May 24, 2017

Dear Committee,

The American Immigration Lawyers Association (AILA) submits this letter in response to APRL’s proposed revisions to ABA Model Rules of Professional Conduct 7.1 and 7.2.

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

Immigration lawyers practice throughout the United States, and their market audience is equally national in scope. For example, an employer needing assistance with obtaining a work visa in Hawaii may hire an immigration lawyer in New York to prepare and file the necessary visa petition with United States Citizenship and Immigration Services (USCIS). Immigration lawyers have an incentive to use online resources to reach the broadest possible audience, since they will not be prohibited from representing a client residing or doing business in a state other than where they are licensed to practice law.

Immigration lawyers represent clients who may be vulnerable to deceptive advertising. Language barriers and socioeconomic circumstances may force immigration clients to turn to the internet to find a lawyer to help find a way out of a life or death situation. When the stakes for residing and working lawfully in the United States are so high, creating an even playing field for clients is needed to avoid exploitation by unethical immigration lawyers.

AILA therefore supports proposed Rule 7.1 as a deterrent to potential fraud and misleading communications disseminated by immigration lawyers over the internet, as well as through other forms of media. Proposed Rule 7.1 serves an important purpose in protecting the consumer by prohibiting lawyers from making a “false or misleading communication about the lawyer or the lawyer’s services,” and by requiring lawyers to supply all facts necessary to avoid making a false or misleading communication about themselves or their services.¹

¹ As noted in comment 8 to proposed Rule 7.1, the “false and misleading” standard establishes a clear expectation that lawyers should not fib or prevaricate about their area of specialization or expertise in their communications to the public. AILA agrees that this is the correct standard to apply, in that it maximizes informed decision-making by prospective clients while allowing the lawyer to advertise responsibly. An immigration lawyer who accurately refers to himself or herself as a “specialist” may comply with proposed Rule 7.1 yet potentially run into problems with 8 CFR 1003.102(f), which prohibits even implying that one is certified as a specialist.
Similarly, AILA supports proposed Rule 7.2, to the extent that it would prohibit in-person or telephonic contact with a prospective client by a lawyer when motivated by the lawyer’s financial considerations. The consumer has an interest in choosing legal representation based on careful research and in selecting the attorney whom the client believes can most effectively advocate for him or her. The lawyer should not be permitted to interfere directly in this process.

Nonetheless, AILA believes that proposed Rule 7.2 could be amended in two respects so that it would do more to protect the consumer. Consumers are more likely to encounter a lawyer for the first time online, when searching for information on the internet to educate themselves about their legal matter or the lawyer’s qualifications or services. The websites of many immigration lawyers combine content about immigration laws with claims about the particular excellence of the lawyer’s services or ability to obtain a result or outcome for the client. These websites and other social media allow the lawyer to have instant communication with a prospective client. AILA therefore urges the inclusion of the term “real time electronic contact” in proposed Rule 7.2(b) to prohibit solicitation by a lawyer by means of email, text message or other types of electronic communication, as well as by telephone or in person.

AILA further urges APRL to define the term “sophisticated user of legal services” contained in proposed Rule 7.2(b). The term is vague and ambiguous. Sophistication in legal affairs is a subjective concept. A business entity that routinely files collection actions against customers who do not pay their bills in state court might be less susceptible to lawyer solicitation, because it uses the legal system on a regular basis. However, with the assistance of legal counsel, immigrants may also file repeated applications with USCIS for temporary visas, work permits, green cards, or naturalization. Without better guidelines for determining who is a “sophisticated user,” proposed Rule 7.2(b) might unfairly treat all clients the same way depending on how many times they have used a lawyer, regardless of the client’s reason for hiring the lawyer.

Typically, for example, a person applying for citizenship will have already obtained a nonimmigrant visa to enter the United States and filed an application to extend his or her nonimmigrant status, an application to adjust his or her status to that of lawful permanent resident, and applications for employment authorization and travel documents. Given the nature of U.S. immigration laws, it would not be accurate to characterize a client who has applied over an extended period of time through multiple petitions as a “sophisticated user.” An immigrant making his or her journey through the immigration system cannot be compared with a plaintiff who systematically files collection actions.

Furthermore, in a hypothetical proceeding involving a lawyer charged with violating proposed Rule 7.2, the lawyer might argue that discipline should not be imposed because the consumer used other legal providers in the past. In order to obtain redress from an unscrupulous lawyer’s violation of the rule, the consumer would therefore be expected to prove they are not “sophisticated.” This is an unreasonable requirement to impose on a non-lawyer, who would
need to resort to a legal understanding he or she does not have in the first place. The requirement would also raise concerns about violation of client confidentiality and attorney-client privilege, insofar as the client or a former lawyer of the client might be expected to disclose confidential communications relevant to establishing the client’s prior experience with lawyers. Moreover, applying the “sophisticated user of legal services” exception in the context of a disciplinary proceeding would create an awkward and embarrassing situation for the client, who might be required to come forward and explain why the exception should not apply. The consumer should not have to hire a second lawyer to make the case that he or she was harmed by the first lawyer’s improper conduct.

We appreciate the opportunity to share these comments on the proposed rule changes.

Sincerely,

AILA National Ethics Committee