COMMENTS OF THE CONNECTICUT PROFESSIONAL ETHICS COMMITTEE ON
APRL PROPOSED REVISIONS TO ABA MODEL RULES 7.1, 7.2, 7.3, 7.4, and 7.51

February 15, 2017

The Connecticut Bar Association Standing Committee on Professional Ethics (The
Committee”) submits these comments in response to a request for comment on the Proposed
Amendments to ABA Model Rules of Professional Conduct 7.1, 7.2, 7.3, 7.4, and 7.5, which the
Association of Professional Responsibility Lawyers (“APRL”) has submitted to the American
Bar Association for comment and consideration.

The Committee largely agrees with APRL’s proposal to greatly simplify the ABA’s
Model Rules pertaining to lawyer advertising, and with APRL’s goal of “achieving greater
rationality and uniformity in regulatory enforcement of lawyer advertising and marketing.”

We agree with APRL that most of the Model Rule’s advertising provisions should be
removed and replaced with a new Model Rule similar to what APRL proposes as Rule 7.1. We
also agree that it is important to retain certain limitations on lawyer solicitations and
communications with potential clients, as APRL’s proposed Rule 7.2 provides.

We do urge APRL to consider adding one more provision to APRL’s proposed Rule 7.2.
While this particular provision does not appear in present Model Rule 7.3, it is in Connecticut
Rule of Professional Responsibility 7.3. Specifically, Connecticut Rule 7.3(b)(5) forbids lawyers
from soliciting employment concerning a personal injury or wrongful death claim less than 40
days after the accident or other incident has occurred. This per se prohibition is in addition to the
prohibition on communications involving coercion, etc. Having a flat ban on solicitations
shortly after an accident has occurred (we are not wedded to 40 days; some other jurisdictions
have a 30-day limitation) reaches communications that may not be in themselves coercive or
harassing, but that should not be undertaken for other reasons, as we explain below.

We also suggest that an additional sentence (regarding retention of advertisements) be
added to the APRL Rule 7.2 commentary, and that two additional sentences (regarding
advertisements that mention fees) be added to the APRL Rule 7.1 commentary.

Before addressing those issues in more detail, the Committee raises one point that may
require clarification. The 2015 Report of the APRL Regulation of Lawyer Advertising
Committee, issued on June 22, 2015, proposed a new Rule 7.1 in place of Model Rules 7.1, 7.2,
7.5, and 7.5. The Report made a strong case for limiting professional discipline for advertising
to violations of the general anti-fraud rule, ABA Model Rule 8.4(c).

1 These comments are from the Connecticut Bar Association Standing Committee on
Professional Ethics; they are not a position statement of the Connecticut Bar Association as a
whole.
However, on April 26, 2016, APRL then issued its 2016 Supplemental Report of the APRL Regulation of Lawyer Advertising Committee (the “Supplemental Report”). The Supplemental Report addressed solicitation and other communications with potential clients, which are subjects covered in Model Rule 7.3. In the words of the Supplemental Report:

The [APRL advertising] committee has now . . . concluded that the legitimate regulatory objectives of preventing overreaching and coercion by lawyers who use in person solicitation and targeted communications with the primary motivation of pecuniary gain can best be achieved by combining provisions of Model Rules 7.2 and 7.3 in a single rule [APRL Rule 7.2].

APRL’s proposed Model Rule 7.2 retains most of current Model Rule 7.3, including the prohibition on solicitations and other communications “involving coercion, duress, or harassment.” Presumably, these prohibitions and other provisions of APRL’s proposed Rule 7.2 would be enforced directly, and not through Rule 8.4(c), as they do not involve fraud. (Comment 6 to APRL Rule 7.2 comes close to explicitly acknowledging this.)

We believe that it may be necessary for to clarify whether APRL’s proposal means that lawyers would still be subject to discipline for solicitations and advertisements outside of enforcement of Rule 8.4(c).

I. Comments Concerning Time Limitation on Contacting Accident Victims

One of the most important changes proposed by the APRL in its Supplemental Report is to eliminate the prohibition on “real-time electronic contact” from present ABA 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.”

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. Connecticut’s 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.

The prohibition in subsection (b)(5) in Connecticut’s Rule 7.3 does not appear in ABA Model Rule 7.3. We believe 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 APRL Rule 7.2) 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. APRL’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 APRL’s proposed Rule 7.2(d). Using the wording of Connecticut Rule 7.3(b)(5), but recommending a limitation of twenty-one days as a more reasonable restriction that the forty days in Connecticut’s current rule, we suggest that the ABA consider amending Rule 7.2(d) as APRL proposes with the addition of the language in italics:

(d) A lawyer shall not solicit professional employment from any person if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer;

(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 twenty-one days prior to the [transmission] of the
communication.

On the other hand, we recognize that there are circumstances in which not being able to receive attorney communications could be to a person's disadvantage, particularly if the person is receiving invasive communications about the accident or disaster from nonlawyers (e.g., claims adjusters or other insurance company representatives).

II. Additional Commentary to Clarify Rules and Help Prevent Need for Discipline

A. Urging the retention (storage) of advertisements creates a minimal burden on lawyers, but doing so will help prevent a need for discipline.

Additional commentary urging lawyers to keep a copy of their advertisements would put a minimal burden on lawyers because cloud storage is free and easily accessible. Yet such encouragement could help to prevent the need for misconduct proceedings.

APRL’s Rule 7.2 Comment [3] reads:

The contents of advertisements and communications permitted under Rule 7.1 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of in-person, face-to-face or live telephone communication can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

For the reasons stated in this comment, we urge that an additional sentence be added to emphasize that not only can these types of advertisements be permanently recorded, but that retention is the wise course of action. The sentence proposed below (in italics) is based on Connecticut Rule 7.2(b)(1), which requires that copies of advertisements be stored for three years.

[3] The contents of advertisements and communications permitted under Rule 7.1 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. *Attorneys are thus urged to retain for three years a copy (in paper or electronic form) of all advertisements and communications permitted under this Rule.* The contents of in-person, face-to-face or live telephone communication can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.
B. Additional commentary that elaborates on how advertisements on contingent fees can be misleading will also help prevent miscommunication.

We urge that commentary be added to APRL Rule 7.1 that clarifies when a particular type of advertisement is likely to be misleading under Rule 8.4(c). Specifically, 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. The additional commentary to APRL Rule 7.1 will help prevent attorneys from unwittingly violating Rule 8.4.

Both the APRL Rule 7.1 and the Model Rule 7.1 provide that a communication is “false or misleading” if it “omits a fact necessary to make the statement considered as a whole not materially misleading.” Both also have the following sentence in the commentary to Rule 7.1: “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.” The Rule is necessarily abstract, as is the commentary just quoted. 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 APRL Rule 7.1. But we do think that the “no fee” or contingent fee situation should be addressed in the commentary to the Rule. The following sentences (in italics) could be added as a new Comment [3] to APRL Rule 7.1:

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

(Subsequent Comments would be renumbered, so that current APRL 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 they could be charged 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 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 both present Model Rule 7.3 and APRPL Rule 7.2 (b) 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.