Additionally, in response to innovation and increased competition, lawyers and law firms are engaging in much more sophisticated forms of marketing and advertising, including "advertorials," cooperative lawyer ads, retargeting, search engine optimization, online referral and lead-sharing sites, and "pay-per-click" or "pay-per-deal" arrangements.[121] For example, Google's AdWords (one of Google's advertising services) gives lawyers an opportunity to capitalize on Google's vast market. The Google AdWords process is a highly efficient marketing device where lawyers may choose keywords in creating text advertisements. When an Internet user types these keywords into Google's search engine, the lawyer's advertisement appears in a list of "sponsored links" on the results page.[122]

Lawyers are also increasingly involved, either voluntarily or involuntarily, in online lawyer rating services, such as Avvo.com, Yelp, "Super Lawyers," and "Best Lawyers." These online companies post ratings and reviews of lawyers and offer consumers help in finding lawyers. Avvo.com, for example, posts ratings and reviews for lawyers in every state and offers a free legal Q&A service for finding the right lawyer. Justia.com offers free case law, legal resources, and a "Find a Lawyer" feature. Premium services provide websites, blogging, and on-line marketing to law firms. LegalMatch.com helps users find prescreened lawyers, and offers attorneys leads that match their legal specialty. Pro-se-litigation.com connects self-represented litigants with lawyers who offer unbundled legal services. Upcounsel.com helps businesses connect with lawyers to an on-line bidding service where users post requests for specific work and attorneys respond with quotes for fixed fees or hourly rates.

There is also a growing number of social networking websites for lawyers, including Avvo, JD Oasis, Legal OnRamp, WireLawyer, and Foxwordy. Social networking sites for lawyers typically include discussion boards, private messaging, profiles, connections, document libraries, and ratings. Even further, large law firms frequently use marketers, public relations personnel, and sales forces to develop leads and pursue business opportunities.

V. Other Deficiencies in Current Regulations Warranting Change

In addition to the foregoing, there are other difficulties with the current approach to regulating lawyer advertising that further demonstrate the need for change.

A. Many Current Rules are Outdated

State rules on lawyer advertising are largely based on print and other forms of traditional advertising such as announcements, business cards, mailers, newsletters, yellow pages, billboards, television and radio ads, newspaper advertisements, and listings in Martindale Hubbell or other print directories. Lawyer advertising

[121] The ABA Commission on Ethics 20/20 studied the issue of the use of the Internet in client development in a paper entitled "Issues Paper Concerning Lawyer's Use of Internet Based Client Development Tools" in September 2010. For more information see http://www.americanbar.org/content/dam/aba/migrated/2011_buildethics_2020/clientdevelopment_issuespaper.authcheckdam. LinkedIn is a social media network that is fast becoming an indispensible tool used by legal professionals and those with whom they communicate. As a social networking website, LinkedIn allows people in professional occupations of all kinds to list their work experience and educational background and share that information, or in other words, "connect" with other professionals, in an effort to obtain employment. LinkedIn currently has approximately 300 million users, with a geographical reach of 200 countries and territories, and it continues to grow. A blog is an Internet-based forum that offers opinions or information, sometimes on a particular issue, and is usually freely accessible by anyone with an operating Internet connection. Many lawyers and law firms have taken to blogging to showcase their knowledge, explore legal issues, and voice their perspectives on specific areas of law.

[122] Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835, 838 (2007).

regulations have even been applied to law firm give-away items such as coffee mugs and baseball hats. A number of states are attempting to apply existing rules to new methods of electronic advertising.[123] For example, Maryland Rule 7.2(b) requires that "[a] copy or recording of an advertisement or such other communication shall be kept for at least three years after its last dissemination along with a record of when and where it was used." For lawyers that use websites, blogs, and other social media, compliance with the rule is problematic because the content of such media is not static, but constantly changing. Lawyers and law firms, as well as bar regulators, frequently raise questions about whether or how to apply pre-electronic era standards to continuously evolving technologies.[124]

Twitter is a prime example of the struggle to apply old rules to new technology. For example, in Florida, Rule 4-7.12 governs required content of advertisements and stipulates that, among other things, all advertisements for legal employment must include the lawyer's or law firm's full name and office location.[125] Perhaps at first blush this rule does not appear burdensome; however, the rule "makes [a lawyer's or law firm's] use of Twitter an impossibility because there is a limit of 140 characters."[126] Peter Joy, an ethics professor at the Washington University School of Law in St. Louis, caustically remarked, "Pity the lawyer trying to use Twitter in . . . Little Harbor on the Hillsboro, Fla."[127] Similarly, lawyers could not use Twitter to announce a specific case outcome in states that require a disclaimer to accompany the statement.[128]

B. The Spread of Over-Regulation

The trend in recent years has been toward greater regulation in an effort to respond to (or perhaps dampen) lawyer advertising in the electronic age. California, for example, now regulates lawyer advertising more than at any time in the past. In addition to an elaborate rule on advertising and solicitation that includes fifteen "advertising standards" that are presumptive violations of the rule,[129] California's State Bar Act restricts the use of certain forms of lawyer advertising, including "computer networks" and provides for injunctive and

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[123] Some states single out electronic media for special treatment or significantly restrict advertising in electronic media. *See e.g.*, NYSBA, *Social Media Ethics Guidelines* (Mar. 18, 2014), *available at* https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html [hereinafter *Social Media Ethics Guidelines*].

[124] A number of states have found that advertising rules apply to an attorney's activity on the Internet, including law firm websites. *See, e.g.*, Cal. State Bar Formal Op. 2001-155, N.Y. State Bar Formal Op. 709, Ala. State Bar Formal Op. 1996-07, N.C. Ethics Comm. RPC 239, N.D. Bar Ass'n Formal Op. 1999-02, R. REGULATING FLA. BAR 4-7.11.

[125] R. REGULATING FLA. BAR 4-7.12(a).

[126] David L. Hudson Jr., *Firm Challenges Florida Bar Over Website Ad Limits*, ABA JOURNAL (Mar. 1, 2014, 9:49 AM), http://www.abajournal.com/magazine/article/firm_challenges_florida_bar_over_website_ad_limits/; *You Cannot Be Serious, Law Firm Tells Florida Bar*, COURTHOUSE NEWS SERVICE (December 13, 2013, 7:25 AM), http://www.courthousenews.com/2013/12/13/63717.htm.

[127] Hudson, *supra* note 126.

[128] VA. R. OF PROF'L CONDUCT 7.1(b): "A communication violates this rule if it advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results."

[129] CAL. R. OF PROF'L CONDUCT 1-400.

declaratory relief, civil penalties, attorney's fees and discipline for violations.[130] Other California statutes and rules provide additional regulation of lawyer advertising.[131]

As in California,[132] the trend in many states has been toward greater micromanagement of on-line advertising to ensure technical compliance with traditional rules. For instance, Model Rule 7.2(c)'s requirement that all advertising contain an "office address" causes more confusion than clarity when lawyers practice through "virtual" offices that do not have a "bricks and mortar" location. By requiring a physical office address, regulations may inadvertently cause more confusion to consumers who then travel to that physical address only to find a post office box or executive suite where the advertising lawyer receives his/her mail.

Another example of over-regulation is the Florida Bar's adoption of new attorney advertising rules in May 2013 that specifically apply to *all* forms of communication in any print or electronic forum.[133] Whereas lawyer websites, blogs, and social media sites such as LinkedIn, Facebook, and Twitter were previously exempt from the rules as "information provided upon request,"[134] social media advertising is now subject to the advertising regulations.[135] The Florida Supreme Court issued an opinion approving the revised rules, but the dissenting opinions questioned whether applying the rules to websites was an "improvement" to the regulatory scheme. Justice Pariente rejected what she categorized as a "one-size-fits-all approach," and explained, "I would exempt websites and information upon request from advertising restrictions, and I question whether the entire revamped approach to regulating traditional forms of advertising is a beneficial change."[136] Similarly, Justice Canady expressed that he found the new rules "unduly restrictive" and explained, "I am particularly concerned about the impact of the application of the advertising rules to lawyer websites."[137] Nonetheless, the Florida Bar embraced and continues to embrace the application of the rules to a panoply of communication mediums and specifically requires disclaimers and disclosures in all advertisements where testimonials and past results are used.

In addition to increased regulation, some states issued ethics opinions that apply existing rules to social media, attorney blogs, and other Internet communications.[138] While these opinions may be technically correct, they often pose impractical obligations on lawyers and can deter lawyers from making communications that are not fraudulent or deceptive.

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[130] CAL. BUS. & PROFESSIONS CODE §§6157-6159.2.

[131] *See, e.g.*, CAL. INS. CODE §1871.7 (unlawful solicitation of business), CAL. LABOR CODE §§139.45, 5430-5434 (advertisements with respect to workers' compensation, CAL. PENAL CODE §549 (penalties for certain solicitations and referrals).

[132] *See* Cal. State Bar Formal Interim Op. 12-0006 (discussing the circumstances under which "blogging" is regulated under the attorney advertising rules).

[133] R. REGULATING FLA. BAR 4-7.11(a). This includes but is not limited to "newspapers, magazines, brochures, flyers, television, radio, direct mail, *electronic mail and Internet, including banners, pop-ups, websites, social networking, and video sharing media*. *Id.* (emphasis added).

[134] *In re Amendments to the Rules Regulating the Fla. Bar – Subchapter 4-7, Lawyer Adver. Rules*, 108 So. 3d 609, 612-13 (2013) (Pariente, J., dissenting). *See also* Hudson, *supra* note 126; *You Cannot Be Serious*, *supra* note 126.

[135] *See, e.g., In re Amendments*, 108 So. 3d at 611, 616 (Appendix).

[136] *Id.* at 612 (Pariente, J., dissenting).

[137] *Id.* at 616 (Canady, J., dissenting).

[138] *See, e.g.*, Cal. State Bar Formal Op. 2012-186 (2012) (characterizing various innocuous Facebook communications as commercial speech subject to California's advertising rules); N.Y. Cnty. Bar Ass'n Formal Op. 748 (2015) (warning lawyers that certain features of LinkedIn present risks of ethics violations); N.C. Formal Op. 2013-10 (2013) (contrasting group lawyer ads and lawyer referral services).

LinkedIn is one example where regulations have caused difficulty and dissension. A central feature of LinkedIn has long been that (i) users can list their abilities and areas of practice in a preset and pre-defined section entitled, "Specialties," or "Skills and Expertise," and, (ii) users probably *should* do so if they want to stay current with the social networking platform, enhance their professional profiles, and get discovered for more opportunities. According to some ethics opinions, however, these headings constitute potentially misleading advertising in violation of the rules. In Florida, for example, Rule 4-7.14 provides "[a] lawyer may not engage in potentially misleading advertising."[139] This means that a lawyer may not state that he or she is "board certified, a specialist, an expert, or other variations of those terms" because it could be potentially misleading to prospective clients.[140] Rule 4-7.14 has thus made attorney participation on LinkedIn seem unduly difficult.

On September 11, 2013, however, the Florida Bar issued an advisory opinion stating that a lawyer may not list his or her practice area under the "Skills & Expertise" heading on LinkedIn unless he or she is board certified in that practice area.[141] The New York State Bar Association ("NYSBA") used similar reasoning in advising that a lawyer or law firm may not use the LinkedIn heading, "Specialties," to describe its areas of practice because such activity would inappropriately allow that lawyer or law firm to claim recognition as a "specialist" without certification.[142] Moreover, the NYSBA recently released Social Media Ethics Guidelines, and Guideline No. 1.B discusses the "prohibited use of 'Specialists' on social media."[143] The Comment focused on LinkedIn in particular, stating, "if the social media network, such as LinkedIn, does not permit otherwise ethically prohibited 'pre-defined' headings, such as 'specialist,' to be modified, the lawyer shall *not* identify herself under such heading unless appropriately certified."[144]

Because LinkedIn's headings raised serious concerns for various state bars and caused uncertainty for lawyers, LinkedIn, agreed to modify its website and headings.[145] LinkedIn first removed the "Specialties" heading; then, in early 2014, LinkedIn changed the "Skills and Expertise" heading to, "Skills and Endorsements," removing the problematic, potentially misleading word, "Expertise"; and today, the heading, "Skills and Endorsements," has been amended so that it now simply reads, "Skills."

The new heading, "Skills," contains none of the problematic words like "Expertise," or "Specialties," or other variations thereof. However, LinkedIn may have simply taken the problem and put it in another place and format: upon editing an account, LinkedIn still asks the user the problematic question, "[d]o you have any of

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[139] R. REGULATING FLA. BAR 4-7.14.

[140] R. REGULATING FLA. BAR 4-7.14(a)(4). The Comments add that "a lawyer can only state or imply that the lawyer is "certified," a "specialist," or an "expert" in the actual area(s) of practice in which the lawyer is certified."

[141] Fla. Bar Advisory Op. (Sept. 11, 2013), *available at* http://it-lex.org/wp-content/uploads/2013/09/Florida-Bar-Opinion-re-LinkedIn-Redacted.pdf (citing NYSBA Formal Ethics Op. 2013-972 (2013).

[142] NYSBA, Formal Ethics Op. 2013-972 (2013).

[143] *Social Media Ethics Guidelines*, *supra* note 123, at 3. *See also* Pa. Bar Ass'n, Formal Op. 2014-300 (2014) [hereinafter *Ethical Obligations for Attorneys Using Social Media*].

