solicitation to be plainly marked as an "Advertisement."); *"Commercial Speech Doctrine,"* THE FLORIDA BAR,

that most of the current restrictions on solicitation in the attorney advertising rules as well as the underlying public policy at play are based primarily upon lawyers approaching prospective clients in a face-to-face encounter without regard to today's digital world of electronic communications.

In fact, the ABA historically expressed concern about in-person solicitation assuming a lawyer may overwhelm a potential client and that, given the verbal nature of the exchange, it may be unclear what the lawyer said or what the prospective client reasonably inferred. However, that rationale does not apply to electronic communications, such as text messaging and posting on social media and in chat rooms, where there are verbatim logs or records of the communications that preserve the lawyer-prospective client exchange, and where the consumer can simply delete/ignore the exchange.

The Supreme Court has upheld restrictions on lawyer solicitation based upon the rationale that lawyers are better trained and skilled than other professionals in persuasion and oral advocacy.[2] For example, in *Ohralik v. Ohio State Bar Ass'n*,[3] the Court upheld a blanket prohibition against in-person solicitation of legal business for pecuniary gain. The state's interest in preventing "those aspects of solicitation that induce fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct" overrides the lawyer's interest in communication. Moreover, the Supreme Court noted that since in-person solicitation for pecuniary gain is basically impossible to regulate, a prophylactic ban is constitutional.

Once again, that rationale may be justified when applied to traditional face-to-face solicitation and live telephone conversations, but loses ground when applied to today's prerecorded telephonic messages and other electronic communications. Individuals may easily ignore a message that a lawyer sends via a chat room, text message or instant message without feeling awkward or impolite in doing so, as they might in a face-to-face encounter or a live telephone conversation. Modern telephone communication also allows a person who sees an unfamiliar number on his caller ID to easily ignore, block or not answer the incoming call. In fact, the tremendous growth of unsolicited business calls have created an environment in which people routinely ignore unfamiliar numbers and, at their convenience, screen their voicemail messages deciding whether to respond to the caller or delete the message. As a result, the risk of duress, coercion, over-persuasion or undue influence is far less with many forms of electronic communications than with live (face-to-face) communications and therefore the case for restricting solicitation by electronic communication is much weaker. Recall that the facts in *Ohralik* involved face-to-face contact between the lawyer and the prospective client.

As the Supreme Court noted in *Edenfield v. Fane*,[4] striking down a ban on in-person solicitation by CPAs:

> "[T]he constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation. Later cases

https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3BC6699A524B477B85257283005D415D/$FILE/Information%20on%20the%20Commercial%20Speech%20Doctrine.pdf?OpenElement.

[2] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-465 (1978)(finding a greater potential for overreaching when a lawyer, professionally trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed person).

[3] 436 U.S. 447, 454 (1978).

[4] 507 U.S. 761 (1993).

have made this clear, explaining that *Ohralik's* holding was narrow and depended upon certain "unique features of in-person solicitation by lawyers" that were present in the circumstances of that case.

Ohralik was a challenge to the application of Ohio's ban on attorney solicitation and held only that a State Bar 'constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.' While *Ohralik* discusses the generic hazards of personal solicitation, the opinion made clear that a preventative rule was justified only in situations 'inherently conducive to overreaching and other forms of misconduct.'"[5]

Therefore, when considering other means of solicitation, for example, through chat rooms, social media, text messaging, instant messaging, etc., regulation of those contacts is justified only if the solicitation occurs under circumstances that are "inherently conducive to overreaching or other forms of misconduct."

The ABA Model Rules currently include a prohibition against what is referred to as "real-time electronic contact" as a form of "in-person" solicitation. See ABA MR 7.3(a).This Committee believes that the term "real-time electronic contact" as a moniker to describe "in person" solicitation ignores the required examination of the precise circumstances under which a solicitation occurs. Many forms of social media and electronic communication (i.e., texting, instant messaging, posting on social media) are more akin to a targeted written communication rather than a face-to-face communication because the person contacted has an opportunity to reflect or research before responding or not respond at all. In other words, "real-time electronic contacts" with a potential client are not face-to-face encounters but are more like targeted mailings, which are constitutionally protected. There is no need for discipline unless they are inherently conducive to overreaching or other forms of misconduct. The requirements under paragraphs (c) and (d) of the proposed rule in addition to the requirements of Rule 7.1 serve as adequate protection and an absolute ban is no longer warranted.

For instance, a chat room is a cyber construct. It is not a room and no one chats. It is a "place" on the Internet where people can visit and write whatever they want, just like a listserv or Facebook Messenger. Anyone can leave the chat room; or, they can "lurk" without posting. No one is "trapped" in an Internet "chat room" with an aggressive lawyer like the hospitalized accident victim in *Ohralik*. Everything posted in a chat room is in writing and there is a record of what is said. The point is not whether chat rooms may be described as "real time" communication, but rather that the contacts that occur in an Internet chat room simply are not "in person" communications. Thus, there is no justification for a prophylactic ban on lawyer solicitation in an Internet chat room or other "real-time" electronic forums.[6] Those communications are subject to the general prohibition of false or misleading speech.

"Face time," "Skype" and other forms of VOIP[7] video conferencing, are just telephone conversations. The Committee's proposed rule bans live telephone calls (with individuals other than those excepted in Rule 7.2(a)), and so it would also ban solicitation via "Face time" or

[5] 507 U.S. at 774. (Citations omitted).

[6] See Philadelphia Bar Ass'n Ethics Op. 2010-6; Florida Advisory Opn. 1-00-1 (Revised).

[7] VOIP is "Voice over the Internet Protocol."

"Skype" because the communication is just a live telephone call with the ability to show yourself to the other person (if he consents).

Though described by the ABA rules as "real-time electronic contacts," if the means of solicitation is more akin to targeted letters or written communications, state regulators cannot impose a prophylactic ban. *Shapero v. Kentucky Bar Ass'n*[8], held that the state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. In *Shapero*, the Court focused on the method of communication and found targeted letters to be comparable to the print advertising used in *Zauderer*,[9] which can easily be ignored or discarded. The same reasoning applies to social media, texting and other forms of electronic solicitation.

The Supreme Court upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days after an accident or disaster. *Florida Bar v. Went For It, Inc*.[10] However, in reaching its holding the Court focused on the timing of the letters. The Court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day "cooling off" period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing. Moreover, other states have not followed Florida's rule.

Thus, having considered the indirect nature of electronic communication, the Committee recommends a rule that imposes a ban only on face-to-face and live telephone solicitations, but not "real time" electronic or video contacts with a potential client. Several state bar opinions have reached similar conclusions.[11]

In addition to limiting prohibited solicitation to face-to-face and live telephone, the Committee proposes an expansion of the exceptions to the ban on direct in-person solicitation to include persons who are sophisticated users of legal services and persons who are contacted pursuant to a court-ordered class action notification. As in the case of persons who are lawyers or with whom the lawyer has a close personal or family relationship, there is far less likelihood of undue influence, intimidation and overreaching when the person contacted is a sophisticated user of legal services.[12] Proposed Comment [4] describes a sophisticated user of legal services as a person who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. The exception under paragraph (b)(3) reflects existing case law. In each instance, the safeguards under paragraphs (c) and (d) as well as the requirements of Rule 7.1 serve as adequate protection and an absolute ban is no longer warranted in these situations.

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[8] 486 U.S. 466 (1988).

[9] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

[10] 515 U.S. 618 (1995).

