# COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

## AGENDA

October 19, 2018; 9:00 a.m.
2 East 14th Ave., Supreme Court Conference Room, 4th Floor
**Call-in number: 720-625-5050 or (toll free) 1-888-604-0017**
**Access Code: 96836475#**
**WiFi Access Code: To be provided at the meeting**

---

1. Approval of minutes for July 27, 2018 meeting [pp. 1 - 8]
2. Report from Rule 8.4(c) Subcommittee [Tom Downey]
3. Report from Contingent Fee Subcommittee [Alec Rothrock]
4. New Business
   a. ABA Amendments to Model Rules 7.1 through 7.5 and Comments [Marcy Glenn – pp. 9-61]
   b. Revisiting Potential Amendments to Rule 8.4(g) to Address Harassment [Marcy Glenn – pp. 62-71]
5. Administrative matters:
   a. Membership discussion
   b. Select next meeting date
6. Adjournment (before noon)

Marcy G. Glenn, Chair
Holland & Hart LLP
(303) 295-8320
mglenn@hollandhart.com

*These submitted minutes have not yet been approved by the Committee*

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On July 27, 2018
(Fifty-first Meeting of the Full Committee)

---

The fifty-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, July 27, 2018, by Chair Marcy G. Glenn. The meeting was held in the Court of Appeals Full Conference Room on the third floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justice William W. Hood III, were Committee members Judge Michael H. Berger, Thomas E. Downey, Jr., Judge Adam Espinosa, Margaret B. Funk, John M. Haried, Lino Lipinsky de Orlov, Melissa C. Meirink, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, Eli Wald, Lisa M. Wayne, Judge John R. Webb, and Jessica E. Yates. Present by conference telephone was E. Tuck Young. Excused from attendance were members Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, David C. Little, Judge William R. Lucero, Henry R. Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., and Frederick R. Yarger. Justice Monica M. Márquez, Jacki Cooper Melmed, and Lisa M. Wayne were not in attendance. Also present was Hannah Armentrout, who is serving as a summer clerk at the Chair's law firm.

I. *Introductions of New Participants*

The Chair introduced to the members Justice William W. Hood III, who replaces now Chief Justice Nathan B. Coats as a liaison justice to the Committee, joining Justice Monica Márquez in that position.

The Chair also introduced new members Judge Adam J. Espinosa, Lino S. Lipinski de Orlov, and Jessica E. Yates, who was recently appointed to be Colorado Attorney Regulation Counsel.

II. *Meeting Materials; Minutes of April 27, 2018 Meeting, the Fiftieth Meeting of the Committee.*

The Chair had provided a package of materials to the members prior to the meeting date, which was followed, tardily, by submitted minutes of the fiftieth meeting of the Committee, held on April 27, 2018. Those minutes were approved with one correction.

III. *Subcommittee on Rule 8.4(c).*

The Chair called on member Thomas E. Downey, Jr. to bring the Committee up to date on the consideration by the subcommittee that Downey chairs, which had been reconvened to consider the adoption of a comment to deal with "pretexting" for Rule 8.4(c), the rule that defines

professional misconduct to include engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," with the exception "that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities"; concern had been expressed that pretexting might not be considered a "lawful investigative activity."

Downey reported that the subcommittee had met four times prior to this meeting of the Committee and that he expects to provide a full report to this Committee at its next regular meeting. Anticipating what that report might be, Downey said the subcommittee has taken a number of straw polls of its members, each such poll indicating that the members do not believe any comment regarding pretexting is necessary; nevertheless, in view of the expressions of members of the full Committee at previous meetings of the Committee, the subcommittee is working on a draft of such a comment. Downey forecast that the subcommittee's report to the Committee will include the text of such a comment, together with a statement of the subcommittee's view that the comment is not needed.

IV. *Subcommittee on a Rule for Contingent Fee Agreements.*

For absent member Alexander R. Rothrock, the Chair reported that a subcommittee, chaired by Rothrock, has met to consider a rule for lawyers' contingent fee agreements. Rothrock has commented to the Chair that the subcommittee's membership is small and could well be expanded, especially to include lawyers who have specific interest in contingent fee agreements and in a rule to govern them; Rothrock is reaching out to such lawyers in both the plaintiffs' bar and the defendants' bar.

The subcommittee is looking at the language currently found in Rule 1.5(c)—

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

—with a view toward moving the substance of the cited Chapter 23.3 into the body of the Rules of Professional Conduct, with an updating and a deletion of obsolete text. The subcommittee is very focused on two aspects of contingent fee agreements: First, fundamentally, should enforceability of contingent fee agreements — their "substantial compliance" with the rule's requirements — be left to determinations by courts in litigation between lawyer and client? And, related to that, how might a new rule preserve the existing body of case law dealing with the conversion of a contingent fee agreement into a fee based on *quantum meruit*?

The Chair added that Committee guest Hannah Armentrout, a summer clerk at her law firm, has completed a "fifty state survey" to determine what other states have done with respect to contingent fee agreements, rules, and statutes. Rothrock's subcommittee is now considering the wealth of information that Ms. Armentrout has provided.

V. *Subcommittee on Flat Fee Agreements.*

The Chair now turned the meeting over to member James S. Sudler III, to guide the Committee's continuing consideration of a rule to govern flat fee agreements.

Sudler began by alluding to the Committee's previous discussion of contingent fee agreements, noting that the overlay of contingent fee principles with those that should govern flat fee agreements was discussed at some length at the Committee's fiftieth meeting, on April 27, 2018.

Serious consideration of flat fees as a matter of lawyer professional conduct, Sudler said, began with the Colorado Supreme Court's decision in *Gilbert*.[1] The Court in that case found that the Rules of Professional Conduct do not themselves provide what Attorney Regulation Counsel sought to establish in that case — that, "for purposes of Rule 1.16(d), an attorney cannot 'earn' a fee except as explicitly provided for in the fee agreement," as the Court characterized Attorney Regulation Counsel's position in the *Gilbert* case. While, as the Court noted, Comment [12] to Rule 1.5 provides that advances of unearned fees "may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b)," that is not sufficient for discipline: "Comments to the Rules of Professional Conduct do not add obligations to the Rules but merely provide guidance for practicing in compliance with the Rules." The *Gilbert* court essentially invited this Committee to consider the application of the Rules to flat fee agreements.

In response to its charge, the subcommittee has drafted proposed Rule 1.5(h) to deal with flat fee agreements. The proposed text was included in the materials that the Chair provided to the Committee for this meeting. In passing, Sudler commented that the subcommittee has "played around" with the terms "agreement" and "arrangement" in its proposal. He added that Steven K. Jacobson, a member of the subcommittee, has submitted a letter to the Committee expressing the need for a rule of conduct governing flat fee agreements in order to guide both practicing lawyers and Attorney Regulation Counsel in disciplinary matters.

Sudler pointed out that the subcommittee has not proposed any further changes to the text of Rule 1.5(h) that it had previously proposed to the Committee. He added that, at the April meeting of the Committee, there had been concern about the statement that use of the form of flat fee agreement that is to be proffered with the rule "shall be sufficient."

Sudler concluded his reintroduction of the topic of flat fee arrangements with the observation that the subcommittee had responded to all of the matters raised by Committee members about the proposed flat fee rule and comments at the Committee's April meeting, adding that most of those comments had been accepted.

But, Sudler continued, a Committee member, Anthony van Westrum, had, the evening before this meeting, sent an email to Sudler and the Chair raising some further issues. Sudler indicated that van Westrum would speak to those concerns after Sudler finished his review.

Sudler said that the bulk of the subcommittee's time spent since the April meeting had been devoted to developing a form flat fee agreement for inclusion in the Rules. The Committee had not expressed any dissent to the inclusion of such a form; and, Sudler added, lawyers like to use them. The subcommittee's proposal can be found at page 12 of the materials that the Chair provided to the Committee for this meeting.

---

1. In re Gilbert, 346 P. 32 1018 (2015).

The proposed form of flat fee agreement provides for early termination of a flat fee engagement by either the lawyer or the client, although, as had been discussed at the April meeting, Section V of the form provides that the lawyer may terminate the engagement before conclusion of all the undertaken tasks only if that termination is done in compliance with Rule 1.16; indeed, reference to that rule is made twice in the text of that Section V.

Sudler said the subcommittee had a long discussion about how lawyers might take advantage of the interim periods between identified milestones. The form provides for that eventuality but, as a result of concerns expressed by a non-lawyer member of the subcommittee that there should be a notion of fairness in how that eventuality is handled, Section V of the proposed form concludes with the over-arching requirement that "in any event, all fees shall be reasonable." As explained in Sudler's memorandum to the Committee dated July 6, 2018, "The thinking of the subcommittee was influenced by our non-lawyer member who was concerned that Lawyer could take advantage of Client by doing work that was of no benefit to the client. The added language to the form emphasizes Lawyer's obligations under Rule 1.5(a)."

Sudler concluded his remarks with the observation that a subcommittee member had asked whether the form flat fee agreement as actually employed by a lawyer in an engagement could be provided to the client with hyperlinks to the cited Rule 1.16. A Committee member suggested that the text of those provisions be made available to the client in footnotes to the agreement.[2]

In response to a question from a Committee member, Sudler said that the American Bar Association has not developed a model rule or agreement for flat fee arrangements, and he knew of no other state that has done so. He added that other jurisdictions do not seem to give such scrutiny to flat fee agreements as Colorado has done since the *Sather* case.[3] Indeed, it appears that, in many jurisdictions, a lawyer may deposit a flat fee payment in the lawyer's operating account even before the work to be done under the engagement has been performed.

At this point, Sudler invited member van Westrum to raise with the Committee the concerns that he had expressed about the subcommittee's draft to Sudler and the Chair in his last-minute email to them the previous evening. As van Westrum is the secretary who prepares these minutes and because he does not remember as he prepares these minutes what it is he actually said in his remarks to the Committee, he here asserts secretarial privilege and extracts from the email that he sent to the Chair and to Sudler, as follows:

> I am looking at Comments [13] and [14] to Rule 1.5, as [the subcommittee] would modify them.
>
> In the current rules, those two comments provide two alternatives, in succession, to accompany the principle enunciated in Comment [12] that, "Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account." Comments [13] and [14] follow that statement of principle in Comment [12] by Comment [13] saying that the lawyer and client may agree to the earning of those "unearned fees" by the lawyer's accrual of billable hours, and Comment [14] saying that, "Alternatively, the lawyer and client may agree to an advance lump-sum or flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events." That is,

---

2. The Committee returned to the matter of how providing the client with the text of cited Rule 1.16 toward the end of the meeting, and that discussion follows below in these minutes.

