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January 19, 2012

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Sent via email to: jamie.gorelick@wilmerhale.com; mtraynor@traynorgroup.com

Re: Comments for the Commission on Ethics 20/20

Dear Ms. Gorelick and Mr. Traynor:

I write on behalf of the ABA Standing Committee on the Delivery of Legal Services (hereinafter "Committee") with proposed changes to the ABA Model Rules of Professional Conduct and its comments as the result of the use of technology to communicate information about legal services. I appreciate whatever consideration the Commission is able to give the Committee's suggestions.

The mission of the Committee is to increase access to lawyers and legal services for those of moderate incomes, who have resources above the thresholds for legal aid or pro bono services, yet lack the means to engage lawyers for full traditional services. Pursuant to this mission, the Committee has tracked developments in the use of technology to enable more effective client development and to provide legal services through the Internet. As a result of the changes in the use of technology over the past decade and the continued struggle to assure that people are able to find suitable and affordable legal services, the Committee asks the Commission to consider changes to the Model Rules and comments as set out below.

The Committee recommends consideration of three issues. First, it is concerned that the scope of the rules is not appropriately defined and encourages changes to Rule 7.1 and Comment 1 to better set out this scope. Second, the Committee believes that Rule 7.2(b) is inconsistently interpreted in ways that limit access to legal services by those

of moderate incomes and should be eliminated, with the comments amended accordingly. Finally, the Committee encourages an amendment to the Commission's proposed definition of "solicitation" in Rule 7.3, Comment 1.

I. Rule 7.1 – Defining the Scope of the Rule

The Committee is aware that the Commission has considered and rejected a modification to Comment 1 of Rule 7.1 that attempted to explicitly address the constitutional doctrine of commercial speech. The Committee agrees with the Commission that this concept is difficult to set out in the comments to the Rule. The details of commercial speech and the state's authority to govern a lawyer's communications can be effectively addressed through other means, including the emergence of constitutional case law on the issues. However, the Committee believes that the scope of Rule 7.1 should be focused, giving lawyers and those in the disciplinary system a common understanding of that scope. In particular, the Committee advocates a change to Rule 7.1 and its comment to differentiate it from restrictions imposed by Rule 8.4(c), prohibiting conduct that is deceitful or a misrepresentation.

The Committee asks the Commission to recommend an amendment to Rule 7.1 and Comment 1 as follows:

> A lawyer shall not make a false or misleading communication <u>to a potential client</u> 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 <u>by a lawyer to communicate with a potential client about the lawyer or the lawyer's services</u> ~~to make known a lawyer's services~~, statements about them must be truthful.

We are beginning to see examples of broad interpretations of Rule 7.1 when lawyers use technology to communicate information either about themselves or about issues they address. For example, South Carolina Advisory Opinion 09-10 concludes that a lawyer has an imputed responsibility for public comments made by others on a third-party's website if the lawyer participates in, or "claims," the site, because the public comments are "communications about the lawyer's services."[1] The lawyer must somehow monitor and amend or remove any comment from anyone that may be considered misleading, or, alternatively, not participate in the site. More recently, the Virginia State Bar has initiated disciplinary actions against a lawyer who blogs about cases he handles under a section entitled, "This Week in Richmond Criminal Defense." The Bar advances the position that the blog discussion is about the lawyer's legal

[1] South Carolina Advisory Opinion 09-10, at http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/107/Ethics-Advisory-Opinion-09-10.aspx

services, that Rule 7.1 applies and that the communication is misleading unless the lawyer complies with the disclaimer obligations imposed by the state for lawyer advertisements.[2]

Even though the details of the commercial speech doctrine may be best left out of the Rule and Comments, the concept should not be ignored. The Committee is concerned that the breadth of the Comment as now written may exceed the state's constitutional authority to impose limits on a lawyer's free speech. It is long-standing constitutional doctrine that states may impose limitations on commercial speech, including prohibitions of false or misleading statements.[3] However, those limitations are confined to commercial speech and are not likely to be deemed as broad as "all communications about a lawyer's services." Commercial speech is defined as that which "beckons business" or "proposes a commercial transaction." In fact, at least one case has held that the state lacks the right to impose limitations on a lawyer's newspaper advertisement when the content of the communication is political discourse and not commercial speech.[4] This issue is again accentuated with the use of blogs and social networking by lawyers, where political discourse appears to be increasingly common. The Committee believes this issue is effectively addressed by amendment to the Rule that clarifies the Rule's application is limited to communications directed to a potential client.

Finally, the Committee reiterates that any communication that is not made to a potential client, but that is deceitful or that includes a misrepresentation subjects the lawyer to discipline under Rule 8.4(c).

