

**MEMORANDUM IN SUPPORT OF
WORKING DRAFT OF PROPOSED AMENDMENTS
TO ABA MODEL RULES OF PROFESSIONAL CONDUCT
ON LAWYER ADVERTISING**

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Standing Committee on Ethics and Professional Conduct
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A: Working Draft of Proposed Amendments dated December 21, 2017 (also separately available)

B: Roster of SCEPR Members, Liaisons, and Staff

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I.

Introduction

The Standing Committee on Ethics and Professional Responsibility (SCEPR) submits this Memorandum to describe the background, development, and rationale for the Working Draft dated December 21, 2017 of proposed amendments to Model Rules 7.1 through 7.5 (the Working Draft). These Rules are titled “Information About Legal Services,” and are also known as the rules that govern lawyer advertising.

Attachment A contains the Working Draft. It shows SCEPR’s proposals in legislative style: additions are underscored. Deletions are ~~stricken~~. The Working Draft is also available as a free-standing document on the website established by the Center for Professional Responsibility at https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility.html.

In September 2016 the Association of Professional Responsibility Lawyers (APRL) formally requested that SCEPR consider amendments to the advertising rules. APRL’s request came after more than three years of study, outreach, and review by its Regulation of Lawyer Advertising Committee, culminating in two substantial reports. Over many months thereafter, SCEPR intensively studied APRL’s proposals, and other materials on lawyer advertising.

Based on this careful analysis and study, SCEPR has concluded that the current advertising rules are outdated, may be overly restrictive of commercial speech, and could hamper the ability of lawyers to adapt to the changes in technology that affect the practice of law, and influence how consumers learn about available legal services. The ABA Model Rules no longer serve as models because the versions used in U.S. jurisdictions vary.

The proposed amendments seek to re-establish the Rules as models by: (i) encouraging more national uniformity; (ii) simplifying the rules that are actually enforced by state regulators; (iii) maintaining the prohibition against engaging in false or misleading communications; and (iv) accommodating developments in the legal profession, technology, and competition (from inside and outside the profession). To protect consumers, the amendments free regulators from the onerous and complicated provisions now in place, and focus attention on harmful conduct.

SCEPR seeks written comments on the Working Draft through March 1, 2018. Written comments should be sent to modelruleamend@americanbar.org. A public forum will be held during the ABA Midyear Meeting in Vancouver on Friday, February 2, 2018, from 2:00 p.m. to 3:30 p.m. at the Vancouver Convention Centre.

II.

Summary of Recommendations

SCEPR's amendments:

- Streamline and simplify the rules while adhering to constitutional limitations on restricting commercial speech, protecting the public, and permitting lawyers to use new technologies that can inform consumers accurately and efficiently about the availability of legal services.
- Combine the provisions on false and misleading communications into Rule 7.1 and its comments. Rule 7.1 remains unchanged. Provisions of Rule 7.5, which largely relate to misleading communications, are moved to Rule 7.1 and its comments.
- Consolidate specific rules for advertising into Rule 7.2, change “office address” to “contact information” to address technological advances that influence how lawyers may be contacted and how advertising is presented, and remove unrelated and superfluous provisions. Lawyer referral services remain limited to qualified entities approved by an appropriate regulatory authority.
- Add a new subdivision to Rule 7.2(c) as an exception to the general provision against paying for referrals. The new provision would permit nominal “thank you” gifts only, and contains other restrictions.
- Define solicitation in new Rule 1.0(l) as “a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person known to be in need of legal services in a particular matter and that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter.” Live person to person solicitation is prohibited. This includes “face to face, telephone, and real-time” communications.
- Broaden slightly the exceptions in Rule 7.3(a)(2) to permit live person to person solicitation of “experienced users of the type of legal services involved for business matters.” Additional commentary offers guidance on the new terms.
- Eliminate the labeling requirement for targeted mailings, but prohibit such mailings that are misleading, involve coercion, duress or harassment, or where the target of the solicitation has made known to the lawyer a desire not to be solicited.
- Retain most of Rule 7.4 and its comments regarding certified specialist designations.

III.

Background

A. History of Lawyer Advertising Regulation

“History teaches that systems that outlive their usefulness, or otherwise fail to make sense in their time, will ultimately go away. Sometimes with a bang, sometimes with a whimper; but they go away nevertheless. No one can say just when, or just how, but our current system of unique state ethics rules will ultimately go away. It simply can’t survive in its present form.” Robert A. Creamer, the 2017 recipient of the Michael Franck Professional Responsibility Award. Creamer’s remarks at the 43rd National Conference on Professional Responsibility urged the legal profession to assume regulatory responsibility for the inevitable changes required to lawyer governing codes. The patchwork of inconsistent state attorney advertising rules is a prime example of a system that “fails to make sense” in the current climate of social media, technology, and global lawyering.¹

Prior to the ABA’s 1908 Canons of Professional Ethics, legal advertising enjoyed unbridled freedom. Abraham Lincoln not only advertised in the newspaper noting “that his firm handled business with ‘promptness and fidelity,’”² but was known to have solicited business through both letters and personal conversation.³ The ban on attorney advertising contained in the 1908 Canons stemmed partially from the explosion in the size of the legal profession and the resulting aggressive attorney advertising—advertising that was thought to diminish ethical standards and the public’s perception of lawyers.⁴

B. Attorney Advertising in the 20th Century

The ban on attorney advertising remained for approximately six decades until two Arizona attorneys challenged it. In 1977, the attorneys prevailed when the U.S. Supreme Court decided *Bates v. Arizona*. The *Bates* opinion establishes an attorney’s First Amendment right to advertise in accordance with the commercial speech doctrine.⁵ However, *Bates* also supports state regulation of attorney advertising that is false, deceptive or misleading.

¹ Robert A. Creamer, *Ethics Rules Uniformity: The “Vision Thing”* The Professional Lawyer Vol. 24 No. 3 (2017) https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-3/ethics-rules-uniformity-visithing.html.

² Mylene Brooks, *Lawyer Advertising: Is There Really a Problem?* 15 LOY. L.A. ENT. L. REV. 1, 7 (1994).

³ Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 548 (1982). Boden describes Lincoln’s successful efforts to be retained in the seminal Illinois case that ultimately prevented counties from taxing railroad properties. Lincoln spoke with and wrote to county officials about retaining him. When he was not retained, Lincoln wrote to the general solicitor of the railroad who ultimately retained Lincoln. Boden comments on page 548 that, “At the worst, Lincoln’s pre-retainer activities in this case could be barratry, solicitation or “ambulance chasing.” Viewed in the best light, they could be called examples of “direct mail” advertising.” Boden offers this anecdote because Lincoln is a nineteenth century lawyer who is considered to be of “unquestionable integrity and morality.”

