March 1, 2018

Barbara S. Gillers, Chair
ABA Standing Committee on Ethics and Professional Responsibility
New York University School of Law
40 Washington Square, South
New York, NY 10012-1005

Re: Standing Committee on Professional Discipline Comments on Discussion Draft of Proposed Changes to ABA Model Rules of Professional Conduct

Dear Barbara:

The Standing Committee on Professional Discipline offers these comments and suggestions regarding the Ethics Committee’s December 2017 Discussion Draft of proposed changes to the “7 Series” of the Model Rules of Professional Conduct. The attached redline illustrates our comments and offers other drafting suggestions. We appreciate the opportunity to comment on the December Draft and the Ethics Committee’s transparency in developing the proposal. I attended the Ethics Committee’s public forum in Vancouver, along with Discipline Committee member Maret Vessella. Congratulations on a successful event!

The Discipline Committee has not yet taken a formal position on the matters encompassed by the Discussion Draft. We offer these suggestions to aid in the policy development process, and look forward to continuing to collaborate with the Ethics Committee on this important topic.

Overarching Considerations:

First, we offer some general comments. The Explanatory Memo accompanying the release of the December Discussion Draft states that the current “7 series” of Rules are “outdated, may be overly restrictive of commercial speech, and could hamper the ability of lawyers to adapt to the changes in technology that affect the practice of law, and influence how consumers learn about legal services…” We agree, and would add that the impact of the current “7 series” on the ability of consumers to access legal services must also be considered. The Explanatory Memo also states that the proposed amendments seek to re-establish the Rules as models, in part by accommodating “developments in the profession, technology, and competition.” With that goal in mind, we think that the Discussion Draft is a very good start, but that it does not go far enough to address the current ways in which consumers access legal services and how lawyers use technology to market their services and get clients. We heard those at the Vancouver public forum express that concern, as have others who submitted written comments.
Technology-savvy consumers, and lawyers’ use of technology to market their services and to serve clients, continue to pressure the current regulatory construct, including the Model Rules. That pressure will only continue to increase. This is evidenced not only by the recent ethics opinions relating to lawyers using technology to deliver limited scope and fixed fee services to clients, but by the more modern rules being adopted and studied in states including Virginia, Oregon, Washington, and North Carolina. It is likely that other jurisdictions are following or will follow their lead, and they are using the APRL documents to inform their work.

We understand why the Ethics Committee has chosen not to address in this proposal the interrelationship between Model Rule 7.2 and Model Rule 5.4’s prohibition on fee sharing. However, we believe that if the Association is to continue to lead in this arena, both of our Committees must consider very soon whether the way we currently define impermissible fee sharing in this context is still in the best interest of clients and the public. Oregon, Washington State, and North Carolina, for example, are actively considering changes to their versions of these Rules.

**Proposed Model Rule 7.1:**

The Discipline Committee reiterates its recommendation to end the first sentence of Comment [1] after “services” and to delete the remaining language. We do not think “that is constitutionally protected speech” is necessary and its inclusion may create confusion. The sentence indicates that the Rule governs all communications about a lawyer’s services.

The Discipline Committee also recommends that the last sentence of Comment [2] be amended to include, as does the preceding sentence, the “substantial likelihood” standard. Given that both sentences provide guidance as to what constitutes misleading statements in the context of leaving a reasonable person with an impression that something is true when it is not, we recommend consistency.

In new Comment [5], The Discipline Committee recommends deleting the sentence beginning at line 65. While it may have been helpful at the time of adoption of the Rule, the Committee suggests it has lost its usefulness and should be deleted. We also recommend moving the last sentence in that Comment to the end of new Comment [4]. We think that doing so improves the logical flow and content of that Comment.

In new Comment [6], we urge the addition of “and/or authorized” after “admitted.” Consistent with other ABA policy, this additional language provides clarity regarding the application of these Rules to foreign lawyers who may be authorized to practice as foreign legal consultants, but who are not otherwise admitted to the bar.

**Proposed Model Rule 7.2:**

Regarding Model Rule 7.2(c), we strongly urge the Ethics Committee to change “or” to “and the,” as shown in the redline. An alternative would be to delete “or law firm.” While this language has long been in the Model Rules, ABA policy does not provide for law firm
discipline. Only an individual lawyer can be held responsible for Rule violations. If only a firm name is listed as being responsible for an advertisement, enforcement become very difficult and results in the disciplinary authorities having to spend already scarce resources to identify the responsible lawyer(s). The disciplinary counsel members of our Committee feel very strongly about this, and recounted instances where that has recently occurred.

