

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD  
MEETING AGENDA**

Friday, January 28, 2022 – 1:00 p.m.

Zoom meeting (invitation to follow for members)

**If you are not a member of the Board and wish to attend the virtual meeting, call the  
Office at 651-296-3952**

1. Approval of Minutes of October 29, 2021, Lawyers Board Meeting (Attachment 1)
2. Board Member Updates
  - a. Resignation of Susan T. Stahl Slieter – November 20, 2021
  - b. Reappointment of Returning Board Members—Jeanette Boerner, Landon Ascherman, Katherine Brown Holmen, Tommy Krause, Kristi Paulson, Bill Pentelovitch and Bruce Williams (Attachment 2)
  - c. Board Vacancies (one public member and one lawyer member)—Posting closes January 28, 2022
  - d. Updated Panel and Committee Assignments—TBD
3. COVID-19 Update
4. Committee Updates:
  - a. Rules and Opinions Committee
    - (i) Comments Received and Public Hearing on Petitions to Amend Rules 7 MRPC and 20 RLPR – January 26, 2022 (Attachment 3)
    - (ii) MSBA Parental Leave Resolution
    - (iii) Model Rules 3.8(g) & Rule 3.8(h)
  - b. Training, Education and Outreach Committee
    - (i) DEC Chairs Symposium – May 13, 2022
    - (ii) Annual Seminar—September 16, 2022
    - (iii) Panel Manual and Board Training Manual Updates
  - c. Equity, Equality, and Inclusion Committee
5. Bar Exam Work Group
6. Director’s Report: (Attachment 4)
  - a. Statistics
  - b. Office Updates
7. New Business

- a. ABA Consultation
- 8. Quarterly Closed Session
- 9. Next Meeting, April 29, 2022

If you have a disability and anticipate needing an accommodation, please contact Susan Humiston at [lprada@courts.state.mn.us](mailto:lprada@courts.state.mn.us) or at 651-296-3952. All requests for accommodation will be given due consideration and may require an interactive process between the requestor and the Office of Lawyers Professional Responsibility to determine the best course of action. If you believe you have been excluded from participating in, or denied benefits of, any Office of Lawyers Professional Responsibility services because of a disability, please visit [www.mncourts.gov/ADAAccommodation.aspx](http://www.mncourts.gov/ADAAccommodation.aspx) for information on how to submit an ADA Grievance form.

**MINUTES OF THE 196<sup>th</sup> MEETING OF THE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

**October 29, 2021**

The 196<sup>th</sup> meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, October 29, 2021, electronically via Zoom. Present were: Board Chair Jeanette Boerner, and Board Members Landon J. Ascherman, Benjamin J. Butler, Daniel J. Cragg, Michael Friedman, Peter Ivy, Virginia Klevorn, Tommy A. Krause, Mark Lanterman, Paul J. Lehman, Kristi J. Paulson, William Z. Pentelovitch, Andrew N. Rhoades, Susan C. Rhode, Geri Sjoquist, Mary L. Waldkirch Tilley, Antoinette M. Watkins, Bruce R. Williams, Allan Witz, and Julian C. Zebot. Present from the Director's Office were: Director Susan M. Humiston and Managing Attorneys Jennifer S. Bovitz and Binh T. Tuong, Assistant Directors Pa Nhia Vang and Taylor Mehr, Senior Assistant Directors Krista Barrie and Jennifer Peterson. Also present were Jeff Meitrodt, Jodi Boyne and Nicholas Ryan.

Jeff Meitrodt requested permission to record the meeting. Susan Humiston deferred to Jodi Boyne, who confirmed recording is allowed for personal use but not for distribution.

Jeanette Boerner began by thanking her fellow Board members and acknowledging the significant amount of work that is required of Board members. Ms. Boerner encouraged Board members to use their cameras during the meeting. Ms. Boerner also outlined if there is a motion requiring a vote, the no vote will be taken first.

**1. APPROVAL OF MINUTES OF JUNE 18, 2021, LAWYERS BOARD MEETING (ATTACHMENT 1).**

A motion and second were made to approve the minutes of the June 18, 2021, Board meeting which was unanimously approved.

New OLPR staff were present and introduced themselves as follows:

Krista Barrie, Senior Assistant Director: Ms. Barrie explained that she is starting her second week, has a background in criminal prosecution and civil litigation and is excited to be here engaged in this important work.

Taylor Mehr, Assistant Director: Ms. Mehr stated that she started in July and came from Chisago County where she was doing child protection and civil commitments. Ms. Mehr explained that she was on jury duty for the last week, is interested in ethics work, and thanks the Board for having us.

Pa Nhia Vang, Assistant Director: Ms. Vang joined the OLPR in August and stated that prior to that she was at Jones Day where her focus was litigation. Ms. Vang explained that she wanted to learn new skills. Ms. Vang also explained that her family has been touched by attorneys who have not been good attorneys and she believes it is important to protect her community from bad attorneys.

Jennifer Peterson, Senior Assistant Director: Ms. Peterson has a background as a prosecutor and public defender as well as a family law practitioner. Ms. Peterson explained that she wanted a change, that she is learning about all areas of law, and is learning how to be a good writer.

Ms. Boerner provided a welcome to all.

2. **OFFICE AND BOARD COVID-19 RESPONSE.**

a. **Hybrid Work and Vaccine Verification Program.**

Ms. Humiston detailed that the Office has fully moved into a hybrid work environment and that there is an uptick in public visits to the office. Ms. Humiston explained that the Branch has not provided full guidance on a return to work timeline, but that we are operating where most people work two days in the office, noting that some individuals are still fully remote and some positions require some personnel to be fully in person.

Ms. Humiston also noted that the Branch has put forward a vaccine verification participation program with testing protocols based on responses to the vaccine verification.

b. **Order Governing the Continuing Operations of the Minnesota Judicial Branch, Updated Preparedness Plan and Court FAQ (Attachment 2).**

Ms. Humiston explained that the order covers work and meetings, and provides Referees the discretion for remote hearings or in person hearings. Ms. Humiston also added that if Panels can comply with the updated safety plan, it is up to Panels how to conduct Panel matters. Ms. Humiston noted that all have been doing a good job of meeting the needs of each case.

Ms. Humiston also added that there was a discussion at the Executive Committee meeting that Board meetings fall under the plan which requires remote meetings.

Ms. Boerner added that it was also discussed that Panel Chairs make decisions about Panel hearings. With regard to the January Board meeting, we will not know whether it is remote until we get closer.

**3. BAR EXAM WORK GROUP.**

Ms. Humiston updated that Emily Eschweiler and Justice Anderson have spoken about this publicly. The work group centers around the debate about the efficacy of the bar exam and whether it is an appropriate gatekeeper. Ms. Humiston also highlighted that there is no national uniformity. Ms. Humiston added that NCBE plans to revise the bar exam. Potential questions are does it test core competency, is there a correlation to discipline and public protection, and what should the threshold be for bar admittance?

Ms. Humiston noted that currently Minnesota follows the UBE. The MSBA has filed a request to appoint a task force to look at the same topic with suggested stakeholders. However the Court decides to move forward, the Board and Office are identified stakeholders.

Part of the work being done is looking at information provided by our Office relating to discipline and any correlation to bar passage or scores and discipline. Ms. Humiston added there is more consistency where there were character and fitness flags, although there are a lot of questions about statistical validity in that area. Ms. Humiston commented that she is glad BLE is taking into consideration issues of discipline into the mix, and pleased they are taking a fresh look at the bar exam.

Ms. Boerner commented that she echoed Ms. Humiston's enthusiasm noting that Julian Zebot and Andrew Rhoades will be participating in the working group from the Board.

Mr. Zebot commented that he is honored to be a member of the working group, and encourage others to contact him with feedback.

**4. COMMITTEE UPDATES:**

a. Update on Committee Restructure (Attachment 3).

Ms. Boerner noted that she made some committee changes, noting that previously there were four committees. Ms. Boerner explained that the Opinions Committee had less active work, and the Rules Committee was working all the time, thus it made sense to combine those committees. The Training, Education

and Outreach Committee works with the OLPR and will also work on external training and outreach (this replaces the formerly titled DEC Committee). Peter Ivy's Rules Committee which will also include the Opinions Committee. Michael Friedman is chairing the EEI Committee, focusing on reducing disparities in the disciplinary system.

b. Rules and Opinions Committee - Peter Ivy.

Mr. Ivy noted that all meetings are publicized on the internal Board calendar, and all Board member are welcome to attend and this leads to a more robust discussion.

- (i) Advertising and Confidentiality Rule Change Petitions Public Comment Order (Attachment 4).

Rule 20 and Rule 7 petitions are with the Court. Comments are due in December. A hearing will be scheduled in January. Mr. Ivy will designate someone to appear in support of the petitions.

- (ii) Info Item: MSBA Resolution for Personal Leave (Attachment 5).

Mr. Ivy reported that the Committee had a concern that the resolution puts the interests of the lawyer before the interest of the client. The Committee considered that the proposal was expansive with potential of impacting clients and Rules 1.3, 3.2, and 3.3, MRPC. The Committee felt the proposed policy was open ended and did not want to see a second or third chair take a leave and delay a trial. According to the working group, the drafting incorporated a rule that would be applicable to all practice groups, however, they did not note right to speedy omnibus hearing and did not note 611A rights of victims to request a speedy trial and those obligations on prosecutors to comply with those requests. Concern was also raised regarding Rule 9, Minn. R. Crim. P., and *Brady/Giglio* issues with a potential stalling of discovery. Mr. Ivy noted that the MSBA proposal breaks with other proposals that provide a maximum leave. Mr. Ivy noted that the MSBA asserts the proposal will not be ripe for abuse.

The MSBA proposal has passed general assembly. Mr. Ivy reported that the Committee believes when the petition is filed, the Committee will look at it again. Mr. Ivy invites others to join the Rules

Committee. Mr. Ivy commented that parental/family leave is important, but that balance is important and the issue requires more analysis.

Daniel Cragg commented that his recollection is the Committee voted to approve an objection to the proposal.

Landon Ascherman commented that it is the first time to look at the working group's proposal and asked if there are any suggestions about how it could be met with approval?

Virginia Klevorn commented that she shares some of Mr. Ascherman's concerns and encourages our group to look at legislation that has been at the Capitol noting this is a huge topic and we also have to address the aging population.

Mr. Ivy noted that we want to get a meeting in December with the MSBA and encourage anyone to participate. Mr. Ivy noted that we cannot support the resolution in its current form.

Mr. Cragg noted the MSBA general assembly passed the resolution and it is unclear when they will file a petition with the Supreme Court. Mr. Cragg noted it seems to take a long time to file and we are late in the process. Mr. Cragg stated there is no one at the MSBA who can change the proposal since it has passed the assembly.

Mr. Zebot added that while he understands the concerns, he was one of the dissenting votes. Mr. Zebot noted that he read the proposal as being subject to other substantive provisions. Mr. Zebot added that the proposal does not offer any guidance on how to request a continuance or how to reconcile it with other rules. Mr. Zebot stated he is not in favor of throwing the baby out with bath water.

Michael Friedman noted that he did not have the benefit of being at the Committee meeting. Mr. Friedman noted that if leave was subject to one's own client, an adversary could make an argument and it does not look so great for us to be jumping into opposition. Mr. Friedman asked where could this proposal lead to conflicts?

Benjamin Butler noted he is on the Rules Committee and voted to oppose the resolution. Mr. Butler noted the proposed rules are automatic and remove all discretion from the trial judge and also remove applicable appellate rules. Mr. Butler explained that the proposal allows one

attorney to drive litigation and that troubled him. Mr. Butler noted the proposal does not work with current rules, these are mandatory rules as long as the proper paperwork is filed, with a continuance automatically being granted. There is no check for the other side, which removes the court.

Ms. Boerner asked, what is the actual time frame for comment?

Mr. Cragg replied that if it is filed, it will be put out for public comment. Mr. Cragg added according to one task force member, designed to be used because a third chair had a life event. The task force member who was a judge noted it was about changing the culture. Mr. Cragg replied that he felt we should not be changing culture, we should be focused on clients.

Mr. Friedman asked whether the exemption in (g) satisfies the issue you are worried about?

Mr. Ascherman noted that his recollection is different than Mr. Cragg's and that the intent was not for chairs down the line to impact scheduling.

William Pentelovitch stated that he read the proposal over a few days ago and has been trying cases for over 48 years. Mr. Pentelovitch noted that the proposal is taking away what little discretion exists with the court. Mr. Pentelovitch noted that rarely are continuances not granted. Mr. Pentelovitch asked why the MSBA felt like there was a need for this?

Mr. Ivy noted there is a time crunch, but he is happy to invite an MSBA representative to address the issue.

A motion was made to oppose the MSBA proposal in its current form. Bruce Williams seconded.

Michael Friedman, Paul Lehman, Landon Ascherman and Julian Zebot opposed.

Kristi Paulson and Geri Sjoquist abstained.

The motion passed.



(iii) Cryptocurrency

Mr. Ivy thanked Mr. Cragg who studied this issue in depth along with Mark Lanterman. Mr. Ivy noted that the goal is to provide notice to attorneys so they do not use cryptocurrency inappropriately; crypto is unique and transcends all borders. Mr. Ivy added that crypto is fast and secure like a credit card and added that El Salvador accepts crypto as a national currency. Mr. Ivy also added that cryptocurrency suffers from nebulous characteristics including its volatility. There are stable coins which are backed by hard currency. Mr. Ivy added that we need to determine whether it is currency or property. No Minnesota bank can accept cryptocurrency into an IOLTA. Mr. Ivy added that Nebraska treats cryptocurrency as property, then protections of Rule 1.8, MRPC, apply; however, then there are issues of non-reporting. Although these are interesting issues, Mr. Ivy reported that the Committee is recommending no action at this time.

(iv) Probable Cause

Mr. Ivy framed the issue as that some members wonder whether probable cause are all or nothing determinations. Mr. Ivy explained that district courts always discern probable cause between counts.

Mr. Ivy addressed Rule 9(j), RLPR, and made a motion to add: "in making probable cause determinations on multiple counts, the panel shall make independent probable cause determinations on each count."

Mr. Cragg seconded the motion.

Binh Tuong, OLPR, provided comments stating she was at the Rules Committee meeting, but was not as helpful as she could have been because she was sick. Ms. Tuong encouraged members to go back to the purpose of the proceedings and what is the purpose of the proceeding? Ms. Tuong noted the cases addressing bifurcation also get at the issue for right of appeal. Ms. Tuong noted referee trials can be appealed. Ms. Tuong asked whether this is a question of training or is a rule change needed?

Ms. Boerner asked of Ms. Tuong whether it is your position that you do not need the rule change or is your position the rule change makes it more murky?

Ms. Tuong replied that the rule already addresses it.

Mr. Butler stated he was not hearing a solid yes or no.

Ms. Humiston replied that the Panel Manual describes this procedure. Ms. Humiston also noted that she has not pulled all of the Rule 9, RLPR, cases, but in the Director's view, it is a count-by-count determination. Ms. Humiston noted the Director does not shy away from having probable cause for each count and added what people miss is that there is no mechanism in the rule for appeal when a count is dropped. Ms. Humiston noted that complainants have no transparency and they do not know how to challenge because they do not have access to what was filed. Ms. Humiston added that we are the only state which has contested probable cause proceedings. Also, Panels cannot separate discipline, one count public, one count private per the Court's case law. Ms. Humiston noted that these are very fair questions and we want to have correct framework and encourages more training, conversation and the Panel Manual update.

Mr. Cragg added that the rule is at best ambiguous, stating he does not know how you can read Rule 9 and come to a conclusion about what to do. Mr. Cragg added we should have the rule.

Ms. Klevorn commented that she is thinking about consistency, and the difference between may and shall and how we think that should be done.

Mr. Ascherman agrees with Mr. Cragg and Panels should have the opportunity to evaluate each count.

Ms. Humiston added that her proposal is that it is not ripe because there are a lot of changes to Rule 9 that should be considered, and would like to consider other changes together.

The question was called and the motion passed.

c. Training, Education and Outreach Committee - Allan Witz.

Mr. Witz noted there was a July meeting with the DEC Chairs and Erikka Ryan, Director of Diversity, Equity, and Inclusion, MSBA. Ms. Ryan also followed up and provided materials to promote diversity and inclusion including assessment materials and materials to conduct a SWOT analysis.

Mr. Witz asked Jennifer Bovitz to share a bit about this meeting. Ms. Bovitz added: Ms. Ryan met with the Committee. There was excellent turnout from the DEC Chairs – how to tackle diversity and inclusion with DEC's and with the discipline process in general. Among the recommendations are that we not jump immediately to recruiting but we must do an internal analysis and look at ourselves first. She shared those resources with OLPR management and forwarded to Nicole Frank for the EEI Committee to collaborate efforts. The Committee should work collaboratively to roll this out to Chairs. There is good engagement among DEC Chairs and we need to capitalize on it.

d. Equity, Equality, and Inclusion Committee-Michael Friedman

(i) Workplan and Priorities

Mr. Friedman reported that the Committee has monthly meetings for a duration of one hour with the next scheduled meeting on November 12, 2021, at noon.

Mr. Friedman added that the Committee is focusing on participation and data. In the area of participation there is going to be Board homework on the issue of individual reach out. The goal will be to develop a contact list of people/organizations to participate in the Board/System. There is not a need to list bar affinity organizations. The Committee also had a preliminary discussion about marketing/social media.