[144] *Social Media Guidelines, supra* note 123, at 4 (emphasis added).

[145] The Florida Bar, *Update: Complying with Bar Rules on LinkedIn May be Easier Than Thought*, FLA. BAR NEWS (Jan. 1, 2014), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/0e9ba4af36b1dbb785257c4a004c633e!OpenDocument.

these skills or areas of expertise?" Additionally, LinkedIn permits endorsements and recommendations, but does not allow for the addition of disclaimers to statements that many state bars would no doubt consider to be testimonials—another issue that is far from resolved.[146]

There is a lack of empirical research showing a correlation between the proliferation of regulation and consumer harm. For example, the Florida Bar's survey of Floridians' attitude toward the increased regulation of attorney advertising found that while 22% of the respondents felt that advertisements for professional services were misleading, 22% also believed such advertisements were accurate.[147] Moreover, whereas about 25% of the respondents indicated that after seeing attorney advertising on television and the Internet, their view of the Florida court system had changed, more than 50% of the respondents indicated that their view had not changed, and 10% of the respondents even reported that their view had *improved*.[148] Thus, the survey results fail to show a real harm to the public, as is required to restrict commercial speech.[149]

Additionally, the data collected in 1997 by a Task Force convened by the Florida State Bar revealed that consumers wanted *more* "useful" and "factual" information to help them choose an attorney and the supporting survey results explained that large majorities of consumers were interested in attorney "qualifications," "experience," "competence," and "professional record (i.e. wins/losses)." The supporting survey results also showed that negative attitudes about legal system and lawyers consistently declined over the relevant period, despite the increase in quantity and breadth of attorney advertising. For example, "the number of people who strongly agreed that lawyer advertisements 'play more on people's emotions and feelings than on logic and thoughtfulness' was down from 56% to 43%; the number of people who felt that attorney advertisements 'encouraged people with little or no injury to take legal action' was down from 55% to 35%, and those who thought advertisements increased the propensity to engage in frivolous lawsuits was down from 55% to 35%; those who believed that attorney advertisements were at least somewhat truthful and honest increased from 51% to 69%; and those who strongly agreed that attorney advertisements lessened the respect for the fairness and integrity of the legal process was cut nearly in half, from 32% to 17%."[150]

The jurisdictional differences are more likely to inhibit the spread of important legal information and create barriers to competition than to inform or protect consumers. Rampant dissimilarity exists among state rules that seek to regulate potentially misleading communications or specific content such as past results, listing lawyer specialties, including endorsements and testimonials and use of symbols, dramatizations, rankings, slogans, and even background music (sometimes referred to as "attention getting techniques"). For example, Arkansas, Nevada, Pennsylvania, South Carolina and Wyoming have prohibitions against the use of testimonials and endorsements.[151] Other states allow the use of testimonials and endorsements with appropriate

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[146] *See, e.g.*, *Ethical Obligations for Attorneys Using Social Media*, *supra* note 143.

[147] Jacobowitz & Hethcoat, *supra* note 34, at 77.

[148] *Id.* (emphasis added).

[149] *Id.*

[150] Rubenstein v. Fla. Bar, No. 14-CIV-20786, 2014 WL 6979574, at *26, n. 6 (S.D. Fla. Dec. 14, 2014) (discussing The Florida Bar Joint Presidential Advertising Task Force, *Final Report & Recommendations* (May 1997)).

[151] Am. Bar Ass'n, *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, at 9 (May 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rules_differences_update.authcheckdam.pdf.

disclaimers.[152] Still other states have rules containing no provision governing endorsements and testimonials at all.[153]

In addition to the over-regulation of lawyer advertising that does not serve the legitimate public policy of assuring accurate information about legal services, state regulators (most often Bar associations) spend hundreds of thousands of dollars attempting to defend the regulations in various lawsuits brought by members. The waste of bar dues and licensing fees to defend the regulations without any quantifiable evidence of the need for the regulations to support a legitimate state purpose is yet another reason the current framework of lawyer advertising regulation is failing.

C. The Questionable Objectives of Certain State Regulations

Upholding "professionalism" and "the dignity of the profession" sneak into various state versions of Model Rules 7.1 and 7.2. Justification for these variants include concern on how lawyers hold themselves out to the public, the lack of decorum and respect for the judicial system, the negative image of lawyers and the legal profession, and the loss of respect and lack of trust in lawyers.[154] For example, in the 2011 Report on The Lawyer Advertising Rules, the Florida Bar stated that the primary goals of lawyer advertising regulation include "protection of the public from advertising that contributes to disrespect for the judicial system, including disrespect for the judiciary" and "protection of the public from advertising that causes the public to have an inaccurate view of the legal system, of lawyers in general, or of the legal profession in general."[155]

This purported public policy basis for regulating lawyer advertising needs to be reexamined. The traditional reason for prohibiting lawyer advertising was that it was "unprofessional."[156] Yet, today under the *Central Hudson* test,[157] regulation of taste, dignity, and professionalism is outside the permissive scope of regulation. Nevertheless, many state regulations continue to prohibit tasteless and unseemly content in the name of misleading or potentially misleading advertisements.

Leaving aside the fact that these tests for "tastelessness," "unseemliness," and the like are vague, the reason for forbidding them appears to be the theory that if lawyers advertise the way they want to, the public would think less of us, so we must forbid lawyers from doing that and metaphorically dress them up in a three-piece suit. If that is true, the problem should be self-correcting — it will be the rare client who hires a lawyer that he or she thinks is "tasteless."

D. Anti-Competitive Concerns With Lawyer Advertising Regulation

During the past twenty years, the Office of Public Policy, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics of the Federal Trade Commission also have weighed in on the regulation of lawyer advertising. The FTC submitted advisory letters to several state supreme courts and lawyer regulation

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[152] These states include California, Florida, Georgia, Louisiana, Missouri, Montana, New York, Rhode Island, South Dakota, and Wisconsin. *Id.*

[153] *E.g.*, VA. R. OF PROF'L RESPONSIBILITY 7.1.

[154] *See* Jacobowitz & Hethcoat, *supra* note34; Smolla, *supra* note 34.

[155] *Rubenstein*, 2014 WL 6979574, at *4 (discussing the Report on the Lawyer Advertising Rules by the Board Review Committee on Professional Ethics (May 27, 2011)).

[156] ABA CANON ON PROF'L ETHICS, CANON 27 (1908).

[157] For discussion of the *Central Hudson* test, see *supra* Part III.D.

offices when various states considered amending their advertising regulations that the FTC perceived could restrict consumer access to factually accurate information that might be useful in making an informed decision about hiring a lawyer. For example, 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 not only reduce competition and violate federal antitrust laws, but also restrict truthful information about legal services.[158]

Restrictions on accurate information about legal service, imposed by competing law firms that function as part of the regulatory governing body, restrain trade and hinders the public's access to useful information.[159]

Not all "state actions" are immune from antitrust laws such as the Sherman Act and FTC Act. If the state action has a significant impact on interstate commerce, it will be subject to Sherman Act scrutiny and will be immune from antitrust compliance only if the action protects a sovereign right. Moreover, when a non-sovereign actor comprised of market participants, such as a unified Bar with quasi-governmental functions, engages in anticompetitive conduct, its actions will be immune from antitrust laws *only if* (1) there is a clearly articulated and affirmative state policy (i.e., the state has to anticipate anticompetitive result as necessary consequence of policy goal); and (2) there is active state supervision of the actor.[160] "Active" state supervision of a non-sovereign actor requires that (a) the state supervisor must actually review the anticompetitive decision (not just the policies and procedures used to come to the decision); (b) the state supervisor must have the ability to veto the decision as inconsistent with state policy goals; and (c) the state supervisor cannot be an active market participant.[161]

Thus, state lawyer regulation offices that impose restraints on truthful lawyer advertising restrain competition, hinder the public's access to useful accurate information about legal services, and may run afoul of antitrust laws.The recent U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. F.T.C.* is illustrative.[162] The Supreme Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anticompetitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that the Board was not actively supervised by a state entity because a controlling number of the Board members who were decision makers were "active market participants" (i.e., dentists) and there was no state entity supervision of the decisions of the non-sovereign board.[163] Many lawyer regulatory entities are carefully monitoring the application of this precedent as the same analysis could be applied to lawyer disciplinary authorities – especially if it appears that the lawyers making decisions on "permissible" lawyer advertising are competitors and there are no clearly articulated objective criteria to determine if the advertising of their competitors violates the Rules of Professional Conduct.

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[158] 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.

[159] *Id.*

[160] F.T.C. v. Phoebe Putney Health System, Inc., 133 S. Ct. 1003, 1010 (2013) (quoting California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)).

[161] North Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct. 1101, 1116 (2015).

[162] 135 S. Ct. 1101 (2015).

[163] *Id.* at 1117.

E The Consequences of Inconsistent Enforcement of Excessive Regulations

The results of APRL's survey and other data demonstrate the lack of consistent enforcement of existing rules and regulations. In particular, state bars have insufficient resources to monitor *all* lawyer advertising and maintain consistent enforcement. Lawyer advertising is viewed by many bar regulators as a low-level problem.[164] There is a general lack of consumer complaints and virtually no empirical data demonstrating actual consumer harm caused by lawyer advertising. Instead, the greater perceived harm is to the profession. Most complaints about lawyer advertising are made by other lawyers.[165] In addition, many regulators acknowledge that compliance with the lawyer advertising rules is better achieved by more effective non-disciplinary measures. Finally, state regulators by and large have had a poor "win" record in the few cases in which enforcement of the advertising rules have been challenged in federal court or sought through discipline.

Inconsistent enforcement of existing rules has significant consequences. A 2002 law review article by Professor Fred C. Zacharias, a former member of APRL, provides a case study of the ramifications of under-enforcement of advertising rules, including engendering confusion and lack of respect and confidence by lawyers and the public.[166] Other articles also discuss the negative consequences of inconsistent enforcement.[167] And the advertising regulations as currently enforced have done little, if anything, to improve the image of the legal profession.

Inconsistent enforcement of inharmonious regulations has also had a negative effect on the dissemination of useful information. Lawyers are unclear as to how to interpret incompatible state regulations and how regulators may apply the rules in the event of a complaint. The effect is to discourage lawyers from communicating with the public in the way that the public (and lawyers themselves) generally communicate with one another.

The time-worn advice that lawyers should comply with the most restrictive rule when faced with competing state regulations is not always practical and does not advance the legitimate goals of regulating lawyer advertising.[168] The requirements of each state may greatly vary such that compliance with each jurisdiction may not be possible.[169]

The deterrent effect of inconsistent advertising rules and enforcement on cross-border practice is well-known. The complex choice of law problems that confront lawyers and state regulators adds to the confusion

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[164] See discussion of APRL's Survey results, *infra*, Part VI.

[165] In the APRL Survey, discussed *infra,* Part VI, one State Bar regulator reported that between 2002 and 2008, only eight complaints about lawyer advertising were opened and all involved lawyers complaining about other lawyers. During the same period, the office received about 4,000 complaints per year and opened roughly over 1,000 investigations.

[166] Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1005 (2002).

[167] *See generally* Nia Marie Monroe, *The Need for Uniformity: Fifty Separate Voices Lead to Disunion in Attorney Internet Advertising*, 18 GEO. J. LEGAL ETHICS 1005, 1015-16 (2005); Fred C. Zacharias, *What Direction Should Legal Advertising Regulation Take?*, 2005 PROF. LAW. SYMP. 45 (2005).

[168] *See* Pa. Bar Ass'n Comm., Legal Ethics and Prof'l Responsibility, Informal Op. 98-85 (1998) (defining the test as the "least common denominator approach."). *See also* Anthony E. Davis, *Ethics and Etiquette of Lawyering on the Internet,* 224 N.Y. L.J. 1, 6 (2000).

[169] Daniel Backer, *Choice of Law in On-Line Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet,* 70 FORDHAM L. REV. 2409, 2418 (2002); Monroe, *supra* note 167.

and uncertainty.[170] For example, each state has different labeling, disclosure, record-keeping and filing requirements, and the rules "vary greatly as to what materials and information need to be retained, and in what form."[171] The lack of predictability on how a particular bar regulator will view a given advertisement is an increasingly difficult problem for lawyers and law firms. This lack of predictability is further compounded by inconsistent and selective enforcement and constantly evolving state bar policy and ethics advisory opinions as a result of new technologies.

VI. The Committee's Survey

In 2014, the Committee sent questionnaires to fifty-one U.S. lawyer regulation offices requesting information regarding the enforcement of advertising rules in their jurisdiction.[172] With the assistance of James Coyle, the Committee's liaison from NOBC, thirty-six of fifty-one jurisdictions responded to the survey. The responses confirm that:

- 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).

In response to the question, "Who are the predominant complainants in lawyer advertising charges," 78% responded that it was other lawyers and only 3% responded that is was consumers.

In regard to how often complaints about lawyer advertising are received: 56% responded, "rarely," 17% responded, "almost never," and 8% responded, "frequently."

The majority of the responding jurisdictions reported that complaints about lawyer advertising that involve a potential advertising rule violation are handled informally, such as through a call or letter requesting changes. Where complaints about lawyer advertising involve a provable advertising rule violation, the majority are still handled informally, in some cases with warning letters, diversion, dismissal of formal charges, changes in advertising language, and other dispositions. Only 17% of the jurisdictions responding reported that they actively monitor lawyer advertisements.

