ABA Standing Committee on Ethics and Professional Responsibility

Dear Committee:

The Commission on Immigration (COI) supports the need for a uniform rule that regulates only false or misleading communications, and thus does not object to the proposed amendment to Rule 7.1 by the Association of Professional Responsibility Lawyers (APRL). On the other hand, the COI does have concerns about (1) not requiring disciplinary investigations relating to attorney advertisements and (2) regarding proposed changes to Rule 7.2 and 7.3 that loosen the prohibitions to solicitation. The COI recognizes that attorneys are changing the way they market their services online but, has concerns about the potential for misleading advertisements by allowing fees to be paid to online providers who generate clients for attorneys.

The Current Attorney-Advertising Rule Is Outdated for Immigration Practitioners

The COI recognizes that the ethical rules governing attorney advertising are outdated and need change. Many immigration lawyers, firms, and nonprofits providing legal services to indigent clients rely on social media such as LinkedIn, Twitter and Facebook. They use social media not just for advertising but also as part of advocacy efforts to raise awareness on immigration issues. If any message disseminated on social media constitutes an attorney advertisement, it triggers additional requirements that may be impossible to comply with in a social media post.

Furthermore, since the practice of immigration law is governed by federal statutes and regulations, immigration lawyers may practice in states even where they have not been admitted, so long as they restrict their practice to immigration law.\(^1\) As a result, a lawyer can also broadcast his or her ability

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\(^1\) 8 Code of Federal Regulation (CFR) § 292.1(a)(1) lists authorized representatives who can practice before federal immigration agencies. Section 1.2 defines “attorney” as “a member in good standing of the bar of the highest court of any State, possessing territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbarring or otherwise restricting him in the practice of
to serve clients across the United States. Immigration lawyers were among the first to start 
websites in the 1990s, and continue to broadcast their services to potential clients across the 
United States and around the world. Since each state has its own rules and requirements, an 
immigration lawyer may conform to the advertising requirements in the state in which s/he is 
admitted but may breach the requirements in one or more other states where the 
advertisement is seen.

Therefore, the COI supports the need for a uniform rule regulating attorney advertising that 
focuses on regulating false and misleading communications.

**There is a Need for Disciplinary Process Because Immigrant Clients Are Vulnerable**

The COI recognizes that many clients served by immigration lawyers and non-profits are 
more vulnerable than the non-immigrant clients due to language and other cultural barriers. 
These clients are desperately in need of remedies to legalize their status, especially if they are 
undocumented in the United States. As a result, these clients, many of whom are foreign 
nationals, are more likely to become victims of scams perpetrated by both licensed attorneys 
and by unauthorized practitioners of law (UPL).

The COI, therefore, does not support the proposal that some complaints about lawyer 
advertising may be better addressed in a non-disciplinary framework, rather than as a 
disciplinary investigation and prosecution of an alleged advertising rule violation. While the 
APRL proposal recognizes that complaints of a serious nature still be subject to the 
disciplinary process, the absence of a de facto disciplinary procedure would incentivize an 
unscrupulous practitioner to perpetuate a scam through a misleading advertisement or 
improper solicitation without the fear of a formal disciplinary investigation. For example, if 
an immigration practitioner is running a deceptive advertisement that is scamming vulnerable 
immigrants, issuing a reprimand through a non-disciplinary framework may not be able to 
remedy the situation right away.

**Loosening the Current Improper-Solicitation Rule Will Harm Immigrant Clients**

The COI also opposes the proposed modifications to Rule 7.2 and 7.3 regarding improper 
solicitation of clients. While the COI notes that APRL supports the prohibition against in 
person or live telephone solicitation, the COI objects to the inclusion of the “sophisticated 
user of legal services” exception to this prohibition. The “sophisticated user” is defined as 
one “who has had significant dealings with the legal profession or who regularly retains legal 
services for business purposes.” The COI does not believe that an immigrant client who 
regularly retains legal services will be considered sophisticated to be included in the 
exception to the solicitation prohibition. Given the complexity of seeking routine benefits

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2 For example, Greg Siskind, a prominent immigration lawyer, set up his website in June 1994 and it was the 
third law firm web site in the country. The first two went online in May 1994. They were Arent Fox in 
Washington, DC and Venable, also in DC. Gregory Siskind & Deborah McMurray, *Lawyer’s Guide to 

3 Proposed Model Rule 7.2(b)(2).
under the immigration laws, a foreign national client may be compelled to use legal services on a regular basis to defend himself or herself in removal proceedings, to file immigrant visa petitions for several family members or to seek renewals of a work authorization document. The repeated use of legal services would not render such a client “sophisticated” as to justify the lack of protection against a prohibited solicitation.

The COI also opposes the proposal to remove “real-time electronic contact” from Rule 7.3, as a prohibited solicitation. For the reasons outlined above, vulnerable clients can be taken advantage of whether through a prohibited live solicitation or through real-time electronic contact.