Mr. Friedman stated that the data discussion was very preliminary and added that Ms. Frank has been very helpful in identifying what is being collected already. One issue that is being considered is whether asking for data on complaint forms could have an impact on the process? The Committee does not want unintended consequences.

Mr. Friedman noted the California Bar has done work on examining whether the system has disparate impacts on respondents.

Mr. Friedman explained that training and public education - overlap with OLPR & Allan's Committee. One recommendation is whether there should be a more prominent presence of the OLPR on the new lawhelpmn website? Another area of inquiry is what kinds of training is available that relate to anti-bias?

Ms. Humiston added that on the data collection piece this issue has been presented in the listserv with all the other disciplinary chiefs. Ms. Humiston explained that Illinois is struggling with this and added that no one currently collects this data. Ms. Humiston noted this is an excellent question and it is timely to be thinking about how to accurately collect meaningful data.

Ms. Boerner added it would be nice to lead on this issue.

5. **ANNUAL SEMINAR VIDEO AND FEEDBACK (ATTACHMENT 6).**

Mr. Witz reported positive feedback on the Seminar noting it is included in the materials.

Ms. Humiston added that the Seminar video has been posted to the LPRB SharePoint site and noted there was robust attendance, and it will be available for lawyers to request on demand credit.

Ms. Paulson asked if there are any dates set yet for Symposium or Seminar in 2022?

Ms. Humiston replied not yet.

6. **PANEL ASSIGNMENT CHANGES (ATTACHMENT 7).**

Ms. Boerner explained that Panel assignment changes have occurred and that there is one current vacancy.

7. **DIRECTOR'S REPORT: (ATTACHMENT 8).**

a. **Statistics.**

Ms. Humiston congratulated Ms. Frank on her promotion to Senior Assistant Director, noting Ms. Frank is a valuable member in the Office, and has stretched in last year in trial work. With her promotion, Ms. Frank now participates in the advisory opinion ethics line, and has talked about how much she likes that part of the new role.

Ms. Humiston stated her next article will cover the Rule 7 and Rule 20 petitions in an effort to encourage comments. Ms. Humiston explained she has heard support for the proposal for a one-way communication to LCL. Ms. Humiston reminded Board members that Bench & Bar articles are included in Board materials and are on the website.

Ms. Humiston explained that Ms. Boerner is now sharing the Director's monthly report with everyone, which is also how it is distributed internally. In the last two months we have seen 100 or so new complaints and we are reaching pre-pandemic filings. This sustained amount over a couple of months felt notable as well as more challenging complaints.

Ms. Humiston noted there will be upgrades to the external public website - and encouraged any thoughts regarding the website.

Ms. Boerner added this is a great project for the Training, Education and Outreach Committee.

Ms. Humiston highlighted ABA Opinion 500 - relating to language access and what are the ethical and ADA requirements for providing client access to communication.

b. Office Updates.

Ms. Humiston requested that resumes provided be kept confidential and noted that she was proud of diversity in hiring in many areas.

Mr. Williams asked where Ms. Humiston was at with updates to the Panel Manual?

Ms. Humiston replied that she apologized for the delay and is working on getting it done. Ms. Humiston further noted she has a four-day trial and has been side-tracked.

Mr. Williams also asked about reported increase in advisory opinions - 301 more, specifically asking if this is more preventative and does it relate to complaints in an area?

Ms. Humiston noted that criminal law is the most complained about area, then family law, general litigation, and probate/real estate.

Ms. Humiston stated she does not have the sense that anyone is getting ahead of anything. If conduct has already occurred, the OLPR will not provide advice, but will help callers with the next step.

Ms. Klevorn stated she has been reviewing cases that are open for more than one year and looked at trends from 2017 to now. Ms. Klevorn asked where are we with efficiency now?

Ms. Humiston responded that there is a lot to that question and that we tend to focus on those cases that are over one year that are not charged out. Ms. Humiston stated that the Office has more public cases, although they are one year old, the question is how quickly are we getting it charged out or getting it to private disposition?

When addressing efficiency, Ms. Humiston stated we have had the most movement with efficiency with Ms. Tuong and Ms. Bovitz's input and work as Managing Attorneys in aligning priorities. Ms. Humiston added that the Office was able to absorb new hires because we have been able to align priorities but also noted it can be challenging for people. Ms. Humiston added the top number is not always most telling.

Ms. Klevorn responded that she also looked at that and found that in 2018 it was 9% and now it is 12% and stated it is really a flat line and stated that the Office is not making progress.

Ms. Humiston responded that not everyone is at 100% efficiency, but the majority are doing an excellent job noting that targets are set by individual case meetings and many are taking on a lot of stretch projects.

Ms. Humiston was also questioned about caseloads versus other priorities and how those priorities were being determined.

Ms. Humiston responded that the Office has been declining more CLEs than normal noting it is a bandwidth drain. Ms. Humiston added that case work is being prioritized along with the advisory opinion service which is not something to be compromised.

Geri Sjoquist stated that her major focus is on the ADA which has been largely ignored and asked if an opinion or article would be helpful? Ms. Sjoquist is interested in bringing this forward, noting it is a civil rights issue.

Ms. Boerner commented that she appreciates Ms. Sjoquist's advocacy in this area and views it as an opportunity for Ms. Sjoquist to participate with the EEI Committee.

Ms. Paulson commented that as LPRB members we can take an integral role in presenting at CLEs to assist the Office, and can help in other ways, noting she and Mr. Lanterman have presented recently.

8. **PROPOSED 2022 MEETING DATES (ATTACHMENT 9).**

The proposed meeting dates were disclosed at the last meeting. Ms. Klevorn moved to approve the meeting dates, which passed unanimously

9. **NEW BUSINESS.**

No new business was raised. A motion to adjourn the public portion of the meeting was made and passed.

10. **QUARTERLY CLOSED SESSION.**

11. **NEXT MEETING, JANUARY 28, 2022.**

Thereafter, the meeting adjourned.

Respectfully submitted,



Humiston, Susan  
Jan 21 2022 12:59 PM  
Susan M. Humiston  
Director

[Minutes are in draft form until approved by the Board at its next Board meeting.]

**FILED**

January 20, 2022

**OFFICE OF  
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042

**IN RE APPOINTMENTS TO THE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

ORDER

IT IS HEREBY ORDERED THAT:

1. Katherine Holmen, William Z. Pentelovitch, and Bruce R. Williams are re-appointed as attorney members of the Lawyers Professional Responsibility Board, each for a three-year term effective as of February 1, 2022, and expiring on January 31, 2025.

2. Landon J. Ascheman and Kristi J. Paulson Mingus, nominees of the Minnesota State Bar Association, are re-appointed as attorney members of the Lawyers Professional Responsibility Board for a three-year term effective as of February 1, 2022, and expiring on January 31, 2025.

3. Tommy A. Krause is re-appointed as a public member of the Lawyers Professional Responsibility Board for a three-year term effective as of February 1, 2022, and expiring on January 31, 2025.

Dated: January 20, 2022

BY THE COURT:



Lorie S. Gildea  
Chief Justice



**FILED**

June 17, 2021

**OFFICE OF  
APPELLATE COURTS**

**FILE NO. ADM10-8005**

**STATE OF MINNESOTA**

**IN SUPREME COURT**

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In Re Petition to Amend Rule 7 of the  
Minnesota Rules of Professional Conduct.  
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**PETITION OF THE LAWYERS  
PROFESSIONAL RESPONSIBILITY  
BOARD**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE  
STATE OF MINNESOTA:

Petitioners, Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (Director), respectfully request this Court to adopt the amendment to Rule 7, Minnesota Rules of Professional Conduct (MRPC), as set forth below. In support of this petition, petitioners would show the Court the following:

### **INTRODUCTION**

1. Petitioner LPRB is a Board established by this Court to oversee the lawyer discipline system. Petitioner Director is appointed by this Court to oversee the lawyer discipline system and seek enforcement of the MRPC.

2. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.

3. This Court has adopted the MRPC to establish standards of conduct for lawyers licensed to practice law in the State of Minnesota. The MRPC, as adopted by this Court in 1985, are based upon the Model Rules of Professional Conduct (Model

Rules) published by the American Bar Association (ABA), as adapted and modified by the Court to conform to Minnesota standards and practices.

4. From time to time, the ABA has amended its Model Rules to adapt them to changing conditions and expectations in society and in the practice of law. When it has done so, petitioner LPRB has studied the amendments through its committee, and made recommendations to this Court on whether, and in what form, the amendments to the Model Rules should be incorporated into the MRPC. Petitioners have petitioned this Court to amend the MRPC to conform to changes in the Model Rules in 2003 and 2014. This Court has also amended the MRPC from time-to-time for good cause shown.

5. For the reasons set forth below, petitioners request this Court adopt the proposed amendment to Rule 7, MRPC, and the Comments thereto, as set forth in Attachment A.

### **BACKGROUND**

6. In August 2018, the ABA amended Rule 7 of its Model Rules, which governs lawyer advertising and communications. The ABA significantly reworked Rule 7 of the Model Rules, eliminating what it believed were unnecessary provisions, and addressing changes in technology and the legal profession since the rule was first adopted. Following the ABA's amendments to Rule 7 of the Model Rules, petitioner LPRB's Rules Committee (LPRB Rules Committee) studied the amendments to determine whether to recommend that the LPRB petition the Court to amend Rule 7, MRPC, to conform to the ABA's amendments to Rule 7. The LPRB Rules Committee also considered the benefits of adopting Rule 7 of the Model Rules in its entirety, including any provisions not previously adopted by this Court when it adopted Rule 7, MRPC.

7. The LPRB Rules Committee also worked closely with the Minnesota State Bar Association (MSBA) and its Standing Committee on the Rules of Professional Conduct in considering adoption of Rule 7 of the Model Rules. Based on its review of

the ABA amended changes to Rule 7 of the Model Rules, the Rules Committee and the MSBA determined that adoption of Rule 7 of the Model Rules would benefit the legal community by providing uniformity and clarity to Minnesota attorneys. The LPRB Rules Committee recommended that the LPRB petition the Court to adopt the amended Rule 7 and Comments thereto of the ABA Model Rules.

8. On April 26, 2019, the LPRB considered and approved amending Rule 7, MRPC, to conform to the ABA amendments, and voted in favor of authorizing the filing of this petition.

9. In June 2019, the MSBA Assembly met to consider the language in Rule 7.2(c) of the amended ABA Model Rules governing when attorneys may refer to themselves as “certified specialists.” The MSBA Assembly voted to delete the words “certified as” in the first line of Rule 7.2(c) of the Model Rules, effectively prohibiting attorneys who are not certified from referring to themselves as specialists. This departed from the ABA amendments to the Model Rules, which allowed attorneys to refer to themselves as “specialist” based on years of experience, education and focus on a specialized practice, even if such attorneys were not certified. The MSBA otherwise agreed that all other provisions under the amended Rule 7 of the Model Rules and the Comments thereto should be adopted.

10. On September 27, 2019, the LPRB considered the MSBA Assembly’s proposed amendment to Rule 7.2(c) of the Model Rules to delete the words “certified as.” The LPRB preferred the broader language as set forth in the Model Rules and therefore reaffirmed its approval of adopting Rule 7 of the Model Rules in its entirety and without adjustments to Rule 7.2(c). The LPRB voted again to authorize the filing of this petition.

11. Consequently, the LPRB and the MSBA are concurrently filing separate petitions. While both urge this Court to amend Rule 7, MRPC, and the Comments thereto, to conform to Rule 7 of the Model Rules, the LPRB and the MSBA differ on the

single issue of completely adopting the language in Rule 7.2(c) of the Model Rules and the corresponding Comments.

### **THE NEED FOR THE AMENDMENTS**

12. The practice of law has become increasingly complex in the years since the adoption of the Rule 7, MRPC, governing lawyer advertising and solicitation. The profession has experienced substantial growth in the number of law firms that practice on a national or global scale. Many local law practices are becoming absorbed into regional or national law firms. Clients often need legal services in multiple jurisdictions. Lawyers often find themselves competing for business with law firms from outside their own jurisdiction, and against providers outside the legal profession. The jurisdictions that have adopted complex, inconsistent and detailed advertising rules have effectively impeded lawyers' ability to expand their practices and thus potentially thwart clients' interests in obtaining needed services. The proposed rule amendments will free lawyers and clients from these constraints without compromising client protection.

13. One objective of changing Rule 7, MRPC, to conform to the ABA Model Rules, is to harmonize and simplify the advertising and client communication rules by offering a level of uniformity. Rule 8.5(a), MRPC, grants this Court jurisdiction over Minnesota lawyers regardless of where misconduct may occur. The Court is also empowered to regulate lawyers licensed in other jurisdictions if those lawyers provide or offer to provide legal services in Minnesota. Rule 8.5(b), MRPC, provides that depending on the circumstances, the choice of law may include the Rules of Professional Conduct in this jurisdiction or other jurisdictions. Changes in the legal profession, including an increasing multijurisdictional practice and the potential need to apply the rules of numerous jurisdictions, make uniformity in rules that govern advertisement and solicitation increasingly necessary to ensure and encourage compliance and consistent enforcement.

14. The updated rules on advertisement also cover the changes in how lawyers advertise and solicit since Rule 7, MRPC, was first adopted. Changes in technology, particularly the advent and increased use of social media, have enabled clients and lawyers to find and communicate with each other in various new ways. The proposed amendments aim to address the changes that have emerged in an ever-evolving technology-based world, while continuing to protect the public. For example, lawyers are no longer limiting themselves to traditional ads or direct mailing campaigns to market their services; the practice is seeing an increase in the use of social media, such as blogs, websites, Twitter, Facebook, and LinkedIn, to advertise and market an attorney's services. As the use of social media to advertise and market has become the new norm across all industries, the public has also become more savvy about the use of social media as an advertising tool. These proposed amendments to Rule 7 are necessary to address the impact changes in technology and the digital age have had on how lawyers now market themselves to solicit business.

15. The proposed amendments also address the trends in the development of First Amendment law and antitrust law that disfavor regulation of truthful communication about the availability of professional services. For over 40 years, the federal courts have recognized that lawyer advertising is commercial speech protected by the First Amendment. *See Bates v. Arizona*, 433 U.S. 350 (1977) (establishing attorneys' First Amendment right to advertise as commercial speech, but supporting state regulation of attorney advertising that is false, deceptive or misleading).

16. Since Rule 7 of the Model Rules was first adopted, more recent cases have emerged, questioning the constitutionality of state regulations that are overly broad and impede upon an attorney's commercial speech rights. Rules that broadly restrict the ability of lawyers to truthfully communicate information about their qualifications and their practices have been successfully challenged as infringement on speech. *See Alexander v. Cahill*, 598 F.3d 79 (2nd Cir. 2010) (held New York's regulation to be

unconstitutional as a categorical ban that prohibited the use of the irrelevant attention-getting techniques unrelated to attorney competence); *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011) (held Louisiana’s revised attorney advertising rule improperly infringed on commercial speech rights because restrictions were overly broad and failed to apply least restrictive means to protect the government’s interest); *Searcy v. Florida Bar*, 140 F. Supp. 3d 1290, 1299 (N.D. Fla. 2015) (enjoining the Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law). The amendments to Rule 7 should be adopted to eliminate overly broad and unnecessary restrictions on speech, thereby limiting the risk of a constitutional challenge to Rule 7, MRPC.

17. The amended Rule 7 also addresses antitrust concerns stemming from overreaching limits on attorney advertisement. For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where such regulations would 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. Adoption of Rule 7 of the ABA Model Rules is necessary to eliminate potential antitrust claims that may be raised under the current Rule 7, MRPC, by removing overly broad restrictions.

18. Petitioners recommend adoption of the proposed amended rule because doing so will balance the dual objectives of protecting clients from false and misleading advertising, while avoiding constitutional challenges of infringement on commercial speech. The amended rule will also increase consumer access to accurate information about the availability of legal services by freeing lawyers to use expanding and innovative technologies to communicate the availability of legal services. Finally, by

providing uniformity, amending Rule 7, MRPC, will allow for better understanding and clarification of the rule, which will promote compliance and consistent enforcement.

### **BRIEF SUMMARY OF THE PROPOSED AMENDMENTS**

19. The following are the principal changes to Minnesota's current Rule 7, MRPC, to conform with the amended ABA Model Rules, which petitioners recommend this Court adopt:

- a. Rule 7.1: Communications Concerning a Lawyer's Services.
  - Principal changes to this subsection are to the Comments, which are amended to address all false and misleading communications inclusive of specific false and misleading communications previously addressed in subsection 7.5, which the ABA amended Model Rules eliminate.
- b. Rule 7.2: Advertising.
  - Permits nominal "thank you" gifts under certain conditions as an exception to the general prohibition against paying for recommendations;
  - Permits the use of a "qualified referral service";
  - Adds to this section "certified specialist" language from the deleted Rule 7.4(d) and amends provision to permit lawyers who, by means of experience, specialized training, or education, have attained special competence in a field of law, to state that they are specialists or specialize in that field of law.
- c. Rule 7.3: Solicitation of Clients.
  - Defines 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";
  - Removes the requirement that all solicitations clearly and conspicuously include the words "Advertising Material," 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;

- Adds provision specifying that the rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

d. Rule 7.4: Communication of Fields of Practice and Certification.