[11] Philadelphia Bar Ass'n Ethics Op. 2010-6 concludes that Rule 7.3 does not apply to solicitation by e-mail, social media, chat room or other electronic means where it would not be socially awkward for potential client to ignore a lawyer's overture as they can with targeted mailing; such contacts are not "real time" communications for purposes of the rule. North Carolina State Bar Op. 2011-08 advises that a lawyer's use of chat room support service does not violate Rule 7.3 as it does not subject the website visitor to undue influence or intimidation; the visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session. Florida also concurs as evidenced by its complete reversal of its original opinion that banned chat room solicitation and its acknowledgement of the evolution of digital communications. Florida Advisory Opinion A-00-1 (Revised) (Approved by the Board Review Committee on Professional Ethics on October 15, 2015) notes,"…written communications via a chat room, albeit in real time, does not involve the same pressure or opportunity for overreaching" as face to face solicitation).

[12] Other state bar rules have recognized this long-established exception. See Va. Rule 7.3, cmt.[2] at http://www.vsb.org/pro-guidelines/index.php/rules/information-about-legal-services/rule7-3/

Proposed Rule 7.2

Proposed Rule 7.2 combines elements of current Model Rules 7.2 and 7.3 regarding solicitation of clients. Paragraph (a) provides a definition of "solicitation" that is derived from the first sentence in Comment [1] to Model Rule 7.3. The Committee believes it is important to define what constitutes a solicitation in the black letter of the rule rather than in a comment and that the definition apply to both direct in-person and targeted written contacts. The definition in paragraph (a) tracks Model Rule 7.3, Comment [1] except that it clarifies that a solicitation includes targeted communications initiated by "or on behalf of" a lawyer and limits solicitations to communications that offer to provide legal services "in a particular matter." The phrase "in a particular matter" is consistent with Model Rule 7.3(c) and paragraph (c) of this rule. The comments to the proposed rule make it clear that all in-person and targeted communications offering to provide legal services in regard to a particular matter must comply with Rule 7.1.

Paragraph (b) defines solicitations that are prohibited under the reasoning in *Ohralik v. Ohio State Bar Ass'n*.[13] Prohibited solicitations under paragraph (b) include employees and other agents of the lawyer. For the reasons described above, the Committee believes that a total ban on in-person contacts to solicit professional employment when a significant motive is the lawyer's pecuniary gain is justified only in the case of direct face-to-face and live telephone contacts and not in the case of real time electronic contact. Chat rooms and other forms of real time electronic communication are less fraught with the possibility of intimidation and coercion and are more properly addressed under paragraphs (c) and (d) of the proposed rule.

The exceptions to the ban on direct in-person solicitation have been expanded to include persons who are sophisticated users of legal services and persons who are contacted pursuant to a court-ordered class action notification. Proposed Comment [4] describes a sophisticated user of legal services as a person who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. The exception under paragraph (b)(3) reflects existing case law.

Paragraph (c) carries forward the requirements of Model Rule 7.3(c) with minor revisions. The phrase "on or behalf of" a lawyer had been added for greater clarity and is consistent with the definition of solicitation in paragraph (a)

Paragraph (d) provides a more straightforward and clear statement of the protections in Model Rule 7.3(b). These protections apply to all in-person and targeted communications permitted under the rule. The headings to each paragraph provide additional clarity.

As noted above, the Committee recommends stream-lining the regulations regarding "solicitation" currently in Model Rules 7.2 and 7.3, while maintaining the legitimate policy objectives of both rules, by including solicitation of potential clients both by direct in-person, face-to-face or telephone communication and through paying someone else something of value for referring prospects in a single rule. Proposed Rule 7.2 combines the solicitation provisions of Model Rule 7.3 with the provision in Model Rule 7.2(b) of refraining from giving someone something of value for referring clients because both provisions involve the solicitation of prospective clients. Paragraph (e) carries forward Model Rule 7.3(d) without substantive change.

Paragraph (f) is substantially the same as Model Rule 7.2(b), which prohibits “giving anything of value” to anyone for referring clients to a lawyer, other than to employees and lawyers

[13] 436 U.S. 447 (1978).

who work in the same firm as the lawyer receiving the referral. Rule 7.2(f)(1) is changed to clarify that payments for online group directories/advertising platforms are just payments for advertising. Paying for referrals historically was a prohibited form of solicitation, allegedly because of the risk that a lawyer who pays someone for referrals would engage in unseemly "ambulance chasing" by engaging runners to lure potential clients. Thus, as Hazard, Hodes, & Jarvis, *Law of Lawyering* §60.05 (4th ed. 2015) notes: "Ordinarily, paying for a recommendation of a lawyer's services is a form of solicitation, and thus prohibited by Model Rule 7.3. Rule 7.2(b), however, provides several commonsense exceptions for a recommendation of services, but where the evils of direct contact solicitation are not present." The Committee has added the language about employees and lawyers in the same firm to address the reality that lawyers in the same firm routinely pay a portion of earned fees on a matter to the "originating" lawyer in the firm. The policy prohibiting giving anything of value for client referrals reflects the same public policy concerns as the Federal Trade Commission's restrictions on the use of endorsements and testimonials in advertising, which are premised on the recognition that marketing products and services based on compensated endorsers, without conspicuous disclosure of the details of their connections, is unfair and deceptive to consumers. *See* 16 C.F.R. Part 255.

The provision in Model Rule 7.2(b) pertaining to lawyer referral services has been carried forward without change to paragraph (f)(2) to permit, among other things, lawyers to pay charges for prepaid plans and not-for-profit or "qualified lawyer referral service." The language was modified in 2000 because, as the Reporter's Notes to the *ABA Ethics 2000 Commission Proposed Amendments to the Model Rules of Professional Conduct* explain:

> This change is intended to more closely conform the Model Rules to ABA policy with respect to lawyer referral services. It recognizes the need to protect prospective clients who have come to think of lawyer referral services as consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.

Comments to Proposed Rule 7.2

Comment [1] to proposed Rule 7.2 is derived from the second sentence in Comment [1] to Model Rule 7.3.

Comments [2] and [3] are Comments [2] and [4] of Model Rule 7.3. No substantive change is intended.

Comment [4] derives from Comment [5] to Model Rule 7.3 and adds a sentence describing who is a sophisticated user of legal services. Comment [5] carries over Comment [8] to Model Rule 7.3. Comments [6] and [7] are based on Comments [6] and [7] of Model Rule 7.3. Comment [8] derives from Comment [9] of Model Rule 7.3

Comments [9] – [11] are Comments [5], [6] and [8] from Model Rule 7.2.

2014-2016 Committee Members and Liaisons

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Peter R. Jarvis
Bruce E. H. Johnson
Arthur J. Lachman
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Ronald D. Rotunda
Lynda C. Shely
James Coyle, Liaison, National Organization of Bar Counsel
Dennis A. Rendleman, Liaison, American Bar Assn. Center for Professional Responsibility

ATTACHMENT A

APRL Proposed Amendments to
ABA Model Rule of Professional Conduct 7.2
[CLEAN VERSION]

Rule 7.2 Solicitation of Clients

Solicitation

(a) A solicitation is a targeted communication initiated by or on behalf of a lawyer, that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services for a particular matter.

(b) Except as provided in paragraphs (c) and (e), a lawyer shall not solicit in person by face-to-face contact or live telephone, or permit employees or agents of the lawyer to solicit in person or by live telephone on the lawyer's behalf, professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer;
(2) is a sophisticated user of legal services;
(3) is pursuant to a court-ordered class action notification; or
(4) has a family, close personal, or prior professional relationship with the lawyer.

Written Solicitation

(c) Every written, recorded or electronic solicitation by or on behalf of a lawyer seeking professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (b)(1)-(4).

Limitation on Solicitation

(d) A lawyer shall not solicit professional employment from any person if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.

