

By SUSAN HUMISTON

Congressional interest in lawyer advertising

I did not expect to receive letters from Congress when I was appointed as director of the Office of Lawyers Professional Responsibility, but that is what my mail contained on March 10, 2017. Congressman Bob Goodlatte (R-Va.), chair of the U.S. House of Representatives Committee on the Judiciary, wrote to me and all other lawyer regulation offices throughout the country on the subject of lawyer advertising. The letter begins, “I write to you to take immediate action to enhance the veracity of attorney advertising.” Rep. Goodlatte’s specific concern, apparently raised initially by the American Medical Association in June 2016, is attorney commercials “which may cause patients to discontinue medically necessary medications,” and advocates a requirement that such commercials contain an “appropriate warning that patients should not discontinue medications without seeking the advice of their physician.”

The letter goes on to describe specific commercials, including one relating to the drugs Pradaxa and Xarelto, which

apparently directs individuals to call the law firm at 1-800-BAD-DRUG. Not mentioned in Rep. Goodlatte’s letter—but easily discovered through a web search—is the fact that www.1800baddrug.com is an alias URL that takes you to the website for a Texas law firm. The letter is concerned with the apparent fear-mongering in these commercials, and it notes that deadly consequences can occur from “deceptive

advertisements” if patients stop taking medically necessary medications. Rep. Goodlatte offered a specific request:

The legal profession, which prides itself on the ability to self-regulate, should consider immediately adopting common sense reforms that require legal advertising to contain a clear and conspicuous admonition to patients not to discontinue medication without consulting their physician. It should also consider reminding patients that the drugs are approved by the FDA and that doctors prescribe these medications because of the overwhelming health benefits from these drugs.

Rep. Goodlatte’s request has been referred to the Lawyer Professional Responsibility Board’s Rules Committee and Minnesota State Bar Association’s Rules of Professional Conduct Committee for their consideration, and we will see where that leads. It did get me thinking about lawyer advertising, however—something that the American Bar Association (ABA) is also reviewing.

Current efforts to amend the rules

At the request of the Association of Professional Responsibility Lawyers (APRL), the ABA Standing Committee on Ethics and Professional Responsibility is considering potential changes to the model rules on lawyer advertising. The proposed changes involve an essential rewrite of the current model rules by limiting and merging Rules 7.2 and 7.3 and deleting Rules 7.4 and 7.5.¹ No amendments are recommended to the cornerstone rule on communications concerning a lawyer’s services, Rule 7.1, but the comments to Rule 7.1 would be expanded to pick up portions of Rules 7.4 and 7.5. The proposed changes are in the review and comment stage and are apparently a “work in process,” with the earliest anticipated action in May 2018. Minnesota largely follows the model rules, so it will be interesting to see where this leads as well.

Minnesota rules on lawyer advertising

Given the current interest in changes and additions to lawyer advertising rules, this is a good time to review the current state of Minnesota’s Rules of Professional Conduct. Under the broad heading “Information about Legal Services” falls several rules:

- Rule 7.1: Communications Concerning Lawyer’s Services;
- Rule 7.2: Advertising;
- Rule 7.3: Solicitation of Clients;
- Rule 7.4: Communication of Fields of Practice and Certification;
- Rule 7.5: Firm Names and Letterheads.

The cardinal rule is that “[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.”² This rule governs all communications about a lawyer’s services, not just advertising.³ The rule’s comments note that truthful statements can be misleading if facts are omitted, or may impermissibly create unjustified expectations about results.⁴

A lawyer may not state or imply that the lawyer is a specialist or certified as a specialist in a particular field of law except where the lawyer clearly identifies the name of the certifying organization.



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Professional Responsibility

Lawyer advertising is expressly permitted by rule, subject to Rule 7.1 (false or misleading) and Rule 7.3 (solicitation of clients).⁵ Lawyers may not give anything of value to a person recommending their services except under specified circumstances,⁶ and any advertisement must include the name of at least one lawyer responsible for its content.⁷

The rules treat advertisements aimed at the public in general differently from direct communications with specific individuals who may need a lawyer.⁸ Specifically, a lawyer cannot solicit work in person or by phone unless the person contacted is a lawyer, family member, close personal friend, or there is a prior professional relationship.⁹ Lawyers may otherwise solicit work by written, recorded or electronic communication, but only if it is clearly and conspicuously marked "Advertising Material" on the outside of the envelope and on the communication itself—unless, again, the person is a lawyer, family member, close personal friend, or there is a prior professional relationship.¹⁰

A lawyer may not state or imply that the lawyer is a specialist or certified as a specialist in a particular field of

law except where the lawyer clearly identifies the name of the certifying organization, and the certifying agency is accredited by the Minnesota Board of Legal Certification (BLC). If the latter is not the case, the communication must note the agency is not accredited by the BLC.¹¹

Finally, the rules prohibit trade names that imply a connection with a governmental agency or public or charitable legal services organization.¹² Lawyers may not state or imply that they are in a partnership or other organization unless that is a fact,¹³ or use the name of a lawyer holding public office while the lawyer is not actively and regularly practicing with the firm.¹⁴ And the use of the word "Associates" or the phrase "& Associates" in a name can only be used if there are at least two or three licensed attorneys in the firm, respectively.¹⁵

In 2016, there were five admonitions that involved violations of one of the above-referenced advertising rules, and nine public cases that involved Rule 7.1 violations. About 5 percent of advisory opinion calls in 2016 involved questions relating to one of the "seven series" rules. If you are advertising your services

and soliciting clients, which I know you are, you are well-served to take a few minutes to review the current rules on advertising. It will be interesting to see where the profession moves next, given the competing interest of protection of the public, constitutional commercial speech, and the ever-evolving business orientation of the legal profession. ▲

Notes

¹ www.americanbar.org/publications/youraba/2017/march-2017/aba-standing-committee-on-ethics-and-professional-responsibility

² Rule 7.1, Minnesota Rules of Professional Conduct (MRPC).

³ Comment [1], Rule 7.1, MRPC.

⁴ Comment [2], Comment [3], Rule 7.1, MRPC.

⁵ Rule 7.2(a), MRPC.

⁶ Rule 7.2(b), MRPC.

⁷ Rule 7.2(c), MRPC.

⁸ Rule 7.3, MRPC.

⁹ Rule 7.3(a), MRPC.

¹⁰ Rule 7.3(c), MRPC.

¹¹ Rule 7.4(d), MRPC.

¹² Rule 7.5(a), MRPC.

¹³ Rule 7.5(d), MRPC.

¹⁴ Rule 7.5(c), MRPC.

¹⁵ LPRB Opinion 20 (2009).



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