- Eliminates this subdivision as it relates to communication of fields of practice such as patent and admiralty; addresses false or misleading communications about the same in the amended comments to Rule 7.1, which prohibits false or misleading communication about a lawyer's services;
- Retains an amended "certified specialist" provision of this rule, but moves it to Rule 7.2.

e. Rule 7.5: Firm Names and Letterheads.

- Eliminates this subdivision concerning firm names and letterheads; addresses false or misleading communications about this in the amended comments to Rule 7.1, which prohibits false or misleading communication about a lawyer's services.

## DISCUSSION OF THE PROPOSED AMENDMENTS

### *Rule 7.1: Communications Concerning a Lawyer's Services.*

20. Rule 7.1 remains unchanged under the amended Model Rules (*see* Attachment B). The principal changes in Rule 7.1 are in the Comments, which clarify and expound on false and misleading communications in lawyer advertising as well as address potential false and misleading communications formerly covered under the deleted Rule 7.5. Those changes to the comments are as follows:

- a. Comment [2] to Rule 7.1 is amended to clarify that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required.
- b. Comment [3] to Rule 7.1 is amended to replace "advertising" with "communication" to make the Comment consistent with the title and



scope of the rule. The amendment expands the guidance in current Comment [3] by clarifying that an “unsubstantiated claim” may also be misleading.

- c. Comment [4] to Rule 7.1 is updated to also reference Rule 8.4(c), MRPC, which prohibits dishonest, fraudulent, deceptive, or misleading conduct. This is added to the Comment’s current reference to Rule 8.4(e), MRPC, which addresses misconduct in stating or implying an ability to influence government entities or officials.
- d. Comments [5] through [8] have been added to incorporate the black letter concepts from the current Rule 7.5, which has been eliminated under the amended Model Rule. The current Rule 7.5, MRPC, addresses specific prohibitions regarding misleading communications in firm names and letterhead. Because the provisions of current Rule 7.5 are merely examples of possibly misleading communications, those concepts are already addressed by the black letter of Rule 7.1 and, therefore, presented as examples of misleading communication in the Comments to Rule 7.1. This change streamlines Rule 7 by eliminating redundancy or unnecessary language that may cause confusion.

Petitioners recommend adopting the above changes to Rule 7, MRPC, to conform to the ABA Model Rule.

***Rule 7.2: Specific Rules on Advertising.***

21. Under the amended Model Rules, all specific rules for advertising were consolidated in Rule 7.2 (*see* Attachment C). The rule was amended to namely address constitutional speech concerns, changes in advertising due to media changes, and to consolidate sections that were removed under the amended rule into this subsection.

Petitioners recommend the following changes to Rule 7.2, MRPC, to conform to the ABA Model Rule:

- a. The amendment expands the means by which a lawyer may communicate about the lawyer’s services to include through “any media.” This change recognizes the expansive and ever-evolving ways technology allows attorneys to advertise, solicit and communicate about their services. Such means of communication are no longer limited to “written, recorded or

electronic communications” contained in the previous Model Rule and the current Rule 7.2, MRPC.

- b. Adoption of the amended Rule 7.2 and the Comments thereto would eliminate current Comments [1] and [3]. The reason for elimination of these Comments is that they provide no additional guidance to lawyers in fulfilling their ethical obligations and because advertising is constitutionally protected speech that needs no additional justification.
- c. Amended Comment [2] is updated to explain that the term “recommendations” does not include directories or other group advertising in which lawyers are merely listed by practice area. Amended 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.”
- d. Adopting the ABA Model Rule would change Rule 7.2(b)(2), MRPC, to permit lawyers to use a “qualified lawyer referral service” in addition to a not-for-profit lawyer referral service. Petitioners find no reason to object to adopting these changes to Rule 7, MRPC, to conform to the ABA Model Rule.
  - i. While this provision is not new to the Model Rules and was not a part of the recent amendments, in order to conform Rule 7, MRPC, to the ABA Model Rule, this change to Rule 7.2(b)(2) and the corresponding Comment [6] should be adopted.
  - ii. The proposed Comment [6] is amended to define “qualified referral services” as “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.”
  - iii. Petitioners request that Comment [6] to Rule 7.2(b)(2) also be amended to specify that in order for a referral service to be considered “qualified,” it must obtain certification to use the ABA Lawyer Referral Logo and Tagline. This will provide clarification

- and guidance to Minnesota lawyers and lawyer referral services as to what it means to be “approved by an appropriate regulatory authority” to be considered a “qualified referral service.”
- iv. In order to receive authorization to use the ABA Lawyer Referral Logo and Tagline, a referral service must undergo an application process that requires it to demonstrate that it is:
    - (1) consumer-oriented; (2) provides unbiased referrals to lawyers with appropriate experience in the subject matter of the representation; and (3) affords other client protections, such as complaint procedures or malpractice insurance requirements. Only after approval by the ABA can a referral service obtain authorization to use the ABA Lawyer Referral Logo and Tagline.
  - v. Defining “qualified referral services” as such will allow the Director to ensure only vetted referral services that meet the ABA Model Rules for qualified referral services meet the definition of “qualified” without adding additional administrative burdens to the Director.
- e. The amended Rule 7.2(b) continues the existing prohibition against giving “anything of value” to someone for recommending a lawyer. The new amended rule, however, adds a new subdivision (b)(5) that contains an exception to the general prohibition against paying for referrals. Petitioners have no objections to adopting these changes to Rule 7, MRPC, to conform to the ABA Model Rule.
- i. This subsection permits lawyers to give a nominal gift to acknowledge a referral—a “thank you” to the person who referred a client to the lawyer. The new provision clearly states that such a nominal gift is permissible only where not expected as payment for a recommendation of the lawyer’s services.
  - ii. New Comment [4] expounds on what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive referrals or to make future referrals. This concept is further supported by the addition of “compensate” and “promise” in Rule 7.2(b), which emphasizes these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e., not “compensation.”

- iii. The proposed additions acknowledge the reality that lawyers frequently give small tokens of appreciation after receiving a referral, and these tokens are neither intended to be a “payment” for the referral nor likely to induce future referrals. Neither is the behavior likely to result in the evils intended to be addressed by the rule: that referral 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 referrals for which they might be paid. Such token acknowledgements are common in other services industries.
  
- f. The proposed amendment adds to Rule 7.2 a subsection (c), concerning when lawyers may refer to themselves as a certified specialist. This provision was previously under Rule 7.4(c)(1) and (2), which has been removed (along with the rest of Rule 7.4) under the amended Model Rule, and moved to Rule 7.2 under subsection (c).
  - i. As amended by the ABA, adoption of Rule 7.2(c) of the Model Rules would now allow attorneys to refer to themselves as “specialist” in a particular field of law – without the need for certification – based on the lawyer’s experience, specialized training, or education.
  - ii. This change avoids potential speech restriction claims by removing an unnecessary restriction on truthful commercial speech. It is common knowledge within the bench and bar that many highly qualified lawyers limit their practices to particular fields of law in which they have attained an exceptional degree of competence and respect. These lawyers may be called upon and qualified to give expert testimony about matters within their field. Lawyers and judges commonly refer to such lawyers as “specialists” in their field. The public will not be harmed if lawyers whose education, experience, and specialized training, which qualify them as experts in their field, are allowed to truthfully state that they are specialists.
  - iii. Comment [9] is amended to provide additional guidance on the circumstances under which a lawyer might properly claim specialization by adding to that claim “based on the lawyer’s experience, specialized training or education.” Comment [9] is

also amended to remind attorneys that claims as a “specialist” are subject to the “false and misleading” standard applied in Rule 7.1, thus maintaining a level of protection for consumers, while loosening the rule to allow those who are not certified specialists to call themselves specialists under certain circumstances.

- iv. While Comment [9] makes it clear that a lawyer may truthfully claim that the lawyer is a “specialist” or “specializes in” a particular field of law based upon the lawyer’s experience, specialized training, or education, under the amended Rule 7.2, a lawyer still may not claim to be a “certified specialist” unless the lawyer is in fact certified by an organization described in the rule.
- v. The proposed amendments also describe which entities qualify to certify or accredit lawyers. The Court may choose to substitute the language in current Rule 7.4(c)(2), which specifies the Board of Legal Certification as the accrediting agency for legal specialization programs in Minnesota.
- vi. Petitioners recommend adoption of Rule 7.2(c) of the Model Rules to eliminate overly broad limitations on commercial speech. *See e.g., Searcy v. Florida Bar*, 140 F. Supp. 3d 1290 at 1299 (enjoining the Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law).
- g. Amended Model Rule 7 removed subsection 7.4. Most of the black letter provisions under Rule 7.4, however, are now addressed in the addition of Comments [10] and [11] to Rule 7.2 of the amended Model Rule. The removal of Rule 7.4 in the amended Model Rule, the addition of Rule 7.2(c) and Comments [9] to [11] to Rule 7.2, work to streamline and clarify Rule 7 by eliminating the redundancy and overly broad restrictions on commercial speech.

***Rule 7.3: Solicitation of Clients.***

22. The amendments to Rule 7.3, MRPC, primarily aim to address and accommodate the changes in how people communicate in the ever-evolving digital world (*see* Attachment D). Rule 7.3 of the Model Rules has been amended to offer some clarity and acknowledge technological advances that have changed how lawyers,

clients, and the general public communicate. Petitioners recommend adopting these changes to Rule 7.3, MRPC, to conform to the ABA Model Rule.

- a. Rule 7.3(a) has been added to Model Rule 7 to provide a definition of solicitation. The MRPC do not, and the previous Model Rules did not, define solicitation. The ABA “borrowed” the definition of solicitation from Virginia and it is now defined 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.”
- b. Rule 7.3(b) of the amended rule continues to prohibit direct, in-person solicitation, but clarifies that the prohibition applies solely to live person-to-person contact. Comment [2] to the amended Rule 7.3 adds examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time electronic or other communications which may include through use of applications such as Skype. Added commentary clarifies that prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.
- c. Rule 7.3(b)’s exceptions to prohibited solicitation are slightly broadened under the Model Rule to include a “person who routinely uses for business purposes the type of legal services offered by the lawyer.” Similarly, Comment [5] to the amended Rule 7.3 now explains that the potential for overreaching that 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. Conversely, the prohibition is justified, and a lawyer may still not engage in live in-person solicitation, involving personal legal matters, such as criminal defense, family law, or personal injury, even if the person has been represented multiple times.
- d. The amendments keep in place the current Rule 7.3(b)(1) and (2) (but renumbered in the amended rule as 7.3(c)(1) and (2)), which prohibit solicitation when a target has made known his or her desire not to be solicited solicitations that involve coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations.

- e. The current Rule 7.3(c), MRPC, relating to the requirement that targeted written solicitations be marked as “advertising material,” is deleted in the amended Model Rule. The requirement is no longer necessary because consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers simply due to the nature of the communications, and most consumers will not feel any compulsion to view the materials solely because they were sent by a lawyer or law firm. Further, no evidence was produced showing 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 is adequately addressed by Rule 7.1.
- f. The amended Model Rule adds a provision, 7.3(d), specifically providing that the advertising rules do not “prohibit communications authorized by law or ordered by a court or other tribunal.” The concept that solicitations authorized by law or court order are not prohibited under Rule 7 is currently addressed in Comment [4] of Rule 7.2. Under the amended rule, Comment [4] of Rule 7.2 would be deleted and moved to new subdivision (d) of Rule 7.3. This addition would address any First Amendment speech issues that may be raised and addressed by the courts. Moreover, new Comment [8] to Rule 7.3 is added, which gives class action notices as an example of a communication that is authorized by law or court order.

***Rule 7.4: Communication of Fields of Practice and Certification.***

- 23. Rule 7.4 was deleted from the amended Model Rule 7 (*see* Attachment E).

In deleting this subsection to Rule 7 of the Model Rules, the ABA consolidated the provisions of this subdivision by adding them to other parts of Rule 7, either as a new subdivision or by addressing the concepts in the Comments as follows:

- a. The amended Model Rule 7 moved subdivisions 7.4(b) and (c) regarding references to a lawyer’s designation in patent or admiralty practice in advertisement, from the black letter to Comments [10] and [11] to Rule 7.2 of the Model Rules. This change would eliminate potential redundancy within the previous Model Rule 7 by consolidating the concept under Rule 7.2.
- b. The amended Model Rule 7 also moved Rule 7.4(c)(1) and (2) of the previous rule, relating to communication about the lawyer’s designation

as a certified specialist, to Rule 7.2(c) of the amended rule. The provision was also amended to clarify circumstances in which a lawyer may claim to be a “certified specialist” and broadened the ability of a lawyer to refer to themselves as a “specialist.” See paragraph 22(f) above.

Petitioners recommend adopting the above changes to Rule 7.4, MRPC, to conform to the ABA Model Rule.

***Rule 7.5: Firm Names and Letterheads.***

24. The current Rule 7.5, MRPC, addresses specific prohibitions regarding misleading communications in firm names and letterheads. The ABA removed Rule 7.5 from amended Model Rule 7 (see Attachment F) because the provisions of Rule 7.5 are merely examples of possibly misleading communications. Those concepts are already addressed by the black letter of Rule 7.1 and, therefore, in an effort to avoid redundancy and confusion, the previous Rule 7.5 is presented, under the amended Model Rule, as examples of misleading communications in the Comments to Rule 7.1. As discussed in further detail in paragraph 21(d) above, the Comments to Rule 7.1 have been amended in the Model Rule to add Comments [5] through [8] to address the black letter concepts previously contained in the now deleted Rule 7.5. Petitioners recommend deleting Rule 7.5, MRPC, and address those black letter concepts in the Comments to Rule 7.1, MRPC, to conform to the ABA Model Rule.

25. The ABA amended the Model Rules on advertising because, despite the state bars’ best intentions to revise attorney advertising regulations and offer guidance to address today’s digital challenges, attorneys and law firms are caught in a dizzying array of regulations and federal case law, especially if they practice in more than one jurisdiction. By adopting Rule 7 of the ABA Model Rules, Minnesota will simplify and streamline the rules on lawyer advertising. As amended, the rules will better serve the bench, the bar and the public by expanding opportunities for lawyers to use modern communications technology to advertise their services, increasing the public’s access to information about the availability of legal services, and continuing to protect the public.



CONCLUSION

For the foregoing reasons, petitioners Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility respectfully request this Court to adopt Rule 7 of the ABA Model Rules and the Comments thereto as set forth in Attachment A, and amend the Minnesota Rules of Professional Conduct accordingly.

Respectfully submitted,

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## INFORMATION ABOUT LEGAL SERVICES

### 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. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[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.

[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 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] 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 influence improperly a government

agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[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.

[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: ADVERTISING.**

a) A lawyer may communicate information regarding the lawyer's services through 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;

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

(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 this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

### **Comment**

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's 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.

### **Paying Others to Recommend a Lawyer**

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. 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) 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 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. Qualified referral services are 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. In order to constitute a qualified lawyer referral service in Minnesota, the referral service must show compliance with the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services by obtaining certification to use the American Bar Association Lawyer Referral Logo and Tagline.

[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. 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.

[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.

### **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.

### **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: 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 solicit professional employment 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 contact is with a:

(1) lawyer;

(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.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (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) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in 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 live person-to-person contact to enroll 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] 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 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 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 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. 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 an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications 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 persuasion that may overwhelm a person's judgment.

[4] The 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 overreaching against a former client, or a person with whom the lawyer has a close personal, 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 overreaching when the person contacted is a lawyer 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 their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that 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(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 does not 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] 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 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 person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but 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(c).

## INFORMATION ABOUT LEGAL SERVICES

### 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~~ Misleading 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 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] ~~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] 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 ~~influence~~ improperly influence a

government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[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.

[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: ADVERTISING

(a) ~~Subject to~~ A lawyer may communicate information regarding the ~~requirements of~~ Rules 7.1 and 7.3, ~~a lawyer may advertise~~ lawyer's services through ~~written, recorded, or electronic communications, 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;

(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 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 or law firm's 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.~~

~~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. 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,~~

[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~~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. In order to constitute a qualified lawyer referral service in Minnesota, the referral service must show compliance with the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services by obtaining certification to use the American Bar Association Lawyer Referral Logo and Tagline.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a ~~not for profit~~ 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 or telephonic 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 afirms 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.

### **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: SOLICITATION OF CLIENTS**

~~(a) A lawyer shall not~~ “Solicitation” or “solicit” denotes a communication initiated by in- or on behalf of a lawyer or law firm that is directed to a specific person or 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 solicit professional employment by live telephone person-to-person contact solicit professional employment from anyone~~ 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

~~(b) A lawyer shall not solicit professional employment by written, recorded, or electronic communication or (3) person who routinely uses for business purposes the type of legal services offered by in-person or telephone contact the lawyer.~~

~~(c) A lawyer shall not solicit professional employment~~ 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.

~~(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 clearly and conspicuously include the words “Advertising Material” on the outside envelope, if any, and within any written, recorded, or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).~~

~~(d)~~ (d) This rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) 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

~~members~~enroll 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 Paragraph (b) prohibits 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 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 typically does~~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 ~~Internet~~electronic searches.

[2] ~~There is a potential for abuse when a solicitation involves direct in person or live telephone contact by a lawyer with someone known to need legal services. These forms of contact subject~~[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 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. 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 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 live person or live telephone solicitation 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 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 or telephone 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 or live telephone 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 or live telephone contact can be disputed and may not be subject to third-party scrutiny.~~ [4] The 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 when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(e) are not applicable in those situations. Also, paragraph (a) overreaching when the person contacted is a lawyer 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 which that~~ contains ~~information which is~~ false or misleading information within the meaning of Rule 7.1, ~~which that~~ involves coercion, duress or harassment within the meaning of Rule 7.3 ~~(b)(c)(2)~~, or ~~which that~~ 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):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 is~~Rule 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~~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(e) 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.~~

[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 (~~de~~) of this ~~rule~~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 (~~de~~) 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 8.4(a)~~ (c).