In response to the question – "How often do formal advertising complaints alleging false or misleading communications result in disciplinary sanctions, including diversion and probation?" – 50% responded, "rarely," 36% responded, "almost never," and 6% responded, "frequently."

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[170] Backer, *supra* note 10.

[171] J.T. Westermeier, *Ethics and the Internet,* 17 GEO. J. LEGAL ETHICS 267, 282 (2004).

[172] Attachment 3 is the Committee's questionnaire to state regulators.

The survey showed that formal advertising complaints involving violations of the advertising rules other than false or misleading communications which result in disciplinary sanctions (including diversion and probation) are infrequent: with 50% responding this occurs, "rarely" and 43% responding this occurs, "almost never."

Finally, in response to the question of whether any formal disciplinary cases found consumer or client harm or confusion that did not violate Rule 8.4(c), 67% said "no" and 11% replied "yes."

VII. Other Survey Results

Donald R. Lundberg, a member of APRL and NOBC and a former executive secretary of the Indiana Supreme Court Disciplinary Commission, wrote a paper for the 24th ABA National Conference on Professional Responsibility in 2008 in which he reported the results of an informal survey he conducted among bar counsel on regulating lawyer advertising. The survey confirmed the low-level enforcement of lawyer advertising rules. Of the responses he received from twenty-two jurisdictions, Mr. Lundberg reported that three jurisdictions are at "the non-interventionist extreme," that is, they throw up their hands in resignation, save, perhaps, for rare third-party initiated forays into enforcement in strong meritorious cases. Eight jurisdictions were described as largely "non-interventionists" and yet responsive to highly meritorious consumer-generated complaints; four jurisdictions were neutral, meaning that there was some responsiveness to meritorious, consumer-generated complaints and occasional self-initiated enforcement actions on a selected case basis. Mr. Lundberg reported that two jurisdictions were "moderately interventionist" in being proactive in selectively reviewing advertising in a non-comprehensive way, and five jurisdictions responded that they examined lawyer advertising in some comprehensive fashion. Mr. Lundberg concluded based on his informal survey results that there is clearly no consensus among states about how advertising enforcement should be pursued, although most states align with the "non-interventionist" end of the spectrum. He also concluded that contrary to many other disciplinary actions, it is difficult to draw a straight line between regulation of lawyer advertising and protection of clients from tangible harm. Mr. Lundberg's informal survey also confirmed that one of the defining features of the advertising regulatory situation is a paucity of complaints originating from consumers.[173]

VIII. A Commonsense Approach to Regulating Lawyer Advertising

A. Condensing Model Rules on Advertising Into One Practical Rule

A new approach to regulating lawyer advertising is long overdue. First, the disciplinary rules on lawyer advertising should be standardized. Second, regulators should focus more narrowly on prohibiting false and deceptive advertisements. Lawyers should not be subject to discipline for "potentially misleading" advertisements or advertisements that a regulator thinks are distasteful or unprofessional. Nor should they be subject to discipline for violations of technical requirements in the rules regarding font size, placement of disclaimer, or advertising record retention. Regulators should use non-disciplinary measures to address lawyer advertising and marketing that does not violate Model Rule 8.4(c).

APRL is not advocating a loosening or abandonment of regulating and enforcing strongly meritorious cases. Rather, APRL's solution addresses the inutility of the overregulation and under-enforcement of lawyer

[173] Donald R. Lundberg, *Some Thoughts About Regulating Lawyer Advertising*, 34 ABA Nat'l Conference on Prof'l Responsibility (May 28-31, 2008). Mr. Lundberg's paper includes an appendix of the specific results of the Bar Counsel survey.

advertising rules, the inconsistencies of the current regulatory scheme, and the practical challenges posed by evolving technologies.

Although *Central Hudson* and its progeny affirm the validity of the state's interest in protecting the public and the trustworthiness of the legal system by regulating deceptive and misleading advertising, the opinions also highlight the constitutional concerns when regulations contain restrictions without adequate evidence of a nexus to harm. Restrictions that are subject to inconsistent and subjective interpretation also raise constitutional concerns.

The Committee's proposed revisions to and deletions from ABA Model Rules of Professional Conduct 7.1, 7.2, 7.4, and 7.5, and their comments, set forth in Attachment 2, reflect a policy determination that the ABA should recommend that states adopt uniform regulatory rules for lawyer communications regarding legal services (outside the context of in-person solicitation) founded upon the constitutional limitation set forth in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), and its progeny prohibiting "false and misleading" communications.

Supreme Court authority has left open the possibility that additional limited restrictions on lawyer communications regarding legal services, including advertising and marketing, may pass muster under the First Amendment. However, empirical data about enforcement of and compliance with the existing patchwork of state lawyer advertising regulations shows that the organized bar can better uphold the integrity of the profession with less restrictive rules. These rules will still promote access to justice: which in the modern age includes the dissemination of accurate information about the availability of professional legal services.

The ABA Model Rules in this area also need to reflect the fact that in an age of web-based and electronic communication, jurisdictional differences in regulatory standards simply are impractical and unworkable. Adopting a regulatory line of refraining from "false and misleading" lawyer communications is consistent with the prohibition in Rule 8.4(c), which prohibits lawyers from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," as well as with consumer protection statutory principles prohibiting unfair and deceptive acts and practices enacted in the vast majority of U.S. jurisdictions, as well as under federal law.

A simple "false or misleading" standard for lawyer communications about legal services best balances the important interests of access to justice, protection of the public and clients, integrity of the legal profession, and the uniform regulation of lawyer conduct.

The legitimate public policy considerations discussed above support removing the general prohibition against "giving anything of value to a person for recommending the lawyer's services" contained in Rule 7.2(b). Legitimate professional responsibility concerns regarding referral fees and the division of fees are adequately dealt with in other rules, including Rule 1.5(e) and Rule 5.4.

Specifically, the Committee proposes that the language in Rule 7.1 be retained, and that Rules 7.2, 7.4, and 7.5, and their comments, be deleted in their entirety.[174] The Committee proposes revising the comments to Rule 7.1 to reflect the language and principles contained in Rules 7.2. 7.4, and 7.5, which provide guidance on the general "false and misleading" standard in Rule 7.1. The incorporation into the comments to Rule 7.1 of

[174] As discussed above, APRL's committee deferred consideration of the rules on solicitation thus APRL has not addressed nor is it recommending any changes to Rules 7.3 and 7.6.

many of the concepts explained in the comments to Rules 7.2, 7.4, and 7.5 offers additional direction to lawyers in interpreting how to avoid "false and misleading" communications when describing specific skills (including specialization or expertise), receiving prospective client referrals from third parties, and in naming law firms.

The proposed streamlining of the Model Rules is the most practical approach to bring the Rules in line with technological changes and current enforcement practices, while still protecting consumers from false, misleading, or deceptive practices.

The comments to Rule 7.1 provide lawyers with practical guidance on what conduct or statements may fall within the prohibited category of "false and misleading" and what statements are *not* considered misleading. The proposed amendments set forth objective criteria to determine what constitutes "false and misleading" communications about a lawyer's services, while preserving a lawyer's constitutional right to disseminate accurate commercial speech. These revisions further support the fifty-one U.S. lawyer regulatory entities in enforcing the least restrictive means to achieve the public policies of maintaining confidence in the legal system and assuring consumers have access to accurate information about legal services.

B. Uniform Enforcement Protocols

The primary goal of regulating lawyer advertising is to protect the public and consumers of legal services from deceptive or fraudulent advertising and marketing by lawyers. This is consistent with the primary goal of lawyer discipline as a whole: protection of the public.

To accomplish this goal, the Committee explored whether complaints made about lawyer advertising may be better addressed in a non-disciplinary framework rather than as a disciplinary investigation and prosecution of an alleged advertising rule violation. The Committee considered that members of the general public rarely file a complaint about a lawyer's advertising or marketing. It is believed that the overwhelming majority of complaints about a lawyer advertising are filed by other lawyers, not by clients or members of the general public. Frequently, the motivation for a lawyer to complain about another lawyer's advertising is that the complaining lawyer sincerely believes that all lawyers should be on a "level playing field" as to advertising and solicitation. The complaint often arises from the complaining lawyer's belief that he or she is suffering a competitive disadvantage.

Experience has shown that most of the reported breaches of the advertising rules are technical or minor in nature and do not involve actual deception of a consumer or client. Regulators can best remedy these kinds of breaches quickly and efficiently by diverting lawyer advertising complaints to regulatory staff that will communicate with the noncompliant lawyer on a more informal basis to obtain voluntary compliance. In other words, the regulatory staff should communicate with the lawyer who is the subject of a complaint to provide notice that the lawyer's advertising does not appear to comply with an applicable advertising rules and should be afforded an informal opportunity to address the issue—either by fixing and avoiding the problem or by explaining why no problem is present. Experience has also shown that, with few exceptions, lawyers will take the necessary action to bring their advertising into compliance once when the matter is brought to their attention. If the lawyer makes a satisfactory correction or provides a satisfactory explanation, the public will be protected.

In contrast, processing all lawyer advertising complaints through the full lawyer disciplinary system takes far more time and expense. It also siphons bar resources and attention away from the investigation of more serious lawyer misconduct where the interests of the public and clients are at greater risk of injury; the public is less protected.

There will be circumstances in which diversion of a complaint is inappropriate and the machinery of formal discipline should be invoked. This will be true, for example, in situations involving apparent coercion, duress, harassment, or criminal or fraudulent conduct involving a risk of demonstrable harm. This also will include lawyers who have been notified of actual or apparent non-compliance, and who either fail to respond or continue to violate the cited rules. That there will be infrequent cases deserving of more serious consideration and a further expenditure of disciplinary resources does not justify treating all cases that way. This is especially true where, as here, experience shows that the vast majority of cases neither need nor require such efforts.

State regulators should consider a non-disciplinary framework for regulating lawyer advertising in which a lawyer is given notice that a complaint has been made about his or her advertising, including identification of the problem or non-compliance, and an opportunity to remedy the matter or offer an explanation. If the lawyer remedies the problem or provides a sufficient explanation supporting his or her advertising, the matter can be closed. These complaints can be handled on an informal basis without referral of the complaint into the disciplinary system. With rare exceptions, lawyers that are given fair notice of non-compliance will remedy the matter and the file can be closed. If a satisfactory correction and/or explanation of the materials is not received, the complaint should be processed as a standard disciplinary complaint. For five years, the Virginia State Bar has used a non-disciplinary process of this nature for handling lawyer advertising complaints. Formal lawyer advertising complaints received by bar counsel or the intake department of the disciplinary system are referred to Ethics Counsel's office for informal non-disciplinary disposition. Absent extraordinary factors, formal discipline based on RPC violations relating to advertising and marketing materials is limited to situations involving lawyers who continue to violate the RPCs even after being placed on notice of their violations and the need to stop them; situations involving criminal conduct, fraudulent conduct or material and demonstrable harm to identified persons; or situations involving coercion, duress or harassment. Complaints of that nature are processed as standard disciplinary complaints, as the alleged conduct will likely involve the application of Rule 8.4(c). Virginia's model is an example of one that may be refined and adopted by the ABA and state bar associations across the country.

IX. Conclusion

It is long past time for rationality and uniformity to be brought to the regulation of lawyer advertising. The Committee recommends that the ABA Model Rules governing communications about legal services be consolidated into a single disciplinary rule that simply prohibits false or misleading statements. Adopting this approach to advertising regulation, combined with reasonable uniform enforcement policies and protocols by state disciplinary authorities, is in the Committee's view the best way to ensure honest communication by lawyers while at the same time promoting the widest possible access by the public to legal services.

ATTACHMENT 1

MARK L. TUFT

Mark L. Tuft is a partner with Cooper, White & Cooper LLP in San Francisco. He serves as counsel to lawyers and law firms on professional responsibility, professional liability, law firm mergers and dissolutions, and State Bar disciplinary matters. Mr. Tuft is certified by the State Bar of California as a specialist in legal malpractice law. His practice includes legal malpractice defense, media law, and defense of individuals and businesses in civil and criminal matters. He also serves as an arbitrator, mediator, and special master in lawyer-client and law firm disputes. Mr. Tuft is a co-author of The California Practice Guide on Professional Responsibility (The Rutter Group, a division of Thomson Reuters). Mr. Tuft obtained his J.D. degree with honors from Hastings College of the Law in 1968. He also received an LL.M. degree with highest honors from George Washington University in 1972.

Mr. Tuft is a member of the California State Bar Commission on the Revision of the Rules of Professional Conduct and a former chair of the California State Bar Committee on Professional Responsibility and Conduct. Mr. Tuft is a member of the ABA Center on Professional Responsibility and is a member of the Center's Policy Implementation Committee and Editorial Board. Mr. Tuft is a past president of the Association of Professional Responsibility Lawyers. He has taught courses on legal ethics as an adjunct professor at the University of San Francisco School of Law and is a frequent lecturer and writer on professional responsibility. Mr. Tuft has received several teaching and bar association awards for his work in legal education.