—*Secretary*

3. In re Sather, 3 P.3d 403 (Colo. 2000).

Comment [13] and Comment [14] are two examples of alternatives by which a lawyer may become entitled to claim that she has earned fees and may now withdraw those earned fees from the deposit contemplated by Comment [12].

But we now would put a new sentence at the beginning of Comment [13], interjecting the flat fee concept even in that first alternative that is currently devoted to the hourly accrual of fees: We say, "A lawyer and client can agree that a flat fee or a portion of a flat fee is earned in various ways." But, because we retain, in the rest of the comment, the current text, we follow that new statement about flat fees with "an example" that does not talk about flat fees at all but, rather, tells the reader that "the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services."

Our next comment, Comment [14], usefully advises that, "Alternatively, the lawyer and client may agree to an advanced flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks." But, in current Comment [14], that alternative (along with the lump sum alternative, however that might differ) is an alternative to the hourly rate arrangement just spoken of in Comment [13] — a comment that we are now turning into the first of two comments on flat fees. That seems gummed up to me.

That Comment [14], as we have modified it, is, by the way, the only place we used the past tense "advanced" in our drafts of the flat fee rules The word is not used at all in the current text of Rule 1.5 or its commentary: Indeed, it shows up only in Comment [1] to Rule 1.14 — "some persons of *advanced* age can be quite capable of handling routine financial matters" (ahh, would that this example of a person of advance age had that capability) — and in Rule 7.4 — " Certification signifies that an objective entity has recognized an *advanced* degree of knowledge and experience in the specialty area."}

I see no reason why existing Comment [12] needs the clause," including 'lump-sum' fees and 'flat fees,'" in its first sentence. I'd strike that clause and also would delete our new, first, sentence to Comment [13], so that the trio [with a bit of tweaking of Comment 14] would read—

> [12] Advances of unearned fees are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.
>
> [13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.
>
> [14] Alternatively, the lawyer and client may agree to an advance of a flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved.

But I am not finished questioning Comment [12]: The existing text, unchanged by the Sudler subcommittee, says that advances of unearned fees — deposits, that is — are "those funds the client pays for specified legal services." But why must the services be "specified"; may I not enter into a "general retainer" with a client where I promise to be on call to deal with whatever legal issues she sends my way — without specification — and to do that work on an hourly rate, while she agrees to maintain with me, in my COLTAF account, $1,000 against which I may draw my payment for whatever she does send my way? And, why does it use the fancy language "as the lawyer performs specified legal services or confers benefits" rather than simply say "as the lawyer earns the fees"?

Further, that third sentence of existing Comment [12] goes on to say that the specified legal services or conferred benefits that entitle the lawyer to draw from the deposit must have been "provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b) or (h)." In my example, I don't have a written statement of the basis or rate of the fee with my client because I just happened to be grandfathered in within the meaning of Rule 1.5(b), for I have "regularly represented the client" from time immemorial. How do I draw from that deposit in the absence of any written statement — a written statement that happens not to be required by Rule 1.5(b) in my case?

. . . .

But why can't Comment [12] simply read—

> [12] Advances of unearned fees are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be drawn from the trust account only as the lawyer earns the fees. Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

In response to van Westrum's actual remarks to the Committee, a member said that Comment [13] was purposely geared toward engagement under an hourly fee arrangement and was structured to permit the lawyer to withdraw funds from the advanced fee deposit as hours of service were accrued. Other members disputed whether flat fees were to be covered by Comment [13] or by Comment [14].

A member suggested that, while there were inconsistencies in the proposed flat-fee comments to Rule 1.5, those could be corrected by the Committee by further revision at a subsequent time; this member was opposed, however, to undertaking a general revision of the comments now; he would not "go for the perfect" and thereby delay adoption of a rule governing flat fee agreements.

Another member echoed Sudler's comment that flat fees have been a particular concern in Colorado since the *Sather* opinion; The Colorado Supreme Court "spent a lot of time" on the flat fee situation in *Sather*, and the existing comments needed to be regarded in the context of *Sather*. The member's recollection was that the existing comments were adopted before this Committee became a participant in the drafting of comments; in that recollection, the comments now under scrutiny were the creation of the Court in the light of *Sather*, and this Committee should not be altering them.

Other members questioned that recollection, remembering that the Committee — and its predecessor that developed the Colorado Rules of Professional Conduct as adopted in 2003 from the American Bar Association's model rules — had been involved in the writing of the comments to Rule 1.5 that are now under consideration in the flat fee context. One member thought that the comments have "not been perfect for a long time" and that the Committee might now ask the subcommittee to take a broader look at all of those comments. But she acknowledged the concern that provisions dealing specifically with flat fees were needed now and should not be delayed while a more complete review of all of the comments to Rule 1.5 was undertaken.

Van Westrum responded by pointing out that lawyers who now undertook to apply these new, provisions to their flat fee arrangements would not be thinking about the precedential *Sather* case and its overlay as the Committee was discussing at this meeting. Accordingly, the Committee should be proposing a flat fee rule and comments that were self-explanatory and available for application by lawyers unfamiliar with the *Sather* history. Van Westrum gave as an example the simple matter of a $10,000 retainer: The lawyer performs some work, sends a bill for $7,000, and takes payment for that work out of the retainer. Van Westrum did not think the proposed comments covered that situation.

To that, the Chair responded with a Yiddish word with which the Secretary was not familiar; she translated it, if the Secretary remembers correctly, as "big and confusing."

The member who had first responded to van Westrum's comments by urging the Committee to not let the perfect delay the good repeated his request that the Committee proceed now to propose to the Court the Sudler subcommittee's provisions for both rule and comment, with its form of agreement, and return to further work on the comments at a later time.

The straw poll taken by the Chair showed that a majority of the members chose to go forward now with the form flat fee agreement and with some version of proposed comments, with refinement of the comments to come at a later time. To a member's inquiry about how often questions about flat fee agreements might arise, many other members answered that such questions arise often.

A member suggested that the Committee delay a fuller review of the comments until it has proposals for additional comment text from Rothrock's contingent fee subcommittee — the Committee could then deal with comments that covered both flat fee and contingent fee arrangements. For the present, this member would respond to van Westrum's concerns about Comments [13] and [14] by moving the first sentence of Comment [13] to Comment [14] and changing the initial word "Alternative" that begins what would become the second sentence of Comment [14] to "For example." As modified, Comments [12], [13], and [14] would read—

> [12] Advances of unearned fees, including advances of all or a portion of a flat fee are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.S(b) or (h). See also Restatement (Third) of the Law Governing Lawyers§§ 34, 38 (1998). Rule 1.S(t) does not prevent a lawyer from entering into these types of arrangements.
>
> [13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.
>
> [14] A lawyer and client may agree that a flat fee or a portion of a flat fee is earned in various ways. For example, the lawyer and client may agree to an advanced flat fee that will be earned in whole or in part . . . .

And the member formally moved that, with those changes, the Committee submit the Sudler subcommittee's product to the Court.

There followed some proposals for minor modifications that were not generally accepted; and the motion described above was then adopted, followed by a round of applause for the service performed by Sudler and his subcommittee.

The Chair asked for the Committee's guidance about whether, as she submitted the flat fee changes to the Court, she should note that the Committee intended to turn to specific rules for contingent fee arrangements and might, in that context, propose further changes to the comments that the Committee was now submitting to the Court to deal with flat fee arrangements. The consensus of the members was that she should so advise the Court but that she should add that the Committee wished that the Court would not delay adoption of these current changes, as now submitted to the Court, until it later received the Committee's proposal for contingent fees.

Prompted by a member's question about how the client who is asked to sign the form of flat fee agreement might be provided with the content of Rule 1.16 that is cited in that form, the members again discussed the technical merits and limitations of hyperlinking and footnoting and found no satisfactory method by which that might be done. In particular, the suggestion that the text of Rule 1.16 be appended to the form was rejected as being impracticable because of the sheer length of the rule; it would not be read at the time the agreement was entered into.

Further, as another member noted, adding a requirement that the text of Rule 1.16, or a method such as a hyperlink by which that text might be obtained by the client, must be given to the client as a part of the flat fee agreement would undoubtedly create compliance questions in practice. That member pointed out that Rule 1.16 does not impose limitations on the client's ability to terminate the engagement, so it is not important that the client be aware of the Rule's requirements that are imposed on the lawyer who seeks to terminate an engagement prior to its completion.

The members agreed that nothing further need be said in the flat fee provisions or form of agreement regarding Rule 1.16.

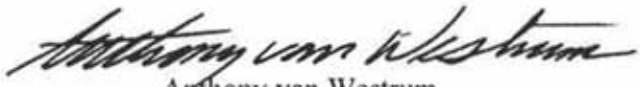
VI. *Departures from the Committee.*

The Chair noted to the Committee, with regret, the resignations of two of its members, Judge Federico C. Alvarez and James C. Coyle, the former Colorado Attorney Regulation counsel.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:20 a.m. The next scheduled meeting of the Committee will be on Friday, October 19, 2006, beginning at 9:00 a.m., in the Supreme Court Conference Room unless otherwise announced.

RESPECTFULLY SUBMITTED,



Anthony van Westrum

[*These submitted minutes have not yet been approved by the Committee.*]

**For More information Contact:**
**Barbara S. Gillers, Chair, SCEPR, Barbara.Gillers@nyu.edu , 917-679-5757**
**Lucian Pera, Chair CPR Coordinating Counsel, Lucian.Pera@arlaw.com, 901-606-4948**
**Hon. Daniel J. Crothers, DCrothers@ndcourts.gov, 701-527-2821**
**Lynda Shely, Lynda@ShelyLaw.com, 602-432-2721**
**Dennis Rendleman, Ethics Counsel, Dennis.Rendleman@ americanbar.org, 312-988-5307**

# Summary of HOD Resolution and Report 101 – Proposals to Amend Model Rules 7.1 through 7.5 (the Advertising Rules)

## Introduction

The Standing Committee on Ethics and Professional Responsibility (SCEPR) has filed Resolution and Report 101 with the House of Delegates. Resolution 101 proposes amendments to Model Rules 7.1 through 7.5, known as the "advertising rules."

Resolution 101 will bring the advertising rules into the 21st Century by (i) eliminating unnecessary and burdensome regulations that inhibit lawyers from effectively competing in national and international legal markets, (ii) continuing to protect the public from false, misleading, and harassing conduct, (iii) focusing the resources of regulators on truly harmful behavior, and (iv) enabling lawyers to use advanced technology to offer their services to clients. As amended, the advertising rules will provide up-to-date models that will encourage uniformity, which will benefit lawyers and clients nationwide. Resolution 101 is the product of over three years of study by professional responsibility groups, public hearings on various proposals at two ABA midyear meetings, and extensive input from ABA entities.

