I. Introduction.

We thank the American Bar Association’s Standing Committee on Ethics and Professional Responsibility for the opportunity to comment on the Association of Professional Responsibility Lawyers’ proposed amendments to the ABA Model Rules of Professional Conduct 7.1, 7.2, 7.3, 7.4 and 7.5 (the “Proposal”), governing attorney advertising and solicitation.

For well over a decade, James Peters and I have been working as attorneys for LegalZoom. In our roles, we have helped our company serve millions with legal needs and have fought to ensure that consumers have choices when it comes to meaningful access to legal services. We have and will continue to promote the need for increased access to affordable and high-quality legal services and better delivery needed legal services to consumers through the utilization of technology, process, advertising and marketing. We strongly believe that the work the Standing Committee is undertaking can result in a positive impact not only for the legal professionals that struggle with compliance, but also for the potential legal consumer that is starving for information about the legal services that they need most.

We fully support the stated goal “to standardize the rules and focus[] regulation on false and misleading communications about legal services,” but we believe the approach taken by the Proposal does not quite hit the mark. In short, we think the Proposal continues to focus on prophylactic prescriptions against methods of communication that might be abused in individual cases, but which are not inherently false or misleading. This will likely frustrate the intended goal rather than achieve it.

A major reason individuals in the United States do not use lawyers for their legal needs is lack of information about available, affordable legal services. Those with everyday legal needs often do not know or fully comprehend the fact that issues they face are legal in nature. Even when they do, these potential consumers have trouble finding a lawyer who can assist them affordably. In large part, this is due to overbroad professional restrictions on lawyer communications in the form of prophylactic, proscriptive regulations that chill advertising, marketing and the solicitation of legal services. That is, rather than simply prohibiting false and
misleading communications, professional rules attempt to prevent such communications by proscribing entire methods of communication.

The time has come to reassess not just the ABA Model Rules governing lawyer communications, but the entire framework of proscriptive lawyer regulation. The recent history of revisions reflects a continuing attempt to catch up and establish rules governing ever-evolving methods of communicating information to prospective clients. Further attempts to list specific allowed and prohibited activities in a fast-moving market only lead down a path that is inevitably outdated and overbroad. This causes attorneys, fearful of disciplinary action, to interpret the rules conservatively, unduly restricting the availability of information to prospective clients. The result is regulation that both misses damaging behavior and exacerbates inefficiencies in the legal services market.

A more sensible approach would be rooted in outcomes-focused regulation. Outcomes-focused regulation represents a move away from a proscriptive rules-based approach to one that focuses on high-level outcomes to govern practice and the quality of outcomes for clients. Outcomes-focused regulation would focus on whether consumers have been or are likely to be mislead, rather than proscribing broad categories or methods of communications. This approach is rooted in the basic principle of empowering consumers with truthful, non-misleading information and is more consistent with the stated goals of the Proposal.

We suggest a simplified emphasis. Rather than focusing on particular categories or methods of communication that might be used for false or misleading communication, or that might be the vehicle for high-pressure tactics, we support the implementation of an outcomes-focused approach – one that simply prohibits advertising and marketing for legal services that is in fact false or misleading. This approach is most consistent with the First Amendment and the states’ constitutional guarantees of freedom speech and the press. It is unclear why the our professional association would encourage the regulation of professional advertising and marketing beyond the scope of consumer protection statutes that have long protected consumers from false and misleading communications about products and services. Limiting proscriptions to false and misleading
communications protects consumers and empowers regulators to take
disciplinary action against misbehaving attorneys.

Rather than focusing on false and misleading communications, many of the
amendments in the Proposal seem more concerned with the mere potential for
harassment via marketing or solicitation. While it is possible for lawyers, like
every other provider of services, to abuse communication methods, we see no
factual basis for concluding or assuming lawyers are more prone to engage in
such tactics in a manner that would justify listing numerous and likely overbroad
prophylactic prohibitions against certain types or methods of communications.

Rather than attempt to guess at hypotheticals that may be harassment, we
encourage looking to outside regulatory efforts that are well-established in this
realm. There are already a number of mechanisms in place to deal with the types
of issues at which these amendments seem to be aimed; for example, CAN-SPAM
and telemarketing regulations.