⁴ Boden, *supra* note 3, at 549; Brooks, *supra* note 2, at 6-9. See also Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015), https://aprl.net/wp-content/uploads/2016/07/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf.

⁵ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

In 1980, the U.S. Supreme Court's *Central Hudson* opinion provided the constitutional litmus test for determining whether a government regulation constitutes an impermissible restriction on commercial speech.⁶ *Central Hudson* provides:

[The regulation]...must concern lawful activity and not be misleading. Next...ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers...determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁷

During the 1980's the U.S. Supreme Court applied the *Central Hudson* test to several attorney-advertising cases and ruled that regulations banning a particular category of commercial speech are unconstitutional.⁸ The court reviewed issues such as the failure to adhere to a state "laundry list" of permitted content in direct mail advertisements,⁹ a newspaper advertisement's use of a picture of a Dalkon Shield uterine device in a state that prohibited all illustrations,¹⁰ and an attorney's letterhead that included his board certification in violation of prohibition against referencing expertise.¹¹ The court's decisions in these cases reinforced the holding in *Bates*; namely that 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.¹²

C. Solicitation

Unlike advertising, direct solicitation of specific clients is subject to heightened scrutiny. The U.S. Supreme Court upheld an Ohio regulation prohibiting lawyers from in-person solicitation for pecuniary gain. In *Ohralik v. Ohio State Bar Ass'n*, the Court held that the state had a substantial interest in preventing "those aspects of solicitation that induce fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct." The state's interest prevailed over the lawyers' commercial speech rights partially due to the lawyers' level of education, skills, and training in oral advocacy and persuasion. The court also concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.¹³

The U.S. Supreme Court elaborated on the holding in *Ohralik*, when it struck down a ban on in-person solicitation by accountants:

⁶ *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y.*, 447 U.S. 557 (1980).

⁷ *Id.* at 566.

⁸ See the APRL report for a more detailed discussion of these cases.

⁹ *In re R.M.J.*, 455 U.S. 191, 197 (1982).

¹⁰ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

¹¹ *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 93-94 (1990).

¹² *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).

¹³ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-465 (1978) (finding a greater potential for overreaching when a lawyer, professionally trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed person).

[T]he constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation. Later cases have made this clear, explaining that *Ohralik's* holding was narrow and depended upon certain “unique features of in-person solicitation by lawyers” that were present in the circumstances of that case.

Ohralik was a challenge to the application of Ohio’s ban on attorney solicitation and held only that a State Bar “constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.” While *Ohralik* discusses the generic hazards of personal solicitation, the opinion made clear that a preventative rule was justified only in situations “inherently conducive to overreaching and other forms of misconduct.”¹⁴

Ohralik's blanket prohibition on personal solicitation does not extend to targeted letters. The U.S. Supreme Court held in *Shapero v. Kentucky Bar Ass’n*,¹⁵ that a state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. The Court concluded targeted letters were comparable to print advertising, which can easily be ignored or discarded.

D. Commercial Speech in the Digital Age

The Bates-era cases preceded the advent of the Internet and social media, which have revolutionized the practice of law, 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.

The more recent cases, while relying on the commercial speech doctrine, exemplify digital age facts. For example, a 2010 case involves a law firm’s challenge to New York’s 2006 revised advertising rules that 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.”¹⁶ The U.S. Court of Appeals for the

¹⁴ *Edenfield v. Fane*, 507 U.S. 761, 774 (1993). (Citations omitted). See also, *inter alia*, *Tennessee Secondary School Athletic Assn v. Brentwood Academy*, 551 U.S. 291 (2007) (“we have not been chary of invalidating state restrictions on solicitation and commercial advertising in the absence of the acute risks associated with in-person legal solicitation”).

¹⁵ 486 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 from *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.

¹⁶ *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

Second Circuit found New York’s regulation to be unconstitutional as a categorical ban on commercial speech. The Second Circuit commented that the regulation targeted speech that likely would not be misleading.¹⁷ The court also noted that categorically prohibiting *potentially misleading* commercial speech would likely fail the *Central Hudson* test.¹⁸ 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.¹⁹

In 2011, the Fifth Circuit reached a similar conclusion in 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 aspect of *Central Hudson*.²⁰ The Fifth Circuit opinion applied the *Central Hudson* test to attorney advertising regulations.²¹ 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 U.S. Supreme Court’s decision in *Zauderer* to conclude the dignity of attorney advertising does not fit within the substantial interest criteria.²²

[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.’’²³

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’s prohibition on advertising of past results to be unconstitutional because the guidelines prohibited any such advertising on indoor and outdoor displays, television or radio.²⁴ The state’s underlying regulatory premise was that these “specific media . . . present

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 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).

¹⁷ *Alexander v. Cahill*, 598 F.3d 79, at 96.

¹⁸ *Id.*

¹⁹ *Id.* Note that the court did uphold the moratorium provisions that prevent lawyers from contacting accident victims for a certain period of time.

²⁰ *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 that the requirement that the regulation materially advanced the government’s interest in protecting the public.

²¹ *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

²² *Id.* at 220.

²³ *Id.* citing *Zauderer v. Office of Disciplinary Counsel of the Sup.Ct. of Ohio*, 471 U.S. at 648.

²⁴ *Rubenstein v Florida Bar*, No. 14-CIV-20786, 2014 WL 6979574, at *2 (S.D. Fla. Dec. 14, 2014).

too high a risk of being misleading.” This total ban on commercial speech again did not survive constitutional scrutiny.²⁵

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.²⁶ 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.

E. State Bar Guidance

In addition to the growing commercial speech jurisprudence, many state bars have issued ethics advisory opinions providing further guidance on the parameters of permissible attorney advertising.

For example, New York, Pennsylvania, Philadelphia, and West Virginia all have opinions providing analysis of advertising issues related to social networking.²⁷ California has parsed various Facebook posts to offer advice on which posts constitute advertising as opposed to an enthusiastic expression of a successful day at work.²⁸ California also has opined on the question of when a blog post becomes subject to the advertising rules.²⁹ Florida offers advertising advice in an online handbook, social media guidelines, and a best practices guide for effective electronic communication.³⁰

“Deal of the day” advertising was addressed in a North Carolina ethics opinion.³¹ South Carolina issued an opinion focusing on whether a lawyer can respond to questions posted on an interactive website.³²

²⁵ *Id.* at *20.

²⁶ *Searcy v. Fla. Bar*, 140 F. Supp. 3d 1290, 1299 (N.D. Fla. 2015). Summary Judgment Order *available at* [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E8E7FDDE9DBB8DE385257ED5004ABB95/\\$FILE/Searcy%20Order%20on%20Merits.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E8E7FDDE9DBB8DE385257ED5004ABB95/$FILE/Searcy%20Order%20on%20Merits.pdf?OpenElement). Searcy challenged both Florida’s objectively verifiable standard, and the regulation that prohibited a lawyer from referring to his expertise unless he is board certified. The court enjoined The Florida Bar from enforcing the rule on expertise but found the objectively verifiable challenge not ripe for consideration based upon a failure to exhaust administrative remedies. However, the Court appeared to have a sympathetic ear as it noted that Searcy “can hardly be criticized for fearing the worst” based upon The Florida Bar’s enforcement history of restrictive advertising regulations.

