April 24, 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 March 23, 2018 Draft of Proposed Changes to ABA Model Rules of Professional Conduct on Advertising and Solicitation

Dear Barbara:

The Standing Committee on Professional Discipline very much appreciates that the Ethics Committee incorporated a number of our comments and suggestions on the December 2017 Discussion Draft into the March 23rd version of proposed changes to the “7 Series” of the Model Rules of Professional Conduct. We thank the Ethics Committee for its close consideration of our recommendations.

The Discipline Committee has not yet taken a formal position on the matters encompassed by the March 23rd draft. However, in anticipation of the Ethics Committee filing its Resolution and Report with the House of Delegates by the May 8, 2018 deadline, we offer some additional recommendations that we hope the Ethics Committee will incorporate into the final Resolution. We are available to discuss these at any time prior to the filing deadline should you have questions. As before, 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:

The Discipline Committee continues to believe that the proposed amendments do 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. In my March 1, 2018 letter we noted that more modern rules are 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. Again, we urge the Ethics Committee to consider going further in the proposal that it files with the House. Doing so will not only demonstrate ABA leadership, but will benefit the public and provide important guidance to state supreme courts and lawyers.
Proposed Model Rule 7.1:

Comment [3] was not in the December 2017 Discussion Draft. It states that “[i]t is misleading for a communication to provide information about a lawyer’s fee without indicating the client’s responsibilities for costs, if any. If the client may be responsible for costs in the absence of a recovery, a communication may not indicate that the lawyer’s fee is contingent on obtaining a recovery unless the communication also discloses that the client may be responsible for court costs and expenses of litigation. See Rule 1.5(c).” We query whether the first sentence could be read to expand, via comment, the black letter obligations in Rule 1.5(b). If the Ethics Committee intended to expand upon such black letter obligations, we suggest that happen in the black letter of Rule 1.5.

An advertisement is a form of communication under Rule 7.1, and cannot be false or misleading. An advertisement can be the first communication from a lawyer that a client experiences. Rule 1.5(b) requires a lawyer to communicate to a client, before or within a reasonable time after commencing the representation, the rate of the fee and any expenses for which the client will be responsible, preferably in writing. Contrary to Rule 1.5(b)’s directive about the timing requirements for making disclosures to clients about fees and costs, new Comment [3] appears to now require such disclosure in what could be the first communication (i.e. advertisement) with a client about the lawyer’s fees. That is so because Comment [3] affirmatively states that the omission of information about client responsibility for costs in a communication that provides information about a lawyer’s fee is per se misleading. We also suggest that the same concerns exist for the second sentence in new Comment [3] to Rule 7.1 that references Rule 1.5(c).

Proposed Model Rule 7.2:

The language in Rule 7.2(b) is also new and was not in the December 2017 Draft. We understand that this language was in APRL’s proposal as Rule 7.2(f). We view this as a significant change, and there was no accompanying explanation for it. We do understand that lawyers may receive an “origination fee” for work that they generate for the firm. However, we believe that the suggested amendments, which can be read to affirmatively permit compensation of nonlawyer employees in the same firm for recommending a lawyer’s services, risk encouraging “inside running” and Rule 5.4 violations. We recommend that the Ethics Committee delete these new changes to Model Rule 7.2(b) and revert to the original language. We do not believe it necessary to affirmatively state in the black letter that origination fees for lawyers generating business for a firm are permissible.

Should the Ethics Committee disagree with our recommendation and decide to retain its proposed changes from the March 23rd Draft, it is crucial that the Ethics Committee specify the issue it is trying to address with these amendments and why it is necessary to do so this way. Additionally, if the Ethics Committee decides to retain its proposed amendments, we suggest that it makes more sense to create a sixth exception stating something akin to:
pay a nominal origination bonus to a nonlawyer employee in the same firm so long as [this additional language would have to be carefully crafted to ensure that the policy comports with the Rules and does not incentivize bad behavior].

What was Model Rule 7.2(c) in the December Draft, is Rule 7.2(d) in the March 23rd version. In our comments on the December Draft we urged the Ethics Committee to change “or” to “and the,” or to delete “or law firm.” We noted that while “or law firm” has long been in the Model Rules, it conflicts with longstanding ABA policy that only lawyers, not law firms, are subject to discipline. If only a firm name is listed as a contact responsible for an advertisement, enforcement becomes very difficult and results in the disciplinary authorities having to spend already scarce resources to identify the responsible lawyer(s). The members of our Committee continue to feel very strongly about this enforcement issue and urge the Ethics Committee to make our suggested changes to Rule 7.2(c) along with concomitant changes to new Comment [12] in the Resolution that it files with the House of Delegates.

In addition, proposed Comment [12] to Rule 7.2 indicates contact information includes a website address. The purpose of requiring that advertisements include contact information is to allow the public to communicate with the lawyer responsible for an ad, and for regulators to easily determine this information. We are concerned that providing a website address alone does not accomplish this goal. In our experience, websites do not always have a “contact us” feature that would provide an email address or phone number for a consumer or regulator to communicate with someone about an advertisement. We ask that the Ethics Committee consider deleting “website address.” Or, if a website address is provided as the contact information, that the lawyer responsible for the ad ensure that consumers can easily determine from the website how to contact an individual at the firm.

We again 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 this new 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. The proposed Comment language regarding “nominal gifts as might be given for holidays, or ordinary social hospitality” does not, in our view, speak to those concerns. We recommend that the Comment provide better guidance about the types of gifts that could be seen as having an improper nexus to the recommendation for the lawyer’s services, and that could then be seen as rising to a level of improper compensation. We do not believe that nominal holiday gifts or gifts of ordinary social hospitality are the types of gifts about which lawyers have concerns in the context of this Rule.

**Proposed Model Rule 7.3:**

After review of the March 23rd Draft, the Discipline Committee reiterates its recommendation that revisions be made to Rule 7.3 based on the approaches taken by Oregon and being considered by Washington State. Our concerns about the new exception
for experienced users of legal services for business matters also remains. As noted in my March 1, 2018 letter, we believe that following the approaches of these two states will render unnecessary the proposed exception and the accompanying concerns we have previously expressed. We hope that the Ethics Committee agrees to amend its proposal before filing it with the House.

We also have some questions regarding Comment [2], which indicates that the technology-based communication tools Skype and Facetime do not permit a person on the receiving end of a “cold” connection request from a lawyer or someone acting on their behalf with necessary time for reflection, and therefore would comprise a form of improper live person-to-person contact under the Rule. For example, when “Person A” tries to initiate a Facetime connection with “Person B,” the technology behaves like a telephone call with Caller ID enabled. When “Person B” sees that “Person A” is trying to connect with them, “Person B” can either choose to accept the connection or it will time out. Given this, some may argue that recipients of a request for Facetime and Skype connections have the necessary time for reflection before establishing the connection. We wanted to flag this for the Ethics Committee. We suggest that in anticipation of such arguments the Report accompanying the Resolution include explanatory language about these types of technologies in relation to the paramount public protection concerns that underlie Rule 7.3. In this regard, we also suggest that the Ethics Committee may wish to find a more “technology agnostic” way to address this in the Comment, rather than identifying specific technology tools. The rapid rate at which technologies are evolving and older tools becoming obsolete may warrant not identifying specific technology tools in the Comment.

We very much appreciate the opportunity to provide these Comments and we hope that the Ethics Committee finds them helpful as it prepares to file its Resolution and Report with the House of Delegates. 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
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