## **~~RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND CERTIFICATION~~**

~~(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) In any communication subject to Rules 7.2, 7.3, or 7.5, a lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law except as follows:~~

~~(1) the communication shall clearly identify the name of the certifying organization, if any, in the communication; and~~

~~(2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by the Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.~~

### ~~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 that has been accredited by the Board of Legal Certification. 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] Lawyers may also be certified as specialists by organizations that either have not yet been accredited to grant such certification or have been disapproved. In such instances, the consumer may be misled as to the significance of the lawyer's status as a certified specialist. The rule therefore requires that a lawyer who chooses to communicate recognition by such an organization also clearly state the absence or denial of the organization's authority to grant such certification. Because lawyer advertising through public media and written or recorded communications invites the greatest danger of misleading consumers, the absence or denial of the organization's authority to grant certification must be clearly stated in such advertising in the same sentence that communicates 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.~~

### **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.~~

~~[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.~~



**FILED**

June 17, 2021

**OFFICE OF  
APPELLATE COURTS**

**FILE NO. ADM10-8005**

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition to Amend Rule 20 of the  
Minnesota Rules on Lawyers Professional  
Responsibility  
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**PETITION OF THE LAWYERS  
PROFESSIONAL RESPONSIBILITY  
BOARD TO AMEND RULE 20,  
RULES ON LAWYERS  
PROFESSIONAL RESPONSIBILITY**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE  
STATE OF MINNESOTA:

Petitioners, Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (Director), respectfully request this Court to adopt the amendment to Rule 20, Rules on Lawyers Professional Responsibility (RLPR), as set forth below. In support of this petition, petitioners would show the Court the following:

#### **INTRODUCTION**

1. Petitioner LPRB is a Board established by this Court to oversee the lawyer discipline system. Petitioner Director is appointed by this Court to oversee the lawyer discipline system and seek enforcement of the Minnesota Rules of Professional Conduct (MRPC).

2. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.

3. This Court has adopted the RLPR to establish the rules governing how investigations and proceedings in lawyer discipline matters should be conducted. *See* Rule 2, RLPR.

4. Rule 20, RLPR, governs the public and private nature of the documents and information maintained by the Office of Lawyers Professional Responsibility (OLPR). From time to time, this Court has amended Rule 20, RLPR, to address necessary changes in handling investigative information. For example, in 1999, Rule 20, RLPR, was modified to allow an exchange of information otherwise confidential between two disciplinary boards involving conduct of judges that occurred prior to the judge assuming judicial office. Records maintained by the OLPR are specifically exempt from the Minnesota Data Practices Act (*see* Minn. Stat. § 13.90) and from the Minnesota Rules of Public Access to Judicial Records (*see* Minn. Stat. Access to Rec., Rule 1, Subdiv. 2). Rule 20, RLPR, is therefore the only guidance on the confidential or public nature of the records maintained by the Director.

5. Petitioners recognize the importance of Rule 20, RLPR. As a government entity, the OLPR is expected to provide transparency to the public. Public access to information is central to that transparency. Petitioners also recognize the heavy burden associated with maintaining records that contain sensitive, personal, and identifiable information that should not be open to public inspection. The proposed amendments to Rule 20, RLPR, aim to balance those two compelling interests, while providing clear guidance on how information maintained by the Director should be handled.

6. For the reasons set forth below, petitioners request this Court adopt the proposed amendment to Rule 20, RLPR, as set forth in Attachment A.

#### **BACKGROUND AND NEED FOR AMENDMENTS**

7. Beginning in 2016, the Director started to review the RLPR to address areas of improvement to provide clarity and better guidance to the Director and the public. Many of the areas of concern relate to the practical day-to-day application of the RLPR. The Director identified Rule 20, RLPR, the rule that governs the confidentiality and public access of records maintained by the Director, as a rule in need of immediate changes.

8. The current Rule 20, RLPR, could be improved in a number of regards. For example, the current Rule 20, RLPR, provides that prior to probable cause, records maintained by the Director during the course of investigation shall be confidential. Rule 20, RLPR, provides no exception, however, for the Director or the District Ethics Committee (DEC) to share information as necessary with fact or expert witnesses who are interviewed as part of the Director's or the DEC's investigation. Moreover, Rule 20, RLPR, provides no exception that would allow the Director to share information as necessary with Lawyers Concerned for Lawyers when an attorney's mental or physical well-being becomes a concern, or with law enforcement as necessary to protect the safety of the OLPR.

9. Conversely, under the current Rule 20, RLPR, once matters become public, the file is open to public inspection without sufficient protections in place for private, personal, or sensitive information of the parties involved. For example, the current Rule 20, RLPR, does not specify that social security, bank account, or medical information should remain confidential. The Director oftentimes obtains information from other government agencies during the course of an investigation. Under the current Rule 20, RLPR, information classified as confidential by other agencies would not remain confidential once a matter becomes public. Non-complainant client information may also become public even though those clients had nothing to do with the complaint.

10. The lack of clarity under Rule 20, RLPR, relating to these scenarios left the Director with little guidance on how to handle records when faced with these pressing issues. The Director determined that amendments to Rule 20, RLPR, were needed to provide clear and specific guidance on the confidential or public nature of such information.

11. In June 2018, LPRB's Rules Committee (LPRB Rules Committee) began work on specific amendments to Rule 20, RLPR. It became clear after attempts at

amending Rule 20, RLPR, that an organizational overhaul of the rule was needed. For example, the LPRB Rules Committee struggled with adding additional exceptions to sections of the rule because as organized, in some cases, those sections were already exceptions to the rule. At times, a necessary proposed change became an exception to an exception to an exception. This made for drafting difficulties and made any changes to Rule 20, RLPR, more difficult to understand, thus defeating the purpose of any amendments.

12. The Director and the LPRB Rules Committee began to reconsider how best to amend Rule 20, RLPR, to avoid making the rule more confusing and difficult to understand. The Director reviewed other jurisdictions to compare how others handled confidential and public information. The Director studied the equivalent rules from other jurisdictions to determine what could be learned and adopted to improve Minnesota's own rule. Based on this information, the Director, in collaboration with the LPRB Rules Committee, worked on drafting a re-organized Rule 20, RLPR, to streamline the rule, making it easier to understand, while addressing the various deficiencies identified in the current rule.

13. On June 5, 2020, the Director presented to the LPRB Rules Committee a revised and reorganized Rule 20, RLPR. The LPRB Rules Committee approved the changes, with additional language to clarify that information related to non-complainant clients should remain confidential except under certain conditions.

14. At a regular Board meeting on June 19, 2020, the LPRB Rules Committee presented to the LPRB the proposed amendments to Rule 20, RLPR. At the meeting, the Board approved petitioners' filing of this petition to amend Rule 20, RLPR, with the Court.

15. On August 25, 2020, at an MSBA Professional Regulation Committee meeting, the OLPR presented the MSBA Professional Regulation Committee with a

draft of the proposed amendments to Rule 20, RLPR. Other than typographical changes, no objections or substantive comments or suggestions were made.

16. At a regular Board meeting on September 25, 2020, the LPRB was informed that the MSBA Professional Regulation Committee offered no substantive recommendations or comments. The LPRB was offered a copy of the proposed amendments to Rule 20, RLPR, inclusive of edits made based on the MSBA Professional Regulation Committee recommended edits for review. The LPRB made no objections or other changes to the LPRB's original approval of filing this petition to amend Rule 20, RLPR.

#### **SUMMARY OF THE PROPOSED AMENDMENTS AND DISCUSSION**

17. The following are the principal changes to Rule 20, RLPR, and the reasons for the changes, which petitioners recommend this Court adopt:

##### **Changes in the Organization of the Rule.**

18. Changes to Rule 20, RLPR, include a change in the rule's organization. The proposed changes would divide the rule into categories of information: (a) before probable cause or commencement of referee or court proceedings; (b) after probable cause or commencement of referee or court proceedings; (c) information maintained as part of the Director's more administrative rather than investigative or prosecutorial function; and (d) expungement.

19. As previously mentioned, this change is necessary to streamline the rule, making it easier to understand and follow and allowing for the amendments without creating a situation where the rule contains confusing multiple exceptions to exceptions to the rule.

##### **Section 20(a), RLPR: Records Before Determination of Probable Cause or Commencement of Referee or Court Proceedings.**

20. To reflect the reorganization of Rule 20, RLPR, Rule 20(a), RLPR, has been modified to make clear that section (a) covers information maintained by the Director

prior to a determination of probable cause or commencement of public referee or Court proceedings. The amended section (a) makes clear that it would include records related to pending investigations, or matters that resulted in dismissals or private discipline. All such information, except specified under Rule 20(a), RLPR, is deemed confidential nonpublic information.

21. This section is mostly unchanged, except for deletions of sections that were made unnecessary due to the change in the rule's organization, additions to include instances where information otherwise confidential may be shared with others, and changes that would clarify the rule. The changes and reason for changes are as follows:

- a. Deletion of 20(a)(2) – under new rule organization, there is no longer a need to specify that confidential information becomes public after a probable cause determination.
- b. Amending current section 20(a)(3) to allow sharing of information with other lawyer admission or disciplinary authority that have matters under investigation relating to the affected attorney.
  - Under the current rule, such information sharing is only allowed if the attorney is admitted to practice or seeks to practice in the other jurisdiction. On occasion, other jurisdictions will seek information about an attorney who is under investigation, even though the attorney is not seeking admission or admitted in the other jurisdiction. The current rule would not permit sharing of information.
  - The amendment broadens the rule to allow sharing of information if the affected lawyer is under investigation in the other jurisdiction.
- c. Deletion of 20(a)(8) which keeps confidential mental impressions and communication between Committee and Board members.
  - This provision is unnecessary under the new rule organization because everything under section 20(a) is confidential unless excepted by the rule.

- This provision has been moved to section 20(b), which addresses information that is public.
- d. Addition to allow the Director to share information otherwise deemed confidential under this section with the DEC and any fact or expert witness as necessary to investigate the complaint.
- This change is important because such necessary information sharing is essential for the Director and the DEC to conduct investigations.
  - Currently, the Director views such information sharing as impliedly authorized in order to carry out the essential function of enforcement of the Rules of Professional Conduct.
  - This change offers clear guidance that such necessary information sharing is permitted.
- e. Addition to allow the Director to share information otherwise deemed confidential under this section with the Supreme Court approved lawyer assistance program (in this case, Lawyers Concerned for Lawyers (LCL)) in situations where, in the Director's discretion, such one way notification is necessary or appropriate to address concerns related to a lawyer's mental, emotional, or physical well-being.
- Oftentimes, during the course of an investigation, the attorney's mental, emotional, or physical well-being becomes an issue.
  - The current Rule 20 does not permit sharing of information with LCL in such cases, which may interfere with necessary assistance offered to the affected lawyer in a timely manner.
  - The amended rule would permit the Director to reach out to LCL for assistance. The amended rule makes clear that any communication would be one-sided, so that it is understood that all interactions between the affected attorney and LCL would remain confidential.
- f. Addition to allow the Director to share information otherwise deemed confidential under this section with law enforcement or court personnel in situations where public safety and the safety of the Director and staff, Board, or district court is at risk.

- Lawyer discipline cases oftentimes involve unhappy respondents and complainants that could lead to potentially threatening situations. The current rule does not provide an exception to reveal information with law enforcement as necessary to protect the Office or the Board.
  - For example, if the Director’s staff meets with a respondent or complainant who becomes threatening, law enforcement may need to be aware of the identity of the lawyer or complainant, the reason for the threat, or any relevant background information relating to the threat.
  - This addition to Rule 20 would make clear that under such circumstances, the Director is permitted to reveal information otherwise deemed confidential under Rule 20(a) if necessary to address public safety or the safety of OLPR staff and others.
- g. The section formerly listed under the heading “Special Matters” is amended to be incorporated within Rule 20(a) as section 20(a)(13), RLPR, with minor edits for clarity.
- The current Rule 20 has a section titled “Special Matters” that lists specific circumstances otherwise confidential information may be revealed. In an effort to streamline the rule, this section remains the same, but incorporated section Rule 20(a)’s exceptions.

**Section 20(b): Records After Determination of Probable Cause or Commencement of Referee or Public Court Proceedings.**

22. As part of the rule’s reorganization, Section 20(b), RLPR, would address records maintained by the Director after probable cause has been determined or after commencement of public referee or court proceedings. Under this provision, records maintained by the Director after a determination of probable cause or the commencement of public court proceedings would be deemed public information except as provided under this section. The changes and reason for changes under this section are as follows:



- a. Minor edits generally made to this section of the rule to clarify the rule and reflect the organizational change.
- b. Addition to the rule to exclude from public access sensitive personal information contained in the file such as social security numbers, birthdates, driver's license numbers, bank account numbers and medical information.
  - During the course of the Director's investigation, the Director necessarily obtains sensitive personal information relating to the affected lawyer, the complainant or others.
  - The current Rule 20, RLPR, does not exclude such information from public access once a file becomes public. The Director currently makes an attempt to protect such information, but it is not specifically provided for under Rule 20, RLPR.
  - This amendment would make clear that such information is not public and will remain confidential even after the file becomes public, but would still allow the Director to file such information under seal pursuant to Minnesota Rules of Civil Appellate Procedure 112.01.
- c. Addition to the rule to exclude from public access information received from other disciplinary or government agencies classified by such agency as confidential, nonpublic information. Such information may remain confidential and nonpublic under this amendment.
  - During the course of an investigation, the Director sometimes obtains information from other governmental agencies. While inter-agency sharing of information is permitted, such information is often confidential and should remain non-public when provided to the Director.
  - The current rules do not specify that confidential information obtained from other agencies should remain confidential. This causes a chilling effect in inter-agency information sharing as the Director cannot guarantee that confidential information from another government agency will remain so under our rules.

- This amendment makes clear that when a file becomes public, confidential information obtained from other government agencies that are classified by such agencies as confidential, will remain confidential.
- d. Addition to the rule to exclude from public access, the identity of non-complaining clients unless such party waives confidentiality, is subpoenaed as a witness to testify under oath, provides a sworn affidavit, or files documents in compliance with a subpoena *duces tecum*.
- During the course of an investigation, the Director may obtain information from other clients who were non-complainants. For example, a trust account case may reveal trust account violations for a number of clients who never complained to the Director.
  - Under the current Rule 20, once a matter becomes public, information relating to these non-complainant clients may become public as part of the public file. Such information may include client name, legal issues handled, or other personal information.
  - Petitioners believe these non-complainant clients should not have their otherwise private information revealed just because they had the misfortune to hire an attorney who committed misconduct.
  - The amended rule would keep confidential such information from non-complainant clients, unless such person waives confidentiality, or was involved in the matter as a witness or someone who provided evidence.
- e. Addition to section 20(b) to protect the disclosure of work product or the mental processes or communications of the Committee or Board members made in furtherance of their duties. This provision was previously contained under section 20(a) of Rule 20, and with the reorganization of Rule 20, is more appropriately under Rule 20(b).

**Section 20(c): Administrative Files: Advisory Opinions, Overdraft Notification Program Files, Rule 26, RLPR, Compliance, Rule 24, RLPR, Collections, Rule 5.8, MRPC, Disclosures, Trusteeship Files, and Probation Files.**

23. As part of the rule's reorganization, Section 20(c), RLPR, would address records maintained by the Director in the Director's administrative capacity unrelated to the investigation or prosecution of attorney misconduct. The amended rule makes clear such information is deemed confidential unless otherwise permitted or required under the rules, or in the discretion of the Director, such disclosure is necessary to carry out the duties of the Director. The changes and reason for changes in this section are as follows:

- a. In general, section 20(c) keeps the provisions of the current section 20(f), which only addresses advisory opinion, overdraft notification and probation files.
- b. Section 20(c) expands current section 20(f) to address the handling of records maintained in other administrative capacities not currently covered by Rule 20(f), such as Rule 26, RLPR, compliance; Rule 24, RLPR, collection efforts, trusteeship files; and Rule 5.8, MRPC, disclosures.
- c. As Section 20(c) is expanded to include handling of Rule 24, RLPR, collection efforts and Rule 5.8, MRPC, disclosures, Section 20(c) adds specific provisions to address the special nature of those two rules as follow:
  - Except for documents containing mental impressions or work product of the Director and Director's staff, the files, notes, and records maintained by the Director relating to efforts by the Director to collect costs and disbursements awarded pursuant to Rule 24 of these rules are not deemed confidential. This is because Rule 24 collection efforts would necessarily involve litigation and court filings, which are public in nature.
  - Correspondence received by the Director pursuant to Rule 5.8, MRPC, are not deemed confidential. This is because Rule 5.8, MRPC, involves the hiring of attorneys whose licenses are

suspended. As a matter of public protection, such disclosures should be public.

**Section 20(d): Expunction of Records.**

24. Current Section 20(e) of RLPR addresses records retention. This section would remain the same, but consistent with the reorganization of Rule 20, RLPR, would be changed to become section 20(d) of RLPR.

