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## **American Bar Association Standing Committee on Ethics and Professional Responsibility: Proposed Amendments to Model Rules of Professional Conduct Rules 7.1 - 7.5**

**Comments Submitted by Avvo, Inc.**

**Dated:** February 27, 2017

### **Introduction**

We would like to thank the Committee for the opportunity to comment on the Association of Professional Responsibility Lawyers' ("APRL") proposal to amend the Model Rules of Professional Conduct relating to attorney advertising. As the web's largest online legal resource for consumers, connecting millions of consumers with lawyers every year, Avvo is intimately familiar with how consumers find and engage legal representation today – and with the economic and structural obstacles that slow or stop those connections.

Both the access-to-justice gap and chronic underemployment of lawyers are well-known problems. While numerous factors contribute to these problems, one that looms large is the availability of information about lawyers and legal services. Avvo's research indicates that over two-thirds of people with real legal issues say they have delayed – or avoided entirely – hiring an attorney if they could not get adequate information about attorney qualifications, competency, or cost.

A staid bio or tagline does not suffice. Consumers operate in a world where they increasingly have access to deep levels of information about even the most inconsequential of purchases. As a result, they expect a wealth of information when choosing something as important as their lawyer. They want specifics about each attorney they are considering, so they can make the right decision. Avvo's surveys show that referrals or client reviews are not sufficient for the vast majority of potential clients. Factors these people rate as important to their decision to hire include practice areas, years of experience, availability of flat fees, languages spoken, and past results in similar matters.

There should be no obstacles standing in the way of attorneys providing potential clients with the depth and breadth of information they are looking for. But too many attorneys are frustrated in this effort by an obstacle that could be easily removed: the century-long accretion of brittle, detailed, and overly-broad attorney advertising regulation.

## The Current Rules: A Hindrance, Not a Help

The 2015 APRL Report is an outstanding work of scholarship and analysis. We will not rehash its findings here, except to expand on several themes and findings in the Report:

- The Rules Chill Lawyer Speech. The rigidity and detail of the rules are a poor match for our rapidly-changing, information-intensive environment. We have seen many lawyers throw up their hands in frustration and choose not to use innovative new services or communicate broadly with the public, out of concern that a broad reading of the Rules might apply.
- Ethics Hotlines and Opinions Exacerbate The Problem. There is a laudable reason for Bars to offer ethics hotlines and opinions: these resources provide a means for conscientious attorneys to ensure they are meeting their obligations to clients, courts, and the public. Ethics opinions are, by design, conservative. They offer a safe harbor, often far back from the edges of a rule, in which lawyers can feel comfort in compliance. While this is a very good thing when it comes to matters such as handling client funds, lawyer substance abuse problems, and keeping client confidences, ethics opinions work poorly with the advertising rules. The First Amendment dictates that rules regulating attorney advertising be far more circumscribed than most other rules.<sup>1</sup> And while the public benefits from “over-compliance” on matters related to their money and confidences, the same cannot be said of advertising. There is an inevitable tension between the cautionary approach of ethics opinions – which look at the language in the existing rules, and apply that language conservatively – and the public interest in access to legal information and innovative legal services. The detailed, specific rules offer fertile ground for Bars and regulators to opine far beyond the bounds of the Constitution.<sup>2</sup>
- This Chilling Effect Hurts Consumers. As the US Supreme Court noted, when first freeing up attorney advertising in *Bates v. Arizona*:

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<sup>1</sup> For state regulation of advertising to survive constitutional review, such regulation must meet either the “intermediate scrutiny” standard (for regulation of misleading advertising), or a developing form of even-more-rigorous scrutiny (for restrictions on non-misleading advertising). See *Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York*, 447 U.S. 557 (1980); *Sorrell v. IMS Health*, 564 U.S. 552 (2011). At a minimum, state attorney regulators have the burden of showing, with empirical evidence, that a particular regulation impacting attorney speech is necessary to meet an important government interest, and that it does so in a narrowly-tailored way.

<sup>2</sup> The Supreme Court recently addressed this problem, in the context of ethics opinions issued by the Federal Election Commission:

“When the FEC issues advisory opinions that prohibit speech, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” [citations omitted]. Consequently, “the censor’s determination may in practice be final.” [Freedman, supra, at 58, 85 S.Ct. 734.](#)

*Citizens United v. Federal Election Commission*, 588 U.S. 310 (2010). In the arena of lawyer regulation, there are numerous examples of ethics opinions applying the advertising rules broadly, in ways unmoored either to the “public protection” purpose of the rules or to the First Amendment principles by which the rules are supposed to be informed. Representative examples include [State Bar of Nevada Formal Opinion No. 17](#), [Pennsylvania Bar Opinion 2016-200](#), and [South Carolina Ethics Advisory Opinion 09-10](#).

*“[T]he consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.”* 433 U.S. 350, 364 (1977) (internal citations removed.)

