COMMENTS OF THE CONNECTICUT BAR ASSOCIATION STANDING COMMITTEE ON PROFESSIONAL ETHICS ON THE SCEPR PROPOSED AMENDMENTS TO ABA MODEL RULES OF PROFESSIONAL CONDUCT ON LAWYER ADVERTISING

February 21, 2018

The Connecticut Bar Association Standing Committee on Professional Ethics (the Committee) submits these comments in response to the Working Draft of Proposed Amendments to the ABA Model Rules of Professional Conduct on Lawyer Advertising, which the Standing Committee on Ethics and Professional Responsibility (“SCEPR”) has submitted to the American Bar Association for comment and consideration.

The Committee largely agrees with the SCEPR proposal to simplify the ABA’s Model Rules pertaining to lawyer advertising. The Committee commends SCEPR’s goals of encouraging uniformity and accommodating technological developments while continuing to prohibit false and misleading communication.

We do, however, disagree with two changes in the draft: (1) SCEPR’s proposed new exception in Model Rule 7.2 allowing nominal gifts in return for a referral, and (2) SCEPR’s proposed deletion in Model Rule 7.3 of the requirement that advertising material be so labeled.

We also recommend two additions to these Rules. The first, in a comment to Model Rule 7.1, would address advertisements regarding contingency fees. The second, in Model Rule 7.2, would ban solicitations shortly after an accident has occurred.

I. Model Rule 7.1

We urge that commentary be added to Model Rule 7.1 that clarifies when a particular type of advertisement is likely to be misleading under Model Rule 8.4(c). Our proposed new comment would specify that an advertisement is misleading if it states simply that no “fee” is due unless the prospective client prevails, but in fact the attorney is likely to require the client to pay court costs and certain other expenses, such as for expert witnesses. Discipline for such advertisements would be under Rule 8.4. We believe that this additional commentary to Rule 7.1 will help prevent attorneys from unwittingly violating Rule 8.4.

Model Rule 7.1 provides that a communication is “false or misleading” if it “omits a fact necessary to make the statement considered as a whole not materially misleading.” The commentary contains the further explanation: “A truthful statement is [also] misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.” Both the Rule and the commentary language are necessarily abstract. We suggest that it would be useful to provide at least one concrete example where an omission results in a truthful statement being misleading. Connecticut Rule 7.2(f) addresses one such situation. The provision states:
Every advertisement and written communication that contains information about the lawyer’s fee, including those indicating that the charging of a fee is contingent on outcome, or that no fee will be charged in the absence of a recovery, or that the fee will be a percentage of the recovery, shall disclose whether and to what extent the client will be responsible for any court costs and expenses of litigation.

We do not suggest adding language to this effect to Model Rule 7.1 itself. But we do think that the “no fee” or contingent fee situation should be addressed in the commentary to the Rule. Specifically, we propose that the following sentences (in italics) be added as a new Comment [3] to Model Rule 7.1:

[3] It is misleading for a communication to indicate that the charging of a fee is contingent on outcome if the client may be responsible for additional costs not mentioned in the advertisement. Such communications should disclose any additional court costs and expenses of litigation the client may be responsible for.

(Subsequent Comments would be renumbered, so that current Comment [3] would become [4], etc.)

It is likely that potential clients without any legal training or experience would not understand that there are additional expenses and court costs that clients may be responsible for, beyond the attorney’s fee. In Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 652, (1985), the Supreme Court said that such disclosure requirements such as we propose are appropriate. As the Court explained, the “assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as “fees” and “costs” --terms that, in ordinary usage, might well be virtually interchangeable.” Id.

We recognize that clients will be on notice of possible additional expenses once they read and discuss the attorney’s retention letter. But we think that such information should still be included in the attorney’s advertisement seeking clients. If a prospective client learns about these additional potential expenses only after having made a preliminary decision to hire the attorney—for instance, when the person is already in the attorney’s office—he or she might believe that it is too late (or too embarrassing or awkward) to back out of the representation. Indeed, the commentary to Model Rule 7.3 recognizes that, in general, there is a greater likelihood that a prospective client will not be able to respond with “reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately.” While that commentary is directed to a different provision—forbidding solicitation through face-to-face contact except in certain situations—we believe the general thrust of the comment applies also when the client learns about non-“fee” expenses for the first time in face-to-face contact with an attorney who had advertised, for instance, “no fee unless you win.”

Of course, an additional clarification is not necessary if the advertising attorney is not expecting to have the client pay court costs and other expenses irrespective of the outcome of the case.
II. Model Rule 7.2

We urge that the ABA not follow SCEPR’s proposal to add proposed subsection (b)(5) to Model Rule 7.2. This provision subsection would create an exception to the prohibition against payment for referrals, by allowing lawyers to provide a referring person with a “nominal gift.” As proposed by SCEPR, Model Rule 7.2(b) would read:

A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may …. (5) give nominal gifts that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

Particularly troubling is the word choice of “except” in 7.2(b): if the gift is not intended to be a form of compensation, then why is an “exception” is necessary? The new language may be read as authorizing a “nominal” (or minor) gift to a referring lawyer “in return for” the referral. This affirmative exception may also make inappropriate conduct harder to police. Where does “nominal” end and non-nominal begin?