We therefore encourage the Standing Committee to move away from an overly-
detailed, prescriptive approach to regulating lawyer communications. Accordingly, we prefer that the Standing Committee reconsider this entire
proposal based on a framework of outcomes-based regulation.

Of course, we recognize that change is often made in smaller incremental steps.
Should the Standing Committee decide to continue down the current path of
considering the Proposal before it, we would then encourage the rejection of
some of the more problematic components of the Proposal.

II.  Comments on specific proposed revisions of the Proposal.

Rule 7.2(a). This proposed revision, which defines and then regulates
“solicitation” of clients, increases rather than decreases confusion. “Solicitation”
is defined as a “targeted communication ... offering to provide legal services for a
particular matter.” The rule and comments, however, do not define what
“targeted” or “a particular matter” mean.

Is a communication “targeted” if it is delivered to an individual? Does this include
mass letter mailings sent to specific addresses? Does it include mass e-mailings?
Does it include Internet advertisements displayed based on the potential client’s
searches, cookies, online profile or other unique information? Is a
communication “targeted” if published in a particular market? If it references a particular legal issue or need?

Likewise, what is “a particular matter?” Comment 2 suggests the rule contemplates an acute need for legal services, such as a personal injury or a criminal prosecution. The definition is, however, unclear about whether “a particular matter” includes legal services most or many people will need at some point in their lives, such as estate planning for a family or employment advice for a small business employer. Is an email “to a specific person” advertising estate planning services, including drafting a will, a “solicitation” simply because everyone may need a will in their lifetime? If the same e-mail is sent to several hundred or even thousands, does that change the analysis, since it is not tailored to a "specific person?" Would the analysis change if, instead of an email, the message was posted to social media? Do we need a new analysis if that posting is made on ephemeral social media like SnapChat? It should be obvious, but attempting to chase technology and evolving markets with proscriptive rules leads to more questions than answers. The fact that the Proposal fails to address these questions (and others that are highly-likely to arise) demonstrates a starting point that is likely to confuse rather than clarify.

**Rule 7.2(c).** Combined with the broad definition of “solicitation,” the requirement that every solicitation include a disclaimer that it is “Advertising Material’ at the beginning and ending of any recorded or electronic communication” is vastly overbroad and practically impossible to implement. If a lawyer were to engage in online chat with a potential client, would each individual communication need an attorney advertising disclaimer on it? If a customer with a known legal need is sent an educational video with no sales pitch, would this fall under the rule? On its face the rule seems to catch such scenarios and, as such seems out of line with existing case law in this area. (See, for example Central Hudson). And what is “the beginning” and “the end” mean applied to email? The subject line? The first two words of the email? If so, such requirements are overbroad and unlikely to survive First Amendment scrutiny.

As we move into the comments to the revised rules it becomes even clearer how slippery the slope of this kind of proscriptive approach is. The comments are filled
with statements about “potential” for harm, things that “may” happen and, in general, do less to clarify the rules than they do to make the rules foggier.

Rule 7.2 comment 2. The comment reads that “[t]here is a potential for abuse when a solicitation involves in-person, face-to-face or live telephone contact by a lawyer with someone known to need legal services.” While the comment seems to draw from case law (Went for It, Inc.), this is a far too broad reading of the prohibition against in-person or real-time solicitation. That concern arose out of contact with people who are in vulnerable situations, such as recently having suffered an injury or an arrest, not in-person solicitation about the availability of routine legal services for individuals or small businesses. The Comment’s reference to persons “who may already feel overwhelmed by the circumstances” shows that this is driving the concern, but the rule is far broader – applying no matter the type of specific legal need, when most legal needs are not “overwhelming” for the average person. The better way to address potential overreach is not to prohibit the communication (which implicates First Amendment rights) but to regulate the terms of the retention, as is done in consumer transaction. For example, a “cooling off” period that allows a solicited consumer the right to cancel the retention if the he or she thinks better of it after a reasonable amount of time.