²⁷ See NYSBA Formal Op. 2013-972 (2013); N.Y. County Lawyers Ass’n Prof’l Ethics Comm. Formal Op. 748 (2015); N.Y. City Bar Ass’n Formal Op. 2015-7 (2015); N.Y. State Bar Revised Guidelines (2015); Pa. Advisory Op. 2014-300 (2014); Philadelphia Advisory Op. 2014-5(2014) W. Va. L.E.O. 2015-02 (2015).

²⁸ Cal. State Bar Formal Op. 2012-186 (2012).

²⁹ Cal. State Bar Formal Interim Op. 12-0006.

³⁰ The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites (Rev’d May 9, 2016), *available at* [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758BB54A5985257B590063EDA8/\\$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758BB54A5985257B590063EDA8/$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement) (last visited June 8, 2016); The Florida Bar Best Practices for Effective Electronic Communication (2015), *available at* [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/867146754B88854A85257E600075565F/\\$FILE/E-communication.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/867146754B88854A85257E600075565F/$FILE/E-communication.pdf?OpenElement).

³¹ N.C. Formal Op. 2013-10 (2013).

³² S.C. Advisory Op. 12-03 (2012).

Ohio, Florida, and North Carolina all permit attorneys to solicit clients by text message if the sender follows each state's applicable guidelines.³³ The Philadelphia Bar Association's Ethics Op. 2010-6 concludes that the Rule 7.3's solicitation prohibition is not violated by solicitation via e-mail, social media, chat room, or other electronic means because it would not be socially awkward for potential client to ignore a lawyer's overture and such contacts are not "real time" communications for purposes of the rule.

North Carolina State Bar's Op. 2011-08 advises that a lawyer's use of chat room support service does not violate Rule 7.3 as it does not subject the website visitor to undue influence or intimidation and the visitor has the ability to ignore the live chat button or to indicate with a click that the visitor does not wish to participate in a live chat session.

Florida now concurs with North Carolina's chat room analysis as evidenced by its reversal of its original opinion that banned chat room solicitation, and its acknowledgement of the evolution of digital communications. Florida Advisory Opinion A-00-1 (Revised) (Approved by the Board Review Committee on Professional Ethics on October 15, 2015) The opinion notes that "...written communications via a chat room, albeit in real time, does not involve the same pressure or opportunity for overreaching" as face-to-face solicitation.

F. Anti-Competitive Concerns

During the past twenty years, the Office of Public Policy, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics of the Federal Trade Commission also have weighed in on the regulation of lawyer advertising. The FTC submitted advisory letters to several state supreme courts and lawyer regulation offices when various states considered amending their advertising regulations in a way that the FTC perceived could restrict consumer access to factually accurate information regarding the availability of lawyer services. For example, 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.³⁴

These trends suggest that restrictions on the dissemination of accurate information about legal services may restrain trade and hinder the public's access to useful information. State lawyer regulation offices that impose such restraints may run afoul of antitrust laws. The recent U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. F.T.C.*³⁵ may be a warning. The Court found that the Board of Dental Examiners exclusion of non-dentists from

³³ Ohio Sup. Ct. Bd. of Commr's on Grievances & Discipline Advisory Op. 2013-2 (2013); *see also* Florida Bar News, *Bar Board Finds Texting is Not Prohibited Solicitation* (Aug. 15, 2015), <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/e060eb44c677d6e085257e9d00424f90!OpenDocument>; N.C. Formal Op. 2017-1 (2017).

³⁴ ABA Center for 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.

³⁵ *North Carolina State Board of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1116 (2015).

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 could be applied to lawyer disciplinary authorities – especially if it appears that the lawyers who are making decisions on “permissible” lawyer advertising are competitors, and there are no clearly articulated objective criteria to determine if their competitors advertising violates the Rules of Professional Conduct.

IV.

Procedural History and Timetable

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

In 2013, APRL created the Regulation of Lawyer Advertising Committee to analyze and study lawyer advertising rules. The Committee studied the ABA Model Rules of Professional Conduct 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. The committee consisted of both 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 committee’s fundamental premise was that the proper and constitutional purpose of regulating advertising is to assure that the public receives factually accurate, non-misleading information about available legal services. The ABA lawyer advertising rules have not been uniformly adopted. The Committee believed that conflicting state advertising regulations create a significant barrier to practice and unreasonably impede innovation in marketing and delivering legal services.

The committee obtained, with NOBC’s assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules. The committee received survey responses from 34 of 51 jurisdictions. The committee also considered consumer surveys, state bar reports, and other materials regarding the attitudes of consumers toward lawyer advertising, and the effects of advertising regulations on the public’s understanding about legal services. It gave particular attention to the impact of evolving technology and innovations in the marketing of legal services.

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 2016³⁶ 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 amendment of the Rules.

B. APRL Presentations in 2016

During 2016 representatives from APRL presented proposals in programs at the ABA Center for Professional Responsibility national conference, the National Conference of Bar Presidents and at an APRL and NOBC joint program.

Committee members also wrote articles and presented CLE programs on the proposals to assure widespread dissemination of the recommendations and garner a broad array of advice and suggestions.

C. ABA Public Forum – February 2017

On February 3, 2017 SCEPR hosted a public forum in conjunction with the ABA 2017 Midyear Meeting, to receive comments about the proposals. Several Center Committee chairs were present, as well as members of SCEPR, and the CPR Coordinating Council Chair Lucian Pera. Oral and written statements were received from over a dozen speakers, including: Thomas Prol, president of the New Jersey State Bar; Josh King of Avvo; Chas Rampenthal of LegalZoom; Christopher Brown and Eli Marchbanks from the ABA Young Lawyers Division; Cyrus Mehta of the ABA Commission on Immigration; Lisa Taylor from the ABA Health Law Section; Seth Guggenheim from the State Bar of Virginia; Will Hornsby, Staff Counsel to the ABA Committee on the Delivery of Legal Services; Gabe Miller; Doug Ende from the Washington State Bar Association; and Amber Rush.³⁷ SCEPR also received over a dozen written comments about the APRL proposals.³⁸

³⁶ Links to both APRL reports are available:
https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html.

³⁷ A transcript of the forum is available at:
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_public_forum_transcript.authcheckdam.pdf.

³⁸ 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. Working Group Meetings and Reports - 2017

In January 2017, SCEPR's chair Myles Lynk appointed a working group to review the APRL proposals. The working group, chaired by SCEPR member Wendy Wen Yun Chang, met by conference call seven times between January and May 2017. Members of the working group included representatives from the following 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 attended all meetings of the working group.

