January 5, 2017

Myles V. Lynk, Chair  
Standing Committee on Ethics and Professional Responsibility

Donald D. Campbell, President  
Association of Professional Responsibility Lawyers

Lynda Shely, Immediate Past President  
Association of Professional Responsibility Lawyers

Re: Association of Professional Responsibility Lawyers Report of the Regulation of Lawyer Advertising Committee

Dear Myles, Don and Lynda:

The ABA Standing Committee on Client Protection (“Committee”) has conducted an initial review of the Association of Professional Responsibility Lawyers (“APRL”) Regulation of Lawyer Advertising Committee’s (“APRL Committee”) proposal to amend the ABA Model Rules of Professional Conduct (“Model Rules”) governing lawyer advertising and solicitation. The Committee greatly appreciates the expansive scope of this review and the effort necessary to produce such a thoughtful and detailed proposal. The Committee agrees that the proper purpose of regulating lawyer advertising is to “assure that consumers of legal services receive factually accurate, non-misleading information” and supports the stated goal of “establishing a uniform and simplified rule that prohibits false and misleading advertisements; and ensuring that consumers have access to accurate information about legal services while not being deceived by members of the Bar.” The Committee also agrees that professional discipline should be reserved for the dissemination of information that is false or misleading, and that the non-existence of virtual practice borders combined with jurisdictional variations in advertising rules increases the likelihood of unintentional violations. The Committee provides the following comments to assist the Center for Professional Responsibility’s joint working group in its evaluation of the proposed amendments moving forward.

regarding a lawyer’s area of practice or areas of specialization would qualify as “false or misleading” in violation of Model Rule 7.1 and misconduct under Model Rule 8.4(c). The majority of the Committee agrees.

A significant minority expressed concern that, absent black letter language, the Comment alone is insufficient to provide meaningful parameters for distinguishing between an area of practice or “specialty” and a lawyer who is a “certified specialist” in a particular area of law. Some members expressed concern that the amendments place the burden on consumers to understand the different standards and not on the lawyer to clearly communicate the distinction. In jurisdictions in which certification or specialization is not available, there is a significant risk that legal consumers might be confused by what such terminology means with regard to a lawyer’s expertise in a given area of practice. The risk is less in jurisdictions which offer specialty certification because consumers can research and understand what specialty certification means and because lawyers without those certifications are less apt to use similar wording out of a fear of misrepresenting themselves as specialty-certified. Members also expressed concern that in jurisdictions that do not adopt the Comments, there will be no restrictions on communicating areas of practice or “specialty” in the rules, thus creating additional confusion about what qualifies as “false and misleading.”

Second, the Committee collectively questioned the elimination of the language in current Model Rule 7.2(c) requiring communications to include the name and office address of “at least one lawyer or law firm” responsible for the content. The Committee understands the APRL Committee’s argument that the current Model Rule 7.2(c) limits the lawyer’s ability to communicate via certain platforms. The APRL Committee’s Report includes the example of character limitations in the social media platform Twitter, which limits individual Tweets to 140-characters. Requiring a name and address may leave little or no room for the actual message. This is a reasonable concern. The Committee notes, though, that just as globalization and innovations in technology have rendered current regulation standards ineffective, they also increase opportunities for fraud and misrepresentation. The Committee believes that a middle ground exists that would provide a better balance for the lawyer’s right to advertise services without unnecessary restrictions and ensure that consumers of legal services are provided with necessary information. Perhaps the answer is not in eliminating the requirement completely, but in amending the type of information required. Using the Twitter example, lawyers who use Twitter for professional communications could be required to provide a link to the firm or other webpage that includes the appropriate identifying information, which would not count against the 140-character per Tweet limit.

The Committee supports the APRL Committee’s proposed new Model Rule 7.2 regarding solicitation of clients. The Committee agrees that “solicitation” should be defined within the black letter and applauds the APRL Committee’s decision to do so. The Committee also agrees with the proposed language in new Model Rule 7.2(b) that prohibits direct solicitation by employees or agents on behalf of the lawyer. However, the Committee is unclear about who would qualify as a “sophisticated user of legal services” per section 7.2(b)(2). The Committee does not believe that the definition of “sophisticated user of legal services” in proposed Comment [4] as “an individual who has had significant dealings with the legal profession or who regularly retains legal counsel for business purposes” is sufficient. One can “regularly retain legal counsel” in a particular area of law and have no meaningful experience with legal counsel in other areas. The Committee
recommends redefining “sophisticated user of legal services” to include more extensive criteria. Minimally, experience retaining legal counsel should only apply if the solicitation involves the same area of law.

Members also expressed concern that proposed Model Rule 7.2(b) excludes real-time electronic communications as prohibited conduct, and that Rule 7.2(c) assumes that all forms of electronic communication are the same. Proposed Comments [2] and [3] seem to imply that “in-person, face-to-face, or live telephone contact” is more persuasive than written electronic communications, and therefore labeling written communications as “advertising material” is sufficient. The Committee disagrees and asserts that the potentially persuasive effect of real-time electronic written communications is comparable to face-to-face or telephone communications in its ability to pressure or persuade, as compared to static means of communication. The Committee recommends including real-time electronic communications as part of the prohibited conduct outlined in Model Rule 7.2(b). The Committee also recommends amending the language in proposed Comments [2] and [3] to better distinguish between written electronic communications generally and real-time electronic communications.

The Committee greatly appreciates the opportunity to provide comments and looks forward to working collaboratively as this effort moves forward. If you have any questions, please contact Dawn Evans, the Committee’s appointee to the Center’s working group at devans@osb.org or Committee Counsel Selina Thomas at selina.thomas@americanbar.org.

Best regards,

Frank X. Neuner, Chair
ABA Standing Committee on Client Protection

cc: Lucian T. Pera, Chair Coordinating Council
    John S. Gleason, Chair of the Policy Implementation Committee
    Paula J. Frederick, Chair of the Standing Committee on Professional Discipline
    Jayne Reardon, Chair of the Standing Committee on Professionalism
    Shontrai Devaughn Irving, Chair of the Standing Committee on Specialization
    Tracy L. Kepler, Director, Center for Professional Responsibility
    Ellyn S. Rosen, Deputy Director & Regulation Counsel
    Theresa M. Gronkiewicz, Deputy Regulation Counsel
    Dennis Rendleman, Ethics Counsel
    Mary McDermott, Associate Ethics Counsel
    John A. Holtaway, Lead Senior Counsel
    Selina Thomas, Client Protection Senior Counsel
    Martin Whittaker, Specialization Senior Counsel