## Summary

Resolution 101 combines the current five rules on lawyer advertising into three: (i) Rule 7.1, which broadly addresses communications concerning a lawyer's services, sets forth the overarching prohibition on false and misleading communications; (ii) Rule 7.2, which contains specific provisions concerning communications; and, (iii) Rule 7.3, which addresses solicitation.

Current Rules 7.4 and 7.5 are deleted but their key provisions, which provide examples of misleading communications, are subsumed into amended Rules 7.1 and 7.2 and their Comments. A few details follow.

### Rule 7.1: Communications Concerning a Lawyer's Services

Rule 7.1 contains the general prohibition that lawyer advertising must not be false or misleading. The black letter of this rule remains unchanged. The Comments have been adjusted to offer additional guidance, and to incorporate the provisions of current Rules 7.4 and 7.5. Current Comment [4], which prohibits communications that state or imply an ability to influence government entities or officials, is deleted. The conduct is addressed in current Rule 8.4(e). The key provisions drawn from current Rule 7.5, addressing firm names, are moved to Comments [6] through [9] of amended Rule 7.1.

### Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules

The salient new provisions in this Rule and its Comments concern (i) permitting nominal gifts, (ii) "certified specialists" (drawn from current Rule 7.4), (iii) "recommendations," and (iv) "contact information."

The general prohibition on payments for recommendations is retained, but new paragraph (b)(5) authorizes nominal gifts that are neither intended for, nor reasonably expected to be, compensation for a recommendation. New Comment [4] makes clear that such gifts must be minimal --- the type of gift that

**For More information Contact:**
**Barbara S. Gillers, Chair, SCEPR, Barbara.Gillers@nyu.edu , 917-679-5757**
**Lucian Pera, Chair CPR Coordinating Counsel, Lucian.Pera@arlaw.com, 901-606-4948**
**Hon. Daniel J. Crothers, DCrothers@ndcourts.gov, 701-527-2821**
**Lynda Shely, Lynda@ShelyLaw.com, 602-432-2721**
**Dennis Rendleman, Ethics Counsel, Dennis.Rendleman@ americanbar.org, 312-988-5307**

is given at holidays --- or as "ordinary social hospitality," as the term is used in Rule 3.13(B)(3) of the ABA Model Code of Judicial Conduct.

Requirements on "certified specialists" are moved from current Rule 7.4 into amended Rule 7.2(c), with additional guidance placed in Comments [9], [10], and [11].

New language in Comment [2] makes clear that the term "recommendations" does not include directories or other group advertising where lawyers are merely listed by practice area.

Revised paragraph (d) requires that all communications include some "contact information" (instead of just a street address) for the lawyer or law firm responsible for the advertisement.

Principal deletions are: Current Comment [1], which contains outdated language, and current Comment [3], which addresses "effectiveness" and "taste." Both are unnecessary and duplicative.

**Rule 7.3: Solicitation of Clients**

Rule 7.3 continues to prohibit solicitation (i) that involves coercion, duress, or harassment, or (ii) when the target of the solicitation makes known to the lawyer that the solicitation is unwelcome. The Rule also continues to restrict most in-person solicitation.

New Rule 7.3(a) defines solicitation as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knowns 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."

Amended Rule 7.3(b) prohibits live person-to-person solicitation for pecuniary gain unless the person contacted is (i) a lawyer, (ii) a person with a family, close personal or prior business or professional relationship to the soliciting lawyer, or (iii) is known to be "an experienced user" of legal services in business matters. Comment [2] offers guidance on the prohibition against "live person-to-person" solicitation, explaining that such contact is "fraught with the possibility of undue influence, intimidation, and over-reaching." New Rule 7.2(d) and new Comment [8] make clear that the prohibition on live person-to-person solicitation does not apply to communications authorized by law or ordered by a court or other tribunal.

Finally, the requirement in current rule 7.3(c) that written, recorded or electronic solicitations be labelled as "advertising" is eliminated (and the related current Comment [8] is deleted). After extensive input from many stakeholders, SCEPR concluded that the labelling requirement is not necessary to protect consumers in this day and age. The rules of Massachusetts, Maine, and the District of Columbia contain no such labeling requirement.

**REVISED 101**

**AMERICAN BAR ASSOCIATION**

**STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

RESOLVED, That the American Bar Association amends Rules 7.1 through 7.5 and Comments of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

**REVISED 101**

# Rules 7.1 through 7.5 and Comments of the ABA Model Rules of Professional Conduct (August 2018)

## 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~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] ~~Truthful statements that are~~ Mmisleading truthful statements 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 exists 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 is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

~~[3] It 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).~~

[3]~~[4]~~ ~~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~~ those 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.

[4][5] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence ~~improperly~~ a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5][6] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. 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.

[6][7] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7][8] 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.

[8][9] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or 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~~ A lawyer may ~~advertise~~ communicate information regarding the lawyer's services through ~~written, recorded or electronic communication, including public~~ any media.**

**(b) A lawyer shall not compensate, give or promise anything of value to a person ~~who is not an employee or lawyer in the same law firm~~ for 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 as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) 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 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.

(d) Any communication made under ~~pursuant to~~ this Rule must ~~shall~~ include the name and ~~office address~~ contact information of at least one lawyer or law firm responsible for its content.

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.

~~[3] 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.~~

**Paying Others to Recommend a Lawyer**

[2] ~~[5]~~ Except as permitted under paragraphs (b)(1)-(b)~~(4)~~(5), lawyers are not permitted to pay others for recommending the lawyer's services. ~~or for channeling professional work in a manner that violates Rule 7.3.~~ A communication contains a recommendation 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, television and radio station employees or spokespersons and website designers.

~~[4] Paragraph (b)(5) 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.~~

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item 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~~ 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 legal problems when determining which lawyer should receive the referral. See Comment [2] (definition 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 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 lawyer referral service 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 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] 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.

**Communications about Fields of Practice**

[9] Paragraph (a) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. 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.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. 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.

[11] 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 authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the 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 ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure 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.

**Required Contact Information**

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

**Model Rule 7.3: Solicitation of Clients**

**(a) "Solicitation" or "solicit" denotes 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.**

**~~(a)~~ (b) 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 with a:**

**(1) ~~is a~~ lawyer; ~~or~~**

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

**(3) person who routinely uses for business purposes the type of legal services offered by the lawyer ~~is known by the lawyer to be an experienced user of the type of legal services involved for business matters~~.**

~~(b)~~(c) 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:

(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).~~

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

~~(d)~~(e) 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~~ live person-to-person 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 (b) 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. 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 electronic ~~Internet~~ searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications ~~such as Skype or FaceTime~~, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. ~~There is a~~ 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~~ This 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] ~~This~~ 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 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, ~~or~~ 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 to ~~be an experienced user of~~ routinely use the type of legal services involved for business purposes. ~~For instance, an "experienced user" of legal services for business matters may include those who hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who hire lawyers for lease or contract issues; and other people who~~

~~retain lawyers for business transactions or formations.~~ Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who regularly routinely hire lawyers for lease or contract issues; and other people who routinely regularly retain lawyers for business transactions or formations. ~~Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also,~~ 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~~ A solicitation that ~~which~~ contains false or misleading information ~~which is false or misleading~~ within the meaning of Rule 7.1, that ~~which~~ involves coercion, duress or harassment within the meaning of Rule 7.3~~(b)~~(c)(2), or that ~~which~~ involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3~~(b)~~(c)(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).~~ Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule ~~is~~ does not ~~intended to~~ prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. 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 spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

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

[9] Paragraph ~~(d)~~ (e) 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)~~(e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the ~~in-person or telephone~~ person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations ~~also~~ must not be directed to a person known to need legal services in a particular matter, but ~~is to~~ must 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)~~(c). ~~See 8.4(a).~~

**Rule 7.4 ~~Communication of Fields of Practice and Specialization~~ (Deleted in 2018.)**

**~~(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.~~**

**~~(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 authority 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 is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.~~

~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) 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 state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~

**Rule 7.5 ~~Firm Names And Letterheads~~ (Deleted in 2018.)**

~~(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~~**

**REVISED 101**

~~[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.~~

**REVISED 101**

# REPORT

# LAWYER ADVERTISING RULES FOR THE 21st CENTURY

## I. Introduction

The American Bar Association is the leader in promulgating rules for regulating the professional conduct of lawyers. For decades, American jurisdictions have adopted provisions consistent with the Model Rules of Professional Conduct, relying on the ABA's expertise, knowledge, and guidance. In lawyer advertising, however, a dizzying number of state variations exist. This breathtaking variety makes compliance by lawyers who seek to represent clients in multiple jurisdictions unnecessarily complex, and burdens bar regulators with enforcing prohibitions on practices that are not truly harmful to the public.[1] This patchwork of advertising rules runs counter to three trends that call for simplicity and uniformity in the regulation of lawyer advertising.

First, lawyers in the 21st century increasingly practice across state and international borders. Clients often need services in multiple jurisdictions. Competition from inside and outside the profession in these expanded markets is fierce. The current web of complex, contradictory, and detailed advertising rules impedes lawyers' efforts to expand their practices and thwart clients' interests in securing the services they need. The proposed rules will free lawyers and clients from these constraints without compromising client protection.

Second, the use of social media and the Internet—including blogging, instant messaging, and more—is ubiquitous now.[2] Advancing technologies can make lawyer advertising easy, inexpensive, and effective for connecting lawyers and clients. Lawyers can use innovative methods to inform the public about the availability of legal services. Clients can use the new technologies to find lawyers. The proposed amendments will facilitate these connections between lawyers and clients, without compromising protection of the public.

Finally, trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal

---

[1] Center for Professional Responsibility Jurisdictional Rules Comparison Charts, *available at*: https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html.

[2] *See* Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereinafter APRL 2015 Report], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf at 18-19 ("According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet: 52% of online adults now use two or more social media sites; 71% are on Facebook; 70% engage in daily use; 56% of all online adults 65 and older use Facebook; 23% use Twitter; 26% use Instagram; 49% engage in daily use; 53% of online young adults (18-29) use Instagram; and 28% use LinkedIn.").

services may be unlawful. The Supreme Court announced almost forty years ago that lawyer advertising is commercial speech protected by the First Amendment. Advertising that is false, misleading and deceptive may be restricted, but many other limitations have been struck down.[3]

Antitrust law may also be a concern. For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where the FTC believed it would, for example, restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services.[4]

The Standing Committee on Ethics and Professional Responsibility (SCEPR) is proposing amendments to ABA Model Rules 7.1 – 7.5 that respond to these trends. It is hoped the U.S. jurisdictions will follow the ABA's lead to eliminate compliance confusion and promote consistency in lawyer advertising rules. As amended, the rules will provide lawyers and regulators nationwide with models that continue to protect clients from false and misleading advertising, but free lawyers to use expanding and innovative technologies to communicate the availability of legal services and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

## II. Brief Summary of the Changes

The principal amendments:

- Combine provisions on false and misleading communications into Rule 7.1 and its Comments.
- Consolidate specific provisions on advertising into Rule 7.2, including requirements for use of the term "certified specialist".