The working group functioned on a discussion and consensus basis—no votes were taken and there was no intent to bind any individual or organization to any position. Rather, the working group functioned as a "think tank" exploring the existing Model Rules of Professional Conduct, the APRL report, and additional comments received.

The working group provided SCEPR with two reports summarizing the various suggestions received for each advertising Rule and, where applicable, identified recommendations from the working group.

E. SCEPR October 2017 Preliminary Draft and December Final Draft

After reviewing the working group reports, SCEPR prepared proposed amendments to ABA 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 requested that Center committees provide feedback on the preliminary draft by December, so that SCEPR could circulate a working draft to all ABA entities, the Conference of Chief Justices, state bar leadership, and the public.

SCEPR appreciates the constructive comments on the preliminary draft amendments received from several Center Committees, including Professional Discipline and Professionalism. Based on those comments, SCEPR further modified the proposed changes to the advertising rules.

F. Next Steps: Vancouver Public Hearing – February 2, 2018 and Outreach to all ABA Sections, Conference of Chief Justices, State Bar Leadership, and the Public

While there have been multiple opportunities over the past 18 months for both ABA and non-ABA entities to provide comments, SCEPR's proposals differ from the APRL proposed amendments. Therefore, SCEPR will hold a public forum in Vancouver, in conjunction with the ABA midyear meeting, to obtain comments on the SCEPR proposals. In addition to the Vancouver public hearing, the SCEPR's final proposed amendments will be posted on the ABA CPR website and circulated to state bar representatives, NOBC, APRL, and the Conference of Chief Justices.

G. Final HOD Report and Resolution – (April/May 2018)

SCEPR anticipates circulating the final proposed amendments to the advertising rules in spring 2018, and presenting the proposed amendments to the ABA House Delegates at the August 2018 meeting.

V.

Discussion of Recommendations

A. Overview

SCEPR’s goal is to streamline the rules by placing similar concepts in the same rule to provide the simplest framework possible, while adhering to the constitutional limitations on restricting commercial speech and furthering the public policy concerns of protecting the public from misleading information regarding legal services.

B. Misleading Communications/Consumer Protection – Rule 7.1

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. Paragraph [4] of the Comments (stating or implying an ability influence government entities or officials) has been removed as redundant because Rule 8.4(e) addresses such conduct.

Paragraphs [4] through [8] of the Comments have been added by moving the black letter concepts from current Rule 7.5. Current Rule 7.5 addresses specific prohibitions regarding misleading communications in firm names and letterheads. Because the provisions of current Rule 7.5 are merely examples of possibly misleading communications, the concepts already are addressed by the black letter of Rule 7.1 and therefore presented as examples of misleading communication in the Comments to Rule 7.1.

C. Specific Rules for Advertising – Rule 7.2

All specific rules for advertising are consolidated in Rule 7.2. The term “office address” is changed to “contact information” in subdivision (b) to address technological advances on how a lawyer may be contacted and how advertising information may be presented.

Extraneous information in the comments justifying lawyer advertising is recommended for deletion in paragraph [1]. Advertising is constitutionally protected speech and needs no additional justification; that commentary provides no additional guidance to lawyers in fulfilling their ethical obligations. Similarly, SCEPR recommends deletion of paragraph [3].

Information about ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous. Similarly, Comment [7] addressing a lawyer’s responsibility for the conduct of a lawyer referral service or legal services plan in which the lawyer participates is also omitted as superfluous.

D. Gifts, Referrals and Recommendations – Rule 7.2

New subdivision (c)(5) contains an exception to the general prohibition against paying for referrals. This subdivision would permit lawyers to give a nominal gift to acknowledge a referral --- a “thank you” to the person who referred a client to the lawyer. The new provision clearly states that such a nominal gift is permissible only where not expected as payment for a recommendation of the lawyer’s services.

New Comment [4] expounds on what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive referrals or to make future referrals. The proposed additions acknowledge the reality that lawyers frequently give small tokens of appreciation after receiving a referral, and these tokens are neither intended to be a “payment” for the referral nor likely to induce future referrals. Neither is the behavior likely to result in the evils intended to be addressed by the rule: that referral sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more referrals for which they might be paid. Such token acknowledgements are common in other services industries.

New Comment [2] also explains that the term “recommendations” does not include directories or other group advertising in which lawyers are merely listed by practice area.

E. Solicitation – Rules 1.0 and 7.3

The Rules currently do not define solicitation, so for clarity, a definition is added as new subdivision (1) of terminology in Rule 1.0. The definition of solicitation is “borrowed” from Virginia as:

a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person known to be in need of legal services in a particular matter and that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter.

Subdivision (a) continues to prohibit direct, in person solicitation, but clarifies that the prohibition applies solely to live person-to-person contact. Paragraph [2] of the comment adds examples of prohibited solicitation including in person, face-to-face, telephone, and real-time electronic or other communications such as Skype. Added commentary clarifies that prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

Exceptions to prohibited solicitation are slightly broadened in Rule 7.3(a)(2) to include “experienced users of the type of legal services involved for business matters.” Similarly, Comment [5] to Rule 7.3 is amended to explain that the potential for overreaching, that justifies the prohibition against in person solicitation, is unlikely to occur when the solicitation is directed toward experienced users of the legal services in a business matter. Conversely, the prohibition is justified, and a lawyer may not engage in live in person solicitation involving personal legal

matters such as criminal defense, family law, or personal injury, even if the person has been represented multiple times.

The concept 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 subdivision (a)(3) of Rule 7.3. New Comment [8] to Rule 7.3 is added. It gives class action notices as an example of a communication that is authorized by law or court order.

The amendments retain Rule 7.3(b)(1) and (2), which prohibit solicitation when a target has made known his or her desire not to be solicited solicitations that involve coercion, duress, or harassment. These restrictions apply both live in-person and written solicitations.

After much discussion, SCEPR recommends deleting the requirement that targeted written solicitations be marked as “advertising material.” Upon the recommendation of Standing Committee on Professionalism, SCEPR concluded the requirement is no longer necessary because consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers simply due to the nature of the communications, and most consumers will not feel any compulsion to view the materials solely because they were sent by a lawyer or law firm. Further, no evidence was produced showing that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers. If the solicitation itself or its contents are misleading, that harm is adequately addressed by Rule 7.1.³⁹

F. Fields of Practice and Specialization – Rule 7.4

The SCEPR acknowledges input by the Standing Committee on Specialization, which shaped revisions to Rule 7.4. The working draft retains most of the black letter Rule and its Comment. SCEPR recommends moving subdivisions (b) and (c) regarding advertising a lawyer’s designation in patent or admiralty from the black letter Rule to paragraph [2] of the Comment. We also recommend clarifying in new subdivision (b)(1) and paragraph [3] of the comment which entities qualify to certify or accredit lawyers. Finally, Comment [1] provides 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.”

