December 28, 2016

Myles V. Lynk, Chair
Standing Committee on Ethics and Professional Responsibility
Lynda Shely, President
Association of Professional Responsibility Lawyers
Donald D. Campbell, President-Elect
Association of Professional Responsibility Lawyers

Re: Discipline Committee Comments Regarding APRL’s Proposal to Amend the Model Rules of Professional Conduct Governing Lawyer Advertising and Solicitation

Dear Myles, Lynda and Don:

As Chair of the ABA Standing Committee on Professional Discipline (Discipline Committee), I write to provide the Discipline Committee’s comments regarding the proposal developed by the Association of Professional Responsibility Lawyers’ (APRL) Regulation of Lawyer Advertising Committee. That proposal suggests amendments to the ABA Model Rules of Professional Conduct (“Model Rules”) governing advertising, solicitation, and payment for referrals. At its most recent meeting in Chicago, the Discipline Committee had a robust discussion about the proposal. We are grateful to the members of the APRL Committee who joined us at that meeting to answer questions about this thought-provoking, and timely work product. We believe that the APRL proposal is an excellent start to help make the Model Rules on these subjects more uniform, practical and enforceable. The lack of national uniformity with respect to advertising rules, and the rapid pace with which technology is evolving, impacts compliance with and enforcement of state versions of the current Model Rules.

The Discipline Committee agrees with APRL that the Model Rules addressing advertising, solicitation and payment for referrals should focus primarily on lawyer communications that are false or misleading. As discussed below, the current strictures against fee sharing in Model Rule 5.4 are also implicated by the APRL proposal. We believe that APRL’s work product is a good launching pad for the Center dialogue, via the Joint Working Group that Myles put together, about streamlining and better focusing these Model Rules, as well as discussing whether changes to other related ABA Model Rules of Professional Conduct, ABA Model Rules for Lawyer Disciplinary Enforcement, or policies are appropriate. Doing so will assure that: the public receives necessary and accurate information about the availability and substance of legal services; lawyers get clear and practical parameters for their conduct; and regulators are
able to focus enforcement resources (money and staff) on conduct that truly harms or risks harm to the public.

To help facilitate the Joint Working Group’s discussions and prepare for the February 3, 2017 public forum in Miami, the Discipline Committee’s initial concerns, comments, and suggestions about APRL’s proposal are set forth below and in the attached redline of the proposed Model Rules.

1. As a threshold matter, if amendments to the relevant Model Rules (7.1 through 7.5) are to be submitted to the House of Delegates for consideration, the Discipline Committee believes that a holistic review of those current Model Rules is essential, instead of just focusing on the changes proposed by APRL. Portions of the Comment language for Model Rules 7.1 through 7.5 have existed since 1983 or 1989, and may be outdated in terms of 21st Century legal practice and applicable law. For example, the text of current Comment [1] of Model Rule 7.2 (retained and renumbered as proposed Comment [5] of APRL’s proposed new Model Rule 7.1), was relevant and necessary to explain the purpose of lawyer advertising when the Model Rule was first adopted in 1983, but that language could be updated.

2. We found some of the retained Comments use phraseology that may require clarification. For example, proposed Comment [3] of new proposed Model Rule 7.2 retains the phrase “information flows cleanly as well as freely” (emphasis added) from current Comment [4] of Model Rule 7.3. We are unsure of what this phrase means or its intended purpose.

3. Similarly, we believe that current Comment [2] of Model Rule 7.2 retained in APRL’s proposal as proposed Comment [6] should be updated in light of the developed case law governing lawyer advertising. This Comment addresses the type of information that a lawyer may convey in an advertisement. We question whether the current text is too restrictive and inconsistent with applicable precedent. We suggest that if this Comment is retained, inserting the phrase at the beginning: “Lawyers may also consider disseminating information concerning a lawyer’s name or firm name…. “ to make clear that the items listed in Comment [2] are not exclusive.