Prepaid and Group Legal Services Plans

(e) Notwithstanding the prohibitions in paragraph (b), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Paying Others to Recommend a Lawyer

(f) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:

(1) pay the reasonable costs of advertisements and other communications permitted by Rule 7.1, including online group advertising;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
(i) the reciprocal referral agreement is not exclusive; and
(ii) the client is informed of the existence and nature of the agreement.

Comment

Solicitation

[1] A lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves in-person, face-to-face or live telephone contact by a lawyer with someone known to need legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyers to the public, rather than direct in-person, face-to-face or live telephone communication, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.1 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of in-person, face-to-face or live telephone communication can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading. All solicitations permitted under this Rule must comply with the prohibition in Rule 7.1 against false and misleading communications

[4] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or a sophisticated user of legal services. A sophisticated user of legal services is an individual who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. Consequently, the general prohibition in paragraph (b) and the requirements in paragraph (c) are not applicable in those situations. Also, paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[5] The requirement in paragraph (c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of paragraph (d)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (d)(1) is prohibited. Moreover, if after sending a solicitation or other communication as permitted by Rule 7.1 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of paragraph (d).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.1.

[8] Paragraph (e) of this Rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be

designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 7.1 and this Rule. See Rule 8.4(a).

Paying Others to Recommend a Lawyer

[9] Except as permitted under paragraphs (f)(1)-(f)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rules 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (f)(1), however, allows a lawyer to pay for advertising and solicitations permitted by Rule 7.1 and this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers, as long as the employees, agents and vendors do not direct or regulate the lawyer's professional judgment (see Rule 5.4(c)). Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[10] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

[11] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (f) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

APRL Proposed Amendments to
ABA Model Rules of Professional Conduct 7.2 and 7.3
[REDLINE VERSION]

Rule 7.2 ~~Advertising~~Solicitation of Clients

Solicitation

(a) ~~Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.~~A solicitation is a targeted communication initiated by or on behalf of a lawyer, that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services for a particular matter.

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(b) Except as provided in paragraphs (c) and (e), a lawyer shall not solicit in person by face-to-face contact or live telephone, or permit employees or agents of the lawyer to solicit in person or by live telephone on the lawyer's behalf, professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

(4) is a lawyer;
(5) is a sophisticated user of legal services;
(6) is pursuant to a court-ordered class action notification; or
(4) has a family, close personal, or prior professional relationship with the lawyer.

Written Solicitation

(c) Every written, recorded or electronic solicitation by or on behalf of a lawyer seeking professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (b)(1)-(4).

Limitation on Solicitation

(d) A lawyer shall not solicit professional employment from any person if:
(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.

Prepaid and Group Legal Services Plans

(e) Notwithstanding the prohibitions in paragraph (b), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Paying Others to Recommend a Lawyer

(f) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for the purpose of recommending or securing the ~~lawyer's~~ services of the lawyer or law firm, except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by ~~this~~ Rule 7.1 including online group advertising;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

~~(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.~~

Comment

~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

~~[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.~~

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would~~

~~regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.~~

~~[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~[*portions of these Comments were moved to the Comments to 7.1]*

Solicitation

[1] A lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves in-person, face-to-face or live telephone contact by a lawyer with someone known to need legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyers to the public, rather than direct in-person, face-to-face or live telephone communication, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.1 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of in-person, face-to-face or live telephone communication can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading. All solicitations permitted under this Rule must comply with the prohibition in Rule 7.1 against false and misleading communications

[4] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or a sophisticated user of legal services. A sophisticated user of legal services is an individual who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. Consequently, the general prohibition in paragraph (b) and the requirements in paragraph (c) are not applicable in those situations. Also, paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade

organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[5] The requirement in paragraph (c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of paragraph (d)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (d)(1) is prohibited. Moreover, if after sending a solicitation or other communication as permitted by Rule 7.1 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of paragraph (d).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.1.

[8] Paragraph (e) of this Rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 7.1 and this Rule. See Rule 8.4(a).

Paying Others to Recommend a Lawyer

[9~~5~~] Except as permitted under paragraphs (f~~b~~)(1)-(~~b~~f)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.~~3~~1 and this Rule. A communication contains a recommendation if it

endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (~~b~~f)(1), however, allows a lawyer to pay for advertising and ~~communications~~solicitations permitted by Rule 7.1 and this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers, as long as the employees, agents and vendors do not direct or regulate the lawyer's professional judgment (See Rule 5.4(c)). Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[10~~6~~] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

~~[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would~~

~~mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.~~

[~~8~~11] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (~~b~~f) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

~~Rule 7.3 Solicitation of Clients~~

~~(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:~~

~~(1) is a lawyer; or~~

~~(2) has a family, close personal, or prior professional relationship with the lawyer.~~

~~(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:~~

~~(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or~~

~~(2) the solicitation involves coercion, duress or harassment.~~

~~(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).~~

~~(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.~~

~~Comment~~

~~[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.~~

~~[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.~~

~~[3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person's judgment.~~

~~[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

~~[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from~~

~~participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.~~

~~[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).~~

~~[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.~~

~~[8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

~~[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).~~

(substance of ER 7.3 moved to new ER 7.2(a), (b), (c), and (d))

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

REVISED 101

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association amends Rules 7.1 through 7.5 and Comments of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

REVISED 101

Rules 7.1 through 7.5 and Comments of the ABA Model Rules of Professional Conduct (August 2018)

Model Rule 7.1: Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising. ~~permitted by Rule 7.2~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] ~~Truthful statements that are~~ M~~m~~isleading truthful statements are ~~also~~ prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is ~~also~~ misleading if ~~there is~~ a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

~~[3] It is misleading for a communication to provide information about a lawyer's fee without indicating the client's responsibilities for costs, if any. If the client may be responsible for costs in the absence of a recovery, a communication may not indicate that the lawyer's fee is contingent on obtaining a recovery unless the communication also discloses that the client may be responsible for court costs and expenses of litigation. See Rule 1.5(c).~~

[3][~~4~~] ~~An advertisement~~ A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with ~~the services or fees~~ those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4]~~[5]~~ It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence ~~improperly~~ a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5]~~[6]~~ Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6]~~[7]~~ A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7]~~[8]~~ Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8]~~[9]~~ It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

Rule 7.2: ~~Advertising~~ Communications Concerning a Lawyer's Services: Specific Rules

(a) ~~Subject to the requirements of Rules 7.1 and 7.3, a~~ A lawyer may ~~advertise~~ communicate information regarding the lawyer's services through ~~written, recorded or electronic communication, including public~~ any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person ~~who is not an employee or lawyer in the same law firm~~ for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. ~~A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority~~;

(3) pay for a law practice in accordance with Rule 1.17; ~~and~~

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under ~~pursuant to~~ this Rule must ~~shall~~ include the name and ~~office address~~ contact information of at least one lawyer or law firm responsible for its content.

Comment

~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about~~

~~legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

[1] ~~[2]~~ This Rule permits public dissemination of information concerning a lawyer's or law firm's name, ~~or firm name,~~ address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.~~

~~[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~

Paying Others to Recommend a Lawyer

[2] ~~[5]~~ Except as permitted under paragraphs (b)(1)-(b)~~(4)~~(5), lawyers are not permitted to pay others for recommending the lawyer's services. ~~or for channeling professional work in a manner that violates Rule 7.3.~~ A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) ~~however,~~ allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

~~[4] Paragraph (b)(5) permits nominal gifts as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.~~

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] ~~Moreover, a~~ A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. ~~Such~~ Qualified referral services are ~~understood by the public to be~~ consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act. ~~(requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice~~

~~insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)~~

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. ~~See Rule 5.3.~~ Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. ~~Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.~~

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (a) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

Model Rule 7.3: Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

~~(a)~~ (b) A lawyer shall not solicit professional employment by live person-to-person contact ~~in-person, live telephone or real-time electronic contact solicit professional employment~~ when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the ~~person~~ contact~~ed~~ is with a:

(1) ~~is a~~ lawyer; ~~or~~

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer ~~is known by the lawyer to be an experienced user of the type of legal services involved for business matters~~.