II. Rule 7.2(b)

Model Rule 7.2(b) states:

> (b) A lawyer shall not give anything of value for the recommendation of the lawyer's services except that the lawyer may:
> (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
> (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
> (3) pay for a law practice in accordance with Rule 1.17;

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[2] In the Matter of Horace F. Hunter, at https://docs.google.com/viewer?a=v&q=cache:DaRb-p3ZUkYJ:op.bna.com/mopc.nsf/r%3FOpen%3Dkswn-8nfngf+In+the+Matter+of+Horace+Frazier+Hunter&hl=en&gl=us&pid=bl&srcid=ADGEESj-DNXippmY6O-gCJ2G0bdSkSeyGXugpYUv5sQ29Z9sVzdHdhECyekG_ZUakczpjTd69jg9F_OT0VDzDHl_C0P0Yo9iUEfLG9o_zefcLiGsCeBjE7CzjinnTVbTelKNtO6G8nh1&sig=AHIEtbRUNa7vb8i-vIV212_IL6N7tIlE9A

[3] Central Hudson Gas & Electric v. Public Service Comm., 447 US 557 (1980), at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=447&invol=557

[4] Texans Against Censorship v. State Bar of Texas, 888 F.Supp. 1328 (1995), at http://scholar.google.com/scholar_case?case=16249251188959826 90&q=texans+against+censorship&hl=en&as_sdt=2,14

(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.

The Committee asks the Commission to recommend the deletion of this rule. The Committee does not take this request lightly, but believes it is justified and necessary because: (1) Rule 7.2(b) serves no purpose that is not otherwise effectively served by other rules; (2) the Rule fails to define terms that do not have universally accepted definitions; (3) the Rule fails to reflect the use of technology to broaden access to legal services for those needing representation for personal legal services; and (4) the prohibition set out in the Rule is contradicted within its own comments.

Setting aside the exceptions to the Rule for a moment, neither the Rule nor its comment provides any rationale for the prohibition banning a lawyer from giving anything of value for the recommendation of the lawyer's services. Comment [5] merely states, "Lawyers are not permitted to pay others for channeling professional work." The comment provides no rationale for this conclusion, which frankly is a position swallowed by the Rule's exceptions.

Law directories have channeled legal services for well over a hundred years. Lawyer referral services have channeled work to lawyers since the mid-twentieth century. Prepaid legal services have channeled work to lawyers for nearly 50 years. Public relations and marketing have joined lawyer advertising as vehicles that channel work since the Supreme Court ruled that states could not prohibit lawyer advertisements in 1977. Law firms providing services to corporations and institutions have in-house marketing staff, some of whom are paid well into six-figures, for the purpose of channeling professional work to their firms. And most recently, we have seen a proliferation of online third-party intermediaries that in some instances defy categorization as advertisements or referral services. Intermediaries are discussed in detail below, but suffice it to say here that the channeling of professional services in the marketplace in and of itself is not inherently inappropriate. Collectively, these mechanisms create access to legal services for potential clients of all economic strata. They are, however, most important for those of moderate or middle class individuals who infrequently use of the services of a lawyer and need the information provided by these resources to help them make the decisions about the legal services most appropriate for them.

So, we then ask what is the rationale for the prohibition imposed by Rule 7.2(b) and is that rationale met by other rules.

One possible rationale is the need to prohibit "ambulance chasing" or in-person solicitations by someone on behalf of a lawyer. However, Rule 7.3(a) prohibits in-person or live telephone contacts soliciting employment for pecuniary gain and Rule 8.4(a) prohibits a lawyer from violating the rules through the acts of another. So, these rules combine to prohibit "ambulance chasing" along with any other inappropriate solicitations.

Another rationale for the prohibition may be the threat to the lawyer's independence of judgment. If someone is channeling cases to the lawyer, the lawyer may become more beholding to that person than to the client. However, Rule 5.4(c), governing the lawyer's independence of judgment, states, "A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." This would seem to effectively address this risk and no additional rule seems necessary.

Perhaps the prohibition against channeling legal services is designed to assure that agents do not proceed outside of the lawyer's direction. However, Rule 5.3(b) requires lawyers to adequately supervise nonlawyer assistants and ensure their conduct is compatible for the lawyer's professional obligations.

Another rationale may be the risk that representations made by someone who channels legal services could be misleading. However Rule 7.1 and 8.4(a) combine to prohibit a lawyer from false or misleading communications when done by someone on the lawyer's behalf. Additionally, Rule 8.4(c) prohibits a lawyer from conduct involving dishonesty, fraud, deceit or misrepresentation.