In addition, Comment 2 describes "potential abuse" to those that "may already feel overwhelmed" when contemplating "face-to-face" or "live telephone" solicitations, but makes no distinction between the two, even though in-person solicitation is more subject to abuse than telephone calls. And to claim that a "trained advocate" (which in the context is a licensed lawyer) might have more influence than a professionally-trained salesperson makes a huge jump in logic, especially given the live telephone sales that occur every day. It also fails to classify other currently-used hybrid forms of communication, such as live chat, video chat, co-browsing or other forms of communication not yet invented or routinely used.

Rule 7.2, Comment 3 suggests live telephone sales may not be subject to third-party scrutiny like written communications, but this leaves no room for telephony systems that do record (lawfully) these conversations and store them for training and liability purposes. Certainly, if a lawyer were to agree to such recordings, and
to keep them for a reasonable time period, then the potential for harm that justifies their preclusion does not exist. It would be better to allow these solicitations with a "safe harbor" type provision for those that retain these recordings for a reasonable and set period of time, rather than halt them all due to the inability of some to record.

**Rule 7.2, comment 6** goes even further than Comments 2 and 3, showing how this type of regulation can be overbroad and unhelpful. The statement “But even permitted forms of solicitation can be abused” highlights this issue nicely. The goal is to prohibit a specific outcome – misleading potential clients. Prohibiting specific forms of communication as *per se* violations both opens the door to bad actors abusing the public through otherwise lawful forms of communication and stops communications that would not compromise the stated goal.

Further, the statement that after a permitted communication is sent, and “the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of paragraph (d)” is extraordinarily overbroad and demonstrates a lack of understanding of how electronic communications to prospective customers actually work in practice. It provides no meaningful guidance as to how many attempts are considered harassing. Silence should not be interpreted as a person requesting not to receive further communications. At least for email, “Unsubscribe” is how this is handled, and handled quite well for established businesses.

**Rule 7.2(f) & comment 9.** The Rule again shows a disconnect between the goals of the rule (avoiding compromising the independence of the attorney) and the practical impact of the rule itself. While the rule expands to permit group advertising, it remains restrictive in only permitting lawyers to pay for unqualified leads. In a modern era where the majority of leads come through online services, there is no reason to consider payment by an attorney for an acquired lead (rather than an unqualified lead) to be a *per se* violation of this rule. This leaves lawyers in the particularly difficult position of being forced to purchase all leads that come in from such providers. There is no basis to assume that a lawyer who pays Google based on acquisition of clients would have her independence compromised. Again, an efficient rule would focus on the outcomes rather than
attempt to predict which types of transactions should be considered violations of the rule.

The rule also ignores the realities of the specificity typically found in on-line searches for services today. Online engines routinely find the one contractor in a certain zip code that has the very specific construction experience a consumer wants. It seems unreasonable that such an engine might be considered an unethical “recommendation” if it disclosed one lawyer in a particular area able to communicate in the Urdu language with a specialization in non-profit representation. Potential consumers of legal services should be able to find lawyers using logical search parameters including license, specialty (See Rule 7.1, Comment 8), experience, rates, client review rating and other relevant information to assist them in finding the "right" combination of professionals. To the extent that this Rule and related Comment might prohibit the dissemination of this type of information, the opposite should be made clear in a separate comment.

III. Conclusion.

Once again, we are thankful for the opportunity to be heard on these important issues. We applaud the direction that APRL and the Standing Committee are beginning to head with these proposed changes – focusing on false and misleading communications rather than broad proscriptions. The public's access to legal services has suffered from both the overbreadth of the Rules and their Comments in the past, and from inconsistent adoption by state regulators. But consumer access to useful information on the services that lawyers provide has been hindered the most from a "do this/not that" approach to regulation; an approach that chills the commercial speech of amazing, rule-abiding lawyers who spend more time fearing reprisal than spreading the word of how they can help consumers in need.

To that end, we will continue to call for efficient “right regulation” (a term we and others have used in the past) when it comes to advertising and solicitation, and other rules that govern the provision of legal services. This type of regulation requires a shift from a proscriptive, situational approach to an outcomes-focused regulatory framework. Only then will our system afford those in the legal profession the flexibility to take advantage of constantly evolving forms of
communication and standards, provided that they remain within the outcomes desired by the profession.

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