“Uberization” of Immigration Practice Can Result in Misleading Advertising

Finally, the COI cautions that proposed Rule 7.2(f) and comment 9 could open the door to misleading advertising through non-legal organizations like Avvo. While the COI is not, in principle, opposed to companies like Avvo using their marketing platform to provide more opportunities for younger and solo lawyers to gain clients and thus level the playing field, the COI wishes to point out that the “Uberization” of immigration law practice could have the potential to mislead consumers of immigration law services. Avvo seeks to disrupt the traditional legal model where a client seeks out an immigration lawyer based on his or her reputation rather than on a web-based network, and the attorney sets the fee. One of the immigration services Avvo offers is a “family-based green card” for $2995 that involves preparing and filing the requisite forms, but no representation at an adjustment of status interview or to respond to a Request for Evidence. The consumer pays $2995 to Avvo directly, but may choose the attorney in the Avvo network that they want to work with. That attorney has 24 hours to directly contact the consumer/client, and do the work as they would any other client. When the work is completed, Avvo releases the funds to the attorney, and in a separate transaction withdraws from the attorney’s account a $400 marketing fee. Any concerns that this may be a prohibited fee splitting arrangement with a non-lawyer under Rule 5.4 seems to have been obviated by Rule 7.2(f) and comment 9, which allows the lawyer to pay others for generating client leads.

Even if we leave alone the concerns of fee splitting with a non-lawyer, a “family-based green card” is not like buying an airline ticket on Expedia, where you know that a seat in economy, be it in row 25 or row 45, will be the same. If the airplane goes through turbulence, the ride will be equally bumpy in any seat of the aircraft. But unlike an airline ticket, there are many traps and pitfalls in family-based immigration practice, even when it appears relatively straightforward. One’s eligibility for adjustment of status based on a marriage to a US citizen spouse is also subject to variables. If the client’s arrival in the US was not through a straight forward inspection at a port of entry, then the case immediately becomes more complex. If the client is potentially inadmissible for a host of reasons, including claiming to

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be a US citizen when seeking employment many years ago, that too would throw the Avvo $2,995 family based green card package out of the window. The client will disappointingly realize that the Avvo family green card package and price is virtually meaningless, and would rather seek out an attorney who has the reputation and expertise to handle difficult family-based immigration cases.

There are other variations even if the client appears prima facie eligible to adjust status. For example, the marriage may have been bona fide at its inception, but the spouses are quarreling and living separately, and still desire to cooperate on the green card for the sake of the children. This too requires the agile immigration attorney to appropriately advocate for the client by educating and allaying the suspicion of malevolent intent by a USCIS examiner that the marriage presently under consideration not be viable so long as it was bona fide at its inception. See Matter of Boromand, 17 I&N Dec. 450 (BIA 1980); Matter of McKee, 17 I&N Dec. 332 (BIA 1980).

There are other problematic aspects of immigration legal services provided by Avvo. Avvo offers a 15-minute immigration advice session for $39. After 15 minutes, the telephone line gets cut off. It is difficult to provide a comprehensive consultation in 15 minutes. While the client may have the option of following up with the attorney, the very fact that Avvo suggests that a 15-minute consultation can satisfy the client’s need in a complex area of the law may be misleading. Avvo also provides a service where an attorney will review immigration applications that the client has prepared pro se, but that is fraught with dangers and pitfalls as referenced in the marriage example preceding. 8 CFR 1003.102(t) provides for sanction of an immigration practitioner who fails to submit a Notice of Entry of Appearance as Attorney or Representative who has engaged in practice or preparation. Under the terms of the Avvo arrangement, since the client will be filing pro se after the attorney reviews it, the attorney will not be able to submit a Notice of Appearance if the attorney’s review of the form is considered to be “practice or preparation.” Presumably Avvo, as an intermediary in connecting a potential client to a lawyer and as a non-legal entity, would not be entering a Notice of Appearance.

In conclusion, the COI recommends that either Rule 7.2(f) or comment 9 emphasize that fee sharing with a non-lawyer, especially where Avvo charges a so-called “marketing fee” after generating a client, is a prohibited fee sharing arrangement under Rule 5.4. In the

5 These terms are defined broadly under 8 CFR 1001.1(i) and (k):

“The term practice means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board.”

“The term preparation, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure.”

6 On the other hand, the COI has no objection to an online model where the attorney pays a fee that is not based on whether it resulted in a paying client.
alternative, the COI reiterates that aggrieved consumers be able to complain about a deceptive advertising pattern to grievance committees, who would be able to initiate a disciplinary investigation against the attorney as opposed to a more informal procedure that has been suggested by APRL.

We thank you for the opportunity to respond to the proposed changes to the advertising rules, and will be glad to provide further information or clarification.

Sincerely,

Mary Meg McCarthy
Chair