4. In consolidating the current Model Rules, APRL elected not to retain the requirement in current Model Rule 7.2(c) that all communications about a lawyer’s services shall include the name and office address of a lawyer or law firm. In light of the global marketplace and the ability of lawyers to practice out of virtual offices, we understand why APRL made that choice. However, the Discipline Committee has concerns about whether eliminating the requirement sufficiently informs and protects the public. We understand that some lawyers operate virtual practices and lack a “brick and mortar” office, and suggest that this issue requires further discussion. We believe that, at a minimum, a consumer who retains or seeks a lawyer should have all pertinent information, including the identity and physical location of the lawyer.
5. The Discipline Committee agrees with APRL’s recommendation to delete the phrase “real-time communication or contact” from the black letter Model Rules and Comments. The current solicitation Model Rule was concerned with face-to-face encounters. The legislative history of Model Rule 7.3 reveals that the phrase “real-time electronic contact” was added at the recommendation of the ABA Ethics 2000 Commission to include lawyer communications via Internet chat rooms. At the time, these communications were perceived to present the same dangers as live telephone contact. Advancing technology has rendered chat rooms all but obsolete (they have been replaced by “pop ups” or other services). Therefore, we agree that the phrase “real-time communications” is outdated. Further, consumers are able to choose whether to defer reading, ignore or delete electronic solicitations, thus eliminating for the most part the concerns for solicitation the Rule was intended to address—the pressure consumers (victims) feel when confronted face-to-face or by live telephone by a lawyer, or representative of a lawyer, at a time of extreme vulnerability.

6. The Discipline Committee has some concerns about APRL’s recommendation to delete from the black letter the provisions currently found in Model Rule 7.4(d), prohibiting a lawyer from stating or implying that the “lawyer is certified as a specialist in a particular field of law” unless certain conditions are met. APRL proposes that this subject be addressed in the Comments as proposed Comment [8] of new Model Rule 7.1, and not in the black letter of the new proposed Model Rules. One concern is that in the Model Rules, prohibitions of, or mandates regarding, conduct are set forth in the black letter, as opposed to in the interpretive Comments. The Discipline Committee believes that this topic warrants further discussion, and is interested to learn the views of the Standing Committee on Specialization.

To facilitate this discussion, the Discipline Committee found Georgia’s version of Model Rule 7.4 of interest. It states that: “A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.”

7. The Discipline Committee agrees with ARPL’s proposal to elevate the definition of “solicitation” which appears in current Comment [1] of Model Rule 7.3 to the black letter of new proposed Model Rule 7.2. However, the Committee observed apparent inconsistencies between the language in proposed Model Rule 7.2(a) and that in proposed 7.2(c) with regard to the phrase “legal services for a particular matter.” Proposed paragraph (c) requires proof of a lawyer’s “knowledge,” while proposed paragraph (a) does not. As an alternative, the Discipline Committee offers for consideration the definition of solicitation proposed by the Virginia State Bar included in its proposed amendments to Rule 7.3 of the Virginia Rules of Professional Conduct: “A solicitation is a communication initiated by or on behalf
of a lawyer that is directed to a specific person known to be in need of legal services in a particular matter and that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter.”

8. We note that the text of proposed new black letter Model Rule 7.2(b) is similar to current Model Rule 7.3(a), except for the inclusion of two categories of persons excepted from the Rule’s prohibition. Those categories are: a) “a sophisticated user of legal services;” and b) those contacted “pursuant to a court-ordered class action notification.” The first category is a new exception to the solicitation Model Rule, about which the Discipline Committee’s concern is explained in the next paragraph. The latter is a group already identified as an exception in current Comment [4] of Model Rule 7.2, and the Discipline Committee would agree with elevating that exception to the black letter, while suggesting the phrasing included in the attached redline.

9. The Committee’s concerns about the phrase “sophisticated user of legal services” relate to how that term is to be defined. The Committee members unanimously found the proposed definition of this phrase to be vague. As result, it does not offer sufficient guidance to lawyers and disciplinary agencies as to who qualifies for membership in this excluded group, and that is also then problematic from an enforcement perspective. A career criminal who has had significant dealings with the legal profession as a result of his frequently hiring or being appointed counsel would seem to qualify as a “sophisticated user of legal services” regardless of his education level or mental state. What about the sole proprietor of a “neighborhood food mart” who frequently retains counsel to handle business related matters relating to the store, vendors, and other matters? Would an immigrant to this country who has frequent dealings with the legal profession as part of her efforts to become a U.S. citizen qualify as a sophisticated user of legal services? This is a particularly vulnerable population that has experienced the type of solicitation that the Rules prohibit.

