STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

In re Petition to Amend the Minnesota
Rules of Professional Conduct

PETITION OF THE MINNESOTA STATE BAR ASSOCIATION TO AMEND THE MINNESOTA RULES OF PROFESIONAL CONDUCT

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 in1985, 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.[1]

[1] "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~~ aA 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~~,~~; 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~~ 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)(l) 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(c) 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~~ their 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(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.~~

[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 7.1to 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 21st CENTURY

I. Introduction

The American Bar Association is the leader in promulgating rules for regulating the professional conduct of lawyers. For decades, American jurisdictions have adopted provisions consistent with the Model Rules of Professional Conduct, relying on the ABA's expertise, knowledge, and guidance. In lawyer advertising, however, a dizzying number of state variations exist. This breathtaking variety makes compliance by lawyers who seek to represent clients in multiple jurisdictions unnecessarily complex, and burdens bar regulators with enforcing prohibitions on practices that are not truly harmful to the public.[1] This patchwork of advertising rules runs counter to three trends that call for simplicity and uniformity in the regulation of lawyer advertising.

First, lawyers in the 21st century increasingly practice across state and international borders. Clients often need services in multiple jurisdictions. Competition from inside and outside the profession in these expanded markets is fierce. The current web of complex, contradictory, and detailed advertising rules impedes lawyers' efforts to expand their practices and thwart clients' interests in securing the services they need. The proposed rules will free lawyers and clients from these constraints without compromising client protection.

Second, the use of social media and the Internet—including blogging, instant messaging, and more—is ubiquitous now.[2] Advancing technologies can make lawyer advertising easy, inexpensive, and effective for connecting lawyers and clients. Lawyers can use innovative methods to inform the public about the availability of legal services. Clients can use the new technologies to find lawyers. The proposed amendments will facilitate these connections between lawyers and clients, without compromising protection of the public.

Finally, trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal

[1] Center for Professional Responsibility Jurisdictional Rules Comparison Charts, *available at*: https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html.
[2] *See* Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereinafter APRL 2015 Report],

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf at 18-19 ("According to a Pew Research Center 2014 Social Media

services may be unlawful. The Supreme Court announced almost forty years ago that lawyer advertising is commercial speech protected by the First Amendment. Advertising that is false, misleading and deceptive may be restricted, but many other limitations have been struck down.[3]

Antitrust law may also be a concern. For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where the FTC believed it would, for example, restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services.[4]

The Standing Committee on Ethics and Professional Responsibility (SCEPR) is proposing amendments to ABA Model Rules 7.1 – 7.5 that respond to these trends. It is hoped the U.S. jurisdictions will follow the ABA's lead to eliminate compliance confusion and promote consistency in lawyer advertising rules. As amended, the rules will provide lawyers and regulators nationwide with models that continue to protect clients from false and misleading advertising, but free lawyers to use expanding and innovative technologies to communicate the availability of legal services and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

II. Brief Summary of the Changes

The principal amendments:

Combine provisions on false and misleading communications into Rule 7.1 and its Comments.
Consolidate specific provisions on advertising into Rule 7.2, including requirements for use of the term "certified specialist".

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.").

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

[4] The recent decision in *North Carolina State Board of Dental Examiners v. F.T.C.,* 135 S. Ct. 1101 (2015) may be a warning. The Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anti-competitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that a controlling number of the board members were "active market participants" (i.e., dentists), and there was no state entity

supervision of the decisions of the non-sovereign board. Many lawyer regulatory entities are monitoring the application of this precedent as the same analysis might be applicable to lawyers. *See also*, ABA

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.

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.

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 l 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.[5] Throughout, SCEPR's process has been transparent, open, and welcoming of comments, suggestions, revisions, and discussion from all quarters of the ABA and the profession. SCEPR's work included the formation of a broad-based working group, posting drafts for comment on the website of the Center for Professional Responsibility, holding public forums at the Midyear Meetings in February 2017 and February 2018, conducting a webinar in March 2018, and engaging in extensive outreach seeking participation and feedback from ABA and state entities and individuals.[6]

A. Development of Proposals by the Association of Professional Responsibility Lawyers (APRL) – 2013 - 2016

In 2013, APRL created a Regulation of Lawyer Advertising Committee to analyze and study lawyer advertising rules. That committee studied the ABA Model Rules and various state approaches to regulating lawyer advertising and made recommendations aimed at bringing rationality and uniformity to the regulation of lawyer advertising and disciplinary enforcement. APRL's committee consisted of former and current bar regulators, law school professors, authors of treatises on the law of lawyering, and lawyer- experts in the field of professional responsibility and legal ethics. Liaisons to the 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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[5] APRL's April 26, 2016 Supplemental Report can be accessed here:

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.authcheckdam.pdf.

[6] Written comments were received through the CPR website. SCEPR studied them all. Those comments are available here:
https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

APRL's 2014 survey of U.S. lawyer regulatory authorities showed:

Complaints about lawyer advertising are rare;
People who complain about lawyer advertising are predominantly other lawyers and not consumers;
Most complaints are handled informally, even where there is a provable advertising rule

violation;

Few states engage in active monitoring of lawyer advertisements; and Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c).