III. Model Rule 7.3

(A) 7.3(b)(3)

A key change in the SCEPR proposal is to eliminate the prohibition on “real-time electronic contact” from present Model Rule 7.3. The original reason for this ban was that potential clients, “overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately.” Model Rule 7.3 cmt 2.

We agree that, in general, the prohibition on “real-time electronic contact” is no longer necessary. Allowing real-time electronic contact usually will not lead to coercive or intrusive solicitation since potential clients can easily not respond to electronic messages.

We believe, however, that there should be an exception for recent tort victims and their families. Because these persons are especially vulnerable, such contact can be intrusive, confusing, and insensitive. A prohibition similar to Connecticut Rule of Professional Conduct 7.3(b)(5) would provide an important safeguard if real-time electronic contact is otherwise permitted. The Connecticut provision forbids attorneys from soliciting employment concerning a personal injury or wrongful death action less than 40 days after the accident or incident occurred. Given the ubiquity of social media and email, our modern-day concern is that real-time electronic contact could be employed by multiple attorneys (and on multiple online platforms) such that individuals (or their family members) who have been involved in an accident could be denied proper privacy, and also feel targeted, at a time of especial vulnerability and stress. When the names of victims have been reported the media, it is often not difficult to obtain their electronic contact information (including for Facebook, LinkedIn, and Twitter). We note that if a victim needs a lawyer right away, finding one is not a hard task, especially with the help of electronic communication.
We realize that the prohibition in subsection (b)(5) in Connecticut’s Rule 7.3 does not appear in the current Model Rule 7.3. We urge, however, that in the modern era, such a limitation is needed in addition to the prohibition in Model Rule 7.3(b)(2) (and retained in SCEPR proposal) on communication that “involves coercion, duress or harassment.” Connecticut Rule 7.3(b)(2) has a similar, broad anti-harassment provision—prohibiting solicitations involving “coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence.” But in a time of massive social media, we do not think that this prohibition is sufficient in the case of accident victims and their families. Although one individual solicitation might not be thought to involve duress or harassment, multiple lawyers contacting a tort victim in the wake of an accident could easily overwhelm the victim-prospective client. SCEPR’s proposed removal of the general prohibition on electronic solicitation makes the protection that has long been in Connecticut’s Rule 7.3 all the more important.

The Supreme Court has acknowledged that immediate solicitation after an accident can be intrusive and has held that a similar rule was permissible. In Florida Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995), the Court said that a Florida Bar rule prohibiting “targeted direct-mail solicitation of accident victims and their relatives” within thirty days of an accident did not violate the First or Fourteenth Amendments. The Court cited the Florida Bar’s two-year study demonstrating that direct-mail solicitations after an accident can be invasive. Id. at 626. The Court permitted this restriction because of the Florida Bar’s interest in “preventing the erosion of confidence” in the legal profession and “protecting injured Floridians from invasive conduct.” Id. at 635. The second interest is the more compelling justification for preventing immediate real-time electronic contact after an accident. The Court’s analysis in Florida Bar applies equally to real-time electronic contact, which can be just as intrusive as direct-mail solicitations.

The appropriate place for this additional rule would be as a new subsection in Model Rule 7.3(b). Using the wording of Connecticut Rule 7.3(b)(5), we suggest that Model Rule 7.3(b)(3) be amended to read as follows (new language in italics):

(b) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (a) if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment; or
(3) the communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than forty days prior to the [transmission] of the communication.
(B) 7.3(c)

SCEPR proposes deleting the provision of Rule 7.3(c) that requires the labeling of “advertising material” on written, recorded, and electronic solicitations. Present Model Rule 7.3 provides:

(c) Every written, recorded or by electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

We see no reason to remove the requirement of clear labeling of solicitations as “Advertising Material.” Without this notice, people may feel compelled to open such advertisements and read them. We believe this is true even for relatively sophisticated recipients. Upon finding a letter from a lawyer or law firm, many people would fear that they might be sued or have a legal problem. They would therefore think they ought to read the communication. Particularly for those without sufficient education, this could cause distress as they parse the words of the letter. If the letter itself were misleading, that harm is addressed in Model Rule 7.1. But implicitly encouraging people spend time reading even non-misleading advertisements, only to later realize that they are just advertisements, sounds in lack of courtesy and professionalism. Moreover, a requirement that “advertising material” be so labeled is a clear, bright line rule that is easy to abide by and easy to enforce.

* * *

Thank you for your consideration of these proposed additions to and deletions from SCEPR’s proposed amendments of Model Rules 7.1, 7.2, and 7.3.