

ADVERTISING RULE CHANGES

by

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Effective September 1, 2022, the section of the ethics rules colloquially called the “advertising rules” will undergo substantial revisions. Notably, most instances of the word “advertising” are gone from the rules, with a broader focus on *information* relating to a lawyer’s services. Let’s review the changes.

Rule 7.1: Communications Concerning a Lawyer’s Services

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 rule continues to state: “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.”

Remember, this rule applies to all communications about the lawyer’s services, whether in writing on your website bio or through verbal communications you have with clients or prospective clients at any point. Do not try and upsell your experience or expertise. Make sure all claims regarding your credentials, experience, and services are grounded in facts you can substantiate. It should go without saying, but if you have not done something before, do not claim that you have done so. Take care not to mislead by omitting relevant facts that place any statement in context.

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

New Rule 7.2 is substantially revised, starting with the title. No longer called “Advertising,” the rule addresses specific issues, building on the cardinal rule of Rule 7.1—be truthful and non-misleading. Rule 7.2 carries forward the prohibition against paying for referrals, except in specifically delineated situations. Lawyers may still pay for the reasonable costs of advertisements. Lawyers can pay the usual charges of a legal services plan.

Lawyers may also pay the usual charges of a lawyer referral service, both not-for-profit lawyer referral services (which has always been permissible) and now also the reasonable costs of other “qualified” lawyer referral services. “Qualified” services can be for-profit referral services that are qualified by the regulatory authorities. As stated in the petition to the Court, the purpose of qualification is generally to ensure the referral service 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. The ABA has such a qualified referral program, which many non-profit and for-profit referral services use to show they are qualified within the meaning of the rule.

Perhaps most notably, new Rule 7.2(b)(5) allows nominal “thank you” gifts as an exception to the general prohibition against paying anything of value for recommendations. Specifically, lawyers may now give a “nominal gift as an expression of appreciation” as long as those nominal gifts are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

We frequently receive questions on the ethics hotline about how to ethically thank someone for a referral. Before September 1, 2022, the answer was a nice written thank you. Now you can provide, for example, a gift card to Target or to a local restaurant as a thank you for the referral. What is nominal is not defined but it should be something one would consider to be a token of appreciation. Remember, there is no such thing as ethically permissible finder’s fees in Minnesota or otherwise paying for referrals. You may share attorney’s fees with an attorney not in your firm if you comply with Rule 1.5(e), Minnesota Rules of Professional Responsibility (MRPC). Otherwise, you should not be providing anything of value (beyond that approved in Rule 7.2) for a referral or recommendation.

In the changes effective September 1, 2022, the Court also maintained the “specialist” language previously in Rule 7.4(c), moving it to Rule 7.2. As a reminder, a lawyer cannot state or imply they are a specialist or certified as a specialist in a particular field of law unless they identify the certifying organization and disclose whether it is accredited by the Minnesota Board of Legal Certification. You may remember from a prior article that there was debate between the state bar, the Lawyer’s Board, and others as to use of the term “specialist” or the phrase “certified as a specialist.” The Court continued with the status quo but moved the text from Rule 7.4 to Rule 7.2.

Finally, in another rule expansion that should be noted by the bar, for all communications relating to the lawyer's services in any media, lawyers need to include the name of the individual lawyer or law firm responsible for the communication (this has always been the case) as well as contact information (this is new). So, please remember to include some form of contact information to ensure that questions regarding content can be addressed.

Notably absent from the revised rules is a requirement that anything be marked "Advertising Material." Yay! Keep the language if you like, but it is no longer ethically required.

Rule 7.3: Solicitation of Clients

There are several changes to Rule 7.3 worth your attention. The rule now includes a definition of "solicitation" in Rule 7.3(a) as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person whom 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." Thus, solicitation is specific to a communication that is directed at someone you know or should know needs a lawyer and includes an offer to provide legal services.

The rule then narrows the prohibited solicitation to "live person-to-person contact." The exceptions to the prohibition were also expanded to make live contact permissible if: the person contacted live is a lawyer, a person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or a person who routinely uses for business purposes the type of legal services offered. The rule maintains the prohibition against any solicitation if the target has made known the desire not to be solicited or the solicitation involves coercion, duress, or harassment.

Importantly, the rule no longer covers live person-to-person efforts to secure business if made generally and not to individuals known to be in need of particular legal services. Further, "live person-to-person contact" can mean in person, or real time telephonic or Zoom-like communications, but it is not meant to cover chat rooms, text messages or other written communications that recipients may easily disregard. Together, these changes broaden the population of individuals that can be personally contacted to request work, hopefully facilitating business development efforts, while maintaining the portions of the rule designed to prohibit overreach toward individuals in need of legal services at a time when they are vulnerable to potential undue influence.

Since the ABA expanded the model advertising rules in 2018 (most of which Minnesota is adopting now), questions and experience led the ABA to provide further guidance on solicitation, particularly around the supervision obligations relating to solicitation. In April 2022, the ABA issued Formal Opinion 501 on solicitation. It is worth your time if you have decided to use individual lead generators or other personnel to expand your marketing efforts.

It is well-settled that lawyers supervising others—whether they are lawyers or non-lawyers, employees, contract personnel or vendors—have an ethical obligation to make reasonable efforts to ensure that all persons working with the lawyer are trained to comply with the ethics rules, including the expanded solicitation rules. Further, a lawyer cannot do through others that which they cannot do themselves. Helpfully, the opinion goes through several hypotheticals of permissible and impermissible solicitation examples.

Conclusion

The new rules regulating communications about the lawyer's services streamline and simplify our obligations and are a welcome update. Please take the time to familiarize yourself with the changes. Most of us market ourselves or our services and, particularly if you wish to up your marketing game or expand your lead-generation work, you should make sure that you and the others with whom you are associated understand the new rules of engagement. As noted in the Court's May 13, 2022 order adopting the changes to the text of the rules (available on our website), the comments are still a work in process as of the writing of this article, so please watch our website for additional updates. And as always, please contact us if you have questions regarding your ethical obligations at 651-296-3952, or www.lprb.mncourts.gov.