MEMO

To: The Standing Committee on Ethics and Professional Responsibility

From: Charles Garcia, Chair, the Standing Committee on the Delivery of Legal Services

Re: Amendments to Section 7 of the Models Rules of Professional Conduct

Date: March 7, 2018

I write to you on behalf of the ABA Standing Committee on the Delivery of Legal Services (hereinafter, the Delivery Committee) regarding proposed changes to the ABA Model Rules of Professional Conduct governing client development that are being proposed by the Standing Committee on Ethics and Professional Responsibility (hereinafter, the Ethics Committee).

The mission of the Delivery Committee is to advance access to lawyers and legal services for those of moderate incomes, who have too many resources to qualify for legal aid or pro bono services, but insufficient assets and income to afford full traditional representation. Lawyer advertising and solicitation, what we may call “client development,” play a significant role in the ability of those with modest means to access legal services. Consequently, client development and its regulation are important aspects of the Committee’s mission.

Let me begin by thanking the Ethics Committee for taking on the task of comprehensively reviewing Model Rules 7.1 through 7.5. In many respects, the proposal is bold and oriented toward revisiting the balance between expanding access to lawyers and protecting the public. That said, the Delivery Committee urges the Ethics Committee to step back and consider many of the decisions that have gone into the draft that was circulated on December 21, 2017. In particular, the Delivery Committee encourages the Ethics Committee to consider four guiding questions:

- Are the revisions as concise as they can be?
- Are the Rules and their Comments consistent throughout?
- Are the Rules and Comments as clear as they can be?
- Have we taken into account technological developments that are currently unfolding and are foreseeable?
I. Are the draft Rules as concise as they can be?

Section 7 is comprised of a series of rules of permissibility and rules of prohibited or mandated conduct. The core of the rules of permissibility derive from a time soon after the Bates decision shifted the governance of advertising rules from those that prohibited communications to that which enabled communications under limited circumstance. Today, more than 40 years after that decision, the Delivery Committee questions the value of including rules of permissibility.

While the Ethics Committee’s proposal would eliminate Rules 7.4(b) and (c) and 7.5(a) through (d), the Delivery Committee advocates the elimination of the other rules of permissibility, including Rules 7.2(a) and 7.4(a). The Delivery Committee suggests the Comments be reviewed in light of these changes and would not find it objectionable to relegate some of the substance of these Rules to the Comments, although it does not believe that is necessary. In addition, the Delivery Committee encourages a review of the wholesale importation of Rule 7.5 into the Comments to Rule 7.1, again with the intent of addressing issues of permissibility.

Beyond this, the Delivery Committee is concerned that Rule 7.1 extends beyond the breadth of constitutional authority as it is now written. Simply put, lawyers, like everyone else, have a right to unrestricted political discourse. This type of communication may be “about the lawyer or the lawyer’s services.” Our right to restrict speech is limited to commercial speech, which has been defined as that which beckons business or proposes a commercial transaction. Consequently, the Delivery Committee suggests Rule 7.1 be amended to clarify its concise limitation and that the second sentence of the Rule, explaining what a false or misleading communication is, be relegated to the Comment. The Delivery Committee suggests Rule 7.1 and Comment 1 be edited as follows:

Rule 7.1: A lawyer shall not make a false or misleading communication to a potential client about the availability of 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: 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. This rule governs all communications about a lawyer’s services, including advertising permitted by rule 7.2. Whatever means are used by a lawyer to communicate with a potential client about the availability of the lawyer’s services, statements about them must be truthful and not misleading.

If the ABA does not set out Rule 7.1 as one applying to commercial speech, then the Rule may be considered duplicative of Rule 8.4, prohibiting conduct that involves “dishonesty, fraud, deceit or misrepresentation.” However, Rule 7.1 addresses communications, while Rule 8.4 addresses conduct. The Delivery Committee believes it is preferable to retain Rule 7.1, in the
conceivable version set out above, but to clarify that it addresses commercial speech and not simply any communication about the lawyer or the lawyer’s services.

II. Are the draft Rules and their Comments consistent?

The Delivery Committee encourages the Ethics Committee to review the Rules and its draft proposal to determine if the Rules and Comments are consistent. For example, when the Ethics Committee’s proposal imports Rule 7.5 into the Comments to Rule 7.1, we have a rule that prohibits misleading communications, but a comment that enables lawyers to practice in a firm that may be designated by the names of deceased partners, yet not by the names of partners who have otherwise left the firm. How it is not misleading to potential clients to operate under a firm name of dead partners when it is misleading to operate under a firm name of former partners still living? The Delivery Committee has no particular objection to the accommodation of firm names including deceased partners, but simply does not believe this Comment is consistent with Rule 7.1.