The Discipline Committee urges deletion in new Comment [2] of the proposed new language defining what constitutes a recommendation. We recommend that the current language be retained because it is clearer than the proposed language. In our view the proposed language is also too restrictive given today’s legal services marketing reality. The inherent purpose of communicating about a lawyer’s services, whether by the lawyer or by someone on the lawyer’s behalf, is to convey the value of that lawyer to a prospective client. Under the proposed definition, a recommendation arguably exists if a communication merely mentions a lawyer’s fee, as that is a way of conveying “value.”

We also recommend that Comment [4] be amended to better illustrate the new exception in black letter paragraph (b)(5). The Explanatory Memo accompanying the December Discussion draft indicated that the exception is intended to clarify that tendering nominal “thank you” gifts to someone after they have recommended a lawyer’s services does not violate the Rule. Such gifts do not rise to the level of intended or expected compensation for the recommendation. We recommend deleting “nominal gifts as might be given for holidays, or ordinary social hospitality” and replacing it with clear language regarding nominal “thank you” gifts.

**Proposed Model Rule 7.3 and Definition of Solicitation:**

The Ethics Committee’s efforts to further streamline this Rule are laudable. With public protection at the fore, we believe that the Discussion Draft does not go far enough. We recommend revisions based on the approaches taken by Oregon and being considered by Washington State.

On February 6th, the Oregon Supreme Court issued an order adopting changes to its version of Rule 7.3. The original order was issued in January 2018; the second order changes paragraph numbering in the new Rule, not substance. A copy of the order is attached. Brackets indicate the deletion of language, and underlining indicates additions. The proposed amendments were approved by the Oregon State Bar prior to submission to the Court. They let lawyers more freely engage with the public and proactively offer help, while retaining necessary protections set forth in the list of exceptions. Coercive and harassing solicitation is still banned.

Washington State is also considering changes that would eliminate in its Rule restrictions on solicitations that mirror the Model Rules. The new proposed Rule is:

**RPC 7.3 SOLICITATION OF CLIENTS**

(a) A lawyer may solicit professional employment unless:
(1) the solicitation is false or misleading;
(2) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;
(3) the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(4) the solicitation involves coercion, duress, or harassment.

We believe that following the approaches in these two states will render unnecessary the proposed “experienced user” exception in the Discussion Draft. Should the Ethics Committee retain its current approach to amending Rule 7.3, we reiterate our serious concerns about vagueness and enforceability regarding that exception. We appreciate that limiting the exception to “the type of legal services involved for business matters” attempts to address these concerns, but we do not think they do so sufficiently, even with the additional Comment language. The accompanying redline specifies some of our concerns in this regard, and offers some suggested clarifying language.

Adopting the Oregon or Washington approaches also may obviate the need to define “solicitation.” If the Ethics Committee does not propose amending Rule 7.3 as we suggest, we now believe that it makes better sense to move the definition of “solicitation” or “solicit” to the black letter of Rule 7.3, with incorporation of the changes noted in the redline. Doing so will provide optimal guidance to lawyers and is consistent with other Model Rules, like Rules 1.18 and 5.7, where defined terms are included in the black letter.

**Proposed Model Rule 7.4:**

Our recommended changes to proposed Model Rule 7.4 are editorial, and are set forth in the redline.

We very much appreciate the opportunity to provide these Comments. As always, if you have any questions, please do not hesitate to contact me or Ellyn.

Best Regards,

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

cc: Standing Committee on Professional Discipline
Tracy L. Kepler, Center Director
Ellyn S. Rosen, Regulation and Global Initiatives Counsel
Dennis A. Rendleman, Ethics Counsel
Mary M. McDermott, Associate Ethics Counsel
Standing Committee on Professional Discipline Redline Re:
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of
Professional Conduct
March 1, 2018

Model Rule 1.0: Terminology

1. “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law
firm that is directed to a specific person reasonably believed to need legal services in a particular
matter, or is directed to an individual with authority to act on behalf of a specific person or
organization known to need legal services in a particular matter, and that offers to provide, or
reasonably can be understood as offering to provide, legal services for that matter.

2. “Substantial” when used in reference to degree or extent denotes a material matter of clear
and weighty importance.