---

[3] For developments in First Amendment law on lawyer advertising, see APRL June 2015 Report, *supra* note 2, at 7-18.

[4] The recent decision in *North Carolina State Board of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015) may be a warning. The Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anti-competitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that a controlling number of the board members were "active market participants" (i.e., dentists), and there was no state entity supervision of the decisions of the non-sovereign board. Many lawyer regulatory entities are monitoring the application of this precedent as the same analysis might be applicable to lawyers. *See also*, ABA Center for Professional Responsibility, *FTC Letters Regarding Lawyer Advertising* (2015), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html.

- Permit nominal "thank you" gifts under certain conditions as an exception to the general prohibition against paying for recommendations.
- Define solicitation 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."
- Prohibit live, person-to-person solicitation for pecuniary gain with certain exceptions.
- Eliminate the labeling requirement for targeted mailings but continue to prohibit targeted mailings that are misleading, involve coercion, duress or harassment, or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited.

## III. Discussion of the Proposed Amendments

### A. Rule 7.1: Communications Concerning a Lawyer's Services

Rule 7.1 remains unchanged; however, additional guidance is inserted in Comment [2] to explain that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required. ~~New Comment [3] provides that communications that contain information about a lawyer's fee must also include information about the client's responsibility for costs to avoid being labeled as a misleading communication.~~

In Comment ~~[4]~~[3], SCEPR recommends replacing "advertising" with "communication" to make the Comment consistent with the title and scope of the Rule. SCEPR expands the guidance in Comment [4] by explaining that an "unsubstantiated claim" may also be misleading. SCEPR also recommends in Comment [5] that lawyers review Rule 8.4(c) for additional guidance.

Comments ~~[6]~~[5] through ~~[9]~~[8] have been added by incorporating the black letter concepts from current Rule 7.5. Current Rule 7.5(a) restates and incorporates Rule 7.1, and then provides examples of misleading statements. SCEPR has concluded that Rule 7.1, with the guidance of new Comments [6] through [9], better addresses the issues.

### B. Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules

Specific Advertising Rules: Specific rules for advertising are consolidated in Rule 7.2, similar to the current structure of Rule 1.8, which provides for specific conflict situations.

SCEPR recommends amendments to Rule 7.2(a) parallel to its recommendations for changes to Comments to Rule 7.1, specifically replacing the term "advertising" with "communication" and replacing the identification of specific methods of communication with a general statement that any media may be used.

Gifts for Recommendations: Rule 7.2(b) continues the existing prohibition against giving "anything of value" to someone for recommending a lawyer. New subparagraph (b)(5), however, contains an exception to the general prohibition. This subparagraph permits lawyers to give a nominal gift to thank the person who recommended the lawyer to the client. The new provision states that such a nominal gift is permissible only where it is not expected or received as payment for the recommendation. The new words "compensate" and "promise" emphasize these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e. not "compensation."

~~SCEPR's amendments to Rule 7.2(b) allow lawyers to give something "of value" to employees or lawyers in the same firm. As to lawyers, this new language in Rule 7.2(b) simply reflects the common and legitimate practice of rewarding lawyers in the same firm for generating business. This is not a change; it is a clarification of existing rules. As to employees,~~ SCEPR has concluded that lawyers ought to be permitted to give nominal gifts to non-lawyers, e.g. paralegals who may refer friends or family members to a firm, marketing personnel and others. Rule 5.4 continues to protect against any improper fee sharing. Rule 7.3 protects against solicitation by, for example, so-called "runners," which are also prohibited by other rules, e.g. Rule 8.4(a).

SCEPR recommends deleting the second sentence Rule 7.2(b)(2) because it is redundant. Comment [6] has the same language.

Specialization: Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and Comments. SCEPR acknowledges suggestions offered by the Standing Committee on Specialization, which shaped revisions to Rule 7.4. Based on these and other recommendations, the prohibition against claiming certification as a specialist is moved to new subdivision (c) of Rule 7.2 as a specific requirement. Amendments also clarify which entities qualify to certify or accredit lawyers. The remaining provisions of Rule 7.4 are moved to Comments [9] through [11] of Rule 7.2. Finally, Comment [9] adds guidance on the circumstances under which a lawyer might properly claim specialization by adding the phrase "based on the lawyer's experience, specialized training or education."

Contact Information: In provision 7.2(d) [formerly subdivision (c)] the term "office address" is changed to "contact information" to address technological advances on how a lawyer may be contacted and how advertising information may be presented. Examples of contact information are added in new Comment [12]. All "communications" about a lawyer's services must include the firm name (or lawyer's name) and some contact information (street address, telephone number, email, or website address).

Changes to the Comments: Statements in Comments [1] and [3] justifying lawyer advertising are deleted. Advertising is constitutionally protected speech and needs no additional justification. These Comments provide no additional guidance to lawyers.

New Comment [2] explains that the term "recommendations" does not include directories or other group advertising in which lawyers are listed by practice area.

New language in Comment [3] clarifies that lawyers who advertise on television and radio may compensate "station employees or spokespersons" as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with advertising that are listed in the Comment, i.e. "employees, agents and vendors who are engaged to provide marketing or client development services."

New Comment [4] explains what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive recommendations or to make future recommendations. These small and token gifts are not likely to result in the harms addressed by the rule: that recommendation sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more recommendations for which they might be paid.

Comment [6] continues to address lawyer referral services, which remain limited to qualified entities approved by an appropriate regulatory authority. Description of the ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous.

The last sentence in Comment [7] is deleted because it is identical to the second sentence in Comment [7] ("Legal services plans and lawyer referral services may communicate with the public, *but such communication must be in conformity with these Rules.*") (Emphasis added.).

### C. Rule 7.3: Solicitation of Clients

The black letter of the current Rules does not define "solicitation;" the definition is contained in Comment [1]. For clarity, a definition is added as new paragraph (a). The definition of solicitation is adapted from Virginia's definition. A solicitation is:

> 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.

Paragraph (b) continues to prohibit direct, in-person solicitation for pecuniary gain, but clarifies that the prohibition applies solely to live person-to-person contact. Comment

[2] provides examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication ~~such as Skype or FaceTime or other face-to-face communications~~. Language added to Comment [2] clarifies that a prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

The Rule no longer prohibits real-time electronic solicitation because real-time electronic communication includes texts and Tweets. These forms of communication are more like a written communication, which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter.

Exceptions to live person-to-person solicitation are slightly broadened in Rule 7.3(b)(2). Persons with whom a lawyer has a business relationship—in addition to or separate from a professional relationship—may be solicited because the potential for overreaching by the lawyer is reduced.

Exceptions to prohibited live person-to-person solicitation are slightly broadened in Rule 7.3(b)(3) to include "person who routinely uses for business purposes the type of legal services offered by the lawyer." ~~"experienced users of the type of legal services involved for business matters."~~ Similarly, Comment [5] to Rule 7.3 is amended to explain that the potential for overreaching, which justifies the prohibition against in-person solicitation, is unlikely to occur when the solicitation is directed toward experienced users of the legal services in a business matter.

The amendments retain Rule 7.3(c)(1) and (2), which prohibit solicitation of any kind when a target has made known his or her desire not to be solicited, or the solicitation involves coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations. Comment [6] identifies examples of persons who may be most vulnerable to coercion or duress, such as the elderly, those whose first language is not English, or the disabled.

After much discussion, SCEPR is recommending deletion of the requirement that targeted written solicitations be marked as "advertising material." Agreeing with the recommendation of the Standing Committee on Professionalism and the Standing Committee on Professional Discipline's suggestion to review both Oregon's rules and Washington State's proposed rules, which do not require such labeling, SCEPR has concluded that the requirement is no longer necessary to protect the public. Consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers due to the nature of the communications. SCEPR was presented with no evidence that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers. If the solicitation itself or its contents are

misleading, that harm can and will be addressed by Rule 7.1's prohibition against false and misleading advertising.

The statement that the rules do not prohibit communications about legal services authorized by law or by court order is moved from Comment [4] of Rule 7.2 to new paragraph (d) of Rule 7.3.

Amendments were made to Rule 7.3(e) to make the prohibition language consistent with the solicitation prohibition and to reflect the reality that prepaid and group legal service plans enroll members and sell subscriptions to wide range of groups. They do not engage in solicitation as defined by the Rules.

New Comment [8] to Rule 7.3 adds class action notices as an example of a communication that is authorized by law or court order.

## IV. SCEPR's Process and Timetable

The amendments were developed during two years of intensive study by SCEPR, after SCEPR received a proposal from the Association of Professional Responsibility Lawyers (APRL) in 2016.[5] Throughout, SCEPR's process has been transparent, open, and welcoming of comments, suggestions, revisions, and discussion from all quarters of the ABA and the profession. SCEPR's work included the formation of a broad-based working group, posting drafts for comment on the website of the Center for Professional Responsibility, holding public forums at the Midyear Meetings in February 2017 and February 2018, conducting a webinar in March 2018, and engaging in extensive outreach seeking participation and feedback from ABA and state entities and individuals.[6]

### A. Development of Proposals by the Association of Professional Responsibility Lawyers (APRL) – 2013 - 2016

In 2013, APRL created a Regulation of Lawyer Advertising Committee to analyze and study lawyer advertising rules. That committee studied the ABA Model Rules and various state approaches to regulating lawyer advertising and made recommendations aimed at bringing rationality and uniformity to the regulation of lawyer advertising and disciplinary enforcement. APRL's committee consisted of former and current bar regulators, law school professors, authors of treatises on the law of lawyering, and lawyer-experts in the field of professional responsibility and legal ethics. Liaisons to the

---

[5] APRL's April 26, 2016 Supplemental Report can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.authcheckdam.pdf.

[6] Written comments were received through the CPR website. SCEPR studied them all. Those comments are available here: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

committee from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel ("NOBC") provided valuable advice and comments.

The APRL committee obtained, with NOBC's assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules. That committee received survey responses from 34 of 51 U.S. jurisdictions.

APRL's 2014 survey of U.S. lawyer regulatory authorities showed:

- Complaints about lawyer advertising are rare;
- People who complain about lawyer advertising are predominantly other lawyers and not consumers;
- Most complaints are handled informally, even where there is a provable advertising rule violation;
- Few states engage in active monitoring of lawyer advertisements; and
- Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c).