VI.

Conclusion

The history of attorney advertising illustrates that despite the state bars’ best intentions to revise attorney advertising regulations and offer guidance to address today’s digital challenges, attorneys and law firms are caught in a dizzying array of regulations and federal case law, especially if they practice in more than one jurisdiction. The literature suggests that this endless pursuit to regulate

³⁹ Two members of SCEPR thought that the current labeling requirement in Rule 7.3(c) should be retained.

advertising in a constantly evolving technological environment frustrates bar regulators and practicing lawyers, and limits the amount of beneficial legal information provided to the public.⁴⁰

SCEPR's proposed amendments to Model Rules 7.1 through 7.5 will simplify and streamline the rules on lawyer advertising. As amended, the Rules will better serve the bench, the bar and the public by expanding opportunities for lawyers to use modern communications technology to advertise their services, increasing the public's access to information about the availability of legal services, and protecting the public while focusing the resources of regulators on harmful conduct.

Dated: December 21, 2017

Barbara S. Gillers, Chair
ABA Standing Committee on Ethics and
Professional Responsibility

⁴⁰ *Association of Professional Responsibility Lawyers 2015 Report Of The Regulation Of Lawyer Advertising Committee* (2015). See also Jan L. Jacobowitz, *Ending the Pursuit: Releasing Attorney Advertising Regulations at the Intersection of Technology and the First Amendment*, *The Professional Lawyer*, Vol. 24 No. 2, ABA (Spring 2017).

Attachment A – Working Draft December 2017

1 **Model Rule 1.0: Terminology**

2 (l) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law
3 firm that is directed to a specific person reasonably believed to need legal services in a particular
4 matter and that offers to provide, or reasonably can be understood as offering to provide, legal
5 services for that matter.

6 ~~(m)~~ (n) “Substantial” when used in reference to degree or extent denotes a material matter of clear
7 and weighty importance.

8 ~~(m)~~ (n) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative
9 body, administrative agency or other body acting in an adjudicative capacity. A legislative body,
10 administrative agency or other body acts in an adjudicative capacity when a neutral official, after
11 the presentation of evidence or legal argument by a party or parties, will render a binding legal
12 judgment directly affecting a party's interests in a particular matter.

13 ~~(n)~~ (o) “Writing” or “written” denotes a tangible or electronic record of a communication or
14 representation, including handwriting, typewriting, printing, photostating, photography, audio or
15 videorecording, and electronic communications. A “signed” writing includes an electronic sound,
16 symbol or process attached to or logically associated with a writing and executed or adopted by a
17 person with the intent to sign the writing.

18

19 **Model Rule 7.1: Communications Concerning A Lawyer's Services**

20 A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's
21 services. A communication is false or misleading if it contains a material misrepresentation of fact
22 or law, or omits a fact necessary to make the statement considered as a whole not materially
23 misleading.

24 **Comment**

25 [1] This Rule governs all communications about a lawyer's services including advertising
26 ~~permitted by Rule 7.2.~~ that is constitutionally protected commercial speech. Whatever means are
27 used to make known a lawyer's services, statements about them must be truthful.

28 [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement
29 is misleading if it omits a fact necessary to make the lawyer's communication considered as a
30 whole not materially misleading. A truthful statement is ~~also~~ misleading if there is a substantial
31 likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer
32 or the lawyer's services for which there is no reasonable factual foundation. A truthful statement
33 also is misleading if presented in a way that leads a reasonable person to believe the lawyer's
34 communication requires that person to take further action when, in fact, no action is required.

35 [3] ~~An advertisement~~ A communication that truthfully reports a lawyer's achievements on behalf
36 of clients or former clients may be misleading if presented so as to lead a reasonable person to
37 form an unjustified expectation that the same results could be obtained for other clients in similar
38 matters without reference to the specific factual and legal circumstances of each client's case.
39 Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an
40 unsubstantiated comparison of the lawyer's or law firm's services or fees with the services or fees
41 those of other lawyers or law firms, may be misleading if presented with such specificity as would
42 lead a reasonable person to conclude that the comparison or claim can be substantiated. The
43 inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a
44 statement is likely to create unjustified expectations or otherwise mislead the public.

45 [4] ~~See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence~~
46 ~~improperly a government agency or official or to achieve results by means that violate the Rules~~
47 ~~of Professional Conduct or other law.~~

48 **Firm Names and Designations**¹

49 [4] Firm names, letterhead and professional designations are communications concerning a
50 lawyer's services. A trade name may be used by a lawyer in private practice if it is not false or
51 misleading. A trade name is misleading if it implies a connection with a government agency, with
52 a deceased lawyer who was not a former member of the firm, or with a public or charitable legal
53 services organization.

54 [5] A firm may be designated by the names of all or some of its members, by the names of deceased
55 members where there has been a succession in the firm's identity, or by a trade name such as the
56 "ABC Legal Clinic." A lawyer or law firm also may be designated by a distinctive website address,
57 electronic social media "handle," or comparable professional designation. If a firm uses a trade
58 name that includes a geographical name such as "Springfield Legal Clinic," an express statement
59 explaining that it is not a public legal aid agency may be required to avoid a misleading implication.
60 A firm name including the name of a deceased partner is, strictly speaking, a trade name. The use
61 of such names to designate law firms has proven a useful means of identification. However, it is
62 misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm,
63 or the name of a nonlawyer.

64 [6] A law firm with offices in more than one jurisdiction may use the same name or other
65 professional designation in each jurisdiction. Lawyers in such an office should indicate where they
66 are admitted to practice.

67 [7] Lawyers may not imply or hold themselves out as practicing together in one firm when they
68 are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

69 [8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm,
70 or in communications on the law firm's behalf, during any substantial period in which the lawyer
71 is not actively and regularly practicing with the firm.

72

¹ Proposed Comments [4] through [8] to Rule 7.1 are drawn from current Rule 7.5.

73 **Rule 7.2: ~~Advertising~~ Communications Concerning a Lawyer's Services: Specific Rules**

74 (a) ~~Subject to the requirements of Rules 7.1 and 7.3, a~~ A lawyer may advertise services through
75 ~~written, recorded or electronic communication, including public~~ any media.

76 (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services
77 except that a lawyer may

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

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

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

83 (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement
84 not otherwise prohibited under these Rules that provides for the other person to refer clients or
85 customers to the lawyer, if:

86 (i) the reciprocal referral agreement is not exclusive; and

87 (ii) the client is informed of the existence and nature of the agreement; and

88 (5) give nominal gifts that are neither intended nor reasonably expected to be a form of
89 compensation for recommending a lawyer's services.

