

# Proposed Amendments to ABA Model Rules of Professional Conduct on Lawyer Advertising

Wednesday, March 28, 2017 | 1:00 PM Eastern

Sponsored by the ABA Center for Professional Responsibility and the Center for Professional Development

# Our Speakers

- **Barbara S. Gillers**, Chair, ABA Standing Committee on Ethics and Professional Responsibility and Adjunct Professor New York University School of Law
- **Justice Dan Crothers**, North Dakota Supreme Court
- **Professor Jan Jacobowitz**, University of Miami School of Law
- **Lynda Shely**, The Shely Firm, PC
- **Elizabeth Tarbert**, Ethics Counsel, The Florida Bar

# Survey Question #1

Please tell us the number of years you have been practicing.

- 0-5
- 6-10
- 11-19
- 20 or more

## Survey Question #2

Please describe your familiarity with the ABA Model Rules of Professional Conduct and/or your state rules of conduct.

- Novice
- Experienced
- Advanced

# Affiliation

Are you:

- Member of ABA House of Delegates
- ABA Section, Committee or Other Entity Member
- State Bar Regulator
- State Bar Officer
- Ethics Lawyer (representing other lawyers or as in-house counsel)

# Goals – Ad Rules for the 21<sup>st</sup> Century

- Encourage national uniformity and simplify the rules.
- Increase access to justice.
- Accommodate changes in the legal profession from technology, competition and cross-border practice.
- Protect the public from false and misleading communications and overreaching.
- Relieve regulators of unnecessary burdens.

# Development of the Amendments - Timeline

- 2014 Association of Professional Responsibility Lawyers (APRL) survey and report.
- Survey of Bar Regulators showed vast majority of bar complaints involving advertising were filed by *other lawyers*.
- Public Forum at 2017 ABA Midyear Meeting.
- Discussion within the ABA, including working groups, comments, and revisions.
- Working Draft disseminated December 2017.
- Public Forum on Draft at ABA 2018 Midyear Meeting.

# Development of the Amendments – Timeline (cont'd)

- Revisions to Working Draft based upon additional input/comments.
- Broad dissemination of March 2018 Draft.
- May 2018 - Submission of Report and Resolution to House of Delegates.
- August 2018 - Presentation to the House of Delegates.



# Public Policies Informing the Changes

- Protecting the public against false and misleading advertising.
- Protecting the public from advertising that is abusive, inherently coercive or subject to undue influence or duress.



# Public Policies Informing the Changes

- Promoting inclusion of useful, relevant information.
- Promoting access to justice by providing information about available legal resources and recognizing changes in the way consumers find lawyers.



# Most Debated Issues

- Nominal gift exception to giving something of value.
- Exceptions to prohibition on person-to-person contact, e.g. experienced user of legal services.
- Elimination of the labeling requirement (“Advertising Material”) for targeted mail.
- No longer a separate rule for law firm names and letterhead.
- Revisions do not go far enough in relaxing unnecessary restrictions.

# For Later Consideration

- Commenters raised questions about Lawyer Referral Services and for-profit entities that refer, recommend, or connect potential clients with lawyers. These services involve more than advertising rules.
- For example, fee sharing, lawyer independence, and conflicts.
- These issues will be examined by the Ethics Committee in the near future.

# Historical Background - Advertising Before 1908

Lincoln & Herndon  
Attorneys and Counselors- will practice in the Courts of Law and Chancery in this State- Springfield, Ill.

From Daily Illinois State Journal

The image shows a collage of historical newspaper advertisements from the Daily Illinois State Journal. The central focus is a vertical column of legal notices for attorneys and counselors in Springfield, Illinois. At the top, N. M. Broadwell is listed as a lawyer with an office north of the square. Below him are Lewis & Adams, Dr. Samuel Long (a physician and surgeon), and Lincoln & Herndon, who are explicitly named as practicing in the Courts of Law and Chancery. Further down are R. F. Ruth (saddle and harness manufacturer) and Dr. Albert H. Trapp (physician). At the bottom of this column is Dr. W. B. Price, also a physician and surgeon. To the right of these legal notices is a medical advertisement for Dr. Topping's medicine, which includes a testimonial about curing salt rheumatism. The text of the advertisement reads: 'Of a cure of Salt Rheumatism by Dr. Topping's Medical Discovery. Since the year 1851 I have been afflicted with this terrible Tetter, some of which was upon the back part of my neck, especially so in cold weather. After trying a number of city physicians and of country ones recommended for me, I have never been able to even mitigate the symptoms as above, called "Salt Rheumatism". While using the first bottle I was slightly worse, but by continuing to directions, I am now completely cured. If any of my acquaintances are afflicted with this particular infirmity, I cheerfully give it. July 30, 1880.' To the left of the legal notices, there are fragments of other advertisements, including one for 'Gold Band, Decorated China, Dinner and Tea Sets, Colognes, Vases, &c., &c.' and another for 'DONA No. 120 War'.

# 1908 Canons - Advertising is Unprofessional

## 1908 ABA Canons of Ethics, Canon 27

The **most worthy and effective advertisement** possible, even for a young lawyer, and especially with his brother lawyers, **is the establishment of a well-merited reputation** for professional capacity and fidelity to trust. This cannot be forced, but must be **the outcome of character and conduct...But solicitation of business by circulars or advertisements, or by personal communications** or interviews, not warranted by personal relations, **is unprofessional**. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer....

# In that Long Ago Land . . .



“A lawyer shall not publicize himself...or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in...telephone directories or other means of commercial publicity, nor shall he authorize others to do so on his behalf.”