GEORGE R. CLARK

George R. Clark is a solo practitioner in Washington, D.C. who represents lawyers, law firms, and their clients. With more than thirty years of experience in professional responsibility matters (over twenty of them as inside ethics partner at a 1000 lawyer firm), he advises law firms and lawyers on the full range of ethics and practice issues, including conflicts and disqualification. A trial lawyer for over thirty years, he frequently consults on litigation-related ethics matters. Mr. Clark also serves as an expert witness, and lectures regularly on ethics issues. Additionally, he often advises clients on their dealings with their lawyers, and acts for lawyers in discipline and admission matters.

Mr. Clark is past chair (2009-2012) of the District of Columbia Bar Rules of Professional Conduct Review Committee. He has been selected for inclusion in 2012 through 2015 Washington DC Super Lawyers. He is a 1969 graduate of the University of Notre Dame (B.S. Physics), earned his J.D. from the University of Illinois College of Law (1972), and began his legal career as law clerk to the late Judge William B. Jones of the U.S. District Court in Washington. He is a member of the Center for Professional Responsibility and the Business Law Section (Firm Counsel Connection and Professional Responsibility Committee) of the American Bar Association and Treasurer of the Association of Professional Responsibility Lawyers. He and his wife Mary live in Washington, D.C., where he was chair of the Committee of 100 on the Federal City (2009-2012) and three time past president of the Federation of Citizens Associations of DC.

JAN L. JACOBOWITZ

Jan L. Jacobowitz is a Lecturer in Law, Associate Director of the Center for Ethics & Public Service and the Director of the Professional Responsibility & Ethics Program (PREP) at the University of Miami's School of Law. Under Ms. Jacobowitz's direction, PREP was a 2012 recipient of the ABA's E. Smythe Gambrell Award—the leading national award for a professionalism program. Ms. Jacobowitz has presented over one hundred PREP Ethics CLE Seminars and has written and been a featured speaker or panelist on topics such as Legal Ethics in Social Media and Advertising, Lawyer's First Amendment Rights, Cultural Awareness in the Practice of Law, and Mindful Ethics.

Prior to devoting herself to legal education, Ms. Jacobowitz practiced law for over twenty years. She began her career as a Legal Aid attorney in the District of Columbia; prosecuted Nazi war criminals at the Office of Special Investigations of the U.S. Department of Justice; was in private practice with general practice and commercial litigation firms in Washington, D.C. and Miami; and served as in-house counsel for a large Miami based corporation. Ms. Jacobowitz has a J.D. from George Washington University and a B.S. in Speech from Northwestern University. She is admitted to practice in the District of Columbia, Florida, and California, and is a certified civil court mediator.

PETER R. JARVIS

Peter Jarvis is a partner in Holland & Knight's Portland office, where he practices primarily in the area of attorney professional responsibility and risk management. Mr. Jarvis advises lawyers, law firms, corporate legal departments and government legal departments about the law governing lawyers. This includes, but is not limited to, matters relating to conflicts of interest, duties of confidentiality, other legal or professional ethics issues, advice on the avoidance of civil or criminal liability, law firm breakups, and questions relating to law firm or legal department structure and operation. Mr. Jarvis also serves as an expert witness and is an avid lecturer for public and private/in-house continuing legal education seminars.

Mr. Jarvis has decades of experience as a trusted adviser to lawyers and also draws on his substantial background as a civil litigation attorney in matters involving antitrust, appellate, business tort, general contract, insurance, product liability, tax and Uniform Commercial Code concerns. Prior to joining Holland & Knight, Mr. Jarvis was the partner-in-charge of the Portland office of a multistate law firm and was co-leader of that firm's national professional responsibility/risk management practice group. He also served for many years as the in-house ethics counsel for a multistate law firm.

BRUCE E. H. JOHNSON

Bruce E. H. Johnson is a partner in the Seattle office of Davis Wright Tremaine LLP. A member of the Washington State and California Bars, Mr. Johnson's litigation practice focuses on internet, media, and professional liability defense. He also regularly advises lawyers, law firms, and legal departments on legal ethics, professional responsibility, and malpractice matters. He has defended many lawsuits involving social media websites, including *Browne v. Avvo, Inc.*, which held that lawyer evaluations and ratings are statements of opinion absolutely protected by the First Amendment. One of the leading national authorities on First Amendment commercial speech protections, Mr. Johnson is the co-author (with Steven G. Brody) of the Practising Law Institute treatise Advertising and Commercial Speech: A First Amendment Guide.

ARTHUR J. LACHMAN

Arthur J. Lachman practices in Seattle, Washington, focusing on legal ethics, professional liability, and law firm risk management issues. A 1989 graduate of the University of Washington School of Law, he clerked on the Ninth Circuit Court of Appeals, has practiced as a commercial litigation attorney, and has taught civil litigation and ethics subjects at both Puget Sound area law schools. Mr. Lachman has served as president of the Association of Professional Responsibility Lawyers and chair of the ABA Center for Professional Responsibility's National Conference Planning Committee. He is co-author of *The Law of Lawyering in Washington*, published by the Washington State Bar Association, and served as chair of the WSBA Rules of Professional Conduct Committee from 2008 to 2010. Mr. Lachman has also served as chair of the Ethics/Loss Prevention Committee and Director of Professional Development at Graham & Dunn in Seattle. He holds bachelors and graduate degrees in accounting from the University of Illinois at Urbana-Champaign.

JAMES M. McCAULEY

James M. McCauley is the Ethics Counsel for the Virginia State Bar. Mr. McCauley and his staff write the draft advisory opinions for the Standing Committees on Legal Ethics and Unauthorized Practice of law and provide informal advice over the telephone to members of the bar, bench, and general public on lawyer regulatory matters. Mr. McCauley teaches Professional Responsibility at the T.C. Williams School of Law in Richmond, Virginia and served on the American Bar Association's Standing Committee on Legal Ethics and Professionalism from 2008-2011. Mr. McCauley served on the faculty of the Virginia State Bar's Mandatory Professionalism Course from 2004-2010. He is a Fellow of the Virginia Law and the American Bar Foundations. Mr. McCauley also served on the Board of Governors of the Real Property Section of the Virginia State Bar from 2004-2010. Mr. McCauley is a member of the John Marshall Inn of Court in Richmond, Virginia. In 2013, he was appointed by the Chief Justice of the Supreme Court of Virginia to serve on its Special Committee on Criminal Discovery Rules. Mr. McCauley serves on the Board of Directors for Lawyers Helping Lawyers.

RONALD D. ROTUNDA

Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University. He joined the faculty in 2008. Before that, he was University Professor and Professor of Law at George Mason University, and the Albert E. Jenner, Jr. Professor of Law, at the University of Illinois. He is a magna cum laude graduate of Harvard College and a magna cum laude graduate of Harvard Law School, where he was a member of Harvard Law Review. He practiced law in Washington, D.C., and was assistant majority counsel for the Watergate Committee.

He has co-authored the most widely used course book on legal ethics, Problems and Materials on Professional Responsibility (Foundation Press, 12th ed. 2014) and is the author of a leading course book on constitutional law, Modern Constitutional Law (West Academic Co., 11th ed. 2015). He is the co-author of Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (ABA-West/Thompson Reuters Publishing, St. Paul, Minnesota, 2014-15 ed.) (jointly published by the ABA and West/Thompson Reuters Publishing). Mr. Rotunda is also the co-author of the six-volume Treatise on Constitutional Law (West/Thompson Reuters Publishing, 5th ed. 2012), and a one volume Treatise on Constitutional Law (West Academic., 8th ed. 2010). He is also the author of several other books and more than 400 articles in various law reviews, journals, newspapers, and books in this country and in Europe. His works have been translated into French, German, Romanian, Czech, Russian, Japanese, and Korean and have been cited more than 2,000 times by law reviews and state and federal courts at every level, from trial courts to the U.S. Supreme Court. Professor Rotunda was rated in 2014 as one of "The 30 Most Influential Constitutional Law Professors" in the United States.

LYNDA C. SHELY

Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to lawyers and law firms. She also assists lawyers in responding to initial Bar charges, performs law office risk management reviews, trains law firm staff in ethics requirements, and advises on a variety of ethics topics including ancillary business ventures, conflicts of interest, fees and billing requirements, trust account procedures, multi-jurisdictional practice requirements, and ethics requirements for law firm advertising/marketing. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona for ten years. Before she moved to Arizona, Ms. Shely was an intellectual property associate with Morgan, Lewis & Bockius in Washington, DC.

Ms. Shely received her B.A. from Franklin & Marshall College in Lancaster, Pennsylvania and her J.D. from Catholic University in Washington, DC. She was selected as the State Bar of Arizona Member of the Year in 2007 and has received other awards from the State Bar for her contributions to Law Related Education and Outstanding Leadership in Continuing Legal Education. She also received the Scottsdale Bar Association's 2010 Award of Excellence. Ms. Shely is a former chair of the ABA Standing Committee on Client Protection and a past member of the ABA's Professionalism Committee and Center for Professional Responsibility Conference Planning Committee. She is the President-Elect of the Association of Professional Responsibility Lawyers and also serves on several State Bar of Arizona Committees. Ms. Shely was the 2008-2009 president of the Scottsdale Bar Association. She has also been an adjunct professor at all three Arizona law schools, teaching professional responsibility.

JAMES COYLE

Jim Coyle is Attorney Regulation Counsel for the Colorado Supreme Court. In that capacity, Mr. Coyle assists the Supreme Court with regulating the practice of law in Colorado, including attorney admissions, registration, discipline, disability, diversion, mandatory continuing legal and judicial education, unauthorized practice and inventory counsel functions. Mr. Coyle's office also acts as counsel for the Attorneys Fund for Client Protection and the Commission on Judicial Discipline. Mr. Coyle is an active member of the American and Colorado Bar Associations, National Conference of Bar Examiners, National Organization of Bar Counsel, ABA Center for Professional Responsibility, National Client Protection Organization, National Continuing Legal Education Regulators Association, Association of Judicial Discipline Counsel and ABA Commission on Lawyer Assistance Programs.

DENNIS A. RENDLEMAN

Dennis A. Rendleman is Ethics Counsel in the Center for Professional Responsibility at the American Bar Association where he provides expertise and research on legal and judicial ethics and professional responsibility law and professionalism. He is counsel to the ABA Standing Committee on Ethics and Professional Responsibility. Prior to joining the ABA, Mr. Rendleman was Assistant Professor of Legal Studies at the University of Illinois at Springfield and spent twenty-three years at the Illinois State Bar Association, leaving in 2003 as General Counsel. Mr. Rendleman has engaged in the private practice as a consultant and expert witness in professional responsibility and discipline matters. He is a former member of and current liaison to the Illinois Supreme Court's Committee on Professional Responsibility and has been a member of the Illinois Judicial Ethics Committee since its founding in 1998. He is a graduate of the University of Illinois and its College of Law.

ATTACHMENT 2

APRL Proposed Changes to the
ABA Model Rules of Professional Conduct - 2015

[CLEAN VERSION]

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.

Comments

[1] This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] 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.

[4] It is professional conduct 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 influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] 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. *[from MR 7.2 Comments]*

[6] This Rule permits public dissemination of information concerning a lawyer'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.

[7] 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. [*from MR 7.2 Comments]*

Areas of Expertise/Specialization

[8] A lawyer may 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. A lawyer may 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. [*from MR 7.4 Comments]*

Firm Names

[9] 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. [*from MR 7.5 Comments]*

[10] 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. [*from MR 7.5 Comments]*

Rule 7.2 Advertising

Comments (*Comments 1, 2, and 3 moved to MR 7.1 Comments)*

Rule 7.3 Solicitation of Clients

No changes

Rule 7.4 Communication of Fields of Practice and Specialization

Comments (*Comments 1 and 3 were moved to MR 7.1 Comments)*

Rule 7.5 Firm Names And Letterheads

Comments (*Comments moved to MR 7.1 Comments)*

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

No changes

APRL Proposed Changes to the
ABA Model Rules of Professional Conduct - 2015

[REDLINE VERSION]

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.

Comments

[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 misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] 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.

[4] It is professional conduct 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 influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] 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. *[from MR 7.2 Comments]*

[6] This Rule permits public dissemination of information concerning a lawyer'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.

[7] 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. *[from MR 7.2 Comments]*

Areas of Expertise/Specialization

[8] A lawyer may 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. A lawyer may 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. *[from MR 7.4 Comments]*

Firm Names

[9] 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. *[from MR 7.5 Comments]*

[10] 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. *[from MR 7.5 Comments]*

Rule 7.2 Advertising

(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 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.

(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.

Comments *(Comments 1, 2, and 3 moved to MR 7.1 Comments)*

[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, 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

[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 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 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.~~

Rule 7.3 Solicitation of Clients

No changes

Rule 7.4 Communication of Fields of Practice and Specialization

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

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

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

~~(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.~~

Comments *(Comments 1 and 3 were moved to MR 7.1 Comments)*

~~[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

(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.

Comments *(Comments moved to MR 7.1 Comments)*

[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.~~

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

No changes

ATTACHMENT 3

APRL ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

Two First National Plaza
20 South Clark Street
Suite 1050
Chicago, IL 60603
www.aprl.net

Phone: 312.782.4396
Fax: 312.782.4725
admin@aprl.net

October 17, 2014

Re: **Regulation of Lawyer Advertising**

Dear Bar Counsel:

I am writing to you on behalf of the Committee on the Regulation of Lawyer Advertising created by the Association of Professional Responsibility Lawyers ("APRL"). As you may know, APRL is a national organization of lawyers and law professors specializing in the field of legal ethics and professional responsibility. APRL's committee is currently studying the enforcement of lawyer advertising regulations by bar regulators particularly in reference to the use of technology and electronic media. As you will note from the list below, our committee includes both APRL and non-APRL members.

