Dear ABA – Embrace reform of the lawyer advertising rules. Please.

February 23, 2017 by Brian Faughnan

I have written in the past about the APRL white papers providing the rationale for, and data supporting the need to, reform the way lawyer advertising is regulated in the United States by state bar entities. You can read those prior posts here and here if you are so inclined.

Jayne Reardon, the Executive Director of the Illinois Supreme Court Commission on Professionalism, over at the 2Civility blog has posted a very thorough report on events that transpired in Miami earlier this month and that reminds folks that the deadline put together by the ABA working group looking at whether to back APRL’s proposals is March 1, 2017.

I am a proud member of APRL – actually presently I’m even fortunate enough to serve as a member of its Board of Directors – but was not able to make it down to Miami for our meeting and the ABA meetings this year. If you are a reader of this blog, you know that my view is that the only advertising rule that ought to be necessary is a version of RPC 7.1 that states, as does the ABA Model:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Period. Full stop.

Now Jayne’s report from the ground mentions that some folks criticized or complained about APRL’s proposal because it would not apply only to advertisements by lawyers. To me that is a feature, not a bug. As I’ve also written and spoken about, RPC 7.1 is violated when a lawyer sends a
fraudulent bill to a client saying they spent more time on something than they really did and that’s a good thing. It also, for example, applies to lawyers who lie on their resumes as we saw with this recent instance of lawyer misconduct.

The concern expressed by someone that it could result in discipline against a lawyer politician (presumably one who would have to have lied about some aspect of their personal history I guess) does not give me much pause because if it were so applied it would likely fail First Amendment scrutiny because of the higher standards afforded to protect political speech rather than constitutional speech.

While I think RPC 7.1 ideally is the only rule that ought to exist, I recognize that people are going to insist there be some restriction on in-person solicitation so I also support APRL’s proposed approach to having an additional rule, over and above RPC 7.1, to address that. As I’ve said before, my only quibble with APRL’s proposal on that front is as to how it defines a sophisticated user of legal services:

If I had one criticism of the APRL proposal, it is with the way it defines a sophisticated user of legal services. The second part about regular retention of legal services for business purposes is likely where it should have stopped, as the first portion of the definition is pretty amorphous and subject to manipulation. For example, would a recidivist offender who has gone through repeated jury trials and spent many years in prison someone who would qualify as having had significant dealings with the legal profession? Seems like a pretty clear argument could be made that the answer would be yes.

I’m going to send this post in to the ABA working committee as my own personal comment. If you have a viewpoint on these issues (whether it jibes with mine or not), I’d encourage you to send your thoughts as well to them at this email address: modelruleamend@americanbar.org. (Unless you don’t think lawyer advertising rules are strict enough already. Then I’d encourage you to stay busy doing other things. Kidding, just kidding. But more like Al Franken’s kidding on the square actually.)
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