APRL issued reports in June 2015 and April 2016[7] proposing amendments to Rules 7.1 through 7.5 to streamline the regulations while maintaining the enforceable standard of prohibiting false and misleading communications.

In September 2016 APRL requested that SCEPR consider its proposals for amendments to the Model Rules.

### B. ABA Public Forum – February 2017

On February 3, 2017 SCEPR hosted a public forum at the ABA 2017 Midyear Meeting to receive comments about the APRL proposals. More than a dozen speakers testified, and written comments were collected from almost 20 groups and individuals.[8]

### C. Working Group Meetings and Reports – 2017

In January 2017, SCEPR's then chair Myles Lynk appointed a working group to review the APRL proposals. The working group, chaired by SCEPR member Wendy Wen Yun Chang, included representatives from Center for Professional Responsibility ("CPR") committees: Client Protection, Ethics and Professional Responsibility, Professional Discipline, Professionalism, and Specialization. Liaisons from the National Conference of

---

[7] Links to both APRL reports are available at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html.

[8] Written submissions to SCEPR are available at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

Bar Presidents, the ABA Solo, Small Firm and General Practice Division, NOBC, and APRL were also appointed.

Chang provided SCEPR with two memoranda summarizing the various suggestions received for each advertising rule and, where applicable, identified recommendations from the working group.

### D. SCEPR December 2017 Draft

After reviewing the Chang memoranda and other materials SCEPR drafted proposed amendments to Model Rules 7.1 through 7.5, and Model Rule 1.0 (terminology), which were presented to all ABA CPR Committees at the October 2017 Leadership Conference. SCEPR then further modified the proposed changes to the advertising rules based in part on the suggestions and comments of CPR Committees. In December 2017, SCEPR released for comment and circulated to ABA entities and outside groups a new Working Draft of proposed amendments to Model Rules 7.1-7.5.

### E. ABA Public Forum – February 2018

In February 2018, the SCEPR hosted another public forum at the 2018 Midyear Meeting, to receive comments about the revised proposals.[9] The proposed amendments were also posted on the ABA CPR website and circulated to state bar representatives, NOBC, and APRL. Thirteen speakers appeared. Twenty-seven written comments were submitted. SCEPR carefully considered all comments and further modified its proposals.[10]

On March 28, 2018, SCEPR presented a free webinar to introduce and explain the Committee's revised recommendations. More than 100 people registered for the forum, and many favorable comments were received.[11]

---

[9] Speakers included George Clark, President of APRL; Mark Tuft, Chair, APRL Subcommittee on Advertising; Charlie Garcia and Will Hornsby, ABA Division for Legal Services; Bruce Johnson; Arthur Lachman; Karen Gould, Executive Director of the Virginia State Bar; Dan Lear, AVVO; Matthew Driggs; and Elijah Marchbanks.

[10] All Comments can be found here: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html. The full transcript of the Public Forum can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/public_hearing_transcript_complete.authcheckdam.pdf.

[11] An MP3 recording of the webinar can be accessed here: https://www.americanbar.org/content/dam/aba/multimedia/professional_responsibility/advertising_rules_webinar.authcheckdam.mp3. A PowerPoint of the webinar is also available: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/webinar_advertising_powerpoint.authcheckdam.pdf.

## V. The Background and History of Lawyer Advertising Rules Demonstrates Why the Proposed Rules are Timely and Necessary

### A. 1908 – A Key Year in the Regulation of Lawyer Advertising

Prior to the ABA's adoption of the Canons of Professional Ethics in 1908, legal advertising was virtually unregulated. The 1908 Canons changed this landscape; the Canons contained a total ban on attorney advertising. This prohibition stemmed partially from an explosion in the size of the legal profession that resulted in aggressive attorney advertising, which was thought to diminish ethical standards and undermine the public's perception of lawyers.[12] This ban on attorney advertising remained for approximately six decades, until the Supreme Court's decision in 1977 in *Bates v. Arizona*.[13]

### B. Attorney Advertising in the 20th Century

*Bates* established that lawyer advertising is commercial speech and entitled to First Amendment protection. But the Court also said that a state could prohibit false, deceptive, or misleading ads, and that other regulation may be permissible.

Three years later, in *Central Hudson,*[14] the Supreme Court explained that regulations on commercial speech must "directly advance the [legitimate] state interest involved" and "[i]f the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive."[15]

In the years that followed, the Supreme Court applied the *Central Hudson* test to strike down a number of regulations on attorney-advertising.[16] The Court reviewed issues such as the failure to adhere to a state "laundry list" of permitted content in direct mail advertisements,[17] a newspaper advertisement's use of a picture of a Dalkon Shield intrauterine device in a state that prohibited all illustrations,[18] and an attorney's letterhead that included his board certification in violation of prohibition against referencing expertise.[19] The court's decisions in these cases reinforced the holding in *Bates*: a state may not constitutionally prohibit commercial speech unless the regulation advances a

---

[12] Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 549 (1982). Mylene Brooks, *Lawyer Advertising: Is There Really A Problem*, 15 LOY. L.A. ENT. L. REV. 1, 6-9 (1994). *See also* APRL 2015 Report, *supra* note 2.

[13] *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[14] *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y.*, 447 U.S. 557 (1980).

[15] 447 U.S. at 564.

[16] *See* APRL 2015 Report, *supra* note 2, at 9-18, for a discussion of these cases.

[17] *In re* R.M.J., 455 U.S. 191, 197 (1982).

[18] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

[19] *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 93-94 (1990).

substantial state interest, and no less restrictive means exists to accomplish the state's goal.[20]

### C. Solicitation

Unlike advertising, in-person solicitation is subject to heightened scrutiny. In *Ohralik v. Ohio State Bar Ass'n,* the Supreme Court upheld an Ohio regulation prohibiting lawyers from in-person solicitation for pecuniary gain. The Court declared: "[T]he State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in-person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."[21] The Court added: "It hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person."[22] The Court concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.[23]

*Ohralik's* blanket prohibition on in-person solicitation does not extend to targeted letters. The U.S. Supreme Court held in *Shapero v. Kentucky Bar Ass'n*,[24] that a state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. The Court concluded that targeted letters were comparable to print advertising, which can easily be ignored or discarded.

### D. Commercial Speech in the Digital Age

The *Bates*-era cases preceded the advent of the Internet and social media, which have revolutionized attorney advertising and client solicitation. Attorneys are posting, blogging, and Tweeting at minimal cost. Their presence on websites, Facebook, LinkedIn, Twitter, and blogs increases exponentially each year. Attorneys are reaching out to a public that has also become social media savvy.

---

[20] *In re R.M.J.*, 455 U.S. 191, 197 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 93-94 (1990).

[21] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978).

[22] *Id.* at 464–65.

[23] *Id.* at 465-467.

[24] 486 U.S. 466 (1988). *But see, Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The Supreme Court has upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days. The court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day "cooling off" period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing. *But see, Ficker v. Curran,* 119 F.3d 1150 (4th Cir. 1997), in which Maryland's 30-day ban on direct mail in traffic and criminal defense cases was found unconstitutional, distinguishing *Went for It*, because criminal and traffic defendants need legal representation, time is of the essence, privacy concerns are different, and criminal defendants enjoy a 6th amendment right to counsel.

More recent cases, while relying on the commercial speech doctrine, exemplify digital age facts. A 2010 case involves a law firm's challenge to New York's 2006 revised advertising rules, which prohibited the use of "the irrelevant attention-getting techniques unrelated to attorney competence, such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and... the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter."[25] The U.S. Court of Appeals for the Second Circuit found New York's regulation to be unconstitutional as a categorical ban on commercial speech. The speech was not likely to be misleading.[26] The court noted that prohibiting *potentially misleading* commercial speech might fail the *Central Hudson* test.[27] The court concluded that even assuming that New York could justify its regulations under the first three prongs of the *Central Hudson* test, an absolute prohibition generally fails the prong requiring that the regulation be narrowly fashioned.[28]

In 2011, the Fifth Circuit reached a similar conclusion, ruling that many of Louisiana's 2009 revised attorney advertising regulations contained absolute prohibitions on commercial speech, rendering the regulations unconstitutional due to a failure to comply with the least restrictive means test in *Central Hudson*.[29] The Fifth Circuit applied the *Central Hudson* test to attorney advertising regulations.[30] Although paying homage to a state's substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied

---

[25] *Alexander v. Cahill,* 598 F.3d 79, 84-86 (2d Cir. 2010). The court commented, "Moreover, the sorts of gimmicks that this rule appears designed to reach—such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as a matter of 'common sense'—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve 'important communicative functions: [they] attract [ ] the attention of the audience to the advertiser's message, and [they] may also serve to impart information directly.'" (Citations omitted.).

[26] *Alexander v. Cahill,* 598 F.3d 79, at 96.

[27] *Id.*

[28] *Id.* Note that the court did uphold the moratorium provisions that prevent lawyers from contacting accident victims for a certain period of time.

[29] *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.,* 632 F.3d 212, 229 (5th Cir. 2011). Note that the court did uphold the regulations that prohibited promising results, that prohibited use of monikers or trade names that implied a promise of success, and that required disclaimers on advertisements that portrayed scenes that were not actual or portrayed clients who were not actual clients. The court distinguished its holding from New York's in *Cahill* by indicating that the Bar had produced evidence in the form of survey results that supported the requirement that the regulation materially advanced the government's interest in protecting the public.

[30] *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.,* 632 F.3d 212 (5th Cir. 2011).

on the Supreme Court's decision in *Zauderer* to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.[31]

> [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.[32]

Florida also revised its attorney advertising rules in light of the digital age evolution of attorney advertising and the commercial speech doctrine. Nonetheless, some of Florida's rules and related guidelines have failed constitutional challenges. For example, in *Rubenstein v. Florida Bar* the Eleventh Circuit declared Florida Bar's prohibition on advertising of past results to be unconstitutional because the guidelines prohibited any such advertising on indoor and outdoor displays, television, or radio.[33] The state's underlying regulatory premise was that these "specific media . . . present too high a risk of being misleading." This total ban on commercial speech again did not survive constitutional scrutiny.[34]

Finally, in *Searcy v. Florida Bar,* a federal court enjoined The Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law.[35] The Searcy law firm challenged the regulation as a blanket prohibition on commercial speech, arguing board certification is not available in all areas of practice, including the firm's primary mass torts area of expertise.