Courts imposing lawyer discipline typically assert that the purpose of lawyer discipline is not to punish the lawyer but to protect the public. On the assumption that this is also the purpose behind discipline for violation of rules regulating advertising and marketing of lawyer services, the Committee would appreciate it if you could respond to the attached brief survey.

Please also indicate whether there have been any consumer surveys in your jurisdiction regarding lawyer advertising and, if so, whether you can provide us with the results of those surveys.

Thank you for responding to our request. We would appreciate receiving your response by email or letter in the next thirty days. If you have any questions or would prefer instead to discuss these matters over the phone, please let me know so that I can arrange a time and date for a call.

I look forward to hearing from you.

Very truly yours,

Mark L. Tuft
Chair, APRL Committee on the
Regulation of Lawyer Advertising

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APRL Committee on the Regulation of Lawyer Advertising

George R. Clark Esq., Washington, D.C.
James M. McCauley, Virginia State Bar, Richmond, VA
Nicole Hyland, Frankfurt Kurnit Klein & Selz, NY., NY
Jan L. Jacobowitz, Professor, University of Miami School of Law, Coral Gables, FL
Peter R. Jarvis, Holland & Knight LLP., Portland, OR
Bruce E. H. Johnson, Davis Wright Tremaine, LLP, Seattle, WA
Ronald D. Rotunda, Professor, Chapman University Law School, Orange, CA
Lynda C. Shely Esq., The Shely Law Firm, Scottsdale, AZ
Mark L. Tuft, Cooper, White & Cooper LLP., San Francisco

Liaisons:
Dennis A. Rendleman, Ethics Counsel, ABA Center on Professional Responsibility
James C. Coyle, Attorney Regulation Counsel, Colorado Supreme Court, Denver, CO., NOBC.

ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

2014 ADVERTISING REGULATION SURVEY

1. Who are the predominant complainants in lawyer advertising charges?

   - Other lawyers _____
   - Consumers _____
   - Judges _____
   - Public officials _____
   - Anonymous _____

2. How often do you receive complaints about lawyer advertising?

   - Frequently _____
   - Rarely _____
   - Almost never _____

3. How do you typically handle complaints about lawyer advertising where there is a potential advertising rule violation?

   - Informally (e.g., call or letter requesting changes) _____
   - Formal investigation _____
   - Diversion _____
   - Peer Review _____
   - Dismissal with advertising language _____
   - Warning letter _____
   - Not at all addressed _____

4. How do you typically handle complaints about lawyer advertising where there is a provable advertising rule violation?

- Informally
  (e.g., call or letter requesting changes) _____
- Formal charges _____
- Diversion _____
- Dismissal with advertising language _____
- Warning letter _____
- Other disposition (please explain) _____
- Not at all addressed _____

5. Does the disposition of complaints where there is a provable advertising rule violation depend on the particular rule (e.g., ABA Model Rules 7.1 – 7.5)?

- Yes _____
  (please identify the advertising rules that receive the greatest attention)
- No _____

6. Is your jurisdiction engaged in actively monitoring lawyer advertisements?

- Yes (please describe these activities) _____
- No _____

7. How often do formal advertising complaints alleging false or misleading communications result in disciplinary sanctions (including diversion and probation)?

- Frequently _____
- Rarely _____
- Almost never _____

8. How often do formal advertising complaints alleging violations of the advertising rules other than false or misleading communications result in disciplinary sanctions (including diversion and probation)?

- Frequently _____
- Rarely _____
- Almost never _____

9. Are there any reported decisions involving or including violations of advertising regulations in which there is a finding of actual consumer or client harm or actual confusion?

- Yes _____
  (please list names, years, and type of harm/confusion)
- No _____

10. In those circumstances where discipline has been imposed, did the violation involve conduct that was partly or entirely based upon dishonesty, fraud, deceit or misrepresentation, whether by affirmative statement or concealment?
(see ABA Model Rule 8.4(c))

- Yes _____
  (please explain, including what state of mind requirement was applied)
- No _____

11. Have there been any formal discipline cases finding consumer or client harm or confusion that *did not* violate Rule 8.4(c)?

- Yes _____
  (please explain what rule was violated and what harm was identified)
- No _____

Thank you for responding by November 25, 2014

Please address your responses to:

Mark L. Tuft, Chair
APRL Regulation of Lawyer Advertising Committee
201 California Street, 17th Floor
San Francisco, CA 94111
mtuft@cwclaw.com

The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)

PHILIP G. SCHRAG*

TABLE OF CONTENTS

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* Delaney Family Professor of Public Interest Law, Georgetown University. The author is grateful to the participants in the Sixth International Legal Ethics Conference for their comments, and to Lisa Lerman for engaging in never-ending discussions of professional responsibility.

The ABA *Model Rules of Professional Conduct* proclaim that all lawyers should use their influence "to ensure equal access to our system of justice,"[1] and in many ways, the *Model Rules* themselves attempt to improve access to justice for individuals of limited financial means. For example, the *Model Rules* explicitly authorize lawyers to charge contingent fees, so that clients who are unable to pay an hourly or flat fee can obtain legal redress for injuries without investing whatever savings they may have.[2] The *Model Rules* also encourage lawyers to aspire to provide at least fifty hours a year of pro bono legal services,[3] and they discourage lawyers from avoiding court appointments to represent indigent or unpopular clients.[4] But Model Rule 1.8(e), which has become law in forty states, is at odds with the legal profession's goal of facilitating access to justice. This rule bars lawyers from assisting their low-income litigation clients with living expenses, such as food, shelter and medicine, though such clients may suffer or even die while waiting for a favorable litigation result. Because of its indifference to the humanitarian or charitable impulses of lawyers and its harsh effects on indigent clients, Rule 1.8(e) stands out as an unethical ethics rule.

This article examines Rule 1.8(e) and its persistence, academic criticism notwithstanding, in the law of most states. It also suggests that the rationale for its continued enforcement rests primarily on concern for clients in contingent fee cases, and that the rule could be amended, rather than repealed outright, to narrow its scope, preserving its possible benefit while reducing its collateral damage.

Part I, based on my personal experience as a clinic director, describes the impact of the rule on indigent clients. It also contrasts the lenient version of the rule adopted by the District of Columbia with the application of the rule in a typical state (Maryland) that has done nothing to soften its harsh consequences. Part II describes the origin and history of Model Rule 1.8(e), culminating in its

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1. MODEL RULES OF PROF'L CONDUCT pmbl. (2010) [hereinafter MODEL RULES].

2. *See* MODEL RULES R. 1.5(c). For a critique of contingent fees in a tort system that increasingly relies on "settlement mills," see Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1524–27 (2009).

3. MODEL RULES R. 6.1.

4. *See* MODEL RULES R. 6.2.

adoption, in its present form, by the House of Delegates of the American Bar Association (ABA) in 1983. Part III discusses the rationales that have been offered in support of the rule. Part IV surveys state law. It examines in particular the rule in the eight states that have adopted less harsh versions, and in two states in which opinions of the bar or the courts have softened its application. It also recounts the recent jurisprudence of the states that simply adopted the ABA's model language. Part V explores conceptual distinctions that arise from the varied jurisprudence in states that do not use the ABA's version of the rule. These distinctions inform Part VI, which describes and evaluates nine different ways, short of complete repeal, in which the rule might be improved.

I. THE HUMAN TOLL OF RULE 1.8(e)

A. INDIGENT CLIENTS IN MARYLAND TRIBUNALS: A CASE IN POINT

Since 1995, Georgetown University Law Center has operated an asylum law clinic, the Center for Applied Legal Studies, and I have had the honor of being its co-director.[5] The clinic's students represent clients who flee from persecution in other countries. Most asylum applicants file affirmatively with the U.S. Department of Homeland Security, and are interviewed by one of the Department's asylum officers.[6] If they are turned down after completing that non-adversarial interview, they are served with summonses to appear in deportation hearings before a federal immigration court (which is actually an agency of the Department of Justice), where they have a new opportunity to win asylum and start on the road to American citizenship. About 20% of asylum-seekers apply "defensively," either as they enter the United States and declare their desire for protection, or after they are apprehended by authorities.[7] When an immigration judge denies asylum, the applicant is ordered deported from the United States, subject to a paper appeal to the Board of Immigration Appeals. The immigration court hearings are adversarial hearings, with an attorney from the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE) cross-examining the applicant and usually arguing vigorously in favor of deportation.

A large proportion of asylum applicants have little or no wealth, are unable to afford lawyers, and are recent arrivals in the United States with poor English language skills and little understanding of American law or legal culture. Many,

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5. The clinic's goals and teaching methods are described in links from its home page, CENTER FOR APPLIED LEGAL STUDIES, http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/CALS/index.cfm (last visited Oct. 10, 2014). For background on the pedagogical choices that went into the creation of this clinic, see Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175 (1996).

6. For a detailed description of the process of asylum adjudication by the Department, and of non-merits factors that apparently affect asylum officers' decisions, see ANDREW I. SCHOENHOLTZ ET AL., LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY (2014).

7. For the statistical breakdown, see SCHOENHOLTZ ET AL., *supra* note 6, at 228 n.7.

even among those who apply affirmatively, have no professional assistance when they file their applications or appear for asylum office interviews.[8] Others are represented by counsel who are not competent or who spend very little time helping them to prepare their written or oral submissions.[9] They expect the asylum officers to believe their stories, even though without professional help they were unable to collect corroborating documentation from their home countries (such as arrest warrants, prison records, or affidavits from friends and relatives who could attest to their persecution and torture).[10] Winning asylum is an uphill struggle, especially if the applicant lacks legal assistance.[11]

Many of these applicants are indigent or, even if not totally impecunious, unable to afford to pay for representation for an immigration court hearing, as practitioners often charge about $15,000 for representation at such a hearing. But some are lucky enough to obtain free assistance from a non-governmental organization, a large law firm with a substantial pro bono practice, or a law school clinic such as the Center for Applied Legal Studies. Such representation is doubly advantageous; not only is it free, but the free services win asylum cases about twice as often as paid lawyers.[12]

Early in our representation of indigent asylum applicants, we discovered a serious problem. Asylum applicants are not allowed to work in the United States until either (a) their applications are granted or (b) 180 days have elapsed without a decision, through no fault of their own.[13] Applicants' "fault," suspending the running of this time period, includes requests for time to obtain counsel, requests for time to file additional documentation, requests to consolidate a case with that of a family member, and requests to have a court hearing in person instead of a

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8. From financial year (FY) 2002 through FY 2005, only 40% of asylum applicants had representation at their asylum office interviews. For the period FY 2006 to FY 2009, this percentage increased to just under 60%. SCHOENHOLTZ ET AL., *supra* note 6, at 25. But these percentages include not only representation by lawyers but also representation by non-lawyer accredited representatives, law students, law graduates not yet admitted to the bar, and other persons of "good moral character" selected by the applicant and allowed by the asylum officer to serve as the representative. *See, e.g.*, 8 C.F.R. 292.1 (2011); Philip G. Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 782 (2010) (explaining that the asylum office codes all representatives as "attorneys" for purposes of the statistical analyses performed by its officials and used as well by the academic researchers).

9. New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 391 (2011) (Even in immigration court proceedings, "close to half of the representation in immigration courts was judged [by immigration judges] to fall below basic standards of adequacy in terms of overall performance (47%), preparation of cases (47%), knowledge of the law (44%), and knowledge of the facts (40%); between 13% and 15% of representation, in all of these categories, was characterized as 'grossly inadequate.'").

10. An application may be denied for lack of corroborating documentation that the asylum officer believes should have been available to the applicant. 8 U.S.C. § 1158(b)(1)(B)(ii) (2009).

11. For a book-length example of one applicant's struggle, see DAVID N. KENNEY & PHILIP G. SCHRAG, ASYLUM DENIED (2008).

12. JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION 45 (2009).

13. 8 C.F.R. § 208.7(a) (2011).

video-conferenced hearing offered by the immigration court.[14] The asylum office often turns down applicants within sixty to ninety days after application, so applicants are not allowed to work until the immigration court makes a favorable decision, unless the entire process takes longer than 180 days. The court promptly schedules a "master calendar hearing" at which the judge offers the applicant a hearing on the merits shortly thereafter; the period of time for preparation of the case may be as short as three or four weeks. Very often, that is too short a time for the applicant to find a lawyer; even if the applicant has a lawyer, it is too little time in which to interview the client (often several times, in the case of a victim of persecution who was tortured in his home country and reluctant to relive the experience), collect the evidence necessary to corroborate the story, prepare witnesses, and write a trial brief, so the applicant's representative must counsel the client to ask for a later date. But, asking for a later date is considered a delay that is the fault of the applicant, and it therefore stops the 180-day employment authorization clock. Furthermore, immigration courts are badly backlogged, so if an applicant for asylum does not take a date in the very near future, she is likely to be given a hearing date a year or more into the future, and she cannot be employed, even in a minimum-wage job, for this entire waiting period. Asylum applicants also have no right to public welfare, Medicaid, or other social services, as they have not yet received any lawful immigration status in the United States.