~~(b)~~(c) A lawyer shall not solicit professional employment ~~by written, recorded or electronic communication or by in person, telephone or real-time electronic contact~~ even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

~~(c) Every written, recorded or by electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).~~

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

~~(d)~~(e) Notwithstanding the prohibitions in this Rule ~~paragraph (a)~~, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses ~~in-person or telephone~~ live person-to-person contact to ~~solicit~~ enroll members~~hips~~ or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] ~~A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a~~ Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is ~~typically does~~ not ~~constitute~~ a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic ~~Internet~~ searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications ~~such as Skype or FaceTime~~, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. ~~There is a~~ A potential for ~~abuse~~ overreaching exists when ~~a solicitation involves~~ a lawyer, seeking pecuniary

gain, ~~direct in-person, live telephone or real-time electronic contact~~ solicits a person ~~by a lawyer with someone~~ known to be in need of legal services. ~~These~~ This form~~s~~ of contact subject~~s~~ a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate ~~fully~~ all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon ~~being retained immediately~~ an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] ~~This~~ The potential for ~~abuse~~ overreaching inherent in live person-to-person contact ~~direct in-person~~, ~~live~~ ~~telephone or real-time~~ ~~electronic solicitation~~ justifies its prohibition, ~~particularly~~ since lawyers have alternative means of conveying necessary information. ~~to those who may be in need of legal services~~. In particular, communications can be mailed or transmitted by email or other electronic means that ~~do not involve real-time contact and~~ do not violate other laws. ~~governing solicitations.~~ These forms of communications ~~and solicitations~~ make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person ~~direct in-person, telephone or real-time electronic~~ persuasion that may overwhelm a person's judgment.

[4] ~~The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.~~ The contents of live person-to-person ~~direct in-person live telephone or real-time electronic~~ contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in ~~abusive practices~~ overreaching against a former client, or a person with whom the lawyer has a close personal, ~~or~~ family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for ~~abuse~~ overreaching when the person contacted is a lawyer or is known to ~~be an experienced user of~~ routinely use the type of legal services involved for business purposes. ~~For instance, an "experienced user" of legal services for business matters may include those who hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who hire lawyers for lease or contract issues; and other people who~~

~~retain lawyers for business transactions or formations.~~ Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who ~~regularly~~ routinely hire lawyers for lease or contract issues; and other people who routinely ~~regularly~~ retain lawyers for business transactions or formations. ~~Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also~~, Paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] ~~But even permitted forms of solicitation can be abused. Thus, any~~ A solicitation that ~~which~~ contains false or misleading information ~~which is false or misleading~~ within the meaning of Rule 7.1, that ~~which~~ involves coercion, duress or harassment within the meaning of Rule 7.3~~(b)~~(c)(2), or that ~~which~~ involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3~~(b)~~(c)(1) is prohibited. ~~Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).~~ Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule ~~is~~ does not ~~intended to~~ prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

~~[8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to request so potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph ~~(d)~~ (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to ~~solicit~~ enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph ~~(d)~~(e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the ~~in-person or telephone~~ person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations ~~also~~ must not be directed to a person known to need legal services in a particular matter, but ~~is to~~ must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3~~(b)~~(c). ~~See 8.4(a).~~

Rule 7.4 ~~Communication of Fields of Practice and Specialization~~ (Deleted in 2018.)

~~(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.~~

~~(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~

~~(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.~~

~~(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:~~

> **~~(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and~~**
>
> **~~(2) the name of the certifying organization is clearly identified in the communication.~~**

~~Comment~~

~~[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or~~

~~will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.~~

~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~

Rule 7.5 ~~Firm Names And Letterheads~~ (Deleted in 2018.)

~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation 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 holding a public office shall not be used in the name of a law 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) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.~~

~~Comment~~

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

REVISED 101

REPORT

LAWYER ADVERTISING RULES FOR THE 21st CENTURY

I. Introduction

The American Bar Association is the leader in promulgating rules for regulating the professional conduct of lawyers. For decades, American jurisdictions have adopted provisions consistent with the Model Rules of Professional Conduct, relying on the ABA's expertise, knowledge, and guidance. In lawyer advertising, however, a dizzying number of state variations exist. This breathtaking variety makes compliance by lawyers who seek to represent clients in multiple jurisdictions unnecessarily complex, and burdens bar regulators with enforcing prohibitions on practices that are not truly harmful to the public.[1] This patchwork of advertising rules runs counter to three trends that call for simplicity and uniformity in the regulation of lawyer advertising.

First, lawyers in the 21st century increasingly practice across state and international borders. Clients often need services in multiple jurisdictions. Competition from inside and outside the profession in these expanded markets is fierce. The current web of complex, contradictory, and detailed advertising rules impedes lawyers' efforts to expand their practices and thwart clients' interests in securing the services they need. The proposed rules will free lawyers and clients from these constraints without compromising client protection.

Second, the use of social media and the Internet—including blogging, instant messaging, and more—is ubiquitous now.[2] Advancing technologies can make lawyer advertising easy, inexpensive, and effective for connecting lawyers and clients. Lawyers can use innovative methods to inform the public about the availability of legal services. Clients can use the new technologies to find lawyers. The proposed amendments will facilitate these connections between lawyers and clients, without compromising protection of the public.

Finally, trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal

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[1] Center for Professional Responsibility Jurisdictional Rules Comparison Charts, *available at*: https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html.

[2] *See* Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereinafter APRL 2015 Report], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf at 18-19 ("According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet: 52% of online adults now use two or more social media sites; 71% are on Facebook; 70% engage in daily use; 56% of all online adults 65 and older use Facebook; 23% use Twitter; 26% use Instagram; 49% engage in daily use; 53% of online young adults (18-29) use Instagram; and 28% use LinkedIn.").

services may be unlawful. The Supreme Court announced almost forty years ago that lawyer advertising is commercial speech protected by the First Amendment. Advertising that is false, misleading and deceptive may be restricted, but many other limitations have been struck down.[3]

Antitrust law may also be a concern. For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where the FTC believed it would, for example, restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services.[4]

The Standing Committee on Ethics and Professional Responsibility (SCEPR) is proposing amendments to ABA Model Rules 7.1 – 7.5 that respond to these trends. It is hoped the U.S. jurisdictions will follow the ABA's lead to eliminate compliance confusion and promote consistency in lawyer advertising rules. As amended, the rules will provide lawyers and regulators nationwide with models that continue to protect clients from false and misleading advertising, but free lawyers to use expanding and innovative technologies to communicate the availability of legal services and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

II. Brief Summary of the Changes

The principal amendments:

- Combine provisions on false and misleading communications into Rule 7.1 and its Comments.
- Consolidate specific provisions on advertising into Rule 7.2, including requirements for use of the term "certified specialist".

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[3] For developments in First Amendment law on lawyer advertising, see APRL June 2015 Report, *supra* note 2, at 7-18.

[4] The recent decision in *North Carolina State Board of Dental Examiners v. F.T.C.,* 135 S. Ct. 1101 (2015) may be a warning. The Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anti-competitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that a controlling number of the board members were "active market participants" (i.e., dentists), and there was no state entity supervision of the decisions of the non-sovereign board. Many lawyer regulatory entities are monitoring the application of this precedent as the same analysis might be applicable to lawyers. *See also*, ABA Center for Professional Responsibility, *FTC Letters Regarding Lawyer Advertising* (2015), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html.