3. “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative
body, administrative agency or other body acting in an adjudicative capacity. A legislative body,
administrative agency or other body acts in an adjudicative capacity when a neutral official, after
the presentation of evidence or legal argument by a party or parties, will render a binding legal
judgment directly affecting a party's interests in a particular matter.

4. “Writing” or “written” denotes a tangible or electronic record of a communication or
representation, including handwriting, typewriting, printing, photostating, photography, audio or
videorecording, and electronic communications. A “signed” writing includes an electronic sound,
symbol or process attached to or logically associated with a writing and executed or adopted by a
person with the intent to sign the writing.
Model 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.

Comment

[1] This Rule governs all communications about a lawyer’s services, including advertising permitted by Rule 7.2, that is constitutionally protected commercial speech. 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. A truthful statement also is misleading if presented in a way that there is a substantial likelihood it will lead a reasonable person to believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.

[3] An advertisement, a communication 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 claim about a lawyer’s or law firm’s services or fees, or an unsubstantiated comparison of the lawyer’s or law firm’s services or fees with the services or fees of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim 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.
Standing Committee on Professional Discipline Redline Re:
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of Professional Conduct
March 1, 2018

[4] 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.

Firm Names and Designations

[4] Firm names, letterhead, and professional designations are communications concerning a lawyer's services. A trade name may be used by a lawyer in private practice if it is not false or misleading. A trade name is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, or with a public or charitable legal services organization. A trade name is also misleading if it uses the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[5] 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 succession in the firm’s identity, or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm also may be designated by a distinctive website address, electronic social media “handle,” or comparable professional designation. If a firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication. A 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.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction. Lawyers in such an office should indicate where they are admitted and/or authorized to practice.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

It is misleading to use in the name of a law firm the name of a lawyer holding a public office in the name of a law firm, or to use that lawyer’s name in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

**Rule 7.2: Advertising Communications Concerning a Lawyer’s Services: Specific Rules**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise legal services through written, recorded or electronic communication, including public any media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may

1. pay the reasonable costs of advertisements or communications permitted by this Rule;
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; and
5. give nominal gifts that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

(c) Any communication made pursuant to this Rule shall include the name and office address contact information of at least one lawyer and the or law firm responsible for its content.
Standing Committee on Professional Discipline Redline Re:
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of Professional Conduct
March 1, 2018

Comment

[1] 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.

[1] [2] This Rule permits public dissemination of information concerning a lawyer’s or law firm’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.

[2] 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.
But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic
exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to
members of a class in class action litigation.
Standing Committee on Professional Discipline Redline Re:
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of Professional Conduct
March 1, 2018

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer’s services. A communication contains a recommendation if it expresses, implies or suggests value as to the lawyer’s services or if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible “recommendations.”

[3] Paragraph (b)(1) however, allows a lawyer to pay for advertising and communications permitted by 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. 2

[4] Paragraph (b)(5) [insert for optimal clarity language specifying nominal thank-you gifts] permits nominal gifts as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] 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 7.1 (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

2 This comes from cmt. [5] to current Rule 7.2. The revision simply breaks former cmt. [5] to Rule 7.2 into three cmts, i.e. [2], [3], and [5] to new 7.2.
Standing Committee on Professional Discipline Redline Re: 
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of 
Professional Conduct 
March 1, 2018

[55x650]legal problems when determining which lawyer should receive the referral. See Comment [2] 
deinition of “recommendation”). 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.

[6] 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 Qualified lawyer 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.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a 
legal service plan must act reasonably to assure that the activities of the plan or service are 
compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer 
referral services may communicate with the public, but such communication must be in conformity 
with these Rules. Thus, advertising must not be false or misleading, as would be the case if the 
communications of a group advertising program or a group legal services plan would mislead the
Standing Committee on Professional Discipline Redline Re: 
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of Professional Conduct 
March 1, 2018

public to think that it was a lawyer referral service sponsored by a state agency or bar association. 

Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3

[8] [7] 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 (b) 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 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.