The Committee simply cannot find an underlying rationale that justifies the prohibition of channeling legal services in and of itself and believes that any perceived wrong-doing addressed by Rule 7.2(b) is effectively cured through the applications of these other rules.

Focusing now on the exceptions set out in Rule 7.2(b), the Committee is concerned that they include terms that are not clearly defined and are inconsistently applied from one state to another.

The rule permits a lawyer to pay the "reasonable costs of advertisements" and the "usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service." When the rule was promulgated, a fairly clean dichotomy separated advertisements from lawyer referral services. On the one hand, advertisements were communications disseminated through various media, such as the Yellow Pages and other print directories, television or billboards. On the other hand, lawyer referral services were often bar-sponsored programs with intake personnel obtaining information about potential clients and providing callers with contact information for participating lawyers who are positioned to provide the appropriate representation. What implicitly is impermissible under this rule is the lawyer's ability to pay to participate in a for-profit or non-qualified lawyer referral service.[5]

The Internet has converted a comprehensible dichotomy between advertisements and referral services to something of a continuum, where various models fall at some point with advertisements at one end and referral services at the other. Is a particular model a group advertisement, where the lawyers can pay an intermediary to participate or is it a for-profit lawyer referral service, where the lawyers cannot pay to participate? The question can only be answered when the terms are defined and neither the Rule nor the comments adequately do so. In

[5] Since only a few states have methods to qualify for-profit lawyer referral services, we will focus on not-for-profit and for-profit referral services going forward.

fact Comment [6] does nothing more than define a referral service as "any organization that holds itself out to the public as a lawyer referral service." But this self-declaration has not been a sufficient basis to make the determination in any of the states that have weighed in on the distinctions between referral services and advertising models.

We briefly provide a few issues that illustrate the difficult application of Rule 7.2(b) when lawyers participate in online models. These include the distinction between "referrals" and "recommendations," the limitation on a lawyer's right to set out credentials and the contradictory conclusions regarding the exercise of judgment and assignment of exclusive territories.

The general counsel for Total Attorneys testified before the Commission regarding that organization's experience with the vagueness of Rule 7.2(b). Total Attorneys is a for-profit company that provides leads to lawyers who subscribe to their service in various fields of practice, most notably, bankruptcy (under the name Total Bankruptcy). In 2009, a competing lawyer filed complaints with disciplinary agencies in nearly every jurisdiction against every lawyer who participated in Total Bankruptcy, nearly 500 in total. The complaint alleged that the lawyers were participating in a for-profit lawyer referral service in violation of Rule 7.2(b). The complaints were found baseless in every jurisdiction except Connecticut, the home state of the complaining lawyer. Connecticut held a hearing on the matter, where the hearing board scrutinized the terms "recommend" and "refer." In its decision dismissing the complaint on summary judgment, the board stated:

> Rule 7.2(c) [the equivalent to MR 7.2(b)] provides that an attorney may not pay a third party to "recommend" the attorney's services. We note the Rules drafters chose the term "recommending" and not "referring." While the terms are sometime used interchangeably, they mean different things. The term "recommend" is not a defined term within the Rules of Professional Conduct. According to the dictionary, the word "recommend" means, "(1) to give in charge; commit; entrust (2) to suggest favorably as suited for some use, function, position, etc." Webster's New World Dictionary (3d College Ed. 1988). The term "refer" on the other hand, means for our purposes, "to send or direct… for aid, information, etc." Id. A "recommendation" connotes an endorsement; a "referral" does not…
>
> Accordingly, Rule 7.2(c) requires us to determine whether the evidence adduced by the Disciplinary Counsel establishes a prima facie case of a "recommendation." The evidence before us did not establish that the websites "recommended" the participating attorneys to viewers of the website. To that end, we conclude that the territorial exclusivity of the arrangement was not an implied endorsement and that the fees charged to the Respondents were the appropriate costs of advertising on the websites.[6]

Total Attorney's general counsel informed the Commission that it spent over one million dollars on counsel expenses defending the complaints. We assume a substantial cost was also incurred by the various state disciplinary entities. All of this led to the tortured conclusion that lawyer referral services do not make "referrals" but rather "recommendations," while advertisements

[6] Zelotes v. Rousseau, Grievance Complaint 09-0412, (2009) at zelotes-v-rousseau-et-al-09-0412-memorandum-of-decision[2].pdf

make "referrals" that have no connotation of an endorsement. If this is confusing, it advances the Committee's point that Rule 7.2(b) is seriously defective and should be deleted.