**Arizona Rule challenged in *Bates v. State Bar of Arizona* (1977).**

# Bates - A New Era

## A Challenge to the Status Quo



ADVERTISEMENT

### **DO YOU NEED A LAWYER?**

**LEGAL SERVICES  
AT VERY REASONABLE FEES**



- \* Divorce or legal separation—uncontested (both spouses sign papers)  
\$175.00 plus \$20.00 court filing fee
- \* Preparation of all court papers and instructions, on how to do your own simple uncontested divorce  
\$100.00
- \* Adoption—uncontested severance proceeding  
\$225.00 plus approximately \$10.00 publication cost
- \* Bankruptcy—non-business, no contested proceedings  
Individual  
\$250.00 plus \$55.00 court filing fee  
Wife and Husband  
\$300.00 plus \$110.00 court filing fee
- \* Change of Name  
\$95.00 plus \$20.00 court filing fee

Information regarding other types of cases furnished on request

**Legal Clinic of Bates & O'Steen**  
417 North 3rd Street  
Phoenix, Arizona 85004  
Telephone (602) 252-8888



# Bates v. State Bar of Arizona (1977)

Lawyer advertising is constitutionally protected. It cannot be completely banned. But it may be subject to reasonable restrictions regarding “time, place, and manner.”



# First Amendment and Antitrust Issues

- Several states sued for overly broad regulations in violation of lawyers' First Amendment rights for commercial speech.
- Federal Trade Commission antitrust concerns about overly broad restrictions of factually accurate commercial speech that inhibit consumers receiving information about the availability of legal services.

# The Amendments – Rule by Rule

# The Proposals: Rule 7.1



- The black letter of Rule 7.1 is not changed and continues as the cornerstone for regulation of lawyer advertising by prohibiting false or misleading communications by a lawyer about the lawyer's services.
- Provisions in current Rule 7.5 and its comments on firm names moved into Rule 7.1 Comments.



# Rule 7.1 – Examples of Application

- Claims in advertising cannot create unjustified expectations or lack substantiation.
- Law firm names cannot be misleading, including incorrectly suggesting affiliation among lawyers who simply share office space, use geographic terms that are false, or imply some affiliation with a government or nonprofit entity.

# The Proposals: Rule 7.2

- Rule 7.2 continues to provide specific rules for advertising, including all communications must include a firm name and contact information.
- “Certified specialist” requirements from Rule 7.4 moved into Rule 7.2(c).

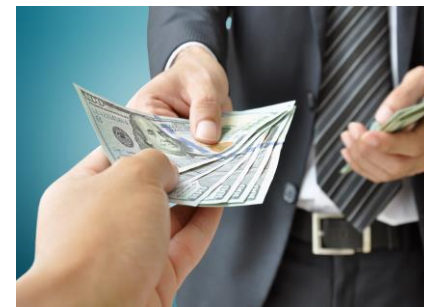


## Rule 7.2 (cont'd)

- Payments for recommendations continue to be prohibited, except to law firm employees and lawyers in the same firm, but nominal gifts that are not compensation for a referral are permitted.
- Clarifies that some things are not “recommendations”: “Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible ‘recommendations’ . . .”

# Rule 7.2 – Examples of Application

- Lawyers can be listed in a directory of ethics lawyers.
- Lawyers *cannot join* a for-profit referral service that connects them to potential clients looking for a criminal defense lawyer.
- Personal injury lawyers could give doctors a de minimus holiday gift.
- Corporate lawyers *cannot* pay a referral fee to accountants or others for referring clients to them.





# Rule 7.3 – Defining Solicitation

- “Solicitation” is defined as: “a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs 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.”

# Rule 7.3 – Person-to-Person Contact

- Lawyers can't solicit by live person-to-person contact unless the prospective client is a friend, family member, has a prior business or professional relationship with the lawyer, or is “an experienced user” of the type of legal services offered “for business matters.”



- Live person-to-person contact means “face-to-face, live telephone and other real-time visual or auditory person to person contact”

# Rule 7.3 – More on Solicitation

- Written solicitation letters are permissible and are NOT required to be labelled as advertising.
- Regardless of who the potential client is, a lawyer cannot solicit if the person has made known they don't want to be solicited and obviously lawyers cannot engage in solicitation that involves harassment, coercion or duress.
- Factors that may be considered when determining if a communication may involve coercion where person-to-person-solicitation is prohibited include individuals who may be particularly vulnerable to duress, such as non-English speakers and the elderly.

# Rule 7.3 - Application



Lawyers *can*:

- Send letters/emails to prospective clients.
- Call former clients or certain business owners to offer services.
- Offer services to friends or family members at a social gathering.
- Solicit in person or by mail if the retention is not for pecuniary gain. See, *NAACP v. Button*.

# Rule 7.3 - Application



Lawyers *cannot*:

- Call or visit a stranger who is someone who has had an accident or been served with divorce papers or charged with a crime, if the contact is for pecuniary gain.
- Send harassing letters to any prospective client or letters/emails if the person has made known they do not want the contact.

# Rule 7.3 – Other Provisions

- Rule specifies that communications authorized by law or court order, including notice to class members, do not violate the Rule.

# Questions?

# Where Do We Go From Here?

- The ABA Standing Committee on Ethics and Professional Responsibility expects to file a Resolution and Report for the 2018 Annual Meeting of the House of Delegates.
- Provide input to update the ABA Model Rules: [modelruleamend@americanbar.org](mailto:modelruleamend@americanbar.org) by April 25<sup>th</sup>.



# Thank you for Joining The Ethics Committees' Discussion

Proposed Amendments to ABA Model  
Rules of Professional Conduct on  
Lawyer Advertising