III. Are the Rules and Comments clear?

The Delivery Committee focuses here on Rule 7.2(b). It has, and continues to advocate for the elimination of this Rule. The details of its reasoning were set out in a letter to former Ethics Committee chair, Prof. Myles Lynk in a letter of March 21, 2017, regarding the Rule amendments proposed by the Association of Professional Responsibility Lawyers. The Delivery Committee provides the pertinent portions of that letter below. Before doing so, however, the Delivery Committee questions whether the Ethics Committee’s proposal to define “recommendation” in the Comment to Rule 7.2(b) helps provide clarity to the concept. By defining “recommendation” in a way that is outside of the word’s usual and commonly understood definition, the Ethics Committee may in fact be confusing the issue all the more. This would create the risk that states will embrace different interpretations or the notion of “recommendations” and defeat the purpose of striving for state uniformity.

On March 21, 2017, the Delivery Committee presented the following comments regarding Rule 7.2(b):

[T]he Committee urges the deletion of MR 7.2(b) in its entirety. We note here that this recommendation was also made to the Commission on Ethics 2020 in 2012. That recommendation was not supported by the Commission and, obviously, did not lead to a deletion of the Rule. However, the Commission did recommend extensive changes to the Comments addressing MR 7.2(b), which were adopted by the House of Delegates. Unfortunately, the Delivery Committee believes that those changes at best failed to provide further clarity on the issues, which are discussed in detail below, and at worst aggravated the problem.
In its comments to the Commission on Ethics 20/20 in 2012, the Committee set out the following justifications for the elimination of MR 7.2(b), as follows:

The Committee does not take this request lightly, but believes it is justified and necessary because: (1) Rule 7.2(b) serves no purpose that is not otherwise effectively served by other rules; (2) the Rule fails to define terms that do not have universally accepted definitions; (3) the Rule fails to reflect the use of technology to broaden access to legal services for those needing representation for personal legal services; and (4) the prohibition set out in the Rule is contradicted within its own comments.

A. MR 7.2(b) serves no purpose that is not otherwise effectively served by other rules.

In its comment to the Commission on Ethics 20/20 in 2012, the Committee stated:

[W]e then ask what is the rationale for the prohibition imposed by Rule 7.2(b) and is that rationale met by other rules.

One possible rationale is the need to prohibit “ambulance chasing” or in-person solicitations by someone on behalf of a lawyer. However, Rule 7.3(a) prohibits in-person or live telephone contacts soliciting employment for pecuniary gain and Rule 8.4(a) prohibits a lawyer from violating the rules through the acts of another. So, these rules combine to prohibit “ambulance chasing” along with any other inappropriate solicitations.

Another rationale for the prohibition may be the threat to the lawyer’s independence of judgment. If someone is channeling cases to the lawyer, the lawyer may become more beholden to that person than to the client. However, Rule 5.4(c), governing the lawyer’s independence of judgment, states, “A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” This would seem to effectively address this risk and no additional rule seems necessary.

Perhaps the prohibition against channeling legal services is designed to assure that agents do not proceed outside of the lawyer’s direction. However, Rule 5.3(b) requires lawyers to adequately supervise
nonlawyer assistants and ensure their conduct is compatible for the lawyer’s professional obligations.
Another rationale may be the risk that representations made by someone who channels legal services could be misleading. However Rule 7.1 and 8.4(a) combine to prohibit a lawyer from false or misleading communications when done by someone on the lawyer’s behalf. Additionally, Rule 8.4(c) prohibits a lawyer from conduct involving dishonesty, fraud, deceit or misrepresentation.

The Committee simply cannot find an underlying rationale that justifies the prohibition of channeling legal services in and of itself and believes that any perceived wrong-doing addressed by Rule 7.2(b) is effectively cured through the applications of these other rules.

The ABA has made no changes to its Rule of Professional Conduct that alter this analysis and the APRL draft does not propose changes that would provide a rationale for the continuation of MR 7.2(b).

B. The Rule fails to define terms necessary for a clear understanding of permissible conduct.

On this point, the Delivery Committee made the following comments to the Commission on Ethics 20/20 in 2012:

Focusing now on the exceptions set out in Rule 7.2(b), the Committee is concerned that they include terms that are not clearly defined and are inconsistently applied from one state to another.