APRL issued reports in June 2015 and April 2016[7] proposing amendments to Rules 7.1 through 7.5 to streamline the regulations while maintaining the enforceable standard of prohibiting false and misleading communications.

In September 2016 APRL requested that SCEPR consider its proposals for amendments to the Model Rules.

B. ABA Public Forum – February 2017

On February 3, 2017 SCEPR hosted a public forum at the ABA 2017 Midyear Meeting to receive comments about the APRL proposals. More than a dozen speakers testified, and written comments were collected from almost 20 groups and individuals.[8]

C. Working Group Meetings and Reports – 2017

In January 2017, SCEPR's then chair Myles Lynk appointed a working group to review the APRL proposals. The working group, chaired by SCEPR member Wendy Wen Yun Chang, included representatives from Center for Professional Responsibility ("CPR") committees: Client Protection, Ethics and Professional Responsibility, Professional Discipline, Professionalism, and Specialization. Liaisons from the National Conference of 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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[7] Links to both APRL reports are available at:

https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html.

[8] Written submissions to SCEPR are available at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

D. SCEPR December 2017 Draft

After reviewing the Chang memoranda and other materials SCEPR drafted proposed amendments to Model Rules 7.1 through 7.5, and Model Rule 1.0 (terminology), which were presented to all ABA CPR Committees at the October 2017 Leadership Conference. SCEPR then further modified the proposed changes to the advertising

rules based in part on the suggestions and comments of CPR Committees. In December 2017, SCEPR released for comment and circulated to ABA entities and outside groups a new Working Draft of proposed amendments to Model Rules 7.1-7.5.

E. ABA Public Forum – February 2018

In February 2018, the SCEPR hosted another public forum at the 2018 Midyear Meeting, to receive comments about the revised proposals.[9] The proposed amendments were also posted on the ABA CPR website and circulated to state bar representatives, NOBC, and APRL. Thirteen speakers appeared. Twenty-seven written comments were submitted. SCEPR carefully considered all comments and further modified its proposals.[10]

On March 28, 2018, SCEPR presented a free webinar to introduce and explain the Committee's revised recommendations. More than 100 people registered for the forum, and many favorable comments were received.[11]

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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[9] Speakers included George Clark, President of APRL; Mark Tuft, Chair, APRL Subcommittee on Advertising; Charlie Garcia and Will Hornsby, ABA Division for Legal Services; Bruce Johnson; Arthur Lachman; Karen Gould, Executive Director of the Virginia State Bar; Dan Lear, AVVO; Matthew Driggs; and Elijah Marchbanks.

[10] All Comments can be found here:

https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html. The full transcript of the Public Forum can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/public_hearing_transcript_complete.authcheckdam.pdf.

[11] An MP3 recording of the webinar can be accessed here:

https://www.americanbar.org/content/dam/aba/multimedia/professional_responsibility/advertising_rules_webinar.authcheckdam.mp3. A PowerPoint of the webinar is also available:

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/webinar_advertising_powerpoint.authcheckdam.pdf.

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

B. Attorney Advertising in the 20th Century

Bates established that lawyer advertising is commercial speech and entitled to First Amendment protection. But the Court also said that a state could prohibit false, deceptive, or misleading ads, and that other regulation may be permissible.

Three years later, in *Central Hudson,*[14] the Supreme Court explained that regulations on commercial speech must "directly advance the [legitimate] state interest involved" and "[i]f the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive."[15]

In the years that followed, the Supreme Court applied the *Central Hudson* test to strike down a number of regulations on attorney-advertising.[16] The Court reviewed issues such as the failure to adhere to a state "laundry list" of permitted content in direct mail advertisements,[17] a newspaper advertisement's use of a picture of a Dalkon Shield intrauterine device in a state that prohibited all illustrations,[18] and an attorney's letterhead that included his board certification in violation of prohibition against referencing expertise.[19] The court's decisions in these cases reinforced the holding in *Bates*: a state may not constitutionally prohibit commercial speech unless the regulation advances a substantial state interest, and no less restrictive means exists to accomplish the state's goal.[20]

C. Solicitation

Unlike advertising, in-person solicitation is subject to heightened scrutiny. In *Ohralik v. Ohio State Bar Ass'n,* the Supreme Court upheld an Ohio regulation prohibiting lawyers from in-person solicitation for pecuniary gain. The Court declared: "[T]he State— or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in-person, for pecuniary gain, under circumstances likely to pose

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[12] Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 549 (1982). Mylene Brooks, *Lawyer Advertising: Is There Really A Problem*, 15 LOY.
L.A. ENT. L. REV. 1, 6-9 (1994). *See also* APRL 2015 Report*, supra* note 2.
[13] *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[14] *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y.,* 447 U.S. 557 (1980).
[15] 447 U.S. at 564.
[16] *See* APRL 2015 Report*, supra* note 2, at 9-18, for a discussion of these cases.
[17] *In re* R.M.J.*,* 455 U.S. 191, 197 (1982).
[18] *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 647 (1985).
[19] *Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 93-94 (1990).
[20] *In re R.M.J.,* 455 U.S. 191, 197 (1982); *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 647 (1985); *Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 93-94 (1990).

dangers that the State has a right to prevent."[21] The Court added: "It hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person."[22] The Court concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.[23]

Ohralik's blanket prohibition on in-person solicitation does not extend to targeted letters. The U.S. Supreme Court held in *Shapero v. Kentucky Bar Ass'n*,[24] that a state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. The Court concluded that targeted letters were comparable to print advertising, which can easily be ignored or discarded.