Model Rule 7.3: Solicitation of Clients

(a) A lawyer shall not solicit professional employment by live person-to-person contact in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the person contacted is:

(1) with is a lawyer; or

(2) with a person who has a family, close personal, or prior business or professional relationship with the lawyer; or

(3) with a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a) if:
Standing Committee on Professional Discipline Redline Re:
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of Professional Conduct
March 1, 2018

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.

c. Every written, recorded or by electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall 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 (a)(1) or (a)(2).

c) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

d) Notwithstanding the prohibitions in this Rule paragraph (a), 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 or telephone contact to solicit enroll memberships or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a Paragraph (a) prohibits a lawyer from soliciting professional employment by live person to person contact when a significant motive for the lawyer’s doing so is the lawyer’s or the law firm’s pecuniary gain. See Rule 1.0(l) for a definition of solicitation. A lawyer’s communication is 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] “Live person to person contact” means in person, face to face, telephone and or real-time person person communications such as Skype or Facetime, and other visual/auditory communications where the prospective client may feel obligated to speak with the lawyer. Such person to person

Commented [RE3]: Hyphenate terms such as this one and “face-to-face” throughout.

Commented [RE4]: Modeling Rule 7.3 after the Oregon Rule and Washington State proposal, as recommended, could necessitate concomitant Comment changes.

Commented [RE5]: Consider whether the prospective client may, as with other written communications, easily disregard something like Skype or Facetime by simply disconnecting?
contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. There is a potential for abuse overreaching exists when a solicitation involves a lawyer, seeking pecuniary gain, direct in-person, live telephone or real-time electronic contact solicits a person by a lawyer with someone known to be in need of legal services. These forms of contact subjects a person to the private 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 fully all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately, an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] The potential for abuse overreaching inherent in live person to person contact direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws. governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person to person direct in-person, telephone or real-time electronic persuasion that may overwhelm a person’s judgment.

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 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 live person to person direct in-person live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to
Standing Committee on Professional Discipline Redline Re:
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of Professional Conduct
March 1, 2018

approach (and occasionally cross) the dividing line between accurate representations and those
that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices, overreaching
against a former client, or a person with whom the lawyer has a close personal, family, business
or professional 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 overreaching when
the person contacted is a lawyer or is known by the lawyer to be an experienced user of the type
of legal services involved for business purposes. For instance, an “experienced user” of legal
services for business matters may include constituents of a business entity who hire outside counsel
to represent the entity; entrepreneurs who regularly engage business, employment law, or
intellectual property lawyers; small proprietorships that regularly hire lawyers for lease or contract
issues; and other people who regularly retain lawyers for business transactions or formations. An
experienced user of legal services would not ordinarily include someone who has hired lawyers on
multiple occasions for family law matters, criminal matters or personal injury claims.

Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not
applicable in those situations. Paragraph (a) 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.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains false or misleading information which is false or misleading within the meaning of Rule
7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or
that involves contact with someone who has made known to the lawyer a desire not to be
solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after
sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response,
any further effort to communicate with the recipient of the communication may violate the
provisions of Rule 7.3(b).

[7] 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

Commented [RE6]: Constituents seems a vague term in this context. Add language akin to Rule 1.13, Comment [1]? How does this make them experienced in the context of business matters? Does not experience in this context also depend on the complexity and scope of the matters for which they are hiring outside counsel?

Commented [RE7]: If the Ethics Committee retains the experienced user exception with a “business matter” limitation in its proposal to the House, with which the Discipline Committee currently disagrees, the inclusion of this sentence seems to add confusion and not clarity. The Discipline Committee recommends its deletion.
Standing Committee on Professional Discipline Redline Re:
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of Professional Conduct
March 1, 2018

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. 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 which 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 7.2.

[8] The requirement in Rule 7.3(c) that certain communications be marked “Advertising Material” does not apply to communications sent in response to request so potential clients or their spokespeople 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.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class or to class members in class action litigation.

[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit enroll 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 (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone 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 Rules 7.1, 7.2 and 7.3(b). See 8.4(a).
Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.

(b) (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state jurisdictional authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Paragraph (a) of this Rule permits a lawyer to 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 “concentrates in” or is a “specialist,” practices a “specialty,” or specializes in particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office has a long-established policy of designating for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that the designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.
Paragraph (d) This Rule permits a lawyer to 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 jurisdictional state authority of a state, the District of Columbia, or a U.S. Territory or accredited by the American Bar Association or another organization. Such jurisdictional authorities include such as a state supreme court or a state bar association, that has been approved by a jurisdictional state authority of the state, the District of Columbia or a U.S. Territory 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.

Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

Standing Committee on Professional Discipline Redline Re:
Ethics Committee’s December 2017 Discussion Draft of Proposed Changes to Model Rules of
Professional Conduct
March 1, 2018

[1] 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.

[2] With regard to paragraph (d), 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.