- Permit nominal "thank you" gifts under certain conditions as an exception to the general prohibition against paying for recommendations.
- Define solicitation as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter."
- Prohibit live, person-to-person solicitation for pecuniary gain with certain exceptions.
- Eliminate the labeling requirement for targeted mailings but continue to prohibit targeted mailings that are misleading, involve coercion, duress or harassment, or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited.

III. Discussion of the Proposed Amendments

A. Rule 7.1: Communications Concerning a Lawyer's Services

Rule 7.1 remains unchanged; however, additional guidance is inserted in Comment [2] to explain that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required. ~~New Comment [3] provides that communications that contain information about a lawyer's fee must also include information about the client's responsibility for costs to avoid being labeled as a misleading communication.~~

In Comment ~~[4]~~[3], SCEPR recommends replacing "advertising" with "communication" to make the Comment consistent with the title and scope of the Rule. SCEPR expands the guidance in Comment [4] by explaining that an "unsubstantiated claim" may also be misleading. SCEPR also recommends in Comment [5] that lawyers review Rule 8.4(c) for additional guidance.

Comments ~~[6]~~[5] through ~~[9]~~[8] have been added by incorporating the black letter concepts from current Rule 7.5. Current Rule 7.5(a) restates and incorporates Rule 7.1, and then provides examples of misleading statements. SCEPR has concluded that Rule 7.1, with the guidance of new Comments [6] through [9], better addresses the issues.

B. Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules

Specific Advertising Rules: Specific rules for advertising are consolidated in Rule 7.2, similar to the current structure of Rule 1.8, which provides for specific conflict situations.

SCEPR recommends amendments to Rule 7.2(a) parallel to its recommendations for changes to Comments to Rule 7.1, specifically replacing the term "advertising" with "communication" and replacing the identification of specific methods of communication with a general statement that any media may be used.

Gifts for Recommendations: Rule 7.2(b) continues the existing prohibition against giving "anything of value" to someone for recommending a lawyer. New subparagraph (b)(5), however, contains an exception to the general prohibition. This subparagraph permits lawyers to give a nominal gift to thank the person who recommended the lawyer to the client. The new provision states that such a nominal gift is permissible only where it is not expected or received as payment for the recommendation. The new words "compensate" and "promise" emphasize these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e. not "compensation."

~~SCEPR's amendments to Rule 7.2(b) allow lawyers to give something "of value" to employees or lawyers in the same firm. As to lawyers, this new language in Rule 7.2(b) simply reflects the common and legitimate practice of rewarding lawyers in the same firm for generating business. This is not a change; it is a clarification of existing rules. As to employees,~~ SCEPR has concluded that lawyers ought to be permitted to give nominal gifts to non-lawyers, e.g. paralegals who may refer friends or family members to a firm, marketing personnel and others. Rule 5.4 continues to protect against any improper fee sharing. Rule 7.3 protects against solicitation by, for example, so-called "runners," which are also prohibited by other rules, e.g. Rule 8.4(a).

SCEPR recommends deleting the second sentence Rule 7.2(b)(2) because it is redundant. Comment [6] has the same language.

Specialization: Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and Comments. SCEPR acknowledges suggestions offered by the Standing Committee on Specialization, which shaped revisions to Rule 7.4. Based on these and other recommendations, the prohibition against claiming certification as a specialist is moved to new subdivision (c) of Rule 7.2 as a specific requirement. Amendments also clarify which entities qualify to certify or accredit lawyers. The remaining provisions of Rule 7.4 are moved to Comments [9] through [11] of Rule 7.2. Finally, Comment [9] adds guidance on the circumstances under which a lawyer might properly claim specialization by adding the phrase "based on the lawyer's experience, specialized training or education."

Contact Information: In provision 7.2(d) [formerly subdivision (c)] the term "office address" is changed to "contact information" to address technological advances on how a lawyer may be contacted and how advertising information may be presented. Examples of contact information are added in new Comment [12]. All "communications" about a lawyer's services must include the firm name (or lawyer's name) and some contact information (street address, telephone number, email, or website address).

Changes to the Comments: Statements in Comments [1] and [3] justifying lawyer advertising are deleted. Advertising is constitutionally protected speech and needs no additional justification. These Comments provide no additional guidance to lawyers.

New Comment [2] explains that the term "recommendations" does not include directories or other group advertising in which lawyers are listed by practice area.

New language in Comment [3] clarifies that lawyers who advertise on television and radio may compensate "station employees or spokespersons" as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with advertising that are listed in the Comment, i.e. "employees, agents and vendors who are engaged to provide marketing or client development services."

New Comment [4] explains what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive recommendations or to make future recommendations. These small and token gifts are not likely to result in the harms addressed by the rule: that recommendation sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more recommendations for which they might be paid.

Comment [6] continues to address lawyer referral services, which remain limited to qualified entities approved by an appropriate regulatory authority. Description of the ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous.

The last sentence in Comment [7] is deleted because it is identical to the second sentence in Comment [7] ("Legal services plans and lawyer referral services may communicate with the public, *but such communication must be in conformity with these Rules*.") (Emphasis added.).

C. Rule 7.3: Solicitation of Clients

The black letter of the current Rules does not define "solicitation;" the definition is contained in Comment [1]. For clarity, a definition is added as new paragraph (a). The definition of solicitation is adapted from Virginia's definition. A solicitation is:

> a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

Paragraph (b) continues to prohibit direct, in-person solicitation for pecuniary gain, but clarifies that the prohibition applies solely to live person-to-person contact. Comment

[2] provides examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication ~~such as Skype or FaceTime or other face-to-face communications~~. Language added to Comment [2] clarifies that a prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

The Rule no longer prohibits real-time electronic solicitation because real-time electronic communication includes texts and Tweets. These forms of communication are more like a written communication, which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter.

Exceptions to live person-to-person solicitation are slightly broadened in Rule 7.3(b)(2). Persons with whom a lawyer has a business relationship—in addition to or separate from a professional relationship—may be solicited because the potential for overreaching by the lawyer is reduced.

Exceptions to prohibited live person-to-person solicitation are slightly broadened in Rule 7.3(b)(3) to include "person who routinely uses for business purposes the type of legal services offered by the lawyer." ~~"experienced users of the type of legal services involved for business matters."~~ Similarly, Comment [5] to Rule 7.3 is amended to explain that the potential for overreaching, which justifies the prohibition against in-person solicitation, is unlikely to occur when the solicitation is directed toward experienced users of the legal services in a business matter.

The amendments retain Rule 7.3(c)(1) and (2), which prohibit solicitation of any kind when a target has made known his or her desire not to be solicited, or the solicitation involves coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations. Comment [6] identifies examples of persons who may be most vulnerable to coercion or duress, such as the elderly, those whose first language is not English, or the disabled.

After much discussion, SCEPR is recommending deletion of the requirement that targeted written solicitations be marked as "advertising material." Agreeing with the recommendation of the Standing Committee on Professionalism and the Standing Committee on Professional Discipline's suggestion to review both Oregon's rules and Washington State's proposed rules, which do not require such labeling, SCEPR has concluded that the requirement is no longer necessary to protect the public. Consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers due to the nature of the communications. SCEPR was presented with no evidence that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers. If the solicitation itself or its contents are

misleading, that harm can and will be addressed by Rule 7.1's prohibition against false and misleading advertising.

The statement that the rules do not prohibit communications about legal services authorized by law or by court order is moved from Comment [4] of Rule 7.2 to new paragraph (d) of Rule 7.3.

