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Via E-Mail

modelruleamend@americanbar.org
Natalia.vera@americanbar.org

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

Dear Barbara:

The Association of Professional Responsibility Lawyers ("APRL") thanks the Standing Committee on Ethics and Professional Responsibility ("SCEPR") for advancing the dialog on updating the ABA Model Rules of Professional Conduct regarding lawyer advertising ("Rules"). Overall, APRL supports the recommendations of SCEPR to improve access to justice for consumers in the transforming market for legal services. Technology advances in the past 30 years and changes in the ways consumers find lawyers require modernizing the Rules while maintaining the prohibition against engaging in false and misleading advertising.

APRL submits the following comments to your Committee's working draft of proposed amendments to the ABA Model Rules on lawyer advertising.

Communications Concerning a Lawyer's Services – Rule 7.1

Comment [4] in APRL's proposed Rule 7.1 provides a useful cross reference to Rules 8.4(c) and 8.4(e) as possible grounds for discipline in regard to lawyer advertising. Rather than deleting current Comment [4], we suggest including the following comment:

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.
Communications Concerning a lawyer's Services; Specific Rules – Rule 7.2

According to the Committee's report, all specific advertising rules are consolidated in Rule 7.2. Structurally, Rule 7.2 is analogous to Model Rule 1.8 that addresses specific conflict of interest situations involving current clients. Under this formulation, Rule 7.4 on fields of practice and specialization, if not eliminated (as originally recommended by APRL), should be included in Rule 7.2 and not as a separate stand-alone rule. The over-arching goal of revising the lawyer advertising rules should be to streamline and simplify the rules for more effective and uniform enforcement.

If SCEPR elects to keep some form of Rule 7.4, we recommend that Model Rule 7.4(a) and (b) be made paragraph (c) in the working draft of Rule 7.2 and paragraph (c) in the working draft be moved to paragraph (d).

Paragraph (a) to Rule 7.2

The word "advertise" in paragraph (a) should be replaced with the word "communicate" to conform to the purpose and scope of the rule. "Advertise" is not a defined term and paragraph (a) applies to all forms of communications concerning a lawyer's services. We recommend that paragraph (a) be modified to read:

(a) A lawyer may communicate information regarding the lawyer's services through any media.

Paragraph (b) to Rule 7.2

For better clarity we recommend that Rule 7.2(b) be revised as follows:

(b) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for the purpose of recommending or securing the services of the lawyer or law firm, except that a lawyer may:

Paragraph (c) to Rule 7.2

APRL continues to believe that a special requirement to include name and contact information in advertisements is unnecessary, but if Rule 7.2(c) is retained, it should be clarified to apply to any written communication pursuant to this Rule. "Written" is defined in Rule 1.0(n) to include electronic communications. We recommend that the paragraph be changed to read:

(c) Any written communication made pursuant to paragraph (a) shall include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment [2] to Rule 7.2

We recommend that the current language defining what constitutes a "recommendation" in the second sentence in Comment [2] be retained. Defining a recommendation as a communication that "endorses or vouches" for a lawyer's credentials, abilities, competence, character, or other professional qualities
is clearer than the phrase "expresses, implies or suggests a value as to the lawyers services or credentials, abilities, competence, character, or other professional qualities."

Solicitation – Rule 1.0

The terms "solicitation" and "solicit" appear only in Rule 7.3 and no other rule of professional conduct. Because the definition of these terms is critical to understanding and complying with the provisions of Rule 7.3, the definition should be in the rule for clarity and not in the terminology rule. We are concerned that lawyers might not think to look in the terminology rule for the definition in applying the rule. There is precedent for defining a term within the specific rule in Rule 1.18, which defines "prospective client" in subparagraph (a).

Current paragraph (c) to Rule 7.3

APRL endorses the Committee’s recommendation to delete the requirement that targeted written communications be marked as "advertising materials." APRL’s study of the advertising rules and empirical data derived from its survey of state regulators demonstrates that states that do not impose this requirement have not experienced greater consumer harm or an increase in violations of its lawyer advertising rules.

Comment [2] to Rule 7.3

We believe that the first sentence in proposed Comment [2] to Rule 7.3 will cause unnecessary confusion because it includes "real time" person to person communications. For better clarity, the first sentence should read:

"Live person to person contact" means in-person, face to face, live telephone and other live visual or auditory communication, such as Skype or Facetime, when the targeted person is subject to a direct personal encounter with the lawyer without time for reflection.

The second sentence adds additional clarity and should be retained.

Rule 7.4

APRL continues to recommend that Rule 7.4, “Communication of Fields of Practice & Specialization,” should be deleted. As the Standing Committee’s Memorandum states on page 15 in support of removing Rule 7.5, 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.” The same rationale applies to removing Rule 7.4: communications by lawyers about their fields of practice and specializations are examples of possibly misleading communications and nothing more, and Rule 7.1 is more than sufficient to regulate lawyers on these matters.
Conclusion

APRL appreciates your Committee's work in studying APRL's reports and recommendations and analyzing the advertising rules. APRL believes that the primary objective of any amendments should be to simplify the lawyer advertising rules for more effective and uniform enforcement, consistent with how states actually regulate lawyer advertising (See 2015 Report of the APRL Advertising Regulation Committee) and to allow lawyers to use new technologies to communicate accurately and efficiently useful information about the availability of legal services.

Lawyers today face a far more competitive marketplace where consumers in need of legal services gather information from the internet (not just from their friends and family) to represent themselves, to hire unlicensed nonlawyers, or to comparison shop for lawyers. Lawyers ethically should be able to provide consumers with truthful information without unreasonable restraints on their commercial speech. We are encouraged by the Committee's proposals, which support these goals.

Thank you for the opportunity to provide your Committee with these comments.

Sincerely,

George R. Clark
President, APRL

Mark L. Tuft
Chair, APRL Regulation of Lawyer Advertising Committee