**CONCLUSION**

For the foregoing reasons, petitioners Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility respectfully request this Court to adopt the amended changes to Rule 20, RLPR, as set forth in Attachment A, and amend the Rules of Lawyers Professional Responsibility accordingly.

Respectfully submitted,

/s/ Robin Wolpert

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## ATTACHMENT A

### Rule 20. CONFIDENTIALITY; EXPUNCTION

#### (a) Records Before Determination of Probable Cause or Commencement of Referee or Public Court Proceedings.

The investigative files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint against or investigation of a lawyer prior to a determination of probable cause or commencement of referee or Court proceedings, including files resulting in private discipline, summary dismissal, or a determination that discipline is not warranted, shall be deemed confidential and shall not be disclosed, except:

- (1) As between the Committees, Board and Director in furtherance of their duties;
- (2) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice, or has a matter under investigation;
- (3) Upon request of the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall a member of the District Ethics Committee or the Board, the Director, or the Director's staff be subject to deposition or compelled testimony, except upon a showing to the Court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected;
- (4) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege, portions may be deleted;
- (5) Where permitted by the Court;
- (6) Where required or permitted by these Rules;

(7) As between the Director or District Ethics Committee and any witnesses, whether fact or expert, as is necessary for the investigation of the complaint;

(8) As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer;

(9) As between the Director and the Board on Judicial Standards or its executive secretary in furtherance of their duties to investigate and consider conduct of a judge that occurred prior to the judge assuming judicial office;

(10) As between the Director and the Board of Law Examiners in furtherance of their duties under these Rules;

(11) From the Director to the Supreme Court approved lawyer assistance program in situations where, in the Director's discretion, such one way notification is necessary or appropriate to address concerns related to a lawyer's mental, emotional, or physical well-being;

(12) As between the Director and law enforcement or court personnel in situations where public safety or the safety of the Director and staff, Board, or District Court is at risk;

(13) Notwithstanding the provisions of this Rule, the following may be disclosed by the Director relating to records before a determination of probable cause or commencement of referee or Court proceedings:

(i) The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;

(ii) With the affected lawyer's consent, the fact that the Director has determined that discipline is not warranted;

(iii) The fact that the Director has issued an admonition;

(iv) The Panel's disposition under these Rules;

(v) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e);

(vi) The fact that the terms of a conditional admission have been modified or extended under Rule 8(d)(5);

(vii) Information to other members of the lawyer's firm or employer necessary for protection of the firm's or organization's clients or for the appropriate exercise of responsibilities under Rules 5.1 and 5.2, Minnesota Rules of Professional Conduct.

**(b) Records After Determination of Probable Cause or Commencement of Referee or Public Court Proceedings.**

After probable cause has been determined under Rule 9(j)(1)(ii) or (iv) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director are public and not confidential except:

(1) As ordered by the referee or this Court;

(2) Medical records and other documents containing sensitive or personal identifying information, including but not limited to social security numbers, birthdates, driver's license numbers, bank account numbers and medical information shall remain confidential and should, as administratively practicable, be redacted or removed from the file;

(3) Information received from other disciplinary or government agencies classified by such agency as confidential, nonpublic information shall remain confidential and nonpublic.

(4) The identity of non-complaining clients shall remain confidential and not subject to public disclosure unless such party waives confidentiality, is subpoenaed as a witness to testify under oath, provides a declaration or sworn affidavit, or files documents in compliance with a subpoena *duces tecum*.

(5) Nothing in this Rule shall be construed to require the disclosure of work product or the mental processes or communications of the Committee or Board members made in furtherance of their duties.

**(c) Administrative Files: Advisory Opinions, Overdraft Notification Program Files, Rule 26, RLPR, Compliance; Rule 24, RLPR, Collections; Rule 5.8, MRPC, Disclosures, Trusteeship Files, and Probation Files.**

(1) All other files, notes, and records maintained by the Director and not specifically mentioned in Rule 20, RLPR, shall not be disclosed unless otherwise permitted or required under the Rules, or in the discretion of the Director, such disclosure is necessary to carry out the duties of the Director.

(2) The files, notes, and records maintained by the Director relating to advisory opinions, trust account overdraft notification, Rule 26, RLPR, compliance, and monitoring of lawyers on probation shall be deemed confidential and shall not be disclosed except:

(i) in the course of disciplinary proceedings arising out of the enforcement of Rule 26, RLPR, or arising out of the facts or circumstances of the advisory opinion, overdraft notification or probation; or

(ii) upon consent of the lawyer who requested the advisory opinion or was the subject of the overdraft notification, probation or Rule 26, RLPR, requirements;

(3) Except for documents containing mental impressions or work product of the Director and Director's staff, the files, notes, and records maintained by the Director relating to efforts by the Director to collect costs and disbursements awarded pursuant to Rule 24 of these Rules are not deemed confidential.

(4) Correspondence received by the Director pursuant to Rule 5.8, Minnesota Rules of Professional Conduct, are not deemed confidential.

**(d) Expunction of Records.**

The Director shall expunge records relating to dismissed complaints as follows:

(1) *Destruction schedule.* All records or other evidence of the existence of a dismissed complaint shall be destroyed three years after the dismissal;

(2) *Retention of records.* Upon application by the Director to a Panel Chair chosen in rotation, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this Rule may be retained for such additional time not exceeding three years as the Panel Chair deems appropriate.



STATE OF MINNESOTA  
IN SUPREME COURT  
ADM10-8005



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In re Petition to Amend the Minnesota  
Rules of Professional Conduct

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**PETITION OF THE MINNESOTA STATE BAR ASSOCIATION  
TO AMEND THE MINNESOTA RULES OF PROFESSIONAL CONDUCT**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF  
MINNESOTA:

The petitioner, the Minnesota State Bar Association, respectfully petitions the Court to adopt amendments to Rule 7 of the Minnesota Rules of Professional Conduct as set forth in this petition. In support of the petition, the Petitioner would show the Court as follows:

1. The Minnesota State Bar Association is a not for profit Minnesota corporation of lawyers admitted to practice before this Court and the lower courts of the State of Minnesota.

2. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.

3. This Court has adopted the Minnesota Rules of Professional Conduct to establish standards of conduct for lawyers licensed to practice law in the State of Minnesota. This Court has amended the Minnesota Rules of Professional Conduct from time-to-time for good cause shown.

4. Petitioner requests that the proposed amendments to Rule 7 of the Minnesota Rules of Professional Conduct set forth in Attachment A hereto be adopted and that the proposed amendments to the comments to the Minnesota Rules of Professional Conduct, as also set forth in Attachment A, be acknowledged so that they may be published to the bar and the public.

### **BACKGROUND**

5. Since the Minnesota Rules of Professional Conduct were adopted by this Court in 1985, they have been based upon the Model Rules of Professional Conduct published by the American Bar Association, as adapted and modified by the Court to conform to Minnesota standards and practices.

6. From time to time, the American Bar Association has amended its Model Rules of Professional Conduct based on experience and to adapt them to changing conditions and expectations in society and in the practice of law. When it has done so, the Petitioner has studied the amendments through its committees and task forces, and made recommendations to this Court about whether and in what form the amendments to the Model Rules should be incorporated into the Minnesota Rules of Professional Conduct. The Petitioner has petitioned this Court to amend the Rules to conform to changes in the ABA Model Rules in 2003 and 2014. The Court has published the proposed amendments,

and, after public comment and a hearing, amended the Minnesota Rules of Professional Conduct adopting as much of the proposed amendments as it deemed proper.

7. In August 2018, the American Bar Association amended Rule 7 of its Model Rules of Professional Conduct, which governs lawyer advertising and communications with potential clients. Following that amendment, Petitioner's Standing Committee on the Rules of Professional Conduct [the "MSBA Committee"] studied the amendments to ABA Model Rule 7 and recommended that Rule 7, Minn. R. Prof. Conduct be amended to conform to the amendments to the ABA Model Rule.

8. Based upon the recommendation of its Committee, and following extensive debate and deliberation, the Assembly of the Minnesota State Bar Association adopted proposed amendments to Rule 7, making one substantive change regarding "specialist" advertising, and authorized the filing of this Petition at its meeting on June 27, 2019.

9. During the development of the recommendations contained in this petition, the MSBA Committee worked closely with the Minnesota Lawyers Professional Responsibility Board and its Rules Committee with a view toward filing a joint petition, if possible, with this Court to adopt the 2018 amendments to ABA Model Rule 7. At its Assembly meeting in June 2019, the MSBA Assembly amended the language of proposed revised Rule 7.2(c) to delete the words "certified as" in the first line of that provision. The MSBA Assembly also amended the proposed comments [9] and [11] to that Rule to conform to the proposed amended text of the Rule. The effect of the change made by the Assembly was to preserve the approach to "specialist" and "specialty" advertising that is in the current Rule 7.4. This approach is designed to avoid misleading

the public about claims of “specialist” or “specialty” by requiring such claims include a full disclosure of whether there is certification by an organization accredited by the Minnesota Board of Legal Certification and the identity of the certifying organization, if any. The LPRB did not concur in the MSBA’s amendment to proposed Rule 7.2(c), preferring the language as set forth in the ABA Model Rule. Consequently, the LPRB and the MSBA are filing separate petitions.

10. Both urge the adoption by this Court of the 2018 amendments to Rules 7.1 to 7.3 ABA Model Rules of Professional Conduct to become part of the Minnesota Rules of Professional Conduct, save that the two organizations are proposing different language in the new proposed Rule 7.2(c) and the comments thereto.

#### **THE NEED FOR THE AMENDMENTS**

11. The practice of law has become increasingly complex in the years since the adoption of the Rules of Professional Conduct governing lawyer advertising and client communications. The profession has experienced substantial growth in law firms that practice on a national or global scale. Local law practices are being absorbed into regional or national law firms. Clients often need legal services in multiple jurisdictions. Lawyers often find themselves competing with law firms from outside their own jurisdiction, indeed against providers outside the legal profession, to secure the ability to serve clients. These changes do favor adopting an approach to the rules that adheres to national uniformity wherever this is reasonable and not outweighed by other considerations.

One objective of the proposed rule changes therefore is to attempt to harmonize and simplify the advertising and client communication rules of many jurisdictions that have adopted complex, inconsistent, and detailed advertising rules that impede lawyers' ability to expand their practices and thwart clients' interests in obtaining needed services. The MSBA's proposed rule changes will free lawyers and clients from these constraints without compromising client protection.

Second, the MSBA's proposed changes acknowledge the advent of social media and the internet as vehicles to enable clients to search for information about lawyers and law firms and that enable lawyers and law firms to efficiently communicate with potential clients about their ability to provide legal services tailored to the needs of the clients. The proposed changes will facilitate these connections between lawyers and clients without compromising protection of the public.

Another change in law practice and the increasing complexity of the law over recent decades has been the greater need and demand for specialization. The courts of various jurisdictions have met this need through creation and expansion of a variety of formal specialization certification programs. These programs are not uniform across the fifty states. In order to preserve and foster Minnesota's specialization program, the Assembly adopted the amended version of proposed new Rule 7.2(c). This is one area where the benefit of uniformity is outweighed by the interests of the public.

MSBA's proposed amendments respond to trends in the development of First Amendment law and antitrust law that favor deregulation of truthful communication about the availability of professional services. The federal courts have recognized that

lawyer advertising is commercial speech protected by the First Amendment. Rules should not unduly restrict the ability of lawyers to truthfully communicate information about their services. Protections to avoid misleading the public, such as those moved from current Rule 7.4 to new proposed Rule 7.2 and related comments, must be narrowly drawn to avoid undue restriction of commercial speech. Rule 7.2, with the MSBA's amendment, including amendments to Comments [9] and [11], strikes that balance.

The proposed amended rules, as advanced by MSBA, will continue to protect clients and the public from false and misleading advertising, but free lawyers to use expanding and innovative technologies to communicate the availability of legal services and limit bar discipline to 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.

#### **BRIEF SUMMARY OF THE PROPOSED AMENDMENTS**

12. 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.
- Permit lawyers to indicate that they concentrate in, limit their practice to or have expertise in a particular field of law, but protect the public by limiting the use of the words “specialist” and “specialize” without making a full disclosure of certification status and identification of any certifying organization.

- 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.

### **ANALYSIS OF THE PROPOSED AMENDMENTS**

#### *13. 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.

In Comment [3] “advertising” is replaced with “communication” to make the Comment consistent with the title and scope of Rule. The amendment expands the guidance in Comment [3] by explaining that an “unsubstantiated claim” may also be

misleading. Comment [4] recommends that lawyers review Rule 8.4(c) for additional guidance.

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. Petitioner believes that Rule 7.1, with the guidance of new Comments [5] through [8], better addresses the issues.

14. *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. The proposed amendments to Rule 7.2(a) parallel the 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” emphasizes these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e. not “compensation.”



Petitioner urges 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).

Specialization: Provisions of Rule 7.4 regarding specialization are reflected in the proposed Rule 7.2(c) and comments thereto. Minnesota Rule 7.4(d) currently prohibits a lawyer from claiming to be a specialist or a certified specialist in any field of law unless (1) the lawyer is certified as a specialist by an organization accredited by the Minnesota Board of Legal Certification; or (2) the lawyer communication states, in the same sentence that claims the specialization, that the lawyer is not certified by any organization accredited by the Board. It also requires that any communication claiming specialization disclose the identity of the certifying organization, if any. This is consistent with a prior ABA Model Rule, except that the Minnesota version incorporated the “disclaimer” approach to assure it was narrowly tailored. The latest ABA Model Rule permits lawyers to truthfully state that they limit their practices to, concentrate in, or specialize in particular fields of law based upon the lawyers’ experience, specialized training, or education, but without any disclaimer or disclosure requirement about certification status.

The MSBA amendment to the proposal for Rule 7.2(c) in this Petition prohibits a lawyer from stating or implying that the lawyer is certified as a specialist unless the lawyer is 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. Any communication that includes a claim of specialization must clearly identify the certifying organization.

In December 2006, the Supreme Court Task Force on Legal Certification filed a final report [Court file CX84-1651] on its review of policy options in the area of legal specialist certification. This Court had sought the review to consider the continuing value to the public of specialty certification, the continuing demand for certification, the appropriateness of the board-initiated areas of certification and the effectiveness of various certification models. The Task Force obtained a public opinion survey conducted by the University of Minnesota Center for Survey Research. The survey revealed that over 80% of survey respondents indicated that it was important that “an attorney who advertised as a specialist had in fact been certified as a specialist by an accredited organization that had been approved by the State of Minnesota or the State Bar Association.

Certification and agency accreditation under the Rules of the Board of Legal Certification provide the public with a way to determine whether the lawyer has met clear and articulated standards to verify expertise. Lawyers must demonstrate substantial involvement in a field of law (defined as 25% of their practice) and pass a written examination of the lawyer’s substantive, procedural and ethical law in the field, receive favorable peer reviews, and demonstrate adequate continuing education in the certified field of law. The Board’s accreditation process verifies that certifying agencies have taken this responsibility seriously and that they have in place mechanisms to provide assurances that certified lawyers are true specialists in their field.

Based on the earlier public opinion survey and longstanding tradition and experience of other professions known to the public, a lawyer who claims to be a “specialist” in a field of law unavoidably implies that the lawyer is certified in that recognized specialty area of law. Permitting a lawyer who has not been certified by an accredited agency to claim to be a specialist in a field of law would unnecessarily confuse the public about whether the lawyer has special qualifications to practice in that field.

The prior public opinion survey result is not surprising and there is no reason to doubt its continuing relevance today. While frequent consumers of legal services, whether organizational or personal, as well as the profession itself, may understand that a lawyer who claims to “specialize” may be referring to informal special expertise based on experience or practice focus, MSBA’s proposed amended new Rule 7.2(c) is concerned mainly with protection of the public at large. Most members of the public would be much more familiar with the medical profession’s model of specialization, which for many years has involved requirements of formal training beyond a medical degree (e.g. internship, residency, fellowship, etc.) and includes a peer-based certification of specialty by a board or organization formed around such a specialty area of training. The ubiquity of this public perception of the meaning of “specialist” can be seen from many dictionary definitions of the term which often cite the medical profession model in its definition.<sup>1</sup>

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<sup>1</sup> “A physician whose practice is limited to a particular branch of medicine or surgery, especially one who is certified by a board of physicians: a specialist in oncology”, Specialist American Heritage Dictionary of the English Language (5 ed. 2020), <https://ahdictionary.com/word/search.html?q=specialist> (last visited June 20, 2021).

Given the longstanding and widely understood model of this type of professional “specialization”, it would be easy to confuse a self-proclaimed lawyer “specialist” as having such formal training and recognition. Such external professional recognition may be highly material to any given individual client choice of a lawyer who is a “specialist” and is therefore worthy of ongoing protection.

Proposed comments [9] and [11] to proposed Rule 7.2(c) clarify the requirement that a lawyer must be certified to claim to be a specialist, but may otherwise truthfully state concentration in a field of law.

The proposed amendments also describe which entities qualify to certify or accredit lawyers. The Court may choose to substitute the language in current Rule 7.4(d)(2) specifying the Board of Legal Certification as the accrediting agency for legal specialization programs.

The remaining provisions of Rule 7.4 are addressed in Comments [9] through [11] of Rule 7.2.

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.”

The substance of former comment [4] is moved to the black letter text of Rule 7.3(d).

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.

#### 15. *Rule 7.3: Solicitation of Clients*

The black letter of the current Rules does not define “solicitation;” the definition is contained in Comment [1] to Rule 7.3. 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. 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 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 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.