Amendments were made to Rule 7.3(e) to make the prohibition language consistent with the solicitation prohibition and to reflect the reality that prepaid and group legal service plans enroll members and sell subscriptions to wide range of groups. They do not engage in solicitation as defined by the Rules.

New Comment [8] to Rule 7.3 adds class action notices as an example of a communication that is authorized by law or court order.

IV. SCEPR's Process and Timetable

The amendments were developed during two years of intensive study by SCEPR, after SCEPR received a proposal from the Association of Professional Responsibility Lawyers (APRL) in 2016.[5] Throughout, SCEPR's process has been transparent, open, and welcoming of comments, suggestions, revisions, and discussion from all quarters of the ABA and the profession. SCEPR's work included the formation of a broad-based working group, posting drafts for comment on the website of the Center for Professional Responsibility, holding public forums at the Midyear Meetings in February 2017 and February 2018, conducting a webinar in March 2018, and engaging in extensive outreach seeking participation and feedback from ABA and state entities and individuals.[6]

A. Development of Proposals by the Association of Professional Responsibility Lawyers (APRL) – 2013 - 2016

In 2013, APRL created a Regulation of Lawyer Advertising Committee to analyze and study lawyer advertising rules. That committee studied the ABA Model Rules and various state approaches to regulating lawyer advertising and made recommendations aimed at bringing rationality and uniformity to the regulation of lawyer advertising and disciplinary enforcement. APRL's committee consisted of former and current bar regulators, law school professors, authors of treatises on the law of lawyering, and lawyer-experts in the field of professional responsibility and legal ethics. Liaisons to the

[5] APRL's April 26, 2016 Supplemental Report can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.authcheckdam.pdf.

[6] Written comments were received through the CPR website. SCEPR studied them all. Those comments are available here: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

committee from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel ("NOBC") provided valuable advice and comments.

The APRL committee obtained, with NOBC's assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules. That committee received survey responses from 34 of 51 U.S. jurisdictions.

APRL's 2014 survey of U.S. lawyer regulatory authorities showed:

- Complaints about lawyer advertising are rare;
- People who complain about lawyer advertising are predominantly other lawyers and not consumers;
- Most complaints are handled informally, even where there is a provable advertising rule violation;
- Few states engage in active monitoring of lawyer advertisements; and
- Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c).

APRL issued reports in June 2015 and April 2016[7] proposing amendments to Rules 7.1 through 7.5 to streamline the regulations while maintaining the enforceable standard of prohibiting false and misleading communications.

In September 2016 APRL requested that SCEPR consider its proposals for amendments to the Model Rules.

B. ABA Public Forum – February 2017

On February 3, 2017 SCEPR hosted a public forum at the ABA 2017 Midyear Meeting to receive comments about the APRL proposals. More than a dozen speakers testified, and written comments were collected from almost 20 groups and individuals.[8]

C. Working Group Meetings and Reports – 2017

In January 2017, SCEPR's then chair Myles Lynk appointed a working group to review the APRL proposals. The working group, chaired by SCEPR member Wendy Wen Yun Chang, included representatives from Center for Professional Responsibility ("CPR") committees: Client Protection, Ethics and Professional Responsibility, Professional Discipline, Professionalism, and Specialization. Liaisons from the National Conference of

[7] Links to both APRL reports are available at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html.

[8] Written submissions to SCEPR are available at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

Bar Presidents, the ABA Solo, Small Firm and General Practice Division, NOBC, and APRL were also appointed.

Chang provided SCEPR with two memoranda summarizing the various suggestions received for each advertising rule and, where applicable, identified recommendations from the working group.

D. SCEPR December 2017 Draft

After reviewing the Chang memoranda and other materials SCEPR drafted proposed amendments to Model Rules 7.1 through 7.5, and Model Rule 1.0 (terminology), which were presented to all ABA CPR Committees at the October 2017 Leadership Conference. SCEPR then further modified the proposed changes to the advertising rules based in part on the suggestions and comments of CPR Committees. In December 2017, SCEPR released for comment and circulated to ABA entities and outside groups a new Working Draft of proposed amendments to Model Rules 7.1-7.5.

E. ABA Public Forum – February 2018

In February 2018, the SCEPR hosted another public forum at the 2018 Midyear Meeting, to receive comments about the revised proposals.[9] The proposed amendments were also posted on the ABA CPR website and circulated to state bar representatives, NOBC, and APRL. Thirteen speakers appeared. Twenty-seven written comments were submitted. SCEPR carefully considered all comments and further modified its proposals.[10]

On March 28, 2018, SCEPR presented a free webinar to introduce and explain the Committee's revised recommendations. More than 100 people registered for the forum, and many favorable comments were received.[11]

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[9] Speakers included George Clark, President of APRL; Mark Tuft, Chair, APRL Subcommittee on Advertising; Charlie Garcia and Will Hornsby, ABA Division for Legal Services; Bruce Johnson; Arthur Lachman; Karen Gould, Executive Director of the Virginia State Bar; Dan Lear, AVVO; Matthew Driggs; and Elijah Marchbanks.

[10] All Comments can be found here: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html. The full transcript of the Public Forum can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/public_hearing_transcript_complete.authcheckdam.pdf.

[11] An MP3 recording of the webinar can be accessed here: https://www.americanbar.org/content/dam/aba/multimedia/professional_responsibility/advertising_rules_webinar.authcheckdam.mp3. A PowerPoint of the webinar is also available: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/webinar_advertising_powerpoint.authcheckdam.pdf.

V. The Background and History of Lawyer Advertising Rules Demonstrates Why the Proposed Rules are Timely and Necessary

A. 1908 – A Key Year in the Regulation of Lawyer Advertising

Prior to the ABA's adoption of the Canons of Professional Ethics in 1908, legal advertising was virtually unregulated. The 1908 Canons changed this landscape; the Canons contained a total ban on attorney advertising. This prohibition stemmed partially from an explosion in the size of the legal profession that resulted in aggressive attorney advertising, which was thought to diminish ethical standards and undermine the public's perception of lawyers.[12] This ban on attorney advertising remained for approximately six decades, until the Supreme Court's decision in 1977 in *Bates v. Arizona*.[13]

B. Attorney Advertising in the 20th Century

Bates established that lawyer advertising is commercial speech and entitled to First Amendment protection. But the Court also said that a state could prohibit false, deceptive, or misleading ads, and that other regulation may be permissible.

Three years later, in *Central Hudson,*[14] the Supreme Court explained that regulations on commercial speech must "directly advance the [legitimate] state interest involved" and "[i]f the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive."[15]

In the years that followed, the Supreme Court applied the *Central Hudson* test to strike down a number of regulations on attorney-advertising.[16] The Court reviewed issues such as the failure to adhere to a state "laundry list" of permitted content in direct mail advertisements,[17] a newspaper advertisement's use of a picture of a Dalkon Shield intrauterine device in a state that prohibited all illustrations,[18] and an attorney's letterhead that included his board certification in violation of prohibition against referencing expertise.[19] The court's decisions in these cases reinforced the holding in *Bates*: a state may not constitutionally prohibit commercial speech unless the regulation advances a

[12] Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 549 (1982). Mylene Brooks, *Lawyer Advertising: Is There Really A Problem*, 15 LOY. L.A. ENT. L. REV. 1, 6-9 (1994). *See also* APRL 2015 Report*, supra* note 2.
[13] *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[14] *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y.,* 447 U.S. 557 (1980).
[15] 447 U.S. at 564.
[16] *See* APRL 2015 Report*, supra* note 2, at 9-18, for a discussion of these cases.
[17] *In re* R.M.J.*,* 455 U.S. 191, 197 (1982).
[18] *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 647 (1985).
[19] *Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 93-94 (1990).

substantial state interest, and no less restrictive means exists to accomplish the state's goal.[20]

C. Solicitation

Unlike advertising, in-person solicitation is subject to heightened scrutiny. In *Ohralik v. Ohio State Bar Ass'n,* the Supreme Court upheld an Ohio regulation prohibiting lawyers from in-person solicitation for pecuniary gain. The Court declared: "[T]he State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in-person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."[21] The Court added: "It hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person."[22] The Court concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.[23]

Ohralik's blanket prohibition on in-person solicitation does not extend to targeted letters. The U.S. Supreme Court held in *Shapero v. Kentucky Bar Ass'n*,[24] that a state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. The Court concluded that targeted letters were comparable to print advertising, which can easily be ignored or discarded.