90 (c) Any communication made pursuant to this Rule shall include the name and ~~office address~~
91 contact information of at least one lawyer or law firm responsible for its content.

92 **Comment**

93 ~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed~~
94 ~~to make known their services not only through reputation but also through organized information~~
95 ~~campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to~~
96 ~~the tradition that a lawyer should not seek clientele. However, the public's need to know about~~
97 ~~legal services can be fulfilled in part through advertising. This need is particularly acute in the case~~

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98 of persons of moderate means who have not made extensive use of legal services. The interest in
99 expanding public information about legal services ought to prevail over considerations of tradition.
100 Nevertheless, advertising by lawyers entails the risk of practices that are misleading or
101 overreaching.

102 [1] ~~[2]~~ This Rule permits public dissemination of information concerning a lawyer's or law firm's
103 name, ~~or firm name,~~ address, email address, website, and telephone number; the kinds of services
104 the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices
105 for specific services and payment and credit arrangements; a lawyer's foreign language ability;
106 names of references and, with their consent, names of clients regularly represented; and other
107 information that might invite the attention of those seeking legal assistance.

108 ~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective~~
109 ~~judgment. Some jurisdictions have had extensive prohibitions against television and other forms~~
110 ~~of advertising, against advertising going beyond specified facts about a lawyer, or against~~
111 ~~"undignified" advertising. Television, the Internet, and other forms of electronic communication~~
112 ~~are now among the most powerful media for getting information to the public, particularly persons~~
113 ~~of low and moderate income; prohibiting television, Internet, and other forms of electronic~~
114 ~~advertising, therefore, would impede the flow of information about legal services to many sectors~~
115 ~~of the public. Limiting the information that may be advertised has a similar effect and assumes~~
116 ~~that the bar can accurately forecast the kind of information that the public would regard as relevant.~~
117 ~~But see Rule 7.3(a) for the prohibition against a solicitation through a real time electronic~~
118 ~~exchange initiated by the lawyer.~~

119 ~~[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to~~
120 ~~members of a class in class action litigation.~~

121 **Paying Others to Recommend a Lawyer**

122 [2] ~~[5]~~ Except as permitted under paragraphs (b)(1)-(b)~~(4)(5)~~, lawyers are not permitted to pay
123 others for recommending the lawyer's services. ~~or for channeling professional work in a manner~~
124 ~~that violates Rule 7.3.~~ A communication contains a recommendation if it expresses, implies or
125 suggests value as to the lawyer's services or if it endorses or vouches for a lawyer's credentials,
126 abilities, competence, character, or other professional qualities. Directory listings and group

127 advertisements that list lawyers by practice area, without more, do not constitute impermissible
128 “recommendations.”

129
130 [3] Paragraph (b)(1) ~~however,~~ allows a lawyer to pay for advertising and communications
131 permitted by this Rule, including the costs of print directory listings, on-line directory listings,
132 newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-
133 based advertisements, and group advertising. A lawyer may compensate employees, agents and
134 vendors who are engaged to provide marketing or client development services, such as publicists,
135 public-relations personnel, business-development staff and website designers.²

136
137 [4] Paragraph (b)(5) permits nominal gifts as might be given for holidays, or other ordinary social
138 hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or
139 understanding that such a gift would be forthcoming or that referrals would be made or encouraged
140 in the future.

141
142 [5] ~~Moreover,~~ a lawyer may pay others for generating client leads, such as Internet-based client
143 leads, as long as the lead generator does not recommend the lawyer, any payment to the lead
144 generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of
145 the lawyer), and the lead generator’s communications are consistent with Rule 7.1
146 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not
147 pay a lead generator that states, implies, or creates a reasonable impression that it is recommending
148 the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s
149 legal problems when determining which lawyer should receive the referral. See Comment [2]
150 (definition of “recommendation”). See also Rule 5.3 (duties of lawyers and law firms with respect
151 to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of
152 another.

153 [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified
154 lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar
155 delivery system that assists people who seek to secure legal representation. A lawyer referral

² This comes from cmt. [5] to current Rule 7.2. The revision simply breaks former cmt. [5] to Rule 7.2 into three cmts, i.e. [2], [3], and [5] to new 7.2.

156 service, on the other hand, is any organization that holds itself out to the public as a lawyer referral
157 service. Such Qualified referral services are ~~understood by the public to be~~ consumer-oriented
158 organizations that provide unbiased referrals to lawyers with appropriate experience in the subject
159 matter of the representation and afford other client protections, such as complaint procedures or
160 malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual
161 charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service
162 is one that is approved by an appropriate regulatory authority as affording adequate protections for
163 the public. ~~See, e.g., the American Bar Association's Model Supreme Court Rules Governing~~
164 ~~Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance~~
165 ~~Act (requiring that organizations that are identified as lawyer referral services (i) permit the~~
166 ~~participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who~~
167 ~~meet reasonable objective eligibility requirements as may be established by the referral service for~~
168 ~~the protection of the public; (ii) require each participating lawyer to carry reasonably adequate~~
169 ~~malpractice insurance; (iii) act reasonably to assess client satisfaction and address client~~
170 ~~complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the~~
171 ~~referral service.)~~

172 ~~[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a~~
173 ~~lawyer referral service must act reasonably to assure that the activities of the plan or service are~~
174 ~~compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer~~
175 ~~referral services may communicate with the public, but such communication must be in conformity~~
176 ~~with these Rules. Thus, advertising must not be false or misleading, as would be the case if the~~
177 ~~communications of a group advertising program or a group legal services plan would mislead the~~
178 ~~public to think that it was a lawyer referral service sponsored by a state agency or bar association.~~
179 ~~Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3~~

180 ~~[8] [7]~~ A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in
181 return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal
182 referral arrangements must not interfere with the lawyer's professional judgment as to making
183 referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided
184 in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not
185 pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by

186 agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal
187 referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts
188 of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements
189 should be of indefinite duration and should be reviewed periodically to determine whether they
190 comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net
191 income among lawyers within firms comprised of multiple entities.

192 **Model Rule 7.3: Solicitation of Clients**

193 (a) A lawyer shall not solicit professional employment by live person to person contact~~in person,~~
194 ~~live telephone or real-time electronic contact~~ solicit professional employment when a significant
195 motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the ~~person~~
196 ~~contacted~~ is:

197 (1) with ~~is~~ a lawyer; ~~or~~

198 (2) with a person who has a family, close personal, or prior business or professional
199 relationship with the lawyer; or

200 (3) with a person who is known by the lawyer to be an experienced user of the type of legal
201 services involved for business matters.

202 (b) A lawyer shall not solicit professional employment ~~by written, recorded or electronic~~
203 ~~communication or by in person, telephone or real-time electronic contact~~ even when not otherwise
204 prohibited by paragraph (a) if:

205 (1) the target of the solicitation has made known to the lawyer a desire not to be solicited
206 by the lawyer; or

207 (2) the solicitation involves coercion, duress or harassment.