The Commission on Ethics 20/20 encountered similar definitional problems when deliberating on whether to include an exclusion for “sophisticated users of legal services” in its choice of law proposal. We note that, in its report, APRL cites to Virginia’s current Rule 7.3 in support of using this phrase. The Discipline Committee suggests that Virginia’s Rule is not a good comparison because instead of creating a new category of persons who can ethically be solicited, Comment [3] of Virginia Rule 7.3 considers the “potential client’s sophistication” as only one factor to be considered when judging appropriateness of the lawyer’s communications. Virginia’s approach is akin to that in Comment [6] of Model Rule 1.0 and Comment [22] of Model Rule 1.7.

10. In proposed paragraph (c) of new proposed Model Rule 7.2 we believe that lawyers should be provided additional guidance regarding the labeling of written solicitations and suggest that the word “conspicuously” be added as indicated in the attached redline.
11. APRL recommends that the text of current paragraph (d) of Model Rule 7.3 be retained and renumbered as paragraph (e) of proposed new Model Rule 7.2. This paragraph states that “a lawyer may participate with a prepaid or group legal service plan” that solicits membership “from persons who are not known to need legal services in a particular matter.” This paragraph addresses permissive rather than mandatory conduct, using the term “may” instead of “shall.” As a result, the Discipline Committee queries whether it should be moved to a Comment. We also recommend that the Comment be clarified since a lawyer’s participation with an organization that solicits persons for membership in a group or prepaid legal plan does not constitute solicitation as defined in paragraph (a) of the proposed Model Rule.

12. In reviewing proposed new Model Rule 7.2, we note that all but one of the proposed black letter paragraphs are derived from current Model Rule 7.3, captioned “Solicitation of Clients.” However, the text of proposed paragraph (f) is comprised substantially from current Model Rule 7.2(b), which discusses payments by lawyers for advertising costs, referrals or recommendations. We believe that there should be discussion by the Joint Working Group as to whether solicitation and payments for recommendations or referrals (proposed paragraph (f) and related Comments [9] through [11]) should be addressed in a separate Model Rule to provide optimal clarity and enforceability. One suggestion for the title of the new Model Rule could be “Payment for Advertising and Recommendations of Professional Employment.”

13. The Discipline Committee is also concerned that proposed paragraph (f) of new Model Rule 7.2, which would expand the scope of the Model Rule to permit lawyers to compensate nonlawyer “employees” for referrals, risks misinterpretation and creates opportunity for abuse. For example, it would seem that while well intended, the new Model Rule could possibly permit currently prohibited payments to “runners” or chasers” if they are employed by the lawyer. We note that in some jurisdictions, like Connecticut, the payment by or receipt of money for referring a prospective client to a lawyer is a crime (see Conn. Gen. Stat. §51-87). However, we are not saying that we agree with that. The Discipline Committee also suggests that if payments to employees in proposed new paragraph (f) are permitted, there appears to be potential conflicts with Model Rule 5.4, which prohibits lawyers from sharing legal fees with nonlawyers. Any such conflicts would have to be addressed and clarified. Currently, the only recognized exception for paying employees beyond a salary appears in Model Rule 5.4(a)((3), which allows nonlawyer employees to be included in a law firm’s profit sharing, compensation or retirement plans.

14. APRL’s examination of current technology and how it is used in the areas of advertising, solicitation, matching services, and referrals, also raises the question as to whether there is a need to undertake simultaneously a review of Model Rule 5.4 to better hone the type of “fee sharing” that should be addressed by the Rule in
a 21st Century legal services marketplace. Such review should include, in our view, discussion of how to properly define “fee sharing.” A review by the Florida Supreme Court of the Florida Bar’s Petition to Amend the Rules Regulating the Florida Bar Lawyer Referral Services (a copy the petition is attached) seems relevant to the discussion of whether the current breadth of Model Rule 5.4’s fee sharing prohibitions remain appropriate, as well as to the discussion of the APRL proposal generally. Florida’s proposal broadens the scope of its current Rule governing lawyer referral services by expanding the definition and changing the term to “qualifying provider” to encompass the widest variety of service providers operating to match lawyers with potential clients.