D. Commercial Speech in the Digital Age

The *Bates*-era cases preceded the advent of the Internet and social media, which have revolutionized attorney advertising and client solicitation. Attorneys are posting, blogging, and Tweeting at minimal cost. Their presence on websites, Facebook, LinkedIn, Twitter, and blogs increases exponentially each year. Attorneys are reaching out to a public that has also become social media savvy.

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[20] *In re R.M.J.,* 455 U.S. 191, 197 (1982); *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 647 (1985); *Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 93-94 (1990).

[21] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978).

[22] *Id.* at 464–65.

[23] *Id.* at 465-467.

[24] 486 U.S. 466 (1988). *But see*, *Florida Bar v. Went For It, Inc.,* 515 U.S. 618 (1995). The Supreme Court has upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days. The court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day "cooling off" period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing*. But see*, *Ficker v. Curran,* 119 F.3d 1150 (4th Cir. 1997), in which Maryland's 30-day ban on direct mail in traffic and criminal defense cases was found unconstitutional, distinguishing *Went for It*, because criminal and traffic defendants need legal representation, time is of the essence, privacy concerns are different, and criminal defendants enjoy a 6th amendment right to counsel.

More recent cases, while relying on the commercial speech doctrine, exemplify digital age facts. A 2010 case involves a law firm's challenge to New York's 2006 revised advertising rules, which prohibited the use of "the irrelevant attention-getting techniques unrelated to attorney competence, such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and… the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter."[25] The U.S. Court of Appeals for the Second Circuit found New York's regulation to be unconstitutional as a categorical ban on commercial speech. The speech was not likely to be misleading.[26] The court noted that prohibiting *potentially misleading* commercial speech might fail the *Central Hudson* test.[27] The court concluded that even assuming that New York could justify its regulations under the first three prongs of the *Central Hudson* test, an absolute prohibition generally fails the prong requiring that the regulation be narrowly fashioned.[28]

In 2011, the Fifth Circuit reached a similar conclusion, ruling that many of Louisiana's 2009 revised attorney advertising regulations contained absolute prohibitions on commercial speech, rendering the regulations unconstitutional due to a failure to comply with the least restrictive means test in *Central Hudson*.[29] The Fifth Circuit applied the *Central Hudson* test to attorney advertising regulations.[30] Although paying homage to a state's substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied

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[25] *Alexander v. Cahill,* 598 F.3d 79, 84-86 (2d Cir. 2010). The court commented, "Moreover, the sorts of gimmicks that this rule appears designed to reach—such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as a matter of 'common sense'—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve 'important communicative functions: [they] attract [ ] the attention of the audience to the advertiser's message, and [they] may also serve to impart information directly.'" (Citations omitted.).

[26] *Alexander v. Cahill,* 598 F.3d 79, at 96.

[27] *Id.*

[28] *Id.* Note that the court did uphold the moratorium provisions that prevent lawyers from contacting accident victims for a certain period of time.

[29] *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.,* 632 F.3d 212, 229 (5th Cir. 2011). Note that the court did uphold the regulations that prohibited promising results, that prohibited use of monikers or trade names that implied a promise of success, and that required disclaimers on advertisements that portrayed scenes that were not actual or portrayed clients who were not actual clients. The court distinguished its holding from New York's in *Cahill* by indicating that the Bar had produced evidence in the form of survey results that supported the requirement that the regulation materially advanced the government's interest in protecting the public.

[30] *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

on the Supreme Court's decision in *Zauderer* to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.[31]

> [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.[32]

Florida also revised its attorney advertising rules in light of the digital age evolution of attorney advertising and the commercial speech doctrine. Nonetheless, some of Florida's rules and related guidelines have failed constitutional challenges. For example, in *Rubenstein v. Florida Bar* the Eleventh Circuit declared Florida Bar's prohibition on advertising of past results to be unconstitutional because the guidelines prohibited any such advertising on indoor and outdoor displays, television, or radio.[33] The state's underlying regulatory premise was that these "specific media . . . present too high a risk of being misleading." This total ban on commercial speech again did not survive constitutional scrutiny.[34]

Finally, in *Searcy v. Florida Bar,* a federal court enjoined The Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law.[35] The Searcy law firm challenged the regulation as a blanket prohibition on commercial speech, arguing board certification is not available in all areas of practice, including the firm's primary mass torts area of expertise.

VII. Conclusion

Trends in the profession, the current needs of clients, new technology, increased competition, and the history and law of lawyer advertising all demonstrate that the current patchwork of complex and burdensome lawyer advertising rules is outdated for the 21st Century. SCEPR's proposed amendments improve Model Rules 7.1 through 7.5 by responding to these developments. Once amended, the Rules will better serve the bar and the public by expanding opportunities for lawyers to use modern technology to advertise their services, increasing the public's access to accurate information about the availability of legal services, continue the prohibition against the use of false and misleading communications, and protect the public by focusing the resources of

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[31] *Id.* at 220.
[32] *Id*. citing *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 648 (1985).
[33] *Rubenstein v. Fla. Bar,* 72 F. Supp. 3d 1298 (S.D. Fla. 2014).
[34] *Id.* at 1312.
[35] *Searcy v. Fla. Bar,* 140 F. Supp. 3d 1290, 1299 (N.D. Fla. 2015). Summary Judgment Order available at: http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E8E7FDDE9DBB8DE385257ED5004ABB95/$FILE/Searcy%20Order%20on%20Merits.pdf?OpenElement.

regulators on truly harmful conduct. The House of Delegates should proudly adopt these amendments.

Respectfully submitted,

Barbara S. Gillers, Chair
Chair, Standing Committee on Ethics and Professional Responsibility
August, 2018

REVISED 101

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Barbara S. Gillers, Chair

1. Summary of Resolution. The SCEPR recommends amendments to Model Rules 7.1 through 7.5 and their related Comments. These amendments:

- Streamline and simplify the rules while adhering to constitutional limitations on restricting commercial speech, protecting the public, and permitting lawyers to use new technologies to inform consumers accurately and efficiently about the availability of legal services.

- Combine the provisions on false and misleading communications into Rule 7.1 and its Comments. The black letter of Rule 7.1 remains unchanged. Provisions of Rule 7.5, which largely relate to misleading communications, are moved into Comments to Rule 7.1.

- Consolidate specific rules for advertising into Rule 7.2, change "office address" to "contact information" (to accommodate technological advances) and delete unrelated or superfluous provisions. Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and its Comments. Lawyer referral services remain limited to qualified entities approved by an appropriate regulatory authority.

- Add a new subparagraph to Rule 7.2(b) as an exception to the general provision against paying for recommendations. The new provision would permit only nominal "thank you" gifts and contains other restrictions.

- Define solicitation as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter." Live person-to-person solicitation is prohibited. This includes in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication ~~such as Skype or FaceTime~~.

- Broaden slightly the exceptions in Rule 7.3(b)(2) and (3) to permit live person-to-person solicitation of routine ~~"experienced~~ users of the type of legal services involved for business matters,~~"~~ and of "persons with whom a lawyer has a business relationship". Additional Comments offers guidance on the new terms.