208 ~~(c) Every written, recorded or by electronic communication from a lawyer soliciting professional~~
209 ~~employment from anyone known to be in need of legal services in a particular matter shall include~~
210 ~~the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending~~
211 ~~of any recorded or electronic communication, unless the recipient of the communication is a person~~
212 ~~specified in paragraphs (a)(1) or (a)(2).~~

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213 (c) This Rule does not prohibit communications authorized by law or ordered by a court or other
214 tribunal.

215 (d) Notwithstanding the prohibitions in this Rule paragraph (a), a lawyer may participate with a
216 prepaid or group legal service plan operated by an organization not owned or directed by the lawyer
217 that uses in-person or telephone contact to ~~solicit~~ enroll memberships or sell subscriptions for the
218 plan from persons who are not known to need legal services in a particular matter covered by the
219 plan.

220 **Comment**

221 [1] ~~A solicitation is a targeted communication initiated by the lawyer that is directed to a specific~~
222 ~~person and that offers to provide, or can reasonably be understood as offering to provide, legal~~
223 ~~services. In contrast, a Paragraph (a) prohibits a lawyer from soliciting professional employment~~
224 ~~by live person to person contact when a significant motive for the lawyer's doing so is the lawyer's~~
225 ~~or the law firm's pecuniary gain. See Rule 1.0(1) for a definition of solicitation. A lawyer's~~
226 ~~communication is typically does not constitute a solicitation if it is directed to the general public,~~
227 ~~such as through a billboard, an Internet banner advertisement, a website or a television commercial,~~
228 ~~or if it is in response to a request for information or is automatically generated in response to~~
229 ~~Internet searches.~~

230 [2] “Live person to person contact” means in person, face to face, telephone and real-time person
231 to person communications such as Skype or Facetime, and other visual/auditory communications
232 where the prospective client may feel obligated to speak with the lawyer. Such person to person
233 contact does not include chat rooms, text messages, or other written communications that
234 recipients may easily disregard. There is a A potential for abuse overreaching exists when a
235 solicitation involves a lawyer, seeking pecuniary gain, direct in person, live telephone or real time
236 electronic contact solicits a person by a lawyer with someone known to be in need of legal services.
237 ~~These~~ This forms of contact subjects a person to the private importuning of the trained advocate
238 in a direct interpersonal encounter. The person, who may already feel overwhelmed by the
239 circumstances giving rise to the need for legal services, may find it difficult to fully evaluate ~~fully~~
240 all available alternatives with reasoned judgment and appropriate self-interest in the face of the
241 lawyer's presence and insistence upon ~~being retained immediately~~ an immediate response. The
242 situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

243 [3] ~~This~~ The potential for abuse overreaching inherent in live person to person contact ~~direct in-~~
244 ~~person, live telephone or real-time electronic solicitation~~ justifies its prohibition, ~~particularly~~ since
245 lawyers have alternative means of conveying necessary information. ~~to those who may be in need~~
246 ~~of legal services.~~ In particular, communications can be mailed or transmitted by email or other
247 electronic means that ~~do not involve real-time contact and~~ do not violate other laws. ~~governing~~
248 ~~solicitations.~~ These forms of communications ~~and solicitations~~ make it possible for the public to
249 be informed about the need for legal services, and about the qualifications of available lawyers
250 and law firms, without subjecting the public to live person to person ~~direct in-person, telephone or~~
251 ~~real-time electronic~~ persuasion that may overwhelm a person's judgment.

252 [4] ~~The use of general advertising and written, recorded or electronic communications to transmit~~
253 ~~information from lawyer to the public, rather than direct in-person, live telephone or real-time~~
254 ~~electronic contact, will help to assure that the information flows cleanly as well as freely. The~~
255 ~~contents of advertisements and communications permitted under Rule 7.2 can be permanently~~
256 ~~recorded so that they cannot be disputed and may be shared with others who know the lawyer.~~
257 ~~This potential for informal review is itself likely to help guard against statements and claims that~~
258 ~~might constitute false and misleading communications, in violation of Rule 7.1.~~ The contents of
259 live person to person ~~direct in-person live telephone or real-time electronic~~ contact can be disputed
260 and may not be subject to third-party scrutiny. Consequently, they are much more likely to
261 approach (and occasionally cross) the dividing line between accurate representations and those
262 that are false and misleading.

263 [5] There is far less likelihood that a lawyer would engage in ~~abusive practices~~ overreaching
264 against a former client, or a person with whom the lawyer has a close personal, ~~or~~ family, business
265 or professional relationship, or in situations in which the lawyer is motivated by considerations
266 other than the lawyer's pecuniary gain. Nor is there a serious potential for ~~abuse~~ overreaching when
267 the person contacted is a lawyer or is known to be an experienced user of the type of legal services
268 involved for business purposes. For instance, an "experienced user" of legal services for business
269 matters may include constituents of a business entity who hire outside counsel to represent the
270 entity; entrepreneurs who regularly engage business, employment law, or intellectual property
271 lawyers; small proprietorships that hire lawyers for lease or contract issues; and other people who
272 retain lawyers for business transactions or formations. An experienced user of legal services would

273 not ordinarily include someone who has hired lawyers on multiple occasions for family law
274 matters, criminal matters or personal injury claims. ~~Consequently, the general prohibition in Rule~~
275 ~~7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.~~ Also, Paragraph
276 (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of
277 public or charitable legal-service organizations or bona fide political, social, civic, fraternal,
278 employee or trade organizations whose purposes include providing or recommending legal
279 services to their members or beneficiaries.

280 ~~[6] But even permitted forms of solicitation can be abused. Thus, any~~ A solicitation that ~~which~~
281 contains false or misleading information ~~which is false or misleading~~ within the meaning of Rule
282 7.1, that ~~which~~ involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or
283 that ~~which~~ involves contact with someone who has made known to the lawyer a desire not to be
284 solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. ~~Moreover, if after~~
285 ~~sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response,~~
286 ~~any further effort to communicate with the recipient of the communication may violate the~~
287 ~~provisions of Rule 7.3(b).~~

288 [7] This Rule is does not intended to prohibit a lawyer from contacting representatives of
289 organizations or groups that may be interested in establishing a group or prepaid legal plan for
290 their members, insureds, beneficiaries or other third parties for the purpose of informing such
291 entities of the availability of and details concerning the plan or arrangement which the lawyer or
292 lawyer's firm is willing to offer. This form of communication is not directed to people who are
293 seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a
294 fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become
295 prospective clients of the lawyer. Under these circumstances, the activity which the lawyer
296 undertakes in communicating with such representatives and the type of information transmitted to
297 the individual are functionally similar to and serve the same purpose as advertising permitted under
298 Rule 7.2.