Forced unemployment does not preclude the receipt of pro bono legal services. But for many such applicants (particularly those who don't want to violate the law by working illegally, or who are too unskilled or disabled to be able to obtain employment even if they were so willing) it means a year or more in which they cannot earn money to pay for food, lodging, medical care, transportation, or other necessities.[15] Unless they happen to have family members or friends who will supply them with charity for a year or more, they quickly become destitute.[16]

An applicant who appeals after being denied asylum by an immigration judge may remain in the United States until the appeal is decided, but the appeal can take a year or more to be decided. An applicant who was not allowed to work before the immigration judge decided the case is not also allowed to work during

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14. Memorandum to Deputy Chief Immigration Judges et al. from Michael J. Creppy, Chief Immigration Judge (June 6, 2005) http://www.justice.gov/eoir/efoia/ocij/oppm05/05-07.pdf.

15. Not only does the period in which employment is forbidden stretch to more than a year for those who are denied asylum by an immigration judge but prevail after an appeal, but a remand to an immigration judge will usually result in still more delay, because the case is likely to be scheduled at the end of the queue of cases already scheduled for hearings.

16. The asylum application process may itself hasten destitution. One of our clinic's clients came from a fairly well-off African family and arrived in the United States with $8,000 worth of gold. But her first immigration lawyer charged her that entire amount—and the client failed to win asylum from the asylum office. She was virtually penniless by the time she learned that she could get free legal help, at the immigration court stage of the proceedings, from our clinic.

the lengthy appeal process, and as time goes by and any savings are depleted, the risk of destitution increases.

Impoverishment while awaiting a decision or appeal is familiar to us. One of our clients, for example, was living in the wreck of an automobile when he secured our services. Another became homeless during the course of our representation; we only learned that she was living on the street after her telephone was disconnected and we lost contact with her. A third was no longer able to afford prescribed anti-psychotic medication and without it had become suicidal. A fourth was living in a friend's apartment but could not afford bus fare to get to our office or anywhere else. A fifth could not communicate with his students because he had no money and no telephone.

In all of these cases, the students who were representing these individuals had only modest means themselves but had far more wealth than their impoverished clients. They wanted to provide the clients with some of their own funds to tide them over until their cases, scheduled a few months hence, could be heard. Some students wanted to pay their clients' rent for a few weeks or months. One wanted to purchase prescribed anti-psychotic medication for the client, fearing that otherwise, she would die. One wanted to purchase a fare card so that the client could use the bus. One wanted to buy the client a pre-paid cell phone.

B. MODEL RULE 1.8(e)

But the students could not give their clients some money for rent, food, or medicine, or even buy pre-paid mobile telephones for them, as such phones could be used for personal calls as well as those to the clients' legal representatives. Their generous impulses clashed head-on with a surprising prohibition in the legal ethics rules.

Model Rule of Professional Conduct 1.8(e), which has been adopted by most states, provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.[17]

Therefore, in a state that has adopted this rule, it would seem that a lawyer may advance court costs and "expenses of litigation" for any client, and even absorb those costs if the client does not prevail, and that a lawyer for an indigent client may simply pay those costs and expenses. But even for an indigent client, a

17. MODEL RULES R. 1.8(e).

lawyer may not provide "financial assistance" if that assistance is "in connection with" litigation. In other words, a lawyer may not extend charity even to an indigent client whom the lawyer is representing, or whom the lawyer plans to represent, in litigation.

In case there was any doubt about what kind of expenses are encompassed within the ban, the ABA's official comments explain that lawyers "may not subsidize lawsuits or administrative proceedings" for their clients, "including making or guaranteeing loans to their clients for living expenses."[18] The comments also explain the twin rationales for this rule. First, such assistance "would encourage clients to pursue lawsuits that might not otherwise be brought." Second, such assistance "gives lawyers too great a financial stake in the litigation."[19]

C. A LENIENT JURISDICTION: THE DISTRICT OF COLUMBIA

Fortunately for my students who wanted to help their clients out of their own pockets, there remained—for a time—a way to do so. Our office was located in the District of Columbia, although the litigation of their deportation litigation occurred in immigration courts in Baltimore, Maryland, and Arlington, Virginia.[20] The District had rejected the Model Rule in favor of a much more liberal version, which is still in effect:

> While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:
>
> (1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and
>
> (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.[21]

A comment to the D.C. rule explains the rationale for this departure from the model: "The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on

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18. MODEL RULES R. 1.8 cmt. 10. This explicit example apparently rules out a theory that a lawyer's gift or loan of living expenses to a litigation client is an independent act and not "in connection with" litigation. The phrase "in connection with litigation" was probably intended to limit the rule's applicability to matters that were in or seemed headed for litigation, making it acceptable for lawyers to make gifts or loans to clients being represented in transactional matters.

19. MODEL RULES R. 1.8 cmt. 10.

20. There is no immigration court in the District of Columbia. District residents who are placed into immigration court proceedings have their cases heard in Virginia.

21. D.C. RULES OF PROF'L CONDUCT R. 1.8(d) (2007). The District's Rule 1.8(d) is the counterpart to the American Bar Association's MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (1983).

unfavorable terms in order to receive the immediate proceeds of settlement."[22] In the case of an indigent in deportation proceedings, a "settlement" is not possible, but the potential consequences of homelessness, starvation, or medical inattention are even more serious than having to accept artificially low financial compensation. The client may die while waiting for a court hearing, or may be unable to remain in communication with counsel, causing a winning case to become a losing one, or causing the client to be unable to participate in the hearing at all, with the result that the client would be ordered deported in absentia.[23]

We had a basis for believing that we could rely on the D.C. rule because, until 2007, the D.C. rule on conflict among ethics rules only required compliance with another jurisdiction's rules if the D.C. attorney was handling a matter in a "court" in another jurisdiction,[24] and the rules of ethics distinguished between "courts" and "tribunals." "Tribunals" included administrative agencies.[25] The immigration court was and still is an administrative agency of the U.S. Department of Justice. However, in 2007, D.C. amended its conflict of ethics rule to require D.C. attorneys to obey the ethics rule of any "tribunal" in which they were handling litigation.[26] Clinic students could no longer provide even the most meager assistance, other than litigation expenses, to their indigent clients, unless the ethics rule of the state of the tribunal—Maryland or Virginia—permitted it.

D. A STRICT JURISDICTION: THE EVOLUTION OF MARYLAND'S HARD LINE

Maryland's rule was particularly severe.[27] Maryland had adopted the Model Rule, but in addition, Maryland's Court of Appeals had on several occasions construed and applied its Rule 1.8(e) literally, and the Maryland Bar had even more severely limited lawyers' generosity.[28]

Maryland's interpretation of Rule 1.8(e) apparently began with a 1975 disciplinary case against a lawyer named Cockrell who had settled a personal injury case for the benefit of his client, Mason. Cockrell deducted from the settlement not only his attorney's fee but also $600 for funds he had loaned to Mason

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22. D.C. RULES OF PROF'L CONDUCT R. 1.8(d), cmt. 9. The comment adds that the provision "does not permit lawyers to 'bid' for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed."

23. 8 U.S.C. § 1229a(b)(5) (2008).

24. *See* D.C. RULES OF PROF'L CONDUCT R. 8.5(b) (1991) (amended 2007).

25. D.C. RULES OF PROF'L CONDUCT terminology.

26. *Compare* D.C. RULE OF PROF'L CONDUCT R. 8.5(b) (2007), *with* the former rule, *supra* note 24.

27. Virginia, like Maryland, had adopted Model Rule 1.8(e) without modification, but no Virginia case or bar opinion had construed it. In 2006, recognizing that it was adopting a minority interpretation, the Virginia Bar took a more liberal approach than the Maryland Bar has consistently taken. *See* text accompanying notes 112–15 discussing Va. State Bar, Legal Ethics Op. 1830 (2006).

28. *See infra* notes 29–51 and accompanying text.

pending the conclusion of year-long settlement negotiations.[29] He gave Mason a check for the balance, but the check was returned to Mason marked "insufficient funds."[30] He was charged with misrepresentations and with having made kickbacks to the insurance adjuster, but neither of these charges were proved, and they were dismissed. A third charge, however, concerned the $600 advance that Cockrell admitted having made to Mason. The Court of Appeals found that this loan violated Disciplinary Rule 5-103(B), the forerunner of what is now Rule 1.8(e).[31] Although the only sustained charge was loaning Mason $600, the Court of Appeals suspended Cockrell from the practice of law for six months.[32]

A few years later, an attorney named Engerman was charged with violating the rule. Engerman had violated several disciplinary rules; among other things, he had paid non-lawyers to refer clients to him, and he had commingled his personal funds with client funds.[33] In addition, he had loaned $712 to a client whom he was representing in a personal injury case.[34] Both Engerman and the client testified that these funds were advanced for "food and other necessities" for the client's home, and Engerman testified that his motivation was that he felt sorry for his client.[35] Motivational explanations had been absent from the *Cockrell* case, and this might have been the basis for a distinction. Nevertheless, the Court of Appeals held that Engerman had clearly violated Rule 5-103(B), and he too was suspended.[36]

Six years later, the Court of Appeals suspended attorney Alan Edgar Harris for six months.[37] Like Cockrell and Engerman, Harris had committed numerous ethical violations. He had neglected a client's case, resulting in its dismissal; he had failed to maintain complete records in connection with nineteen cases that he handled for a family named Jacks; and, at a time when he was authorized to file a case for one of the members of the Jacks family, he had loaned the family nearly $9,000 so that it could purchase a house, a car, and a "video machine," which apparently increased the severity of his punishment.[38]

Two years later, the court considered a case in which, contrary to the three previous matters, an attorney was charged only with violating the rule against

29. Bar Ass'n of Balt. City v. Cockrell, 334 A.2d 85, 86 (Md. 1975).

30. *Id.*

31. That rule differed from Rule 1.8(e) in that while lawyers could advance litigation expenses to clients, the client had to remain "ultimately liable" for the expense. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1980) [hereinafter MODEL CODE]. Rule 1.8(e) eliminated the requirement of ultimate client liability while retaining the limits on the type of expenses that could be advanced. *See* MODEL RULES R. 1.8(e).

32. *Cockrell*, 334 A.2d at 89.

33. Att'y Grievance Comm'n of Md. v. Engerman, 424 A.2d 362, 336–67 (Md. 1981).

34. *Id.*

35. *Id.*

36. Curiously, he was suspended for only thirty days, five months less than Cockrell, although he had committed several other violations.

37. Att'y Grievance Comm'n of Md. v. Harris, 528 A.2d 895, 904 (Md. 1987).

38. *Id.* at 901–04.

advancing funds, other than litigation expenses, to clients. Nelson Kandel represented plaintiff Vincent Prescimone in two suits for injuries resulting from accidents.[39] Prescimone had limited means, and his car broke down so often that he could not reliably get to his medical appointments.[40] Kandel loaned him $200 for automobile repairs, although Kandel "admitted" that Prescimone may have used the car for other purposes, as well as to see the doctor.[41] Later, while Prescimone was still indigent and his cases were still pending but after he no longer needed medical care, Kandel loaned him an additional $1,000 for car repairs.[42] Prescimone repaid the funds after he received a settlement from an insurance company.[43] The court held that although "Kandel was not motivated by self-interest or personal gain in making the advancements to his client," and Prescimone suffered no harm or loss, Kandel had to be disciplined because "advancement of funds for medical treatment, or for transportation to a medical office for treatment" is not an advance for "necessary expenses of litigation."[44] It publicly reprimanded him; a dissenting judge would have suspended him for thirty days.[45]

By the time of the next Maryland case, the ethics rule that had been violated by Cockrell, Engerman, Harris, and Kandel had been replaced by Rule 1.8(e), which allowed lawyers to make repayment of advanced litigation expenses contingent on the outcome and allowed lawyers to pay such expenses, without even the façade of a loan, for indigent clients. But that change did nothing to help Myles Eisenstein, who loaned money to his client, William Curtis Taylor, while representing him in a claim for funds from a job-related injury.[46] The court acknowledged that the loan may have been made "in part because of his [Eisenstein's] long-standing personal relationship" with Taylor (and that Eisenstein was still representing Taylor in related proceedings), but held it a violation of Rule 1.8(e) anyway.[47] For the first time, the court offered a rationale for its promulgation of the Rule: "advancing non-litigation related expenses smacks of 'purchasing an interest in the subject matter of the litigation.'" Eisenstein was suspended for two years, in part because he had also violated Rule 1.15, which pertains to maintaining client funds in a separate trust account.[48] Nor did the new rule save Jill Johnson Pennington from a reprimand after she made a personal

39. Att'y Grievance Comm'n of Md. v. Kandel, 563 A.2d 387, 387–88 (Md. 1989).
40. *Id.* at 388.
41. *Id.*
42. *See id.* at 389.
43. *Id.* at 389.
44. *Id.* at 389–90.
45. *Id.* at 390–91.
46. Att'y Grievance Comm'n of Md. v. Eisenstein, 635 A.2d 1327, 1333 (Md. 1994).
47. *Id.* at 1337.
48. *Id.* at 1337–38.

loan of $1,350 to a client while representing that client in a fair employment suit.[49]

None of those cases involved gifts, as opposed to loans. But in 2001, the Maryland State Bar issued an ethics opinion concluding that because the Rule "makes no distinctions between advances/loans and gifts . . . it is a violation of Rule 1.8(e) for an attorney to provide housing or other financial assistance to a client or potential client in connection with contemplated or pending litigation."[50] A concurring opinion by "several" committee members recommended "a comprehensive rewrite of the Rule" by the appropriate committee, because the bar should "not try to punish every good deed done by attorneys, the public believes we do few enough of them as is."[51] No rewrite occurred.