In an effort to distinguish lawyer advertising through online intermediaries and lawyer referral services, states have sometimes imposed limitations when lawyers advertise as a group that would not be imposed on them when advertising individually. Before examining some of these limitations, note that small firm practitioners, who typically provide personal legal services, generally lack the ability to appear on the first few pages of an online search through search engines such as Google or Yahoo. However, intermediaries frequently appear at the top of searches, enabling participating practitioners to benefit from those searches.

In *Alabama State Bar Assn. v. RW Lynch Company, Inc*, 655 So.2d 982 (1995), the court considered whether an intermediary that advertised on television was a group advertising model or a referral service. It concluded that the service was an advertisement because, among other factors, (1) it expressly informed viewers it was a paid advertisement, (2) the calls were not screened by an answering service, (3) no representation was made regarding the lawyer's experience or skills, (4) calls were forwarded to lawyers based solely on the geographic location of the caller, and (5) the advertising lawyers were the only person who spoke to the caller about legal matters.

Several of these factors have been embraced by states in their efforts to distinguish a lawyer's participation in an advertising intermediary from a lawyer referral service.[7] However, these restrictions clearly do not apply generally to lawyers who advertise individually. Nowhere in the Model Rules or the rules of most states must a lawyer label media-based communications as a paid advertisement. Also, lawyers advertising individually may provide full details about their experiences and skills, subject only to the limitations imposed by Rules 7.1 and 7.4, governing false or misleading communications and communications of specialties, yet according to the authorities, lawyers advertising in a group may not do so. Lawyers conducting business outside of advertising intermediaries are fully entitled to assign the tasks of screening and legal analyses to subordinates, including paralegals. Yet again, without any rules as justifications, lawyers using intermediaries are forbidden from making these assignments. As intermediaries use the Internet to expand access to legal services for those of moderate incomes, these elements impose limitations that are inconsistent with individual advertising and have no basis in the Rules.

In addition, the issue of geographic exclusivity that is set out in *Lynch* as an element distinguishing lawyer advertisements from referral services has been refuted by some states, resulting in inconsistent interpretations from one state to another. The *Lynch* decision focuses on the exercise of judgment and concludes that an intermediary does not have the ability to exercise judgment in the selection of a lawyer if callers are directed to a single lawyer in the caller's geographic area. The fact that there is no choice in the selection of a lawyer means that there is no judgment exercised in that selection. However, some state opinions prohibit geographic exclusivity. For example, Colorado Ethics Opinion 122 (2010) sets out criteria for Internet marketing programs including a provision that the program does not limit or restrict the number

[7] See for example, Ohio Opinion 2001-2 (2001), requiring an intermediary to be identified as an advertisement and provide only ministerial services, and New Jersey Committee on Attorney Advertising Opinion 43 (2011), requiring an intermediary to inform viewers that lawyers have paid a fee to participate.

of lawyers that can participate in a program. This conclusion is based on the assumption that limitations may in fact result in recommendations to a particular lawyer. So, an intermediary must either avoid the exercise of judgment by imposing geographic limitations, as set out in *Lynch*, resulting in the selection of a single lawyer, or must not impose geographic limitations because doing so may result in the recommendation of a particular lawyer, presumably being an exercise of judgment in the selection of a lawyer. Again, the attempt to distinguish advertisements from referral services proves futile in the effort to develop and apply criteria.

Finally, as noted above, there is no real prohibition against "channeling professional work." This was recognized when Comment [5] was amended in 2002 as a result of the work of the Commission on Ethics 2000. The Comment now states, in part, "A lawyer may compensate employees, agents and vendors who are engaged in providing marketing or client-development services such as publicists, public-relations personnel, business-development staff and web designers." Nowhere in Rule 7.2(b) does it state that a lawyer may give anything of value for the services of a publicist or public-relations personnel. No exceptions are set out in the Rule for these endeavors. Furthermore, it is notable that publicists, public-relations personnel and business-development staff are fundamentally agents and vendors of law firms that provide corporate and institutional legal services, whereas group advertising intermediaries represent an important client development technique available to lawyers providing personal legal services.

Given that Rule 7.2(b) serves no purpose that is not effectively addressed by other rules, includes exceptions that lack definition and are subject to inconsistent interpretations by the states, has been interpreted to impose limitations outside of the scope of the Rules on lawyers participating in intermediaries, and includes permissible endeavors within its comments that are seemingly prohibited by the Rule itself, the Committee believes Rule 7.2(b) cannot be structured in a way that is consistent with the dynamics of client development through the Internet, is beyond rehabilitation and should be deleted from the Model Rules. The Committee asks the Commission to make this recommendation.