## VII. Conclusion

Trends in the profession, the current needs of clients, new technology, increased competition, and the history and law of lawyer advertising all demonstrate that the current patchwork of complex and burdensome lawyer advertising rules is outdated for the 21st Century. SCEPR's proposed amendments improve Model Rules 7.1 through 7.5 by responding to these developments. Once amended, the Rules will better serve the bar and the public by expanding opportunities for lawyers to use modern technology to advertise their services, increasing the public's access to accurate information about the availability of legal services, continue the prohibition against the use of false and misleading communications, and protect the public by focusing the resources of

---

[31] *Id.* at 220.
[32] *Id.* citing *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 648 (1985).
[33] *Rubenstein v. Fla. Bar,* 72 F. Supp. 3d 1298 (S.D. Fla. 2014).
[34] *Id.* at 1312.
[35] *Searcy v. Fla. Bar,* 140 F. Supp. 3d 1290, 1299 (N.D. Fla. 2015). Summary Judgment Order available at: http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E8E7FDDE9DBB8DE385257ED5004ABB95/$FILE/Searcy%20Order%20on%20Merits.pdf?OpenElement.

regulators on truly harmful conduct. The House of Delegates should proudly adopt these amendments.

Respectfully submitted,

Barbara S. Gillers, Chair
Chair, Standing Committee on Ethics and Professional Responsibility
August, 2018

**The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.**

**REVISED 101**

## GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Barbara S. Gillers, Chair

**1. Summary of Resolution.** The SCEPR recommends amendments to Model Rules 7.1 through 7.5 and their related Comments. These amendments:

- Streamline and simplify the rules while adhering to constitutional limitations on restricting commercial speech, protecting the public, and permitting lawyers to use new technologies to inform consumers accurately and efficiently about the availability of legal services.

- Combine the provisions on false and misleading communications into Rule 7.1 and its Comments. The black letter of Rule 7.1 remains unchanged. Provisions of Rule 7.5, which largely relate to misleading communications, are moved into Comments to Rule 7.1.

- Consolidate specific rules for advertising into Rule 7.2, change "office address" to "contact information" (to accommodate technological advances) and delete unrelated or superfluous provisions. Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and its Comments. Lawyer referral services remain limited to qualified entities approved by an appropriate regulatory authority.

- Add a new subparagraph to Rule 7.2(b) as an exception to the general provision against paying for recommendations. The new provision would permit only nominal "thank you" gifts and contains other restrictions.

- Define solicitation 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." Live person-to-person solicitation is prohibited. This includes in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication ~~such as Skype or FaceTime~~.

- Broaden slightly the exceptions in Rule 7.3(b)(2) and (3) to permit live person-to-person solicitation of routine ~~"experienced~~ users of the type of legal services involved for business matters,~~"~~ and of "persons with whom a lawyer has a business relationship". Additional Comments offers guidance on the new terms.

- Eliminate the requirement to label targeted mailings as "Advertising", but prohibit targeted mailings that are misleading, involve coercion, duress, or harassment, or

where the target of the solicitation has made known to the lawyer a desire not to be solicited.

**2. Approval by Submitting Entity**

The SCEPR approved this recommendation on April 11, 2018.

**3. Has this or a similar Resolution been submitted to the House or Board previously?**

Yes. All amendments to the ABA Model Rules of Professional Conduct must be approved by the House of Delegates.

**4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

Adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct. Goal II of the Association—to improve our profession by promoting ethical conduct—would be advanced by the adoption of this resolution.

**5. If this is a late Report, what urgency exists which requires action at this meeting of the House?**

N/A

**6. Status of Legislation (if applicable).**

N/A

**7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The Center for Professional Responsibility will publish amendments to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies that are adopted by the House of Delegates.

**8. Cost to the Association (both indirect and direct costs):**

None.

**9. Disclosure of interest:**

N/A.

**10. Referrals.**

In February 2017, SCEPR hosted a public forum when it received from the Association of Professional Responsibility Lawyers (APRL) a proposal to amend the lawyer advertising rules. Invitations to attend and comment were extended to ABA entities including:

Bar Activities and Services
Client Protection
Delivery of Legal Services
Election Law
Group and Prepaid Legal Services
Lawyers Referral and Information Services
Lawyers' Professional Liability
Legal Aid and Indigent Defendants
Pro Bono and Public Service
Professional Discipline
Professionalism
Public Education
Specialization
Technology and Information Services
Bioethics and the Law
Commission on Disability Rights
Commission on Domestic and Sexual Violence
Hispanic Legal Rights and Responsibilities
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Law and Aging
Commission on Lawyer Assistance Programs
Center for Racial and Ethnic Diversity
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Administrative Law and Regulatory Practice
Antitrust Law
Business Law Section
Civil Rights and Social Justice
Criminal Justice Section
Section of Dispute Resolution
Section of Environment, Energy and Resources
Section of Family Law
Government and Public Sector Lawyers Division
Health Law Section
Infrastructure and Regulated Industries Section
Intellectual Property Law
Section of International Law
Judicial Division
Labor and Employment Law

Law Practice Division
Law Student Division
Section of Litigation
Section of Public Contract Law
Real Property, Trust and Estate Law
Science and Technology Law
State and Local Govt. Law
Section of Taxation
TTIPS
YLD
Forum on Communications Law
Forum on Construction Law
Forum on Entertainment and Sports Industries
Franchising
Solo Small Firm GP

In December 2017, SCEPR released a Working Draft of its proposal to amend the Model Rules regulating lawyer advertising. Information released also included instructions on how to comment in writing and about the February 2018 public forum the Committee was to host. This was emailed to the state bar associations, state disciplinary agencies and the ethics committees of the following ABA entities:

Antitrust Law
Business Law
Criminal Justice
Dispute Resolution
Environment, Energy and Resources
Family Law
Government and Public Sector Lawyers Division
Health Law
Intellectual Property
International Law
Judicial Division
Labor and Employment Law
Law Practice Division
Litigation
Real Property, Trust and Estate Law
Senior Lawyers
Solo, Small Firm, and General Practice
State and Local Govt. Law
Tort Trial and Insurance Practice
Young Lawyers Division

SCEPR also made its work available to the press and the public. Many news articles about its work appeared in the Lawyers' Manual on Professional Conduct, the ABA Journal, and other legal news outlets.

In February 2018, SCEPR hosted a Public Forum at the Midyear Meeting in Vancouver. More than 50 people attended, many spoke, and many written comments were received. A transcript of the proceedings and all the Comments were posted on the Committee's website.

In March 2018, SCEPR hosted a free webinar on the revisions it made to its proposal to amend the Model Rules. Information was emailed to members of the ABA House of Delegates, state bars, state regulators, and other groups.

**11. Contact Name and Address Information. (Prior to the meeting contact person information.)**

Barbara S. Gillers, Chair, Standing Committee on Ethics
and Professional Responsibility
New York University School of Law
40 Washington Square South, Room 422
New York, New York 10012
W: 212-992-6364
C: 917-679-5757
barbara.gillers@nyu.edu

Dennis Rendleman
Ethics Counsel
Center for Professional Responsibility
American Bar Association
321 North Clark Street, 20th Floor
Chicago, IL 60654
T: 312.988.5307
C: 312.753.9518
Dennis.Rendleman@americanbar.org

**12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)**

Barbara S. Gillers, Chair, Standing Committee on Ethics
and Professional Responsibility
New York University School of Law
40 Washington Square South, Room 422
New York, New York 10012

**The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.**

**REVISED 101**

W: 212-992-6364
C: 917-679-5757
barbara.gillers@nyu.edu

**REVISED 101**

## EXECUTIVE SUMMARY

### 1. Summary of Resolution.

The Resolution proposes changes to Model Rules 7.1 through 7.5, known as the lawyer advertising rules. The changes highlight the American Bar Association's long-standing leadership in promulgating rules for the professional conduct of lawyers generally, and in the rules governing lawyer advertising in particular.

A dizzying number of state variations in the rules governing lawyer advertising exist. There are vast departures from the Model Rules and numerous differences between jurisdictions. These differences cause compliance confusion among intra-state and interstate lawyers and firms, time-consuming and expensive litigation, and enforcement uncertainties for bar regulators. At the same time, changes in the law on commercial speech, trends in the profession including increased cross-border practice and intensified competition from inside and outside the profession, and technological advances demand greater uniformity, more simplification, and focused enforcement.

As amended the rules will provide lawyers and regulators nationwide with models that protect clients from false and misleading advertising, free lawyers to use expanding and innovative technologies for advertising, and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

### 2. Summary of the issues which the Resolution addresses.

The Resolution addresses at least five issues. First, the Resolution addresses the overwhelming variation in the rules governing lawyer advertising by promoting simplified, targeted, and more uniform regulation in this area. Second, the Resolution addresses changes in the profession resulting from increased competition from inside and outside the profession and from increased cross-border practice. Lawyers who serve clients across jurisdictions and clients who need service across jurisdictions will benefit from the proposed changes. Third, the Resolution frees bar regulators to focus on truly harmful conduct: advertising that is misleading, harassing, and coercive. Fourth, the Resolution will increase access to legal services by freeing lawyers and clients to connect via ever-expanding technologies. Finally, the Resolution responds to developments in First Amendment law governing commercial speech and antitrust concerns.

### 3. An explanation of how the proposed policy position will address the issue.

At least three policies inform the Resolution. First, lawyers and clients should be free to use advancing technology to provide the public with greater access to legal services. Second, lawyer advertising rules should focus on truly harmful conduct: false, deceptive,

and misleading statements, harassment, coercion, and invasions of privacy, freeing lawyers of unnecessary restrictions. Finally, bar regulators should be able to concentrate their limited enforcement resources on truly harmful conduct.

**4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

Minority opposition has been received from two state bar associations: the Illinois State Bar Association and the New Jersey State Bar Association. There was also opposition, but only on two amendments, from the Connecticut Bar Association Standing Committee on Professional Ethics (the "Connecticut Ethics Committee"). The two amendments opposed by the Connecticut Ethics Committee are: (i) eliminating the labeling requirement and (ii) permitting nominal gifts for recommendations.

That said, proposals to change the Model Rules of Professional Conduct typically generate diverse comments rooted in dissimilar philosophical and drafting approaches. The comments received by SCEPR throughout this process followed that pattern; they reflected divergent approaches toward lawyer advertising. Generally, however, the minority views fell into two categories.

One group of minority views argued that SCEPR's proposals do not remove enough restrictions on lawyer communications with the public regarding legal services and the availability of legal services. In this group are states and individuals—within and outside the ABA—who argue that the Model Rules should prohibit only false or misleading communications.

The other group thought the opposite was true—that SCEPR's proposals went too far in lifting regulatory constraints on lawyers. In this group are a handful of individuals and state bar associations that oppose, for example, (i) lifting limitations on communicating with experienced users of legal services in business matters, (ii) permitting nominal gifts for recommendations, and (iii) removing the labelling requirement on targeted mail. Some of these commenters also opposed the simple restructuring of current provisions on firm names and claims about specialization.