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."[25] The U.S. Court of Appeals for the Second Circuit found New York's regulation to be to be

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[21] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978).

[22] *Id.* at 464–65.

[23] *Id.* at 465-467.

[24] 486 U.S. 466 (1988). *But see*, *Florida Bar v. Went For It, Inc.,* 515 U.S. 618 (1995). The Supreme Court has upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days. The court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day "cooling off" period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing. *But see*, *Ficker v. Curran,* 119 F.3d 1150 (4th Cir. 1997), in which Maryland's 30-day ban on direct mail in traffic and criminal defense cases was found unconstitutional, distinguishing *Went for It*, because criminal and traffic defendants need legal representation, time is of the essence, privacy concerns are different, and criminal defendants enjoy a 6th amendment right to counsel.

[25] *Alexander v. Cahill,* 598 F.3d 79, 84-86 (2d Cir. 2010). The court commented, "Moreover, the sorts of gimmicks that this rule appears designed to reach—such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But

misleading.[26] The court noted that prohibiting *potentially misleading* commercial speech might fail the *Central Hudson* test.[27] The court concluded that even assuming that New York could justify its regulations under the first three prongs of the *Central Hudson* test, an absolute prohibition generally fails the prong requiring that the regulation be narrowly fashioned.[28]

In 2011, the Fifth Circuit reached a similar conclusion, ruling that many of Louisiana's 2009 revised attorney advertising regulations contained absolute prohibitions on commercial speech, rendering the regulations unconstitutional due to a failure to comply with the least restrictive means test in *Central Hudson*.[29] The Fifth Circuit applied the *Central Hudson* test to attorney advertising regulations.[30] Although paying homage to a state's substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied on the Supreme Court's decision in *Zauderer* to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.[31]

> [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.[32]

Florida also revised its attorney advertising rules in light of the digital age evolution of attorney advertising and the commercial speech doctrine. Nonetheless, some of Florida's rules and related guidelines have failed constitutional challenges. For example, in *Rubenstein v. Florida Bar* the Eleventh Circuit declared Florida Bar's prohibition on advertising of past results to be unconstitutional because the guidelines prohibited any

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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.).

[26] *Alexander v. Cahill,* 598 F.3d 79, at 96.

[27] *Id.*

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

[29] *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.,* 632 F.3d 212, 229 (5th Cir. 2011). Note that the court did uphold the regulations that prohibited promising results, that prohibited use of monikers or trade names that implied a promise of success, and that required disclaimers on advertisements that portrayed scenes that were not actual or portrayed clients who were not actual clients. The court distinguished its holding from New York's in *Cahill* by indicating that the Bar had produced evidence in the form of survey results that supported the requirement that the regulation materially advanced the government's interest in protecting the public.

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

[32] *Id*. citing *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 648 (1985).

such advertising on indoor and outdoor displays, television, or radio.[33] The state's underlying regulatory premise was that these "specific media . . . present too high a risk of being misleading." This total ban on commercial speech again did not survive constitutional scrutiny.[34]

Finally, in *Searcy v. Florida Bar,* a federal court enjoined The Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law.[35] The Searcy law firm challenged the regulation as a blanket prohibition on commercial speech, arguing board certification is not available in all areas of practice, including the firm's primary mass torts area of expertise.

VII. Conclusion

Trends in the profession, the current needs of clients, new technology, increased competition, and the history and law of lawyer advertising all demonstrate that the current patchwork of complex and burdensome lawyer advertising rules is outdated for the 21st Century. SCEPR's proposed amendments improve Model Rules 7.1 through 7.5 by responding to these developments. Once amended, the Rules will better serve the bar and the public by expanding opportunities for lawyers to use modern technology to advertise their services, increasing the public's access to accurate information about the availability of legal services, continue the prohibition against the use of false and misleading communications, and protect the public by focusing the resources of regulators on truly harmful conduct. The House of Delegates should proudly adopt these amendments.

Respectfully submitted,

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Chair, Standing Committee on Ethics and Professional Responsibility
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[33] *Rubenstein v. Fla. Bar,* 72 F. Supp. 3d 1298 (S.D. Fla. 2014).
[34] *Id.* at 1312.

[35] *Searcy v. Fla. Bar,* 140 F. Supp. 3d 1290, 1299 (N.D. Fla. 2015). Summary Judgment Order available at:
http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E8E7FDDE9DBB8DE385257ED5004ABB95/$FILE/Searcy%20Order%20on%20Merits.pd