The rule permits a lawyer to pay the “reasonable costs of advertisements” and the “usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service.” When the rule was promulgated, a fairly clean dichotomy separated advertisements from lawyer referral services. On the one hand, advertisements were communications disseminated through various media, such as the Yellow Pages and other print directories, television or billboards. On the other hand, lawyer referral services were often bar-sponsored programs with intake personnel obtaining information about potential clients and providing callers with contact information for participating lawyers who are positioned to provide the appropriate representation. What implicitly is impermissible under this rule is the lawyer’s ability to pay to participate in a for-profit or non-qualified lawyer referral service.1

The Internet has converted a comprehensible dichotomy between advertisements and referral services to something of a continuum, where various models fall at some point with advertisements at one end and

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1 Since only a few states have methods to qualify for-profit lawyer referral services, we will focus on not-for-profit and for-profit referral services going forward.
referral services at the other. Is a particular model a group advertisement, where the lawyers can pay an intermediary to participate or is it a for-profit lawyer referral service, where the lawyers cannot pay to participate? The question can only be answered when the terms are defined and neither the Rule nor the comments adequately do so. In fact Comment [6] does nothing more than define a referral service as “any organization that holds itself out to the public as a lawyer referral service.” But this self-declaration has not been a sufficient basis to make the determination in any of the states that have weighed in on the distinctions between referral services and advertising models.

We briefly provide a few issues that illustrate the difficult application of Rule 7.2(b) when lawyers participate in online models. These include the distinction between “referrals” and “recommendations,” the limitation on a lawyer’s right to set out credentials and the contradictory conclusions regarding the exercise of judgment and assignment of exclusive territories.

The general counsel for Total Attorneys testified before the Commission regarding that organization’s experience with the vagueness of Rule 7.2(b). Total Attorneys is a for-profit company that provides leads to lawyers who subscribe to their service in various fields of practice, most notably, bankruptcy (under the name Total Bankruptcy). In 2009, a competing lawyer filed complaints with disciplinary agencies in nearly every jurisdiction against every lawyer who participated in Total Bankruptcy, nearly 500 in total. The complaint alleged that the lawyers were participating in a for-profit lawyer referral service in violation of Rule 7.2(b). The complaints were found baseless in every jurisdiction except Connecticut, the home state of the complaining lawyer. Connecticut held a hearing on the matter, where the hearing board scrutinized the terms “recommend” and “refer.” In its decision dismissing the complaint on summary judgment, the board stated:

Rule 7.2(c) [the equivalent to MR 7.2(b)] provides that an attorney may not pay a third party to “recommend” the attorney’s services. We note the Rules drafters chose the term “recommending” and not “referring.” While the terms are sometime used interchangeably, they mean different things. The term “recommend” is not a defined term within the Rules of Professional Conduct. According to the dictionary, the word “recommend” means, “(1) to give in charge; commit; entrust (2) to suggest favorably as suited for some use, function, position, etc.” Webster’s New World Dictionary (3d College Ed. 1988). The term “refer” on the other hand, means for our purposes, “to send or direct… for aid, information, etc.” Id. A “recommendation” connotes an endorsement; a “referral” does not
Accordingly, Rule 7.2(c) requires us to determine whether the evidence adduced by the Disciplinary Counsel establishes a prima facie case of a “recommendation.” The evidence before us did not establish that the websites “recommended” the participating attorneys to viewers of the website. To that end, we conclude that the territorial exclusivity of the arrangement was not an implied endorsement and that the fees charged to the Respondents were the appropriate costs of advertising on the websites.2

Total Attorney’s general counsel informed the Commission that it spent over one million dollars on counsel expenses defending the complaints. We assume a substantial cost was also incurred by the various state disciplinary entities. All of this led to the tortured conclusion that lawyer referral services do not make “referrals” but rather “recommendations,” while advertisements make “referrals” that have no connotation of an endorsement. If this is confusing, it advances the Committee’s point that Rule 7.2(b) is seriously defective and should be deleted.

In an effort to distinguish lawyer advertising through online intermediaries and lawyer referral services, states have sometimes imposed limitations when lawyers advertise as a group that would not be imposed on them when advertising individually. Before examining some of these limitations, note that small firm practitioners, who typically provide personal legal services, generally lack the ability to appear on the first few pages of an online search through search engines such as Google or Yahoo. However, intermediaries frequently appear at the top of searches, enabling participating practitioners to benefit from those searches.

In Alabama State Bar Assn. v. RW Lynch Company, Inc, 655 So.2d 982 (1995), the court considered whether an intermediary that advertised on television was a group advertising model or a referral service. It concluded that the service was an advertisement because, among other factors, (1) it expressly informed viewers it was a paid advertisement, (2) the calls were not screened by an answering service, (3) no representation was made regarding the lawyer’s experience or skills, (4) calls were forwarded to lawyers based solely on the geographic location of the caller, and (5) the advertising lawyers were the only people who spoke to the caller about legal matters.