Petitioner is recommending deletion of the requirement in current Rule 7.3(c) that targeted written solicitations be marked as “advertising material.” Agreeing with the ABA Standing Committee on Ethics and Professional Responsibility and other ABA entities, Petitioner 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. The ABA Standing Committee 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.

16. *Rules 7.4 and 7.5 are deleted.*

The content of much of Rule 7.4 that addresses communications about fields of practice and specialization has been moved to Rule 7.2 and related comments. Petitioner agrees with the ABA that the remainder of Rules 7.4 and 7.5 are no longer necessary. All such communications must comply with Rule 7.1.

17. To further inform the Court regarding the nature and content of the proposed amendments, Petitioner is attaching as Attachment B a redlined copy of Rules 7.1 through 7.3 showing the changes made to the rules and the comments. Petitioner is also attaching, as Attachment C, a copy of the Report of the ABA Standing Committee on Ethics and Professional Responsibility that accompanied the proposed amendments when they were submitted to the House of Delegates of the ABA for approval in August 2018. The Report sets forth in greater detail the work of the Standing Committee in



preparing the proposed amendment and the considerations that led to their recommendations.

18. The Petitioner thus asks this Court to publish the attached proposed Amendments to Rules 7.1 to 7.3 of the Minnesota Rules of Professional Conduct, including the proposed deletion of Rules 7.4 and 7.5, together with the comments thereto for notice and comment and to adopt the Amendments after due consideration.

Respectfully submitted,

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## ATTACHMENT A TO MSBA PETITION

### **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. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[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.

[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 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] 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.

[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.

[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) A lawyer may communicate information regarding the lawyer’s services through 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;

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

(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 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 this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

## **Comment**

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's 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.

## **Paying Others to Recommend a Lawyer**

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. 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) 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 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. Qualified referral services are 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.

[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. 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.

[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.

### **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 an expert in" or limits his or her practice to 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 field of law only if the lawyer is certified as a specialist 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. See Rule 7.4 for requirements associated with the use of the words "specialist" or "specialty".

### **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: 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 solicit professional employment 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 contact is with a:

(1) lawyer;

(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.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (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) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in 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 live person-to-person contact to enroll 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] 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 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 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 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. 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 an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications 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 persuasion that may overwhelm a person's judgment.

[4] The 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 overreaching against a former client, or a person with whom the lawyer has a close personal, 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 overreaching when the person contacted is a lawyer 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 their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that 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(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 does not 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] 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 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 person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but 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 (c).

## ATTACHMENT B TO MSBA PETITION

### Comparison of the Proposed Amendments to Rules 7.1 through 7.5

#### Minnesota Rules of Professional Conduct, to Existing Rules 7.1 through 7.5.

[Additions are shown underlined, deletions are shown ~~struck out~~.]

#### **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] Misleading truthful statements ~~that~~ 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 ~~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] ~~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] 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 ~~influence~~ improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[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.

[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: 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 communications, 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;

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

(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;<sup>2</sup> 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 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 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 or law firm's 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.~~

~~[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)(5), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling 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 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 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.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a ~~not for profit~~ 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 or telephonic 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.

### **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 an expert in" or limits his or her practice to 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 a specialist in a field of law only if the lawyer is certified as a specialist 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.

### **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 ~~by in person or live telephone contact~~ solicit professional employment by live person-to-person contact from anyone 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 by written, recorded, or electronic communication or telephone 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.~~

~~(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 clearly and conspicuously include the words "Advertising Material" on the outside envelope, if any, and within any written, 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.~~

~~(e) 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 person or telephone contact to solicit memberships live person-to-person contact to enroll 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 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 Internet electronic 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 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 abuse-overreaching exists when a solicitation involves lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. These forms-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 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 live person-to-person contact direct in-person or live telephone 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 that do not violate other laws. 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 or telephone 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 or live telephone~~ 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, 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(e) are not applicable in those situations.~~ 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 its members or beneficiaries.

[6] ~~But even permitted forms of solicitation can be abused. Thus, any A solicitation which that contains information which is false or misleading information within the meaning of Rule 7.1, which that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that 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)(2)(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 not intended to~~ does not 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(e) 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.~~

[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 Rule 8.4(a).~~

#### **~~RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND CERTIFICATION~~**

~~(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) In any communication subject to Rules 7.2, 7.3, or 7.5, a lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law except as follows:~~

~~(1) the communication shall clearly identify the name of the certifying organization\_ if any, in the communication; and~~

~~(2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification\_ the communication shall clearly state that the attorney is not certified by any organization accredited by the Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.~~

### **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 that has been accredited by the Board of Legal Certification. 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] Lawyers may also be certified as specialists by organizations that either have not yet been accredited to grant such certification or have been disapproved. In such instances, the consumer may be misled as to the significance of the lawyer's status as a certified specialist. The rule therefore requires that a lawyer who chooses to communicate recognition by such an organization also clearly state the absence or denial of the organization's authority to grant such certification. Because lawyer advertising through public media and written or recorded communications invites the greatest danger of misleading consumers, the absence or denial of the organization's authority to grant certification must be clearly stated in such advertising in the same sentence that communicates 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.~~

### **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 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.~~

~~[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.~~



## ATTACHMENT C TO MSBA PETITION

### AMERICAN BAR ASSOCIATION

### AMERICAN BAR ASSOCIATION

### STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

## REPORT

## LAWYER ADVERTISING RULES FOR THE 21<sup>ST</sup> 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.<sup>1</sup> 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 21<sup>st</sup> 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.<sup>2</sup> 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

<sup>1</sup> Center for Professional Responsibility Jurisdictional Rules Comparison Charts, *available at* [https://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts.html](https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html).

<sup>2</sup> 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/apr\\_lune\\_22\\_2015%20report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/apr_lune_22_2015%20report.authcheckdam.pdf) at 18-19 (“According to a Pew Research Center 2014 Social Media

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.<sup>3</sup>

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.<sup>4</sup>

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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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.”).

<sup>3</sup> For developments in First Amendment law on lawyer advertising, see APRL June 2015 Report, *supra* note 2, at 7-18.

<sup>4</sup> 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

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.

In Comment [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 [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. 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.

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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](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html).

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 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. 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.” 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.<sup>5</sup> 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.<sup>6</sup>

##### **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 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.

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<sup>5</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.authcheckdam.pdf).

<sup>6</sup> 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](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html).

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<sup>7</sup> 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.<sup>8</sup>

### **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 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.

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<sup>7</sup> 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](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html).

<sup>8</sup> 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](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html).

### **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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

## **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

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<sup>9</sup> 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.

<sup>10</sup> 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](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](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/public_hearing_transcript_complete.authcheckdam.pdf).

<sup>11</sup> 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](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](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/webinar_advertising_powerpoint.authcheckdam.pdf).

advertising, which was thought to diminish ethical standards and undermine the public's perception of lawyers.<sup>12</sup> This ban on attorney advertising remained for approximately six decades, until the Supreme Court's decision in 1977 in *Bates v. Arizona*.<sup>13</sup>

## B. Attorney Advertising in the 20<sup>th</sup> 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*,<sup>14</sup> 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.”<sup>15</sup>

In the years that followed, the Supreme Court applied the *Central Hudson* test to strike down a number of regulations on attorney-advertising.<sup>16</sup> The Court reviewed issues such as the failure to adhere to a state “laundry list” of permitted content in direct mail advertisements,<sup>17</sup> a newspaper advertisement's use of a picture of a Dalkon Shield intrauterine device in a state that prohibited all illustrations,<sup>18</sup> and an attorney's letterhead that included his board certification in violation of prohibition against referencing expertise.<sup>19</sup> 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 substantial state interest, and no less restrictive means exists to accomplish the state's goal.<sup>20</sup>

## 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

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<sup>12</sup> 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.

<sup>13</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>14</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y.*, 447 U.S. 557 (1980).

<sup>15</sup> 447 U.S. at 564.

<sup>16</sup> See APRL 2015 Report, *supra* note 2, at 9-18, for a discussion of these cases.

<sup>17</sup> *In re R.M.J.*, 455 U.S. 191, 197 (1982).

<sup>18</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

<sup>19</sup> *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 93-94 (1990).

<sup>20</sup> *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).

dangers that the State has a right to prevent.”<sup>21</sup> 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.”<sup>22</sup> The Court concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.<sup>23</sup>

*Ohralik’s* blanket prohibition on in-person solicitation does not extend to targeted letters. The U.S. Supreme Court held in *Shapiro v. Kentucky Bar Ass’n*,<sup>24</sup> 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.

### A. 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.

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.”<sup>25</sup> The U.S. Court of Appeals for the Second Circuit found New York’s regulation to be to be

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<sup>21</sup> *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449 (1978).

<sup>22</sup> *Id.* at 464–65.

<sup>23</sup> *Id.* at 465-467.

<sup>24</sup> 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.

<sup>25</sup> *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

misleading.<sup>26</sup> The court noted that prohibiting *potentially misleading* commercial speech might fail the *Central Hudson* test.<sup>27</sup> 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.<sup>28</sup>

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*.<sup>29</sup> The Fifth Circuit applied the *Central Hudson* test to attorney advertising regulations.<sup>30</sup> 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 on the Supreme Court's decision in *Zauderer* to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.<sup>31</sup>

[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.<sup>32</sup>

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

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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.).

<sup>26</sup> *Alexander v. Cahill*, 598 F.3d 79, at 96.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Note that the court did uphold the moratorium provisions that prevent lawyers from contacting accident victims for a certain period of time.

<sup>29</sup> *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.

<sup>30</sup> *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011). <sup>31</sup> *Id.* at 220.

<sup>32</sup> *Id.* citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985).

such advertising on indoor and outdoor displays, television, or radio.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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 21<sup>st</sup> 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 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

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<sup>33</sup> *Rubenstein v. Fla. Bar*, 72 F. Supp. 3d 1298 (S.D. Fla. 2014).

<sup>34</sup> *Id.* at 1312.

<sup>35</sup> *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](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E8E7FDDE9DBB8DE385257ED5004ABB95/$FILE/Searcy%20Order%20on%20Merits.pdf)

**FILED**

October 21, 2021

**OFFICE OF  
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

**ORDER ESTABLISHING PUBLIC COMMENT PERIOD AND  
HEARING ON PROPOSED AMENDMENTS TO  
THE MINNESOTA RULES OF PROFESSIONAL CONDUCT  
AND THE MINNESOTA RULES ON LAWYERS  
PROFESSIONAL RESPONSIBILITY**

The Minnesota State Bar Association and the Lawyers Professional Responsibility Board with the Director of the Office of Lawyers Professional Responsibility have each filed petitions that propose amendments to Rule 7 of the Minnesota Rules of Professional Conduct, which governs lawyer advertising and communications with potential clients. The petitioners support amendments to Rule 7 to provide uniformity and clarity in the regulation of lawyer advertising and client communications, but they differ on the need for language in the rule that addresses advertising claims that asserts “specialist” or “specialty” status.

The Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility have filed a second, separate, petition that proposes amendments to Rule 20 of the Rules on Lawyers Professional Responsibility, which governs public access to documents and information maintained by the Office. The proposed amendments would reorganize provisions of the rule and classify the public or non-public status of documents and information held by the Director.

The petitions to amend Rule 7, Minnesota Rules of Professional Conduct, and the petition to amend Rule 20, Rules on Lawyers Professional Responsibility, are available on the public access site for the Minnesota Appellate Courts, P-MACS, under case number

ADM10-8005. The court will consider the proposed amendments to Rule 7 of the Minnesota Rules of Professional Conduct and Rule 20 of the Rules on Lawyers Professional Responsibility after providing a period for public comment on those proposed amendments. Given the different positions taken by the petitioners regarding language in Rule 7 of the Rules of Professional Conduct to address advertising claims regarding specialist or specialty status, the court invites comments on these proposed amendments from the Minnesota State Board of Legal Certification.

IT IS HEREBY ORDERED THAT:


1. Any person or organization wishing to provide written comments in support of or in opposition to the amendments proposed to Rule 7 of the Minnesota Rules of Professional Conduct, or to the amendments proposed to Rule 20 of the Rules on Lawyers Professional Responsibility, shall file those comments with the Clerk of the Appellate Courts, using the appellate courts' e-filing application, E-MACS, if required to do so. *See* Minn. R. Civ. App. P. 125.01(a)(1). All comments shall be filed so as to be received by the Clerk's office no later than December 20, 2021.

2. A hearing will be held before this court to consider the proposed amendments to Rule 7 of the Minnesota Rules of Professional Conduct and Rule 20 of the Rules on Lawyers Professional Responsibility. The hearing will take place in the Supreme Court Courtroom, State Capitol, Saint Paul, Minnesota, on January 26, 2022, at 10 a.m. Any person or organization who wishes to make a presentation at the hearing in support of or in opposition to the proposed amendments to these rules shall file a request to so appear along with one copy of the material to be presented with the Clerk of the Appellate Courts,

using the appellate courts' e-filing application, E-MACS, if required to do so. *See* Minn. R. Civ. App. P. 125.01(a)(1). All requests and accompanying materials shall be filed so as to be received by the Clerk's office no later than December 20, 2021.

Dated: October 21, 2021

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Lorie S. Gildea".

Lorie S. Gildea  
Chief Justice



**FILED**

LAW OFFICE OF  
**ERIC T. COOPERSTEIN, PLLC**  
800 NICOLLET MALL, SUITE 2600 • MINNEAPOLIS, MN 55402

December 20, 2021

**OFFICE OF  
APPELLATE COURTS**

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December 20, 2021

Ms. AnnMarie S. O'Neill  
Clerk of Appellate Courts  
305 Minnesota Judicial Center  
25 Rev. Martin Luther King Jr., Blvd.  
St. Paul, MN 55155

Re: Amendments to Rule 20, Rules on Lawyers Professional Responsibility  
Minnesota Supreme Court File No: ADM10-8005

Dear Ms. O'Neill:

I submit this letter to comment on the Petition of the Lawyers Professional Responsibility Board to Amend Rule 20, Rules on Lawyers Professional Responsibility (RLPR). I am not requesting the opportunity to make a presentation at the hearing scheduled for January 26, 2022.

The proposed rewriting of Rule 20 generally improves upon the existing rule. There is one instance, however, in which some clarity may have been lost. Rule 20(a)(4) currently provides that the Director's file in an investigation of a lawyer must be produced to the lawyer upon request, save for the Director's work product. That portion of the rule applies throughout a disciplinary matter, regardless of whether the matter is private or public or whether the file is open or closed.

The proposed rule retains that provision as a new section Rule 20(a)(3). However, in the process of carving out confidentiality provisions that apply only to public proceedings (captured in Rule 20(b)), the provision that requires the Director to provide her file to the affected lawyer appears only in the context of private proceedings, prior to a finding of probable cause or the filing of a public petition under other rules. Hence, the new rule could be read to require the Director to release her file regarding a lawyer only prior to a finding of probable cause or the commencement of public proceedings. This could have the unintended effect of

depriving the lawyer access to the categories of records identified in Rule 20(b)(2) and (3).

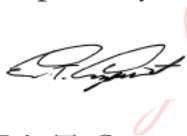
For example, because the Director's investigation of a matter continues after the matter becomes public, it is possible that the Director would receive medical records "or other documents containing sensitive or personal identifying information" after a public case begins. Similarly, the Director could receive information from other agencies after the public phase of a discipline case has begun. Although I do not think that this was the Director's intent, the rewritten rule could be interpreted to allow the Director to decline to provide such materials to the lawyer upon request.

The issue could be remedied by referencing the provision from Rule 20(a)(3) in a new paragraph, part (b)(5):

(5) Nothing in this rule shall be construed to limit the Director's obligation to provide a copy of the Director's file upon the request of the lawyer affected, as specified in part (a)(3) of this rule.

The last provision of part (b) in the draft rule could then be renumbered from (5) to (6).

Respectfully submitted,



Digitally signed by  
Eric Cooperstein  
Date: 2021.12.20  
12:26:27 -06'00'

Eric T. Cooperstein

Andrew J. Pratt, Chair  
Linda S. Birnbaum  
Martin A. Cole  
Cynthia K. Daniels  
Samuel Edmunds  
Thomas A. Jacobson  
Kellie Reynolds  
Bruce Rivers  
Brandon M. Schwartz  
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**FILED**

December 20, 2021

TTY Users  
1-800-627-3529  
Ask For (651) 297-1857

**OFFICE OF  
APPELLATE COURTS**

Emily Eschweiler  
Director

THE SUPREME COURT OF MINNESOTA  
BOARD OF LEGAL CERTIFICATION

December 20, 2021  
By electronic filing

Christa Rutherford-Block  
Clerk of Appellate Courts  
305 Minnesota Judicial Center  
25 Rev. Dr. Martin Luther King Jr. Boulevard  
St. Paul, MN 55155

Re: Court File No. ADM10-8005

Honorable Justices of the Minnesota Supreme Court:

The Minnesota Board of Legal Certification (Board) submits this correspondence in response to the Court's Order dated October 21, 2021, seeking commentary to the Petitions filed by the Minnesota State Bar Association (MSBA) and the Lawyers Professional Responsibility Board proposing changes to Rule 7 of the Minnesota Rules of Professional Conduct, which governs lawyer advertising. The Chair of the Board requests the opportunity to speak to this issue at the Court's January 26, 2022, hearing in this matter.