SCEPR considered all of these, as well as other comments. After significant study, debate, deliberation, and work, SCEPR concluded that its proposals represent the right mix of regulations to protect the public from false, misleading, and harassing conduct while freeing lawyers to use innovative technologies to communicate accurate information about the availability of legal services, enabling clients to find lawyers using those technologies, and focusing regulators on truly harmful conduct.

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Code of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos)
Information About Legal Services

Rules of Prof.Cond., Rule 7.1

# RULE 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

Currentness

(a) 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:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(3) is likely to create an unjustified expectation about results the lawyer can achieve;

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and shall not resemble legal pleadings or other legal documents.

(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

(e) A lawyer shall not knowingly permit, encourage or assist in any way employees, agents or other persons to make communications on behalf of the lawyer or the law firm in violation of this Rule or Rules 7.2 through 7.4.

(f) In connection with the sale of a private law practice under Rule 1.17, an opinion of the purchasing lawyer's suitability and competence to represent existing clients shall not violate this Rule if the lawyer complies with Rule 1.17(d).

**Credits**

Repealed and readopted April 12, 2007, effective January 1, 2008. Comment amended effective April 6, 2016.

**Editors' Notes**

**COMMENT**

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 and solicitations governed by Rule 7.3.

[2] The touchstone of this Rule, as well as Rules 7.2 through 7.4, is that all communications regarding a lawyer's services must be truthful. Truthful communications regarding a lawyer's services provide a valuable public service and, in any event, are constitutionally protected. False and misleading statements regarding a lawyer's services do not serve any valid purpose and may be constitutionally proscribed.

[3] It is not possible to catalog all types and variations of communications that are false or misleading. Nevertheless, certain types of statements recur and deserve special attention.

[4] One of the basic covenants of a lawyer is that the lawyer is competent to handle those matters accepted by the lawyer. Rule 1.1. It is therefore false and misleading for a lawyer to advertise for clients in a field of practice where the lawyer is not competent within the meaning of Rule 1.1.

[5] Characterizations of a lawyer's fees such as "cut-rate", "lowest" and "cheap" are likely to be misleading if those statements cannot be factually substantiated. Similarly, characterizations regarding a lawyer's abilities or skills have the potential to be misleading where those characterizations cannot be factually substantiated. Equally problematic are factually unsubstantiated characterizations of the results that a lawyer has in the past obtained. Such statements often imply that the lawyer will be able to obtain the same or similar results in the future. This type of statement, due to the inevitable factual and legal differences between different representations, is likely to mislead prospective clients.

[6] Statements that a law firm has a vast number of years of experience, by aggregating the experience of all members of the firm, provide little meaningful information to prospective clients and have the potential to be misleading.

[7] Statements such as "no recovery, no fee" are misleading if they do not additionally mention that a client may be obligated to pay costs of the lawsuit. Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs.

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

[9] Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.

Notes of Decisions (6)

Rules of Prof. Cond., Rule 7.1, CO ST RPC Rule 7.1
Current with amendments received through December 1, 2017.

End of Document

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Code of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos)
Information About Legal Services

Rules of Prof.Cond., Rule 7.2

# RULE 7.2. ADVERTISING

Currentness

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public 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 communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization.

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

(4) refer clients to another lawyer or a nonlawyer 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.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

**Credits**

Repealed and readopted April 12, 2007, effective January 1, 2008. Comment amended effective April 6, 2016.

**Editors' Notes**

**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.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, e-mail 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.

[3] 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 communications are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television 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. See Rule 7.3 (a) for the prohibition against the solicitation of a prospective client 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.

*Paying Others to Recommend a Lawyer*

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. 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. 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 legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[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 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 lawyer referral service 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 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] A lawyer also may agree to refer clients to another lawyer or a nonlawyer 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(d), a lawyer who receives referrals from a lawyer or nonlawyer 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, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Notes of Decisions (2)

Rules of Prof. Cond., Rule 7.2, CO ST RPC Rule 7.2
Current with amendments received through December 1, 2017.

End of Document

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Code of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos)
Information About Legal Services

Rules of Prof.Cond., Rule 7.3

# RULE 7.3. SOLICITATION OF CLIENTS

Currentness

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

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client 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:

(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) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the lawyer has a family or prior professional relationship with the prospective client or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) no such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented resented by a lawyer in the matter; and

(2) if a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(d) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall:

(1) 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);

(2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(e) Notwithstanding the prohibitions in 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 memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

**Credits**

Repealed and readopted April 12, 2007, effective January 1, 2008. Amended effective April 6, 2016.

**Editors' Notes**

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

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject 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 fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in 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 e-mail 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 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 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 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 against a former client or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, 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 its members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains 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 which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client 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 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(d)(1) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned

by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person 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 Rule 8.4(a).

Notes of Decisions (2)

Rules of Prof. Cond., Rule 7.3, CO ST RPC Rule 7.3
Current with amendments received through December 1, 2017.

End of Document

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Code of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos)
Information About Legal Services

Rules of Prof.Cond., Rule 7.4

# RULE 7.4. COMMUNICATION OF FIELDS OF PRACTICE

Currentness

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or that the lawyer is a specialist in particular fields of law. Such communication shall be in accordance with Rule 7.1.

(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.

(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 authority or that has been accredited by the American Bar Association; and

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

(e) In any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify lawyers as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

**Credits**

Repealed and readopted April 12, 2007, effective January 1, 2008.

**Editors' Notes**

**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 is a "specialist,"

practices a "specialty" or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) 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 state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[4] A claim of certification contained in a lawyer's letterhead does not require the disclaimer in Rule 7.4(e) unless the letterhead is used in an advertisement.

Rules of Prof. Cond., Rule 7.4, CO ST RPC Rule 7.4
Current with amendments received through December 1, 2017.

End of Document

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Code of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos)
Information About Legal Services

Rules of Prof.Cond., Rule 7.5

# RULE 7.5. FIRM NAMES AND LETTERHEADS

Currentness

(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.

**Credits**
Repealed and readopted April 12, 2007, effective January 1, 2008.

**Editors' Notes**

**COMMENT**

[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.

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Code of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos)
Information About Legal Services

Rules of Prof.Cond., Rule 7.6

# RULE 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

Currentness

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

**Credits**
Adopted April 12, 2007, effective January 1, 2008.

**Editors' Notes**

**COMMENT**

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

Rules of Prof. Cond., Rule 7.6, CO ST RPC Rule 7.6
Current with amendments received through December 1, 2017.

End of Document

From minutes of 6/16/17 meeting

III. *Chair's Correspondence with Court and Attorney General Regarding Committee's Consideration of Disclosure of Public Entity Legal Fees.*

The Chair explained that the third item contained in the meeting materials — pages 28 through 31 of the meeting packet — was included to inform the Committee of her letters to the Court and to Attorney General Cynthia H. Coffman, advising them of the Committee's vote at its forty-sixth meeting, on February 24, 2017, against recommending to the Court a change in CRPC 1.6 that would require or permit government lawyers to disclose aggregate fee information. As proposed by the Colorado Attorney General, the following provision would have been added to the list contained in Rule 1.6(b) of disclosures that can be made notwithstanding the basic requirement of confidentiality imposed by Rule 1.6(a):

> (9) to comply with a request for information made under other law when the information sought is the total number of attorney hours expended or the total amount of costs incurred on a particular matter by a public law office on behalf of a client.

The Chair added that the Court had not yet acted on the matter.

IV. *Flat Fee Agreements.*

At the Chair's request, James S. Sudler III gave a brief report on the consideration of agreements for "flat fees" for legal services by a subcommittee formed for that purpose.[1] Sudler said that the subcommittee met on June 1, 2017, and reached a consensus on principles to apply when a lawyer has failed to comply with the requirements of the Rules governing flat fee agreements. The subcommittee intends to send its proposal to lawyers in the Colorado Criminal Defense Bar Association and the Colorado Bar Association's Trusts and Estates Section for their comment.

V. *Proposal for Amendment of Rule 8.4(g) to Prohibit Harassing or Discriminatory Conduct.*

The Chair invited member Judge John W. Webb, who was attending the meeting by conference telephone, to give the members an overview of the activities of the subcommittee that was formed following the forty-sixth Committee meeting, on February 24, 2017, to consider an amendment to Colorado Rule 8.4(g)[2] based upon an amendment to Model Rule 8.4(g) that was adopted by the American Bar Association at a meeting of its House of Delegates in August 2016, amending the paragraph to read as follows:

---

1. Previous consideration by the Committee of the matter of flat fees for legal services can be found in these Committee minutes, with the materials provided for these meetings containing reports from the flat-fees subcommittee:

Fortieth meeting, 6/5/2015, Item IV.
Forty-first meeting, 10/16/2015, Item IV.
Forty-second meeting, 1/29/2016, Item V.
Forty-third meeting, 4/29/2016, Item 3.
Forty-fourth meeting, 7/22/2016, Item III.
Forty-fifth meeting, 11/4/2016, Item VII.
Forty-sixth meeting, 2/24/2017, Item 5.

—*Secretary*

2. *See* materials previously provided by the Chair to the Committee with respect to this proposal, at p. 96–99 of the meeting packet for the Committee's forty-fifth meeting, on November 4, 2016, and at p. 52-85 of the meeting packet for its forty-sixth meeting, on February 24, 2017. —*Secretary*

It is professional misconduct for a lawyer to:

. . .

(g) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

Correlative changes are proposed for the comments to Rule 8.4(g).

Judge Webb invited members Judge Ruthanne Polidori and Alexander R. Rothrock to join in the conversation, noting that he and they had not anticipated a substantive discussion of the subcommittee's work at this meeting. He then recounted that, as of today's meeting of this Committee, the ABA amendment has not been adopted in any jurisdiction and that there has been a great deal of commentary[3] "and more than a little controversy" about the proposal. He noted that some of the commentary has questioned the constitutionality of the broad proscription on lawyer conduct that would be imposed by the amended rule.

Judge Webb pointed out that, under the current version of Rule 8.4(g) in the Colorado Rules of Professional Conduct,[4] as in the ABA's model rules prior to the 2016 amendment, discriminatory conduct is proscribed only if done "in the representation of a client." The proposal would extend the proscription to "the practice of law"; he commented that the accompanying amendments to the comments evince the intended breadth of that phrase: Proposed Comment [4] to accompany the amendment would read, in part—

Conduct related to the practice of Jaw includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing· a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. . . .