The Discipline Committee appreciates the opportunity to share its comments regarding ARPL’s excellent report and proposal. We look forward to the collaborative process that the Joint Working Group affords to review the proposal and work to develop optimal amendments to the Model Rules for ultimate consideration by the House of Delegates.

Please do not hesitate to contact me or Center Deputy Director and Regulation Counsel, Ellyn S. Rosen at ellyn.rosen@americanbar.org, if you have any questions.

Sincerely,

Paula J. Frederick, Chair
ABA Standing Committee on Professional Discipline

cc:  Lucian T. Pera, Chair Coordinating Council
     John S. Gleason, Chair of the Policy Implementation Committee
     Shontrai Devaughn Irving, Chair of the Standing Committee on Specialization
     Frank X. Neuner, Jr, Chair of the Standing Committee on Client Protection
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Rule 7.1 Communications Concerning A Lawyer's Services

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.

Comments

[1] This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. 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.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation, Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations
of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[6] This Rule permits public dissemination of information concerning a lawyer’s name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[7] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Areas of Expertise/ Specialization

[8] A lawyer may indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services. A lawyer may state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Firm Names

Commented [GT2]: The Discipline Committee questions whether this subject is sufficiently addressed in a Comment or whether the restrictions of communicating a certification as a specialist should be addressed in the black letter of proposed Model Rule 7.1 in a separate paragraph.
[9] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[10] Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

**Rule 7.2 Solicitation of Clients**

(a) A solicitation is a targeted communication initiated by or on behalf of a lawyer, that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services for a particular matter.

(b) Except as provided in paragraphs (c) and (e), a lawyer shall not solicit in person by face-to-face contact or live telephone, or permit employees or agents of the lawyer to solicit in person or by live telephone on the lawyer's behalf, professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted is:

1. is with a lawyer;
2. is a sophisticated user of legal services;
3. is pursuant to a court-ordered class action notification; or
4. with a person who has a family, close personal, or prior professional relationship with the lawyer.

(c) Every written, recorded or electronic solicitation by or on behalf of a lawyer seeking professional employment from anyone known to be in need of legal services in a particular matter shall conspicuously 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 (b)(1)-(4).

(d) A lawyer shall not solicit professional employment from any person if:
(1) from any person who the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) if the solicitation involves coercion, duress or harassment.

(e) Notwithstanding the prohibitions in paragraph (b), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

(f) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for the purpose of recommending or securing the services of the lawyer or the lawyer’s law firm, except that a lawyer may:

(1) pay the reasonable costs of advertisements and other communications permitted by Rule 7.1, including online group advertising;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement.

Comment

Solicitation

[1] A lawyer’s communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There 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. This form of contact subjects a person to the importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully 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. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyers to the public, rather than direct in-person, face-to-face or live telephone communication, will help to assure that the information flows cleanly as well as freely. 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. All solicitations permitted under this Rule must comply with the prohibition in Rule 7.1 against false and misleading communications.

[4] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or a sophisticated user of legal services. A sophisticated user of legal services is an individual who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. Consequently, the general prohibition in paragraph (b) and the requirements in paragraph (c) are not applicable in those situations. Also, paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[5] The requirement in paragraph (c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of paragraph (d)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (d)(1) is prohibited. Moreover, if after sending a solicitation or other communication as permitted by Rule 7.1 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of paragraph (d).
This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves relating to a particular legal matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.1.

Paragraph (e) of this Rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 7.1 and this Rule. See Rule 8.4(a).

Paying Others to Recommend a Lawyer

Except as permitted under paragraphs (f)(1)-(f)(4), lawyers are not permitted to pay others for recommending the lawyer’s services or for channeling professional work in a manner that violates Rules 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Paragraph (f)(1), however, allows a lawyer to pay for advertising and solicitations permitted by Rule 7.1 and this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers, as long as the employees, agents and vendors do not direct or regulate the lawyer’s professional judgment (see Rule 5.4(c)). Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule (communications concerning a lawyer’s
services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[10] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

[11] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (f) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.