299 ~~[8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material"~~
300 ~~does not apply to communications sent in response to request so potential clients or their~~
301 ~~spokespersons or sponsors. General announcements by lawyers, including changes in personnel~~

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302 ~~or office location do not constitute communications soliciting professional employment from a~~
303 ~~client known to be in need of legal services within the meaning of this Rule.~~

304 [8] Communications authorized by law or ordered by a court or tribunal include a notice to
305 potential members of a class in class action litigation.

306 [9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses
307 personal contact to ~~solicit~~ enroll members for its group or prepaid legal service plan, provided that
308 the personal contact is not undertaken by any lawyer who would be a provider of legal services
309 through the plan. The organization must not be owned by or directed (whether as manager or
310 otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d)
311 would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer
312 and use the organization for the in-person or telephone solicitation of legal employment of the
313 lawyer through memberships in the plan or otherwise. The communication permitted by these
314 organizations ~~also~~ must not be directed to a person known to need legal services in a particular
315 matter, but ~~is to~~ be designed to inform potential plan members generally of another means of
316 affordable legal services. Lawyers who participate in a legal service plan must reasonably assure
317 that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). ~~See 8.4(a).~~

318 **Rule 7.4 Communication of Fields of Practice and Specialization**

319 (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields
320 of law.

321 ~~(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark
322 Office may use the designation “Patent Attorney” or a substantially similar designation.~~

323 ~~(c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in
324 Admiralty” or a substantially similar designation.~~

325 ~~(b) (d)~~ A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular
326 field of law, unless:

327 (1) the lawyer has been certified as a specialist by an organization that has been approved
328 by an appropriate ~~state~~ authority of the state or the District of Columbia or a U.S. Territory
329 or that has been accredited by the American Bar Association; and

330 (2) the name of the certifying organization is clearly identified in the communication.

331 **Comment**

332 [1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications
333 about the lawyer’s services. If a lawyer practices only in certain fields, or will not accept matters
334 except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally
335 permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or
336 “specializes in” particular fields based on the lawyer’s experience, specialized training or
337 education, but such communications are subject to the “false and misleading” standard applied in
338 Rule 7.1 to communications concerning a lawyer’s services.

339 [2] ~~Paragraph (b) recognizes the long-established policy of the~~ The Patent and Trademark Office
340 has a long-established policy of designating for the designation of lawyers practicing before the
341 Office. Paragraph (c) recognizes that The designation of Admiralty practice also has a long
342 historical tradition associated with maritime commerce and the federal courts. A lawyer’s
343 communications about these practice areas are not prohibited by this Rule.

344 [3] ~~Paragraph (d)~~ This Rule permits a lawyer to state that the lawyer is certified as a specialist in a
345 field of law if such certification is granted by an organization approved by an appropriate ~~state~~

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346 authority of a state, the District of Columbia, or a U.S. Territory or accredited by the American
347 Bar Association or another organization, such as a state supreme court or a state bar association,
348 that has been approved by the ~~state~~ authority of the state, the District of Columbia or a U.S.
349 Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an
350 objective entity has recognized an advanced degree of knowledge and experience in the specialty
351 area greater than is suggested by general licensure to practice law. Certifying organizations may
352 be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's
353 recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain
354 access to useful information about an organization granting certification, the name of the certifying
355 organization must be included in any communication regarding the certification.

356

357 **Rule 7.5 Firm Names and Letterheads³**

358 ~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates~~
359 ~~Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection~~
360 ~~with a government agency or with a public or charitable legal services organization and is not~~
361 ~~otherwise in violation of Rule 7.1.~~

362 ~~(b) A law firm with offices in more than one jurisdiction may use the same name or other~~
363 ~~professional designation in each jurisdiction, but identification of the lawyers in an office of the~~
364 ~~firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction~~
365 ~~where the office is located.~~

366 ~~(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in~~
367 ~~communications on its behalf, during any substantial period in which the lawyer is not actively~~
368 ~~and regularly practicing with the firm.~~

369 ~~(d) Lawyers may state or imply that they practice in a partnership or other organization only when~~
370 ~~that is the fact.~~

371 **Comment**

372 ~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased~~
373 ~~members where there has been a continuing succession in the firm's identity or by a trade name~~
374 ~~such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive~~
375 ~~website address or comparable professional designation. Although the United States Supreme~~
376 ~~Court has held that legislation may prohibit the use of trade names in professional practice, use of~~
377 ~~such names in law practice is acceptable so long as it is not misleading. If a private firm uses a~~
378 ~~trade name that includes a geographical name such as "Springfield Legal Clinic," an express~~
379 ~~disclaimer that it is a public legal aid agency may be required to avoid a misleading implication.~~
380 ~~It may be observed that any firm name including the name of a deceased partner is, strictly~~
381 ~~speaking, a trade name. The use of such names to designate law firms has proven a useful means~~
382 ~~of identification. However, it is misleading to use the name of a lawyer not associated with the~~
383 ~~firm or a predecessor of the firm, or the name of a nonlawyer.~~

384 ~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated~~
385 ~~with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones,"~~
386 ~~for that title suggests that they are practicing law together in a firm.~~

³ Rule 7.5 is deleted. Proposed Comments [4] through [8] in Proposed Rule 7.1 are derived from current 7.5.

Attachment B – SCEPR Members, Liaisons, and Staff

Chair:

Barbara S. Gillers, Adjunct Professor of Law, New York University School of Law

Members:

John M. Barkett, Shook Hardy & Bacon LLP
Wendy Wen Yun Chang, Hinshaw & Culbertson
Hon Daniel J. Crothers, North Dakota Supreme Court
Keith Robert Fisher, National Center for State Courts
Douglas Richmond, Aon Risk Solutions
Michael H. Rubin, McGlinchey Stafford PLLC
Lynda C. Shely, The Shely Firm PC
Elizabeth C. Tarbert, The Florida Bar
Allison L. Wood, Legal Ethics Consulting PC

Liaisons:

BOG: Penina K. Lieber, Dinsmore & Shohl LLP
TTIPS: William Thomas Barker, Dentons
NOBC: Charles Centinaro, Director, Office of Attorney Ethics, New Jersey
APRL: Jan Jacobowitz, Professor of Law, University of Miami School of Law
US DOJ: Stacy Ludwig, US Department of Justice Professional Responsibility Advisory Office
SMALL FIRM: George R. Ripplinger, Jr.
AALS Section on Professional Responsibility: Rebecca Roiphe, Professor of Law, NY Law School

ABA Staff:

Tracy Kepler, Executive Director
Dennis Rendleman, Ethics Counsel
Mary McDermott, Associate Ethics Counsel
Peter Geraghty, ETHICSearch Director
Natalia Vera, Senior Paralegal