Several of these factors have been embraced by states in their efforts to distinguish a lawyer’s participation in an advertising intermediary from a

lawyer referral service. However, these restrictions clearly do not apply generally to lawyers who advertise individually. Nowhere in the Model Rules or the rules of most states must a lawyer label media-based communications as a paid advertisement. Also, lawyers advertising individually may provide full details about their experiences and skills, subject only to the limitations imposed by Rules 7.1 and 7.4, governing false or misleading communications and communications of specialties, yet according to the authorities, lawyers advertising in a group may not do so. Lawyers conducting business outside of advertising intermediaries are fully entitled to assign the tasks of screening and legal analyses to subordinates, including paralegals. Yet again, without any rules as justifications, lawyers using intermediaries are forbidden from making these assignments. As intermediaries use the Internet to expand access to legal services for those of moderate incomes, these elements impose limitations that are inconsistent with individual advertising and have no basis in the Rules.

As a result of the work of the Commission on Ethics 20/20, the ABA did recommend amending Comment [5] of MR 7.2(b) and this recommendation was approved by the House of Delegates in 2013. In pertinent part, those changes add the following language:

A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities… 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.

So, MR 7.2(b) prohibits a lawyer from giving anything of value for the recommendation of the lawyer’s services. Comment [5] indicates that a recommendation involves an endorsement. The Rule then provides an exception making it permissible for a lawyer to pay the reasonable costs of advertisements, which, by definition is not a recommendation. In other words, the Rule prohibits one thing, that is paying for a recommendation. It then goes on to create an exception for lawyer advertising, but lawyer advertising is not something that is prohibited to start with since it does not involve a recommendation. To be blunt, this is beyond confusing and needs to be deconstructed.

... As indicated above, the Committee recommends the deletion of MR 7.2(b). It does so with one caveat. The second exception to the Rule allows a lawyer to pay

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3 See for example, Ohio Opinion 2001-2 (2001), requiring an intermediary to be identified as an advertisement and provide only ministerial services, and New Jersey Committee on Attorney Advertising Opinion 43 (2011), requiring an intermediary to inform viewers that lawyers have paid a fee to participate.
the “usual charges” of a non-profit or state-qualified lawyer referral service. Ethics opinions have interpreted these usual charges to include a division of fees. If MR 7.2(b) were deleted, rule changes should be made to preserve the ability of participating lawyers to divide fees with non-profit and state-qualified lawyer referral services. Seemingly, this would best be addressed by adding a provision to MR 5.4(a) creating an exception to the prohibition against the division of fees. Such a change would be consistent with the purpose of MR 5.4 since nothing permitting a lawyer to divide fees with a non-profit or state-qualified lawyer referral service would have an impact on the professional independence of lawyer.

In addition, as set out in the Committee’s comment to the Commission on Ethics 20/20:

[T]he deletion of Rule 7.2(b) would enable lawyers to recommend other lawyers to potential clients without transparency. Rule 1.5(e) effectively addresses the circumstance where lawyers not in the same firm divide fees. However, lawyers may agree to an arrangement where one lawyer recommends potential clients to another lawyer not in the same law firm for a fee, separate and apart from a division of fees in the event the potential client becomes a fee-generating client. The Committee believes that potential clients may be misled in this circumstance and that the issue should be governed by Rule 7.1. To remedy any risk of abuse, the Committee suggests amending the comments to Rule 7.1 by adding a new Comment [4] that states:

[4] A communication with a potential client may be misleading when a lawyer recommends the services of another lawyer not in the same law firm and receives something of value for that recommendation without prior notice to the potential client.

In the event the analysis of rule changes does not lead to the conclusion that MR 7.2(b) should be deleted, the Committee strongly recommends the Rule be redrafted in a way that clarifies the terms “recommendation,” “advertisements,” and “lawyer referral services” and affords those lawyers who provide personal legal services to those of moderate and modest means the opportunity to pursue client development opportunities with certainty about their ethical responsibilities.

In addition to the deletion of Rule 7.2(b), the Delivery Committee urges the Ethics Committee to review its proposed changes to be certain terms are clear and used in their common vernacular. If it does not do so, it seems likely that states will apply different meanings and the quest for uniformity will be undermined.
IV. Have we taken technological developments into account?

The Delivery Committee is concerned that the proposed rules lack the input from those with an in-depth understanding of the role of evolving technologies that could pertain to client development. For example, Rule 7.3 addresses live person-to-person contact, but does not examine the role of artificial intelligence to input data, design algorithms and advance chatbots as a facsimile for person-to-person contact. What is the role of in-home voice-activated devices that are connected to Google or other data-bases that can recommend lawyers based on a combination of the lawyer’s involvement and the user’s data or simply on the user’s data with no role from the lawyer? What impact does the Blockchain have on client development and what regulatory issues are pertinent to its emergence? What is the impact of digital genomes on the quest to obtain clients for medically-related legal issues? Not only do we need to reach out beyond the legal ethics community for answers to these types of questions, but we need to reach out beyond the legal ecosystem to the technology community at large. If we do not, we will find we are creating rules for the way things used to be, not the way things are becoming.

The Delivery Committee appreciates the opportunity to share these thoughts and hopes you will consider it a resource moving forward.