The combination of the District of Columbia's new conflicts rule and the Maryland Bar's emphatic conclusion that gifts to indigent clients would violate the ethics rules forced the clinic to conclude that students could not make charitable contributions to their Maryland clients, even if those clients were freezing, starving, or in desperate need of medical care. Virginia apparently had no court cases or, at that time, bar opinions interpreting its Rule 1.8(e), but it too had simply adopted the Model Rule, so we did not think that we could adopt a more lenient policy for cases in the Virginia immigration court. We could only ask our students to ponder why the ABA and the highest courts of most states desired impoverished clients to experience so much needless suffering.[52]

II. THE ORIGINS OF RULE 1.8(e)

A. BRITISH LAW

The Maryland Bar opinion stated that "the public policy against 'stirring up litigation'" is "furthered by Rule 1.8(e)" and that "if anything, a gift provides more financial assistance than a loan" so that the rule is "violated as much or more by a gift as compared to an advance."[53]

The concern that lawyers' gifts to indigent clients could stimulate more litigation than would otherwise be conducted accurately reflects the medieval

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49. Att'y Grievance Comm'n of Md. v. Pennington, 733 A.2d 1029, 1031, 1038 (Md. 1999).

50. Md. State Bar Ass'n Comm. on Ethics, Op. 01-10 (2001) (financial assistance to a client by gift).

51. *Id.* (concurring opinion).

52. It is impossible even to estimate how many impoverished clients across the country are adversely affected by Rule 1.8(e). One would have to poll, at the least, all legal aid lawyers, all law school clinics, and all private lawyers who represent poor clients on a pro bono basis, and ask them whether they would have been willing to contribute to the subsistence expenses of some of their indigent litigation clients if permitted to do so, and how many such clients they would have assisted in recent years. The number of pro bono lawyers, in particular, is very large, and they would be extremely hard to identify. But many of them might be relatively wealthy individuals in corporate law firms who could afford to be generous, and if Rule 1.8(e) allowed it, their firms might even create small accounts to provide assistance to indigent clients.

53. Md. State Bar Ass'n Comm. on Ethics, *supra* note 50.

origins of Rule 1.8(e). Professor James Moliterno has traced the origins of the rule to its roots in fifteenth century England, and specifically to the Star Chamber Act of 1487 and the Statute of Liveries of 1504, directed against "maintenance."[54] These statutes were not aimed at lawyers; they were aimed at wealthy feudal landowners who supported litigation by their "minions and supporters" to gain land and power, which diminished the influence of the crown.[55] These landowners retained lawyers to conduct the litigation, and in time, a new justification emerged for laws against maintenance or "barratry," the "habitual provision of maintenance."[56] This new rationale was simply the "fundamental distrust of legal procedure and of lawyers," resulting in the application to lawyers of the barratry and maintenance laws.[57]

B. PRE-RULE BAR ASSOCIATION OPINIONS

First, the Association of the Bar of the City of New York and then the ABA weighed in against loans and gifts by lawyers to clients, except for actual litigation expenses. But they did not rely on the barratry and maintenance rationale for their views, as the British restrictions had long been rejected by American courts.[58] The first salvo was a 1925 opinion of the New York City bar. The lawyer's client was a seaman from another country who was injured, allegedly negligently, by his employer.[59] The accident had caused him to lose his hand.[60] As a result, he could not work unless he obtained a prosthetic hand.[61] The lawyer wanted to pay for the prosthetic, because if the client continued to be unemployed, he would become a "public charge," would be deported, and would be unable to pursue his negligence claim.[62] The bar committee concluded that

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54. James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 228 (2003) (drawing on Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1934)).

55. *Id.* at 228.

56. *Id.*

57. *Id.* at 228–29.

58. Nineteenth and early twentieth century American courts rejected the British prohibitions on these offenses. Indeed, over the objections of the organized bar (which was dominated by defendants' lawyers), they accepted the development of the contingent fee system, through which lawyers enabled impecunious clients to bring lawsuits, with the attorneys fronting the time and expenses. At least one state supreme court explicitly endorsed loans by a lawyer to an indigent client for living and medical expenses, to "prevent his becoming a public charge." People *ex rel.* Chi. Bar Ass'n v. McCallum, 173 N.E. 827, 831 (Ill. 1930). When the first *ABA Canons of Ethics* were issued in 1908, they barred attorneys from purchasing interests in the lawsuits they were conducting, but they did not outlaw either contingent fees or loans or gifts to their clients. Moliterno, *supra* note 54, at 229–31.

59. Comm. on Prof'l Ethics of the Ass'n of the Bar of the City of New York, Op. 20 (1925), *reprinted in* OPINIONS OF THE COMM'S ON PROF'L ETHICS OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASS'N 10 (1956) [hereinafter NYC BAR OPINIONS].

60. *Id.* at 10.

61. *Id.*

62. *Id.*

while "charity is in accord with the best traditions of the profession," the lawyer could not pay for the prosthetic because this form of charity would give the lawyer "greater control of the action . . . than is consistent with the free agency of the client" and would create "an undue personal interest in the action on the part of the attorney."[63]

The 1925 opinion was followed by others to similar effect. In 1932, the City Bar refused to allow a personal injury lawyer to lend funds for food and board to destitute clients because such loans would be "in effect, a method of soliciting business for the attorney."[64] In 1953, a lawyer with another client who was an injured, unemployable and destitute seaman reported to the bar that the allegedly negligent steamship company was making periodic maintenance payments to his client but that it had told the client that it would cease making those payments while he was represented by a lawyer.[65] The lawyer wanted to lend the seaman some money so that he would not starve or be forced by his poverty to accept a low settlement offer.[66] The Bar refused to permit it, stating that "such loans might induce a client to employ one attorney rather than another" and "would impair the dignity of the profession."[67]

The ABA focused initially on personal injury cases in a 1954 opinion rendered at the request of a lawyer for a client that had been sued by several "badly injured" plaintiffs who were being supported by "certain attorneys."[68] The bar concluded that "payments, pending trial in personal injury cases, by an attorney to or for the benefit of his injured client, for any purpose other than to cover expenses of litigation, subject to reimbursement, are improper."[69]

C. FORMAL RULES OF ETHICS

In 1969, that opinion was codified in the ABA's Disciplinary Rule 5-103(b) of its *Model Code of Professional Responsibility*, which cited the opinion in a footnote but in fact went beyond the opinion by applying the prohibition to all cases, not merely personal injury cases:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of medical examination, and costs of obtaining

63. *Id.* at 11.
64. NYC BAR OPINIONS, Op. 319 (1934), *supra* note 59, at 169.
65. NYC BAR OPINIONS, Op. 779 (1953), *supra* note 59, at 474.
66. *Id.*
67. *Id.*
68. ABA Formal Op. 288 (1954), in ABA Journal, Jan. 1955, at 33 n.53.
69. *Id.*

> and presenting evidence, provided the client remains ultimately liable for such expenses.[70]

The *Model Rules of Professional Conduct*, adopted in 1983, continued most of these restrictions.[71] Model Rule 1.8(e) relaxed them only to the extent of allowing lawyers to advance the expenses of litigation contingently (so the client would not be required to repay them if there was no recovery) and allowing lawyers to pay the litigation expenses of indigent clients without even a contingent repayment requirement. Loans or gifts to enable indigent clients to survive remained subject to a ban.[72] Neither the ABA's Ethics 2000 commission nor its Ethics 20/20 commission proposed any further change, and most states have adopted Rule 1.8(e) in the form proposed by the ABA.

III. RATIONALES FOR THE RESTRICTIONS

A. CONFLICTS OF INTEREST

Although the restrictions seem to be rooted historically in hostility to litigation and one can find echoes of that reasoning even in a few modern cases,[73] it has also been justified on the ground that lawyer assistance to clients for living expenses could result in conflicts of interest. This was the justification asserted by the Association of the Bar of the City of New York in its original 1925 opinion.[74] It was offered, as well, by the American Law Institute (ALI), which stated that "a loan gives the lawyer the conflicting role of a creditor and could induce the lawyer to conduct the litigation so as to protect the lawyer's interests rather than the client's."[75] In this instance, the reporters for the ALI's Restatement of the Law Governing Lawyers expressed a rare public disagreement with the members for whom they were serving as staff. The reporters believed that the lawyers should be allowed to advance living expenses to clients, at least if they did not promise to do so before being retained, "but that position was not accepted by the [ALI]."[76]

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70. MODEL CODE DR 5-103 (1969).

71. Hazard and Hodes assert that pursuant to the Proposed Final Draft of the Model Rules, "a lawyer would have been allowed to advance living expenses as well as litigation costs" but that "this proved too much of a liberalization." Therefore the ABA's "House of Delegates amended Rule 1.8" so that "advances for living expenses were once again prohibited altogether." GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING 1.8:802 (2d ed. Supp. 1998). But, the proposed liberalization does not appear in the Proposed Final Draft. *See* MODEL RULES OF PROF'L CONDUCT (Proposed Final Draft May 30, 1981), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.authcheckdam.pdf. Nor is either the proposal or its defeat by the House of Delegates reported in the official history of the adoption of the Model Rules. AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 (2006).

72. *See* MODEL RULES R. 1.8(e).

73. *See* Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 462 (Okla. 2000).

74. *See supra* note 59 and accompanying text.

75. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 36, cmt. c. (2000).

76. *Id.* at reporter's note to cmt. c.

The justification based on potential conflict between lawyer and client has some merit, but for several reasons it is not entirely convincing. First, it does not distinguish between loans and gifts. Even if there could be some sort of conflict because a lawyer becomes a creditor, the role of creditor is absent once the lawyer has made an unconditional gift to a client. Second, even as to loans, as Moliterno points out, when a lawyer makes such a loan, "the lawyer's interests have been aligned in a more-than-usual way with those of the client,"[77] because the lawyer's likelihood of being repaid becomes greater as the size of a plaintiff-client's damage recovery increases. Moliterno notes the possibility, however, that a risk-averse lawyer-creditor intent on repayment of a loan might advise a client to accept a settlement offer that a less risk-averse client might otherwise reject.[78] As a rationale for the policy, however, even this scenario is undercut by the third weakness of the conflicts theory: the bar readily accepts contingent fee agreements,[79] in which the lawyer's revenues also depend on the client's success, and in which usually much more money is at stake for the lawyer than the amounts that the lawyer is likely to have advanced for a client's subsistence. A risk-averse lawyer representing a plaintiff through a contingent fee agreement may also counsel accepting a settlement offer in order to be assured of earning a fee, yet the organized bar seems to have no difficulty with that possibility.[80] Finally, the solution to most conflicts of interest between lawyers and clients is disclosure and consent; even if there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interests, a client's informed consent can waive the conflict, unless the lawyer cannot reasonably believe that he can provide diligent representation to the client, or the representation is prohibited by law.[81]

The ABA acknowledged that there exists "an inescapable conflict of interest between the attorney and his client with regard to counsel fees,"[82] but it believed that

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77. Moliterno, *supra* note 54, at 243.

78. *Id.* at 244.

79. MODEL RULES R. 1.5(c).

80. Contingent fee agreements must be in writing and signed by the client, but presumably debts incurred by a client are also written and signed, and in any event could be required to be written and signed. Many other potential conflicts between lawyers and clients are common but not considered objectionable. For example, lawyers generally want to charge high hourly rates, and clients generally want to pay as little as possible. Hourly billing gives lawyers incentives to put more hours into a case than necessary. And, there are some cases that would benefit by having the lawyer work for a single client on that case during every waking hour for several years, but lawyers also want to serve other clients and to spend time with their families, relax, and engage in other personal pursuits. *See* LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 522 (3d ed. 2012).

81. *See* MODEL RULES R. 1.7(b).

82. This may refer to the conflict depicted in the Leo Cullum cartoon for The New Yorker Magazine showing a lawyer advising his prospective client, "My fees are quite high, and yet you say you have little money. I think I'm seeing a conflict of interest here." The cartoon is reproduced, with permission, in LERMAN & SCHRAG, *supra* note 80, at 522.

> "this conflict of interest need not and should not be extended to permit the lawyer to acquire an additional stake in the outcome of the suit which might lead him to consider his own recovery rather than that of this client and to accept a settlement which might take care of his own interest in the verdict but would not advance the interest of his client to the maximum degree."[83]

The suggestion appears to be that the lawyer would pressure the client to accept a quick settlement so that the lawyer could recover a loan made to the client. But it is hard to see how this justification would apply to an outright gift, or why it would not apply with much greater force to contingent fee agreements, or why a client would be more likely to be disadvantaged by his lawyer's interest in recovering a debt than by his adversary's forcing him to accept unfair settlement terms because the client is unable to feed himself or his family.