The Board objects to any changes that would eliminate the language that promotes the strength of certification in the state of Minnesota. The current language of Rule 7.4(d) has served the public well and the proposed reasoning for recommended changes focuses more on the interests of lawyers and national uniformity than on the protection of the public.

The Minnesota Supreme Court has stated:

The purpose of the Minnesota State Board of Legal Certification (Board) is to accredit agencies that certify lawyers as specialists, so that public access to appropriate legal services may be enhanced. In carrying out its purpose, the Board shall provide information about certification of lawyers as specialists for the benefit of the profession and the public.<sup>1</sup>

In December 2006, the Supreme Court Task Force on Legal Certification filed its Final Report on its review of the policy options in the area of legal specialist certification. The

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<sup>1</sup> Rule 100, Rules of the Minnesota State Board of Legal Certification.

Court had sought the review to consider the continuing value to the public of specialty certification, the continuing professional demand for certification, the appropriateness of the “board initiated areas of certification,” and the effectiveness of the various certification models.<sup>2</sup>

As part of the process, the University of Minnesota Center for Survey Research conducted a public opinion survey that found that it was important to over 80% of those responding that “an attorney who advertised as a specialist had in fact been certified as a specialist by an accredited organization that had been approved by the State of Minnesota or the State Bar Association.”<sup>3</sup>

The current language of Rule 7.4(d) reads:

(d) In any communication subject to Rule [7.2](#), [7.3](#), or [7.5](#), a lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law except as follows:

(1) the communication shall clearly identify the name of the certifying organization, if any, in the communication; and

(2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by that Board, and in any advertising subject to Rule [7.2](#), this statement shall appear in the same sentence that communicates the certification.

The Petition filed by the Lawyers’ Board of Professional Responsibility seeks to allow non-certified lawyers to state that they are specialists, based on the lawyer’s experience, training, or education, without the additional requirement that the lawyer clearly state that they are not certified as a specialist by an organization accredited by the Board. In addition, the Lawyers’ Board’s language proposes removing the requirement that agencies be accredited by the Minnesota Board of Legal Certification and allows for accreditation by the American Bar Association or another jurisdiction. This would dilute the strength of certification in Minnesota.

The Petition filed by the MSBA requires that lawyers not state they are specialists unless they are certified. As proposed, it removes the language currently in Rule 7.4(d)(2) that allows non-certified lawyers to state that they are specialists as long as they also provide the language that they are not certified by an accredited agency. The MSBA’s proposal also dilutes the certification process in Minnesota by allowing accreditation by the ABA or other jurisdictions, without requiring that the lawyer state they are accredited by an entity other than the Minnesota Board of Legal Certification.

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<sup>2</sup> See Legal Certification Review Task Force Final Report, filed December 5, 2006. Court File: CX-84-1651

<sup>3</sup> Id. at page 3.

Ms. Rutherford-Block

December 20, 2021

Page 3

This additional information provides important public notice that the accreditation standards may be different than those required in Minnesota.

The Board does not object to moving Rule 7.4(d) to Rule 7.2, but does object to any change that would dilute the value of certification in Minnesota. Certification by the Minnesota Board of Legal Certification provides the public with a way to determine whether the lawyer has met clear and articulated standards to verify expertise. Lawyers must demonstrate substantial involvement (defined as at least 25% of practice in the field of law); pass a written examination of the lawyer's substantive, procedural, and ethical law in the field; be admitted in good standing; receive favorable peer reviews; and demonstrate adequate continuing legal education in the certified specialist's field of law. The Board's accreditation process verifies that the agencies have taken this responsibility seriously and that they have in place the mechanisms to provide assurances that the individuals certified are true specialists in those fields.

Based on the public opinion survey and long standing tradition, a lawyer who states that he or she is a "specialist" creates an implication that the lawyer is certified in that field of law. Removing the requirement that the lawyer provide additional information diminishes the Board's role in protecting the public.

The Board proposes that the language of the current rule be restructured and moved to Rule 7.2, but proposes the following, consistent with the current rule language:

A lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law, unless (1) (i) the lawyer has been certified as a specialist by an organization accredited by the Minnesota Board of Legal Certification and (ii) the name of the certifying organization is clearly identified in the communication; or (2) the communication clearly states that the lawyer is not certified by any organization accredited by the Board in the same paragraph as the representation.

We appreciate the opportunity to provide comments on this matter.

Very truly yours,

MINNESOTA STATE BOARD OF LEGAL CERTIFICATION

/s/

Andrew Pratt, Chair

Emily Eschweiler, Director

**FILED**

December 20, 2021

**OFFICE OF  
APPELLATE COURTS**

STATE OF MINNESOTA  
IN SUPREME COURT  
ADM 10-8005

In re: Petition to Amend Rule 20, of the Minnesota Rules on Lawyers Professional  
Responsibility

**WRITTEN COMMENTS OF LAWYERS CONCERNED FOR LAWYERS**

**LAWYERS CONCERNED FOR LAWYERS**

Hon. Lawrence Johnson,  
Chair, Board of Directors  
Joan Bibelhausen, Executive Director (#0149111)  
Lawyers Concerned for Lawyers  
2550 University Avenue West  
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# **Lawyers Concerned for Lawyers Statement Regarding the Petition to Amend Rule 20, of the Minnesota Rules on Lawyers Professional Responsibility**

## **Introduction**

Lawyers Concerned for Lawyers (LCL) serves as the Lawyer Assistance Program for the State of Minnesota. LCL serves lawyers, judges, law students, and staff who work on legal matters, as well as their immediate family members, on any issue that causes stress or distress. LCL works to reduce stigma associated with mental health, including substance use issues. These are by far the most common disabilities and potentially disabling conditions in our profession.

## **I. LCL Experience Attorneys Facing Discipline**

In its 2021 *Profile of the Legal Profession*, the American Bar Association addressed the connection between impairment and attorney discipline: “These issues can have major consequences. Studies show that 25% to 30% of lawyers facing disciplinary charges suffer from some type of addiction or mental illness.”<sup>1</sup> Professional responsibility concerns associated with impairment and well-being often involve competence and diligence, as referenced in the report, *The Path to Lawyer Well-Being, Practical Recommendations for Positive Change*.<sup>2</sup>

For LCL clients who are the subject of a complaint to the Minnesota Office of Lawyers Professional Responsibility, the most common issues concern a lawyer’s failure to communicate with clients, lack of diligence in handling matters, and failure to cooperate as required with the OLPR. LCL contends these categories of professional responsibility violations, and others not specified here, are directly related to impairment and well-being in the legal profession. For example, an impairment such as depression may affect an individual’s ability to respond to an OLPR inquiry, leading to further complications and allegations in their professional responsibility matter.

LCL facilitates a support group for lawyers with professional responsibility concerns. We have observed that there is often shame experienced on the lawyer’s part and recognition that a professional responsibility problem may have been less severe with earlier response

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<sup>1</sup> American Bar Association, *Profile of the Legal Profession* 96 (ABA 2021) (citing *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. Addict. Med. (January-February 2016)),

<https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf>.

<sup>2</sup> National Task Force on Lawyer Well-being, *The Path to Lawyer Well-Being, Practical Recommendations for Positive Change* (ABA 2017),

<https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>.

or cooperation. LCL has worked with attorneys whose distress ranges from shame and embarrassment to active suicidal ideation.

## **II. LCL Steps to Connect with Attorneys Facing Discipline**

Several years ago, LCL reached an agreement with the OLPR that LCL would receive a courtesy copy of any petition for discipline or reinstatement via U.S. mail (more recently via email). LCL will reach out to the individuals; we note that we learned of their situation due to public record, and we offer help. In many of the cases, LCL is unfamiliar with the lawyers prior to receiving a copy of the petition.

LCL receives this notification at the same time as any other individuals or entities who would receive this public notice, including media. Thus, at the same time the affected lawyer receives LCL outreach, they could receive a call from a reporter. We believe we could have a greater opportunity to support that lawyer, and perhaps lessen the likelihood of continued misconduct, by reaching them earlier. “I wish I had called you sooner” is not an uncommon response when the lawyer realizes LCL will provide non-judgmental support through the disciplinary process.

Sometimes LCL learns that we have made a truly significant difference for someone. A lawyer who had been prominent earlier in his career was embarrassed by some mistakes he had made and was extremely distressed. We provided services and several months later he sent us a note that included the phrase “But for your outreach when I was facing my problems, I might not be here today.” When we met him, he had been considering how and when to take his life.

## **III. LCL Statement on Proposed Amendment to Rule 20**

The Board of Directors of Lawyers Concerned for Lawyers has reviewed and discussed the proposed amendments to Rule 20 of the Minnesota Rules on Lawyers Professional Responsibility, which allows for one-way communication between the OLPR Director and the Lawyers Assistance Program (which is LCL). The Board is in support of this amendment and believes it supports LCL’s mission to provide consistent, robust, and confidential assistance to the Minnesota legal community.



**PRIDGEON & ZOSS, PLLC  
ATTORNEYS AT LAW**

**FILED**

December 21, 2021

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December 21, 2021

Clerk of Appellate Courts  
305 Minnesota Judicial Center  
25 Rev. Dr. Martin Luther King Blvd  
St. Paul MN 55155

RE: Minn. S. Ct File No. ADM 10-8005  
Proposed amendments to the Minnesota Rules of Professional Conduct

Dear Clerk of the Appellate Courts:

In response to the Supreme Court's Order of October 21, 2021, establishing a public comment period on proposed amendments to the Minnesota Rules of Professional Conduct, we hereby file comments in support of the Lawyers Professional Responsibility Board in regard to proposed amendments to Rule 7 of the Rules of Professional Conduct. We do not request time for an oral presentation. We specifically address the proposed amendments to Rule 7.2 regarding the use of the term "specialists." Specifically, we endorse the position of the American Bar Association and the Lawyers Professional Responsibility Board that would allow attorneys to refer to themselves as a "specialist" based on years of experience, education and focus on a specialized practice, even if such attorneys are not certified. We understand the position of the Minnesota State Bar Association to be that only attorneys who have gone through the certification process may refer to themselves as a "specialist."

We note the following language from the Petition of the Lawyers Board of Professional Responsibility, (page 12 ¶1(F)(ii)):

"It is common knowledge within the bench and bar that many highly qualified lawyers limit their practice to particular fields of law within which they have obtained an exceptional degree of competence and respect. These lawyers may be called upon and qualified to give expert testimony to matters within their field. Lawyers and judges commonly refer to such lawyers as "specialists" in their field. The public will not be harmed if lawyers whose education, experience and specialized training, which qualifies them as experts in their field, are allowed to truthfully state that they are specialists."

Based on our experience, we can say that this paragraph provides an accurate summary in regard to lawyers who are experts in a given field or subject matter of law. We believe that the public will be adequately protected against false information by the prohibitions on false and misleading communications in lawyer advertising.

We believe that both members of our firm, Mark A. Pridgeon and David L. Zoss qualify as “specialists” under common sense standard proposed by the ABA and the Lawyer’s Board of Professional Responsibility. Mark A. Pridgeon, J.D., C.P.A., is a practicing attorney in the Twin Cities area. He specializes primarily in tax litigation in the United States and Minnesota Tax Courts and taxpayer representation before the Internal Revenue Service and the Minnesota Department of Revenue. After graduating from Harvard Law School in 1978, Mr. Pridgeon began his career as an attorney for the Chief Counsel's Office for the Internal Revenue Service where he tried cases in the United States Tax Court and served as a legal advisor to the field operations of the Internal Revenue Service (the Examination, Collection and Criminal Investigation Divisions). Mr. Pridgeon left the Chief Counsel's Office in May of 1985 to join the international accounting firm of Ernst & Whinney after which he practiced with the accounting firm of Larson, Allen & Weishair. In July 1990, Mr. Pridgeon returned to the practice of law as described above. Mr. Pridgeon has also served as expert witness in a number of cases where tax issues, especially tax litigation issues have developed.

David L. Zoss, J.D., LL.M. (Taxation), is also a practicing attorney in the Twin Cities area. Mr. Zoss received his J.D. degree from the Valparaiso University School of Law in 1976, and his LL.M degree in taxation from The John Marshall Law School in 1985. He was admitted to practice in Indiana in 1976. In 1977 he was admitted to practice before the United States District Court for the Northern District of Indiana. In 1987, Mr. Zoss left private practice and commenced employment with the IRS Office of Chief Counsel in Chicago, Illinois, and was admitted to practice in the United States Tax Court. While with the IRS Office of Chief Counsel Mr. Zoss appeared in many cases before the U.S. Tax Court. He also represented the United States in the U.S. Bankruptcy Court for the District of Minnesota as a Special Assistant United States Attorney. During his employment with IRS Counsel’s Office Mr. Zoss was assigned to matters, both civil and criminal, involving federal income, employment, estate and gift, excise and international tax issues.

Mr. Zoss retired from his federal service with the IRS Office of Chief Counsel in 2016. In that year he was admitted to, and commenced, practice in Minnesota. His current practice is limited to federal and state tax issues, and taxpayer representation in both litigation and administrative proceedings. Mr. Zoss represents taxpayers in administrative matters pending before the Internal Revenue Service, and the Minnesota Department of Revenue. In his current litigation practice Mr. Zoss appears on behalf of taxpayers in the U.S. District Court for the District of Minnesota, the Minnesota Tax Court, and in Minnesota District and Appellate Courts.

Mr. Zoss is co-author of Chapter 26, Bankruptcy Tax & Accounting Issues, of the Bankruptcy Practice in Minnesota Deskbook, published by Minnesota Continuing Legal Education. Mr. Zoss has presented at Minnesota CLE programs including at its annual Tax and Bankruptcy Institutes on a number of past occasions. Between 2009 and 2014 Mr. Zoss taught Federal Tax Practice and Procedure at the William Mitchell College of Law as an adjunct professor.

In addition, we believe that the Minnesota Bar Association’s preference for limiting the use of the term “specialist” to lawyers obtaining certification in a certain field is unnecessarily cramped and likely to be misunderstood by the public. The Minnesota State Board of Legal Certification lists 12 fields in which a Minnesota fields in which a Minnesota lawyer may obtain certification. Tax law and taxpayer representation is not one of those fields. Rule 114 of the Minnesota State Board

of Legal Certification sets forth several requirements for obtaining certification in a field of law for which certification is available.

- The lawyer must show by independent evidence “substantial involvement in the field of law during a three-year period preceding certification” which means at least 25% of the lawyers practice is spent in that certification field.
- The lawyer seeking certification must submit three written peer recommendations and references from lawyers and judges unrelated to and not in legal practice with the lawyer.
- The lawyer seeking certification must complete a written examination of the lawyers knowledge of substantive, procedural and related ethical law of the field.
- The lawyer must provide evidence of at least 20 hours in every three years of CLE activity directly related to the field of law.

While these are admirable requirements, these requirements do not compare with each of us having spent 40 years in professional tax practice during which we have dedicated virtually of our time and effort to tax issues and tax litigation.

Furthermore, the Minnesota State Bar Association’s view of the use of the term “specialist” as being restricted to those obtaining certification who will likely only confuse the public. We have noticed that potential clients increasingly use social media including attorney websites and Facebook pages to find counsel to represent them. We have found in our conversations with potential clients that they want an expert or specialist in tax issues. They want a specialist as defined in the language of the Petitioner of the Lawyers Board of Professional Responsibility quoted above: an attorney with long practice and deep knowledge of the substantive and procedural and ethical aspects of a specific field of law, in our case taxpayer representation and taxpayer litigation. Restricting the use of the word “specialist” to “certified” lawyers serves only to confuse the public. We agree that lawyers who have not obtained certification in the field specific fields for which certification is offered should not be allowed to state that they are certified in that field. However, the practice of law can be subdivided into far more specialized fields than those for which certification is possible to obtain. Lawyers with long knowledge and experience should be allowed to claim the mantle or the title of “specialist” if their experience and knowledge warrants the use of that term.

Respectfully submitted,

 (City # 88262)

Mark A. Pridgeon



David L. Zoss

MAP/sjo

**FILED**

January 11, 2022

**OFFICE OF  
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

**ORDER REGARDING PUBLIC HEARING  
ON PROPOSED AMENDMENTS TO THE  
MINNESOTA RULES OF PROFESSIONAL CONDUCT  
AND THE MINNESOTA RULES ON LAWYERS  
PROFESSIONAL RESPONSIBILITY**

The Minnesota State Bar Association and the Lawyers Professional Responsibility Board with the Director of the Office of Lawyers Professional Responsibility have each filed petitions that propose amendments to Rule 7 of the Minnesota Rules of Professional Conduct. In addition, the Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility have filed a second, separate, petition that proposes amendments to Rule 20 of the Rules on Lawyers Professional Responsibility. We opened a public comment period on the proposed amendments and scheduled a public hearing, on January 26, 2022, at 10:00 a.m. in the Supreme Court Courtroom, State Capitol. Written comments have been filed and three requests to speak at the public hearing have been filed.

Based on the petitions, written comments, and requests to speak,

IT IS HEREBY ORDERED that the hearing on January 26, 2022, at the State Capitol Courtroom shall proceed as follows.

1. Jennifer A. Thompson and Michael W. Unger, on behalf of the Minnesota State Bar Association shall proceed first and together have up to 15 minutes of time to

present the petition, proposed amendments to Rule 7 of the Minnesota Rules of Professional Conduct, and any comments regarding those proposed amendments.