The legacy of pre-*Bates* rules, and the process of conscientious attorneys and cautious ethics opinions interpreting these rules to apply far beyond their constitutional parameters, has significantly impacted the free flow of commercial speech regarding legal services. And this pulling back is happening at the same time that consumers are increasingly demanding more information and options when making purchasing decisions of all kinds. Online reviews, forums, widespread photo sharing, blogging, and social media have taken down barriers that once existed to such information being shared. Legal services are stressful and complex enough for consumers to learn about, yet we as an industry compound the matter by making it far harder than it should be for lawyers to provide information and services. The result? Consumers are getting less information and options when it comes to legal services than pertains to far less important purchases.

- Most of the Advertising Rules Aren’t Necessary. To survive constitutional scrutiny, any interpretation of the detailed rules would have to be limited to proscribing activity that is false, misleading, or deceptive. Yet rules 7.1 and 8.4(c) already cover that ground, making the detailed provisions entirely redundant for enforcement purposes. As the APRL report aptly demonstrates, this view is widely held by those who would know best: the Bar disciplinary authorities charged with policing violations of the advertising rules.

If enforcement authorities don’t need the detailed rules in order to go after bad actors, and if the detailed rules are actively making life harder for lawyers and stifling the ability of consumers to get access to legal services and information, why would we keep these detailed rules on the books?

### **One Important Departure from the APRL Report**

The 2016 APRL report picks up the topic of the attorney solicitation rules and proposes some changes. We agree that most of these changes are for the good. Having an exception for sophisticated users of legal services will help expand access to information, and having a catch-all for harassing or coercive solicitation – regardless of medium – should help stave off “creative compliance” with the solicitation rules.<sup>3</sup>

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<sup>3</sup> An even cleaner approach would be to shift the focus from the form to the substance of the solicitation: i.e., eliminate the specifics from the solicitation rule entirely, and simply prohibit ANY attorney solicitation – regardless of medium – that’s done in circumstances where such solicitation is unwanted, harassing, or otherwise abusive.

However, there is one significant problem with the 2016 APRL report: it brings back into play, as proposed rule 7.2(f), the most detailed portions of the advertising rules that the 2015 Report would have seen eliminated. These are those rules that are driving the lions' share of the problems discussed above. Amending the rules while leaving these provisions in place would end up defeating much of the purpose of this endeavor.

In its 2015 Report, the APRL committee noted:

*"The legitimate public policy considerations discussed above support removing the general prohibition against "giving anything of value to a person for recommending the lawyer's services" contained in Rule 7.2(b). Legitimate professional responsibility concerns regarding referral fees and the division of fees are adequately dealt with in other rules, including Rule 1.5(e) and Rule 5.4."*

Current Rule 7.2(b) is where much of the angst for compliance-minded lawyers and writers of ethics opinions comes from, as they wrestle with whether a form of marketing is a "recommendation," or a "lawyer referral service," or involves the "reasonable cost of advertising." For the reasons discussed above and in the 2015 Report, none of these detailed concepts serve to protect the public, and are in fact actively harming consumers and lawyers.

It's unclear why these rules find their way back into the 2016 Proposal after being recommended for excision. The 2016 Report is far briefer than its predecessor, and its discussion of these Rules seems to associate them only with the primary topic of the 2016 Report, solicitation:

*"Proposed Rule 7.2 combines the solicitation provisions of Model Rule 7.3 with the provision in Model Rule 7.2(b) of refraining from giving someone something of value for referring clients because both provisions involve the solicitation of prospective clients."*

This makes little sense, as these detailed rules around "giving someone something of value for referring clients" contain language applying broadly to advertising and referral services, and are regularly interpreted as applying well beyond solicitation. If the purpose is to ensure that solicitation cannot be carried out by third parties, this concern is already addressed by the language prohibiting solicitation by third parties acting on the lawyer's behalf.

It is critical that the Committee pause on this point and ask why these rules – which the 2015 Proposal went to great lengths to demonstrate the futility and active harm of – have resurfaced in the 2016 Proposal. If there is not a reason to revisit the findings of the 2015 Proposal (and we do not believe there is), its good work should not be undone by keeping these rules. And if the purpose is to only further qualify the direct solicitation restrictions in Rule 7.2, the language about referrals and the like should be amended to make this limitation clear.

## **Conclusion**

We commend the Committee for taking up this important work, and advancing the excellent analysis and scholarship undertaken by the APRL committee. We wholeheartedly endorse the adoption of the APRL Proposals into the ABA Model Rules, save for the proposed new Rule

7.2(f). To the extent there is a desire to provide guidance on some of these matters previously subject to detailed regulation, this could be accomplished by adding appropriate comments to the revised Rule 7.1.

Thank you again for the opportunity, and don't hesitate to reach out if there are questions or if we can be helpful to this effort in any way. Best,

A handwritten signature in blue ink, appearing to read 'Josh King', with a stylized flourish extending to the right.

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