- Eliminate the requirement to label targeted mailings as "Advertising", but prohibit targeted mailings that are misleading, involve coercion, duress, or harassment, or

where the target of the solicitation has made known to the lawyer a desire not to be solicited.

2. Approval by Submitting Entity

The SCEPR approved this recommendation on April 11, 2018.

3. Has this or a similar Resolution been submitted to the House or Board previously?

Yes. All amendments to the ABA Model Rules of Professional Conduct must be approved by the House of Delegates.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

Adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct. Goal II of the Association—to improve our profession by promoting ethical conduct—would be advanced by the adoption of this resolution.

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation (if applicable).

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Professional Responsibility will publish amendments to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies that are adopted by the House of Delegates.

8. Cost to the Association (both indirect and direct costs):

None.

9. Disclosure of interest:

N/A.

10. Referrals.

In February 2017, SCEPR hosted a public forum when it received from the Association of Professional Responsibility Lawyers (APRL) a proposal to amend the lawyer advertising rules. Invitations to attend and comment were extended to ABA entities including:

Bar Activities and Services
Client Protection
Delivery of Legal Services
Election Law
Group and Prepaid Legal Services
Lawyers Referral and Information Services
Lawyers' Professional Liability
Legal Aid and Indigent Defendants
Pro Bono and Public Service
Professional Discipline
Professionalism
Public Education
Specialization
Technology and Information Services
Bioethics and the Law
Commission on Disability Rights
Commission on Domestic and Sexual Violence
Hispanic Legal Rights and Responsibilities
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Law and Aging
Commission on Lawyer Assistance Programs
Center for Racial and Ethnic Diversity
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Administrative Law and Regulatory Practice
Antitrust Law
Business Law Section
Civil Rights and Social Justice
Criminal Justice Section
Section of Dispute Resolution
Section of Environment, Energy and Resources
Section of Family Law
Government and Public Sector Lawyers Division
Health Law Section
Infrastructure and Regulated Industries Section
Intellectual Property Law
Section of International Law
Judicial Division
Labor and Employment Law

Law Practice Division
Law Student Division
Section of Litigation
Section of Public Contract Law
Real Property, Trust and Estate Law
Science and Technology Law
State and Local Govt. Law
Section of Taxation
TTIPS
YLD
Forum on Communications Law
Forum on Construction Law
Forum on Entertainment and Sports Industries
Franchising
Solo Small Firm GP

In December 2017, SCEPR released a Working Draft of its proposal to amend the Model Rules regulating lawyer advertising. Information released also included instructions on how to comment in writing and about the February 2018 public forum the Committee was to host. This was emailed to the state bar associations, state disciplinary agencies and the ethics committees of the following ABA entities:

Antitrust Law
Business Law
Criminal Justice
Dispute Resolution
Environment, Energy and Resources
Family Law
Government and Public Sector Lawyers Division
Health Law
Intellectual Property
International Law
Judicial Division
Labor and Employment Law
Law Practice Division
Litigation
Real Property, Trust and Estate Law
Senior Lawyers
Solo, Small Firm, and General Practice
State and Local Govt. Law
Tort Trial and Insurance Practice
Young Lawyers Division

SCEPR also made its work available to the press and the public. Many news articles about its work appeared in the Lawyers' Manual on Professional Conduct, the ABA Journal, and other legal news outlets.

In February 2018, SCEPR hosted a Public Forum at the Midyear Meeting in Vancouver. More than 50 people attended, many spoke, and many written comments were received. A transcript of the proceedings and all the Comments were posted on the Committee's website.

In March 2018, SCEPR hosted a free webinar on the revisions it made to its proposal to amend the Model Rules. Information was emailed to members of the ABA House of Delegates, state bars, state regulators, and other groups.

11. Contact Name and Address Information. (Prior to the meeting contact person information.)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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REVISED 101

EXECUTIVE SUMMARY

1. Summary of Resolution.

The Resolution proposes changes to Model Rules 7.1 through 7.5, known as the lawyer advertising rules. The changes highlight the American Bar Association's long-standing leadership in promulgating rules for the professional conduct of lawyers generally, and in the rules governing lawyer advertising in particular.

A dizzying number of state variations in the rules governing lawyer advertising exist. There are vast departures from the Model Rules and numerous differences between jurisdictions. These differences cause compliance confusion among intra-state and interstate lawyers and firms, time-consuming and expensive litigation, and enforcement uncertainties for bar regulators. At the same time, changes in the law on commercial speech, trends in the profession including increased cross-border practice and intensified competition from inside and outside the profession, and technological advances demand greater uniformity, more simplification, and focused enforcement.

As amended the rules will provide lawyers and regulators nationwide with models that protect clients from false and misleading advertising, free lawyers to use expanding and innovative technologies for advertising, and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

2. Summary of the issues which the Resolution addresses.

The Resolution addresses at least five issues. First, the Resolution addresses the overwhelming variation in the rules governing lawyer advertising by promoting simplified, targeted, and more uniform regulation in this area. Second, the Resolution addresses changes in the profession resulting from increased competition from inside and outside the profession and from increased cross-border practice. Lawyers who serve clients across jurisdictions and clients who need service across jurisdictions will benefit from the proposed changes. Third, the Resolution frees bar regulators to focus on truly harmful conduct: advertising that is misleading, harassing, and coercive. Fourth, the Resolution will increase access to legal services by freeing lawyers and clients to connect via ever-expanding technologies. Finally, the Resolution responds to developments in First Amendment law governing commercial speech and antitrust concerns.

3. An explanation of how the proposed policy position will address the issue.

At least three policies inform the Resolution. First, lawyers and clients should be free to use advancing technology to provide the public with greater access to legal services. Second, lawyer advertising rules should focus on truly harmful conduct: false, deceptive,

and misleading statements, harassment, coercion, and invasions of privacy, freeing lawyers of unnecessary restrictions. Finally, bar regulators should be able to concentrate their limited enforcement resources on truly harmful conduct.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.

Minority opposition has been received from two state bar associations: the Illinois State Bar Association and the New Jersey State Bar Association. There was also opposition, but only on two amendments, from the Connecticut Bar Association Standing Committee on Professional Ethics (the "Connecticut Ethics Committee"). The two amendments opposed by the Connecticut Ethics Committee are: (i) eliminating the labeling requirement and (ii) permitting nominal gifts for recommendations.

That said, proposals to change the Model Rules of Professional Conduct typically generate diverse comments rooted in dissimilar philosophical and drafting approaches. The comments received by SCEPR throughout this process followed that pattern; they reflected divergent approaches toward lawyer advertising. Generally, however, the minority views fell into two categories.

One group of minority views argued that SCEPR's proposals do not remove enough restrictions on lawyer communications with the public regarding legal services and the availability of legal services. In this group are states and individuals—within and outside the ABA—who argue that the Model Rules should prohibit only false or misleading communications.

The other group thought the opposite was true—that SCEPR's proposals went too far in lifting regulatory constraints on lawyers. In this group are a handful of individuals and state bar associations that oppose, for example, (i) lifting limitations on communicating with experienced users of legal services in business matters, (ii) permitting nominal gifts for recommendations, and (iii) removing the labelling requirement on targeted mail. Some of these commenters also opposed the simple restructuring of current provisions on firm names and claims about specialization.

SCEPR considered all of these, as well as other comments. After significant study, debate, deliberation, and work, SCEPR concluded that its proposals represent the right mix of regulations to protect the public from false, misleading, and harassing conduct while freeing lawyers to use innovative technologies to communicate accurate information about the availability of legal services, enabling clients to find lawyers using those technologies, and focusing regulators on truly harmful conduct.