2. Daniel J. Cragg, on behalf of the Lawyers Professional Responsibility Board shall proceed next and shall have up to 15 minutes of time to present the Board's petition, proposed amendments to Rule 7 of the Minnesota Rules of Professional Conduct, and any comments regarding those proposed amendments.

3. Andrew Pratt, chair of the Minnesota Board of Legal Certification, shall proceed next and shall have up to 10 minutes of time to present the Board's comments regarding the proposed amendments to Rule 7 of the Minnesota Rules of Professional Conduct.

4. In the event members of the court have questions, we ask that Susan Humiston, Director of the Office of Lawyers Professional Responsibility, be available at the hearing on January 26, 2022, and be ready to answer questions regarding the proposed amendments to both Rule 7 of the Minnesota Rules of Professional Conduct and Rule 20 of the Rules on Lawyers Professional Responsibility.

Dated: January 11, 2022

BY THE COURT:



Lorie S. Gildea  
Chief Justice

### OLPR Dashboard for Court And Chair

	Month Ending December 2021	Change from Previous Month	Month Ending November 2021	Month Ending December 2020
<b>Open Files</b>	479	9	470	442
<b>Total Number of Lawyers</b>	353	7	346	350
<b>New Files YTD</b>	946	73	873	930
<b>Closed Files YTD</b>	909	64	845	969
<b>Closed CO12s YTD</b>	109	13	96	182
<b>Summary Dismissals YTD</b>	429	21	408	436
<b>Files Opened During December 2021</b>	73	1	72	80
<b>Files Closed During December 2021</b>	64	-4	68	94
<b>Public Matters Pending (excluding Resignations)</b>	41	1	40	35
<b>Panel Matters Pending</b>	8	1	7	23
<b>DEC Matters Pending</b>	105	5	100	75
<b>Files on Hold</b>	12	0	12	15
<b>Advisory Opinion Requests YTD</b>	2004	151	1853	1700
<b>CLE Presentations YTD</b>	49	3	46	46
<b>Files Over 1 Year Old</b>				
<b>Total Number of Lawyers</b>	122	-5	127	125
<b>Total Number of Lawyers</b>	84	-6	90	92
<b>Files Pending Over 1 Year Old w/o Charges</b>	57	-6	63	57
<b>Total Number of Lawyers</b>	44	-4	48	43

	2021 YTD	2020 YTD
<b>Lawyers Disbarred</b>	4	3
<b>Lawyers Suspended</b>	17	24
<b>Lawyers Reprimand &amp; Probation</b>	4	5
<b>Lawyers Reprimand</b>	3	1
<b>TOTAL PUBLIC</b>	<b>28</b>	<b>33</b>
<b>Private Probation Files</b>	9	20
<b>Admonition Files</b>	88	82
<b>TOTAL PRIVATE</b>	<b>97</b>	<b>102</b>

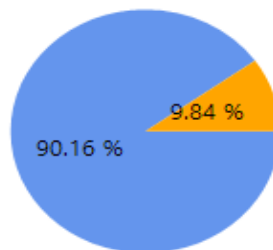
# FILES OVER 1 YEAR OLD

Year/Month	OLPR	PAN	HOLD	SUP	S12C	SCUA	Total
2017-03			1	1			2
2018-04				1			1
2018-06				1			1
2018-07		1		1			2
2018-08		1		1			2
2018-10	2						2
2018-12	1			1			2
2019-01			1				1
2019-03				2		1	3
2019-04	2		3			1	6
2019-05				3		1	4
2019-06			1	1			2
2019-07	1			1	1		3
2019-08	1						1
2019-09		1		2			3
2019-10	2			2		1	5
2019-11			1			1	2
2019-12	2						2
2020-01	4						4
2020-02	1		2	1		2	6
2020-03	1			1		1	3
2020-04				1		1	2
2020-05			1	3			4
2020-06	2			2			4
2020-07	4					2	6
2020-08	7	1		2		1	11
2020-09	7			3			10
2020-10	8		1	1		1	11
2020-11	6			1		1	8
2020-12	6			2		1	9
<b>Total</b>	<b>57</b>	<b>4</b>	<b>11</b>	<b>34</b>	<b>1</b>	<b>15</b>	<b>122</b>

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	107	35
Total Cases Under Advisement	15	15
<b>Total Cases Over One Year Old</b>	<b>122</b>	<b>50</b>

Active v. Inactive

■ Active 110  
■ Inactive 12



## All Pending Files as of Month Ending December 2021

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2017-03							1	1						2
2018-04								1						1
2018-06								1						1
2018-07						1		1						2
2018-08						1		1						2
2018-10				2										2
2018-12				1				1						2
2019-01							1							1
2019-03								2		1				3
2019-04				2			3			1				6
2019-05								3		1				4
2019-06							1	1						2
2019-07				1				1	1					3
2019-08				1										1
2019-09						1		2						3
2019-10				2				2		1				5
2019-11							1			1				2
2019-12				2										2
2020-01				4										4
2020-02				1			2	1		3				7
2020-03				1				1		1				3
2020-04								1		1				2
2020-05							1	3						4
2020-06				2				2						4
2020-07				4						2				6
2020-08				7		1		2		1				11
2020-09				7				3						10
2020-10				8			1	1		1				11
2020-11				6				1		1				8
2020-12				6				2		1				9
2021-01				18				2			1			21
2021-02				9				1		3	1			14
2021-03				21	3		1	2			1			28
2021-04			1	23				2						26
2021-05		1	5	22										28
2021-06		5	1	21						1			1	29
2021-07		10	1	9							1			21
2021-08		12	3	22						1			1	39
2021-09		20	2	16										38
2021-10		17	2	9										28
2021-11		17		13										30
2021-12	15	23		11							1	4		54
<b>Total</b>	<b>15</b>	<b>105</b>	<b>15</b>	<b>251</b>	<b>3</b>	<b>4</b>	<b>12</b>	<b>41</b>	<b>1</b>	<b>21</b>	<b>5</b>	<b>4</b>	<b>2</b>	<b>479</b>



**ALL FILES PENDING & FILES OVER 1 YR. OLD**

SD	Summary Dismissal
DEC	District Ethics Committees
REV	Being reviewed by OLPR attorney after DEC report received
OLPR	Under Investigation at Director's Office
AD	Admonition issued
ADAP	Admonition Appealed by Respondent
PROB	Probation Stipulation Issued
PAN	Charges Issued
HOLD	On Hold
SUP	Petition has been filed.
S12C	Respondent cannot be found
SCUA	Under Advisement by the Supreme Court
REIN	Reinstatement
RESG	Resignation
TRUS	Trusteeship

January 13, 2022

**OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY**

2021 Year in Review Numbers—Year over (Year)

New Complaints:	946	(930)
Closings:	909	(969)
Advisory Opinions:	2004	(1700)
Public Discipline:	28	(33)
Disbarred:	4	(3)
Suspended:	17	(24)
Reprimand/Prob:	4	(5)
Reprimand:	3	(1)
Private Discipline (files):	97	(102)
Probation:	9	(20)
Admonitions:	88	(82)
Open Files:	479	(442)
Year Old:	122	(125)
With Office:	57	(57)
With Court:	65	(68)
Oldest File:	3/2017	(3/2017)



# Lawyer neutrals and other people's money

Last month's column focused on trust accounts and overdrafts. One reader asked an excellent follow-up question: What about lawyers who serve as neutrals? What are they to do with other people's money that they hold? Many attorneys serve as parenting consultants, parenting time expeditors, special masters, custody evaluators, arbitrators, and mediators. Many receive retainers in advance and bill their services as a third-party neutral on an hourly basis over time. Where should the lawyer as neutral put those third-party funds, in their trust account or business account?



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## The rules

As always, it is helpful to start with the text of the rules. Rule 2.4(a), Minnesota Rules of Professional Conduct (MRPC), acknowledges this common role for lawyers:

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

Rule 1.15(a), MRPC, states the rule for safekeeping property: "All funds

of clients or third persons held by a lawyer or law firm *in connection with a representation* shall be deposited in one or more identifiable trust accounts..." (emphasis added). When a lawyer serves as a neutral, the parties involved are not the neutral's clients. The lawyer is holding third-party funds but is not doing so "in connection with a representation." Therefore, Rule 1.15(a) does not require those funds to be placed in a trust account.

The rule continues: "No funds belonging to the lawyer or the law firm shall be deposited" in the trust account except monies to cover service charges or funds payable to both the client or third person and the lawyer or law firm. Based upon the language of Rule 1.15(a), MRPC, the OLPR has always advised lawyers that funds not held in connection with a representation, such as advance fees paid for neutral services, not legal services, should not be in your trust account. The Minnesota Supreme Court has interpreted Rule 1.15(a), MRPC, in this manner as well. (*In re Varriano*, 755 N.W.2d 282, 289 (Minn. 2008): "Rule 1.15(a) explicitly requires that funds held in connection with a representation be deposited into a trust account. Implicitly these are the only types of funds that belong in a trust account. Lawyers' personal funds or fees to which they are entitled must not remain in the trust account.")

## What if you have this wrong?

To the extent that this surprises you, please don't panic. There is no duty to self-report a violation of the rules. This fact also surprises many people. The rules do require lawyers to report certain misconduct of others if they know of it (Rule 8.3(a), MRPC), but there is no duty to self-report. Now that you know, I recommend that you revise your business practices as soon as possible to hold advance third-party neutral fees in your business account, not your trust account. No doubt this

will be welcome news for many, as it might eliminate unnecessary trust account record-keeping. If you only do this type of third-party neutral work, you may find you do not need a trust account at all.

Remember, though, if you are holding third-party funds *in connection with a representation*, those must go into trust, and it is a violation of the ethics rules to hold them in a non-trust account. Take care, as well, if you choose to act as an escrow agent for third parties. Those funds should not be in your trust account either, since they are not held in connection with a client representation. These rules may seem overly cautious, but the point of the rules is to protect money placed in trust. Holding other funds not relating to client representations in your trust account may put those funds at risk of claims by third parties or improperly shelter funds from rightful claims of third parties.

### Other tips for lawyers acting as neutrals

Another question I have received on the ethics line from lawyers acting as neutrals relates to the duty to report misconduct of lawyers that they learn of while acting as neutrals. Neutrals have strong confidentiality rules, as do lawyers. For those acting as neutrals subject to Rule 114 of the

Minnesota Rules of Practice, there is a specific exception to confidentiality if disclosure is required by a professional code. Rule 114.08(e) provides the “[n]otes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes.” Thus, if you are required to report lawyer misconduct you learn of while serving as a neutral, you may do so consistent with your neutral confidentiality obligations. You can always give us a call if you have questions about whether you would be required to report particular misconduct. Whether or not a duty to report exists is one of the most frequent questions on the ethics line.

### Conclusion

While I understand the impulse of lawyers to treat the handling of other people’s money the same in all circumstances—put it into trust for safekeeping—the rules are more precise than that. If you are holding other people’s money for purposes other than in connection with a client representation, those funds do not belong in your trust account. Please call our ethics hotline (651-296-3952) if you have questions, and thanks to a thoughtful reader for this column suggestion. ▲



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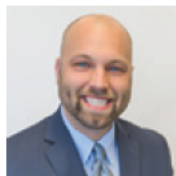
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# Potential ethics rule changes

The ethics rules generally change infrequently. Currently pending before the Minnesota Supreme Court are petitions to amend the advertising ethics rules (Rule 7, Minnesota Rules of Professional Conduct) as well as a proposal to amend the confidentiality rules applicable to information held by the Director's Office (Rule 20, Rules on Lawyers Professional Responsibility). If you are interested in either of these topics, take note of the comment period established by the Court: Any person or organization wishing to provide written comments in support of or in opposition to the amendments must file comments with the Clerk of the Appellate Court by December 20, 2021. I thought an overview of the proposed changes to Rule 7, MRPC, and Rule 20, RLPR, would be helpful in case you wish to comment.

## Rule 7, MRPC

Rule 7, MRPC, governs lawyer advertising and communications. In August 2018, the American Bar Association amended Rule 7 of the Model Rules, significantly reworking the

rule's subparts to eliminate what the ABA believed were unnecessary provisions. Some of the noted reasons for amending Rule 7 include the advent and increased use of social media, and to address trends in First Amendment and antitrust law that disfavor regulation of truthful communication about the availability of professional services. The Director's

Office and the Lawyers Professional Responsibility Board (LPRB) jointly petitioned the Court to adopt the ABA model rule changes. The Minnesota State Bar Association also petitioned the Court to adopt the proposed ABA changes, with one notable exception. In general, the main changes are as follows:

### Rule 7.1: Communications Concerning a Lawyer's Services

The principal change to 7.1 is to the comments. The cardinal rule remains the same: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The proposed rule moves the requirements of Rule 7.5, MRPC, to the comments of Rule 7.1.

### Rule 7.2: Advertising

The amended changes would permit nominal "thank you" gifts under certain conditions as an exception to the general prohibition against paying for recommendations. The amendment would also permit the use of a "qualified referral service," which the current rule does not provide. Notably, the proposed amendment would broaden the use of "specialist" language currently addressed in Rule 7.4(c) (which would be deleted under the amended rule) and permit lawyers who, by means of experience, specialized training, or education, have attained special competence in a field of law, to state that they are specialists or specialize in that field of law.

This is the primary area of disagreement between the OLPR/LPRB petition and the MSBA petition, and may be of particular interest to members of the bar. The MSBA's petition wishes to maintain rule language such that only individuals who are "certified" by an accredited program may use the term "specialists." This departs from the ABA proposed amendments, which allows attorneys to refer to themselves as "specialists" based on years of experience, education, and focus on a specialized practice, even if such attorneys were not certified, and limits the use of "certification" as a specialist to accredited programs. This

also differs from the current Rule 7.4(c), MRPC, which allows the use of the term "certified as a specialist" as determined by any program as long as the certifying organization and its accreditation by the Minnesota Board of Legal Certification (or lack thereof) are noted.

### Rule 7.3: Solicitation of Clients

The most notable change in Rule 7.3 is the elimination of the requirement that all solicitations clearly and conspicuously include the words "Advertising Material." The rule still prohibits 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. Added to Rule 7.3 under the amendment is a provision specifying that the rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

### Rule 7.4: Communication of Fields of Practice and Certification

As noted above, this subdivision is eliminated with a portion of its requirements incorporated into revised Rule 7.2.

### Rule 7.5: Firm Names and Letterheads

The amendments eliminate this subdivision concerning firm names and letterheads by incorporating its guidance as part of the comments to Rule 7.1.

## Rule 20, Rules of Lawyers Professional Responsibility

Many attorneys are not familiar with Rule 20, RLPR, and most attorneys will never have to know this rule. Rule 20, RLPR, governs the public and private nature of the documents and information maintained by the OLPR. Records maintained by the OLPR are specifically exempt from the Minnesota Data Practices Act (see Minn. Stat. §13.90) and from the Minnesota Rules of Public Access to Judicial Records (see Minn. Stat. Access to Rec., Rule 1, Subdiv. 2). Rule 20, RLPR, is therefore the only guidance on the confidential or public



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nature of the records maintained by the Director. The purpose of amending Rule 20, RLPR, is to provide clarity as to the public or private nature of information maintained by the Director. Here are the changes of note.

### Changes in the organization of the rule

A major change in the rule is in its organization. The proposed amendment would divide the rule into categories of information: (a) before probable cause or commencement of referee or court proceedings (nonpublic information); (b) after probable cause or commencement of referee or court proceedings (public information); (c) information maintained as part of the Director's more administrative rather than investigative or prosecutorial function; and (d) expungement.

### Changes related to nonpublic information

The amended changes to Rule 20 would make clear the circumstances under which the Director is allowed to reveal otherwise nonpublic information. The amended changes would clarify that the OLPR may:

- share information with other lawyer admission or disciplinary authority that have matters under investigation relating to the affected attorney;
- share information otherwise deemed confidential with the DEC and any fact witness or expert witness as necessary to investigate a complaint;
- share information with the Supreme Court-approved lawyer assistance program (in this case, Lawyers Concerned for Lawyers (LCL)) in situations where, in the Director's discretion, such *one-way* notification is necessary or appropriate to address concerns related to a lawyer's mental, emotional, or physical well-being; and
- share information otherwise deemed confidential under this section with law enforcement

or court personnel in situations where public safety and the safety of the Director and staff, Board, or district court is at risk.

### Changes to public information

The amended changes to Rule 20 would make clear the circumstances under which the Director is allowed to keep certain information confidential that would otherwise be public. The amended changes would clarify that the OLPR may keep confidential:

- sensitive personal information contained in the file such as Social Security numbers, birthdates, driver's license numbers, bank account numbers, and medical information;
- information received from other disciplinary or government agencies classified by such agency as confidential, nonpublic information;
- the identity of non-complaining clients unless such party waives confidentiality, is subpoenaed as a witness to testify under oath, provides a sworn affidavit, or files documents in compliance with a subpoena *duces tecum*; and
- the Director's work product or the mental processes or communications of the Committee or Board members made in furtherance of their duties. This provision was previously contained under section 20(a) of Rule 20, and with the reorganization of Rule 20, is more appropriately under Rule 20(b).

### Conclusion

If you have an opinion about these proposed amendments to the rules, please provide your comments to the Minnesota Supreme Court by the deadline of December 20, 2021. The Court's order and the pending petitions can be found at the LPRB website under the "Rules" heading and "Proposed/Pending Rules/Opinions" section. If you have suggestions for additional rule changes, please let me know. ▲

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