MEMORANDUM

To: Barbara S. Gillers, Chair, ABA Standing Committee on Ethics and Professional Responsibility

From: Sarah Jo Hamilton, Member NYCLA Committee on Professional Ethics
      James Q. Walker, Chair, NYCLA Committee on Professional Ethics

Date: January 31, 2018

Re: ABA Standing Committee on Ethics and Professional Responsibility
    Working Draft of Proposed Amendments to the ABA Model Rules on Lawyer Advertising

Below are comments from members of NYCLA’s Committee on Professional Ethics on the Proposed Changes to the Model Rules regarding Lawyer Advertising. The comments address the proposed changes in order.

1. Model Rule 7.1 Comment [1]

   Describing the scope of the rule to include advertising “that is constitutionally protected commercial speech” seems unnecessary and is confusing.

To keep the language parallel, trade names should be described as “a communication about a lawyer or lawyer’s services” both times it is used, i.e., in Comment [4] and [5]. More fundamentally, it would be preferable to keep a separate rule about law firm names, trade names, etc. Lawyers often have questions about trade names (we often receive hotline inquiries on this topic) and would have an easier time finding the answer if they could look at one rule with a specific title about names.


The Comment states that lawyers in offices with more than one jurisdiction should indicate where they are admitted to practice. We recommend that those lawyers also indicate that they are in good standing in the jurisdictions in which they are admitted, since many jurisdictions have an administrative provision permitting attorneys’ admissions to be suspended if they are not actually practicing there.


On the referral/fee-sharing rules generally, the ABA should be aware that there is a lot afoot with the online services, including the on-line report by NYCLA (which Michael Miller is going to talk to the ABA about but which it would be good to mention even though it’s not about referrals per se). This implicates access to justice issues. NYCLA is going to continue its efforts in the on-line provider realm, and will take up the issue of referrals in its next round. It is possible that the landscape of regulation and what seems desirable could change in this area. Most likely the fundamentals would not change too much but the ABA should be cautious in having rules set in stone when the landscape is changing and some loosening of the ability to make and accept even paid referrals may even come to be thought desirable.

Regarding Comment [2], the added language defines a recommendation as including suggesting value as to the lawyer’s services. Suggest is too vague a concept, and should not be included.

5. Model Rule 7.3 Comment [5]

There is no need to modify the phrase “‘experienced user’ of legal services” with the phrase “for business matters.” There could be areas that might or not be considered “business matters” that could involve sophisticated users of legal services. Also, the concept of “business matters” is unclear. Are they confined to commercial cases and contracts?
Finally, the speculation about who might or might not be considered an “experienced user” in the comment is unnecessary.

SJH
JQW