The Committee raises two additional issues regarding Rule 7.2(b). Many, but not all, states have issued ethics opinions indicating that the "usual charges" of a non-profit lawyer referral service permit a lawyer to divide fees with the service. Nothing in the Rule or the Comment expressly permits the lawyer to do so and, seemingly, a division of fees with a referral service is a violation of Model Rule 5.4. The Committee does not believe there is a significant risk to a lawyer's independence of judgment or the likelihood of harm to potential clients when a lawyer is permitted to divide fees with a non-profit referral service. Therefore, the Committee encourages the Commission to consult with the Standing Committee on Lawyer Referral and Information Services about crafting a change to Rule 5.4(a) that creates an explicit exception to the prohibition against a division of fees with a nonlawyer that would enable lawyers to divide fees with non-profit referral services.

Second, the deletion of Rule 7.2(b) would enable lawyers to recommend other lawyers to potential clients without transparency. Rule 1.5(e) effectively addresses the circumstance where lawyers not in the same firm divide fees. However, lawyers may agree to an arrangement were one lawyer recommends potential clients engage another lawyer not in the same firm for a fee, separate and apart from a division of fees in the event the potential client becomes a fee-

generating client. The Committee believes that potential clients may be misled in this circumstance and that the issue should be governed by Rule 7.1. To remedy any risk of abuse, the Committee suggests amending the comments to Rule 7.1 by adding a new Comment [4] that states:

> [4] A communication with a potential client may be misleading when a lawyer recommends the services of another lawyer not in the same law firm and receives something of value for that recommendation without prior notice to the potential client.

Current Comment 4 would be retained and become Comment 5.

III. Defining Solicitations

The Commission proposes adding a new Comment 1 to Rule 7.3, defining a solicitation and stating:

> A solicitation is a target communication initiated by the lawyer that is directed to a specific potential client and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

The Committee believes the development of a definition of solicitation is a valuable addition to the comments and that an exception for communications provided in response to requests is an essential element of this definition. However, the Committee is concerned that the overall definition does not neatly create a dichotomy between advertisements and solicitations. This dichotomy is important because constitutional case law prohibits states from banning advertisements, i.e. communications conveyed via media, but permits it to ban solicitations under some circumstances. Without a clear dichotomy, there is a risk that solicitations will be construed to be subsets of advertisements, which may lead to ambiguous interpretations among the states and unreasonable restrictions on the communications of legal services.

The Committee believes this issue is addressed with a simply change to proposed Comment 1 stating:

> A solicitation is a ~~targeted communication initiated by the lawyer that is directed to a specific potential client and~~ direct contact with a potential client that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication ~~typically~~ does not constitute a solicitation if it is directed to the general public through the media, such as through a billboard, an Internet banner advertisement, a website or television commercial, or if ~~it~~ the contact is in response to a request for information or is automatically generated in response to Internet searches.

The Committee appreciates the attention of the Commission on these matters and offers its resources to further explain anything that it has not clearly set out in this letter.

Sincerely,

H. Ritchey Hollenbaugh
Chair

cc. Ellyn S. Rosen, Staff Counsel, Commission on Ethics 20/20
Members and Liaisons, Standing Committee on the Delivery of Legal Services
William Hornsby, Staff Counsel, Standing Committee on the Delivery of Legal Services

Appendix

Recommended Changes

Rule 7.1

A lawyer shall not make a false or misleading communication to a potential client 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 by a lawyer to communicate with a potential client about the lawyer or the lawyer's services ~~to make known a lawyer's services~~, statements about them must be truthful…

Comment [4] A communication with a potential client may be misleading when a lawyer recommends the services of another lawyer not in the same law firm and receives something of value for that recommendation without prior notice to the potential client of the recommendation.

Rule 7.2(b)

~~(b) A lawyer shall not give anything of value for the recommendation of the lawyer's services except that the lawyer may:~~

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

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

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

~~(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.~~

Comments

~~Paying Others to Recommend a Lawyer~~

~~[5] Lawyers are not permitted to pay others for channeling professional work. 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, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel,~~

~~business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.~~

~~[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 prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons 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 prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)~~

~~[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, 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 prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.~~

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

Rule 7.3, Proposed Comment 1

[1] A solicitation is a ~~targeted communication initiated by the lawyer that is directed to a specific potential client and~~ direct contact with a potential client that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication ~~typically~~ does not constitute a solicitation if it is directed to the general public through the media, such as through a billboard, an Internet banner advertisement, a website or television commercial, or if ~~it~~ the contact is in response to a request for information or is automatically generated in response to Internet searches…