Judge Webb reported that the subcommittee's members were closely divided on the matter at its initial meeting; he added that there was low attendance at the second meeting, at which a proposal was made to amend the current Colorado provision to "play off" the current text of Rule 8.4(g) but with regard to religious discrimination.

At Judge Webb's invitation, Rothrock explained that he had, at the second meeting of the subcommittee, proposed that the issue of the ABA amendment be tabled for the time being, in part because of the nationwide controversy swirling around the ABA's adoption of the amendment and in part because no other jurisdiction has yet adopted it. At Rothrock's urging, the subcommittee now proposed

---

3. Links to some commentary is found on the ABA's website at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/8_4_articles.authcheckdam.pdf. –Secretary

4. Currently, Colorado Rule 8.4(g) reads as follows:

It is professional misconduct for a lawyer to:

. . .

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process;

—*Secretary*

that the Committee defer further consideration of the amendment until other jurisdictions act and, possibly, until challenges to the amendment are resolved in adopting jurisdictions. Rothrock did not believe the issue is settled nationally; he did not want to disband the subcommittee but saw no need to get out ahead for the national consideration of the amendment.

Judge Webb added that, in discussions with the Colorado Office of Attorney Regulation Counsel, it appears that existing Rule 8.4(g) is rarely at issue in disciplinary cases. As he put it, "If it ain't broke, don't fix it."

A member spoke to note that a number of jurisdictions have provisions similar to the ABA amendment to Rule 8.4(g) and to say that the issue came before the ABA because of concerns about sexism in law firm settings. She drew from this that there may be other states that do not see a need to adopt the ABA amendment because they already have similar provisions and see no need for change. The member added that the proposal that had initially emerged from the ABA's Center for Professional Responsibility had been modified before it reached the floor of House of Delegates at the ABA's August 2016 meeting, because other state standing committees had voiced concern about that proposal; she did not describe the initial text or explain the modifications that had been made, but she added that a number of female lawyers had expressed concerns about gender issues arising in their private practices.

To those comments, Rothrock noted that the Colorado case of *People v. Lowery*[5] involved sexual harassment within a law firm, and thus there is actual case law on the matter in this state; perhaps no other jurisdiction has such case law to supplant the need for an amendment to the Rules, although, he added, Indiana also has such cases.

On a member's motion, the Committee determined to "let the matter percolate."

VI. *Amendment of Rule 3.5(c) Regarding Impeachment following* Peña-Rodriguez.

The Chair turned the Committee' attention to the next item on the agenda, consideration of an amendment to Rule 3.5(c) in response to the recent five-to-four decision of the United States Supreme Court in *Peña-Rodriguez v. Colorado*,[6] in which the Court reversed existing law and held that, where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment of the United States Constitution requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the constitutional jury trial guarantee. The Chair noted that Committee member Frederick Yarger had argued the case for the State of Colorado before the high court. The Chair asked Judge Michael Berger to lead the Committee's discussion.

Judge Berger explained that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying about jury deliberations in a subsequent proceeding questioning the verdict. In *Peña-Rodriguez*, the United States Supreme Court held that such a rule of evidence must give way under some

---

5. People v. Lowery, 894 P.2d 758 (Colo. 1995). The Committee was aware of the *Lowery* case as it worked to modify the ABA Ethics 2000 model rules for adoption in Colorado — *see* the minutes of its eleventh meeting, on September 27, 2005. At that meeting, the Committee determined to shift the text of Comment [3] in the ABA's model Rule 8.4 into the rule itself, as a new Rule 8.4(g). —*Secretary*

6. Peña-Rodriguez v. Colorado, 137 S.Ct. 855 (2017). —*Secretary*

# REVISED 109

ADOPTED AS REVISED

## RESOLUTION

RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply 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; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) ENGAGE IN CONDUCT THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS HARASSMENT OR DISCRIMINATION ~~harass or discriminate~~ on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This ~~Rule~~ PARAGRAPH does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. THIS PARAGRAPH DOES NOT PRECLUDE LEGITIMATE ADVICE OR ADVOCACY CONSISTENT WITH THESE RULES.

DELETIONS STRUCK THROUGH; ADDITIONS UNDERLINED

# REVISED 109

Comment

...

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others ~~because of their membership or perceived membership in one or more of the groups listed in paragraph (g).~~ Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct ~~towards a person who is, or is perceived to be, a member of one of the groups.~~ Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. ~~Paragraph (g) does not prohibit conduct undertaken to promote diversity.~~ LAWYERS MAY ENGAGE IN CONDUCT UNDERTAKEN TO PROMOTE DIVERSITY AND INCLUSION WITHOUT VIOLATING THIS RULE BY, FOR EXAMPLE, IMPLEMENTING INITIATIVES AIMED AT RECRUITING, HIRING, RETAINING AND ADVANCING DICVERSE EMPLOYEES OR SPONSORING DIVERSE LAW STUDENT ORGANIZATIONS.

~~[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.~~ A TRIAL JUDGE'S FINDING THAT PEREMPTORY CHALLENGES WERE EXERCISED ON A DISCRIMINATORY BASIS DOES NOT ALONE ESTABLISH A VIOLATION OF PARAGRAPH (G). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

...

Colorado

# Rule 8.4. Misconduct

**It is professional misconduct for a lawyer to:**

**(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**

**(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**

**(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**

**(d) engage in conduct that is prejudicial to the administration of justice;**

**(e) state or imply 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;**

**(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;**

**(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or**

**(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.**

**Source:** Committee comment amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

**COMMENT**

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# The ABA Was Dead Wrong About Model Rule 8.4 (g)

By **Bradley Abramson** (October 12, 2018, 2:53 PM EDT)


Bradley Abramson

In the summer of 2016, the American Bar Association adopted Model Rule 8.4(g), its controversial anti-discrimination and harassment rule for lawyers. It then engaged in an aggressive campaign urging all state supreme courts to add the new model rule to their states' Rules of Professional Conduct.

However, more than two years after the ABA adopted Model Rule 8.4(g), Vermont stands alone as the only state to have adopted it. Many other states have considered the rule but taken no action to enact it. And the supreme courts of four states — South Carolina, Tennessee and most recently Arizona and Idaho — have officially rejected the rule.

The rule, which prohibits attorneys from engaging in "harassment or discrimination" in any "conduct related to the practice of law" — including derogatory, demeaning and harmful speech while engaged in bar association, business and even social activities — elicited fierce criticism both before and after it was adopted. Many critics claim the rule is unconstitutionally vague and overbroad, and that it violates attorneys' First Amendment free speech, free association and free exercise rights. Some have characterized the rule as a speech code for lawyers.

Those criticisms have taken deep root. In fact, thus far, four state attorneys general have issued official opinions against the rule.

The Texas attorney general issued his opinion within just a few months of the ABA's adoption of the rule and concluded that a court would likely find that Model Rule 8.4(g) infringes upon the First Amendment rights of attorneys, is unconstitutionally overbroad and is void for vagueness.

The attorney general of South Carolina agreed, as did the Louisiana attorney general, who opined that "a court would likely find ABA Model Rule 8.4(g) violates a lawyer's freedom of speech under the First Amendment" and "is unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct." He added that the rule "violates the First Amendment because it can be applied in a manner that unconstitutionally restricts a lawyer's participation and involvement with both faith-based and secular groups that advocate or promote a specific religious, political, or social platform" and is "unconstitutionally vague and a violation of the Fourteenth Amendment."

The attorney general of Tennessee wrote that Rule 8.4(g) would not only infringe on attorneys' constitutionally protected rights, but that it would also conflict with other rules

of professional conduct.

And the attorney general of Arizona, in a comment filed with the Arizona Supreme Court when the rule was recently considered in that state, wrote that the rule "raises significant constitutional concerns."

Other legal authorities, organizations and political bodies have expressed similar opposition to the rule. For example, the National Lawyers Association Commission for the Protection of Constitutional Rights voiced nearly identical concerns about the rule to those of the state attorneys general.

The national Catholic Bar Association issued a statement that, "While the CBA opposes all forms of unjust discrimination, the CBA recommends against adoption of the American Bar Association proposed Model Rule of Professional Conduct 8.4(g) because it is unconstitutional and incompatible with Catholic teaching and the obligations of Catholic lawyers."

The Illinois Bar Association, the Pennsylvania Supreme Court Disciplinary Board, the South Carolina Bar's Committee on Professional Responsibility, the Louisiana District Attorneys Association, the North Dakota Supreme Court Joint Commission on Attorney Standards, the Tennessee District Attorneys General Conference and the Memphis Bar Association have all criticized the rule as well.

Many academics have also expressed their concerns about the rule on constitutional grounds — the most recent of whom is George W. Dent, Jr., professor of law at Case Western Reserve University School of Law. His article in the Notre Dame Journal of Law, Ethics & Public Policy titled "Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political" concludes that "ABA Model Rule 8.4(g) violates the First Amendment ... [and w]here the rule is adopted, courts should pronounce it unconstitutional on its face."

After the Montana Supreme Court began consideration of the rule, the Montana Legislature took the somewhat remarkable step of adopting a joint resolution declaring that the rule, if adopted in that state, would violate the First Amendment rights of Montana lawyers.

And when versions of the rule were being considered in New Hampshire, the ACLU of New Hampshire commented that the rule "is overbroad and could capture within its scope speech that is protected under the First Amendment." Additionally, it wrote that "[a]s written, the rule could also implicate advocacy by lawyers who represent religious organizations and who are giving advice based on that organization's faith, as one person's religious tenet could be another person's manifestation of bias" and that "[t]he subjective nature of the terms 'harassment' and 'discrimination' also creates the possibility for arbitrary and discriminatory enforcement."

This ever-increasing chorus of criticism, along with the growing number of states rejecting the rule, validate the views of those who advised the ABA, prior to its adoption, that the rule was constitutionally infirm. The sad fact is that the ABA — an organization of lawyers supposedly dedicated to the rule of law and the best interests of the legal profession — ignored these infirmities in pursuit of its own increasingly partisan agenda. Faced with the clear choice of pursuing its ideological goal of forcing a "cultural shift" upon attorneys or abiding by the First Amendment of the U.S. Constitution, it chose the former.

In doing so, the ABA evidently believed that lawyers were not fit guardians of their own constitutionally protected rights and, that when confronted with the rule, would roll over and play dead.

Fortunately for the legal profession — and free speech — the ABA was dead wrong about

that.

---

*Bradley S. Abramson is an attorney with Alliance Defending Freedom, and has been a member of the American Bar Association since 1990.*

***Disclosure: The author led the effort to file a comment with the Arizona Supreme Court in May on behalf of a group of Arizona attorneys opposed to adoption of the ABA rule discussed in the article.***

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the organization, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

---