B. STIMULATION OF COMPETITION AMONG LAWYERS

A second thread that runs through the history of Rule 1.8(e) is the concern that lawyers might compete with each other for business through the generosity of the gifts or loan terms that they might offer their clients. This theme is suggested by the 1934 New York City opinion, which termed advances to clients a "method of soliciting business for the attorney,"[84] and even more explicitly by its 1953 opinion, which stated that "there is real danger that such loans might induce a client to employ one attorney rather than another."[85] It also suggested by the ABA's claim that the practice of offering subsistence benefits to clients, "if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him."[86] The bar's desire to prevent the legal profession from becoming a competitive one was reflected in prohibitions, before the 1970s, against lawyer advertising, and in minimum fees for particular types of legal services that were published by state bars. But this rationale seems quaint now that the Supreme Court has weighed in against both of those anti-competitive measures.[87] Advertisements by lawyers are ubiquitous on television, billboards, and buses, and minimum fee schedules are a thing of the past. In addition, lawyers representing personal injury clients can compete with each other by offering to charge lower percentages of the recovery as their fee. In essence, anti-competitive rationales may have seemed reasonable in the past but are no longer viable. Curiously, although advertising by lawyers and open competition

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83. ABA Formal Op. 288, *supra* note 68.

84. NYC BAR OPINIONS, Op. 319, *supra* note 59, at 169.

85. NYC BAR OPINIONS, Op. 779, *supra* note 59, at 474.

86. ABA Formal Op. 288, *supra* note 68.

87. Most restrictions on advertising by lawyers fell away after *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), held that they violated the First Amendment. Bar associations' minimum fee schedules were declared to be violations of the Sherman Antitrust Act in *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

among them are now commonplace, some judges still characterize "unregulated lending to clients" as a practice that would lead to "unseemly bidding wars."[88]

C. THE IMAGE OF THE PROFESSION

The 1953 opinion of the New York City bar also justified its restriction by claiming that the "making of such loans [to unemployable, impoverished clients] . . . would impair the dignity of the profession."[89] The Mississippi Supreme Court remains concerned that competition among lawyers that is reflected in supporting low-income clients while their cases are pending would cause "further denigration of our civil justice system."[90] This rationale seems even more archaic than the anti-competitive justification now that law is seen as just another business rather than a unique "profession"[91] and that only 3% of the public rates lawyers very highly for honesty and ethical standards.[92] As the concurring opinion to the most recent Maryland ethics pronouncement on its gifts-to-clients rule noted,[93] it is hard to see how the ban on such charity to destitute clients improves the dignity of the legal profession.[94]

IV. STATE VARIATIONS

One might have thought that well into the 21st century, these rationales for limits on lawyers' assistance to impoverished clients would have been re-examined and the rule amended or construed to allow more exceptions than appear on its face. A small number of states have in fact moderated the rule, but most states continue to prohibit lawyers from providing financial help to their clients, often citing one of the traditional rationales. A survey of state variations

88. Att'y AAA v. Miss. Bar, 735 So. 2d 294, 298 (Miss. 1999).

89. NYC BAR OPINIONS, Op. 779, *supra* note 59, at 474.

90. *Id.* As a result of this concern, the court amended its rule to allow some support for indigent clients, but limited the amount to $1,500 and imposed other restrictions. *Id.* A variation of some judges' fears about the evils of competition is the expressed concern by certain judges that in the resulting competition, "the more financially secure attorneys will have an advantage." Matter of Rule 1.8(c), 53 Mont. St. Rep. 707 (Mt. 1996) (dissenting opinion).

91. *See generally* THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER (2010) 10–69 (arguing that the idea of law as a "profession" was a fiction perpetrated by the ABA to confer prestige on lawyers and to justify anti-competitive practices that kept prices artificially high).

92. Art Swift, *Honesty and Ethics Rating of Clergy Slides to New Low*, GALLUP (Dec. 16, 2013), http://www.gallup.com/poll/166298/honesty-ethics-rating-clergy-slides-new-low.aspx (follow link to methodology and full question results). Another 17% rated lawyers "high," but even the 20% combined "very high" and "high" results put lawyers far below auto mechanics, who scored 29%.

93. *See* text at *supra* note 50.

94. An additional justification, cited favorably but rarely by judges enforcing the rule, is that "the rules can also be said to protect lawyers from client requests for help." Rubenstein v. Statewide Grievance Comm., 2003 Conn. Super. Ct. LEXIS 1727 (Conn. Super. Ct. 2003) (quoting Law. Man. On Prof'l Conduct (ABA/BNA) 51:803 (1995)). This rationale seems to assume that lawyers can't take responsibility for turning down client requests that they don't want to honor and need the protection of the state in order to say no.

and recent case law is useful for the purpose of examining possible amendments to Rule 1.8 that the ABA or a majority of states might adopt. Those potential changes are explored more fully in Parts V and VI of this article.

A. JURISDICTIONS THAT HAVE SOFTENED RULE 1.8(e)

In addition to the District of Columbia,[95] eight states have adopted more lenient versions of Rule 1.8(e).

Texas allows lawyers to advance or guarantee "reasonably necessary medical and living expenses," and repayment can be forgiven if the client loses the case.[96]

Alabama allows a lawyer to "advance or guarantee emergency financial assistance" with two conditions: the client's obligation to repay may not be contingent on the outcome of the matter, and the lawyer must not make the promise to assist the client until after the client has retained the lawyer.[97] The first of the two conditions apparently means that in a contingent fee case, the client must continue to be obligated to the lawyer for the amount of the loan even if the client has no recovery.

California allows lawyers who have already been retained to lend money to their clients, provided that the client promises, in writing, to repay the loan.[98] In addition, even before the lawyer is retained, the lawyer may, with the client's consent, agree to pay personal expenses for the prospective client to third parties from funds that will be collected as a result of the representation.[99]

In Minnesota and North Dakota, a lawyer may not give or loan money to a client, but may guarantee such a loan if the loan is "reasonably needed" to prevent financial hardship that would pressure the client to settle a case.[100] The client must remain liable for repayment even if the client loses the case, and the lawyer may not offer the guarantee before being retained.[101] Montana has the same rule, except that there the loan must come from a regulated financial institution, the amount may not exceed "basic living expenses," and the rule

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95. *See* text accompanying *supra* note 21.

96. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(d)(1) (2013).

97. ALA. RULES OF PROF'L CONDUCT R. 1(8)(e)(3) (2008).

98. CAL. RULES OF PROF'L CONDUCT R. 4-210(A)(2) (2012).

99. CAL. RULES OF PROF'L CONDUCT R. 4-210(A)(1) (2012). A proposed revision of the California rules, drafted by the state bar, would add a requirement that the client consent to such terms in writing after having consulted an independent attorney or having been advised by the client's prospective lawyer to do so and having been given an opportunity to do so. CAL. RULES OF PROF'L CONDUCT R. 1.8.1 (proposed Sept. 22, 2010), http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/RRC%20Final%20Docs/ProposedRulesofProfessionalConduct011014.pdf. In addition, the proposed rule would allow lawyers to offer or make gifts to current clients. *Id.* at R. 1.8.5(a).

100. MINN. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2005); N.D. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2009).

101. *Id.*

explicitly prohibits advertising of the arrangement as well as offering it before the lawyer is retained.[102]

Mississippi and Louisiana have quite detailed regulations. Mississippi allows lawyer to advance to clients "reasonable and necessary" expenses in two categories: medical expenses associated with "treatment for the injury giving rise to the litigation" and "living expenses."[103] However, before any such loan can be made, the lawyer must engage in "due diligence and inquiry into the circumstances of the client" and must wait until sixty days have elapsed after the lawyer has been retained.[104] At that point, the loan can be made only "under dire and necessitous circumstances" and must be limited to "minimal living expenses of minor sums such as those necessary to prevent foreclosure or repossession or for necessary medical expenses."[105] A further limitation is that the lawyer must report a loan of $1,500 or less to the state bar's ethics committee, and must seek the committee's approval before lending more than $1,500. The $1,500 limit on loans not approved in advance includes any loans made by the client's previous counsel.[106] Louisiana imposes even more conditions. As in Mississippi, the assistance must not be a gift; it can be a loan or a loan guarantee, and the client must be in "necessitous circumstances."[107] The requirement that those circumstances be "dire" is absent, but the lawyer must determine that without assistance, the client's ability to initiate or to maintain the claim would be adversely affected. The lawyer may not advertise a willingness to help clients in this way or use the prospect of a loan or guarantee as an inducement to be retained.[108] The amount loaned may not exceed the "minimum" amount needed to meet the client's immediate family's "documented" obligations for food, shelter, utilities, and insurance, and the medical expenses unrelated to the litigation (because loans for medical expenses are permitted under a different clause of the section).[109] Loans from a lawyer's own funds may not bear interest; loans obtained from financial institutions may bear interest, but not in an amount greater than the actual bank charge or ten percentage points above the bank prime rate, whichever is less. The client must sign a written consent to the loan terms, and a copy of the ethics rule itself must be given to the client along with the lawyer's bill or with the settlement documents.[110]

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102. MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2004).

103. MISS. RULES OF PROF'L CONDUCT R. 1.8(e)(2) (2005).

104. *Id.*

105. *Id.*

106. *Id.*; *see also* Att'y AAA v. Miss. Bar, 735 So. 2d 294, 298 (Miss. 1999) (finding an advance of $1,414 for living and medical expenses not in violation of the rule because less than $1,500).

107. LA. RULES OF PROF'L CONDUCT R. 1.8(e)(4) (2005).

108. LA. RULES OF PROF'L CONDUCT R. 1.8(e)(4)(ii)–(iii).

109. LA. RULES OF PROF'L CONDUCT R. 1.8(e)(4)(iv); 1.8(e)(1).

110. LA. RULES OF PROF'L CONDUCT R. 1.8(e)(5)(v)–(vi).

B. JURISDICTIONS IN WHICH COURTS OR STATE BARS HAVE INTERPRETED RULE 1.8(e) PERMISSIVELY

In another two jurisdictions, state bars or courts have construed Rule 1.8(e) to permit at least some forms of financial assistance despite formal rules that appeared to prohibit it.[111] In Virginia, the issue arose when attorneys asked the state bar whether they could contribute small amounts to the commissary accounts of jailed clients so that the clients could purchase toothpaste or food. The bar's ethics committee concluded that they could do so, notwithstanding the fact that the state's version of Rule 1.8(e) used the Model Rule language that appeared to prohibit such conduct.[112] The committee opined that "neither the language nor the spirit of this prohibition create a per se ban on all financial assistance, regardless of the purpose or size of the assistance" and that "a total prohibition on all such giving paints with an unnecessarily broad brush."[113] It justified its decision by reference to the fact that the rule barred financial assistance "in connection with" litigation; according to the committee, "the provision of this commissary money appears to have nothing to do directly with the litigation that is the subject of the representation."[114] It acknowledged that this conclusion put it in the minority of jurisdictions.[115]

The Supreme Court of Florida has opened the door slightly to financial assistance to clients. In the years before 1991, a lawyer named Taylor represented Mary Barner, an indigent client, and her child, in a medical malpractice claim.[116] His firm's "medical group" advanced her $600 per month (probably in violation

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111. In addition to the cases identified in this section, Colorado allowed an attorney to provide assistance in *Mercantile Adjustment Bureau v. Flood*, 278 P.3d 348 (Colo. 2012). An attorney lost a fair debt collection practices case. With his client's consent, he mortgaged his home and personally paid the fee of an appellate attorney, with the understanding that he would be reimbursed if the appellate attorney won statutory fees that were paid by the defendant. A divided Colorado Supreme Court decided that this assistance did not violate the rule. This is not a particularly lenient application of the rule, however, because the appellate attorney's fees are easily characterized as a litigation expense of the type that the rule allows to be advanced.

112. Va. State Bar, Legal Ethics Op. 1830 (2006).

113. *Id.*

114. *Id.*

115. The committee's citation for other jurisdictions in the minority reveals only one that clearly support its suggestion that other jurisdictions' interpretations of the rule are consistent with its view. It cited a case from Mississippi, which uses language that differs significantly from the Model Rule and bar opinions from Connecticut, Pennsylvania and Maryland that deal with third-party litigation finance, not with loans or gifts from lawyers to their clients. It also cited a Maryland bar opinion from 2000, which concluded that the state's rule did not bar a small, outright gift of money to a personal injury client who was in financial difficulty as a result of an automobile accident. Md. State Bar, Comm. on Ethics, Op. 00-42 (2000). That opinion, however, seems to have been overruled the following year by Md. State Bar Ass'n Comm. on Ethics Op. 2001-10, *supra* note 50, which cited the earlier opinion in a footnote and claimed to distinguish it but did so only by characterizing the previous opinion as allowing a "de minimis exception," without citing distinguishing facts or explaining why the exception did not cause it to reach the opposite result. *Id.* at n.4. The cited case that most clearly aligned with the committee's view is *Fla. Bar v. Taylor*, 648 So. 2d 1190 (Fla. 1994), discussed in text at *infra* notes 121–23.

116. Fla. Bar v. Taylor, 648 So. 2d 1190, 1191 (Fla. 1994).

of the state's equivalent of Rule 1.8(e), though that appears not to have been adjudicated).[117] In 1991, Taylor moved to a different firm, which would not advance funds to clients.[118] However, while at the new firm, Taylor personally gave Ms. Barner some used clothing, and his partner gave her $200 from his personal funds.[119] The Florida bar learned of these gifts and initiated a disciplinary proceeding.[120] A referee concluded that Taylor had not violated any rule because Ms. Barner was not obliged to make any repayment; therefore, the referee reasoned, the gifts were not "in connection with" the litigation.[121] By a 4-3 vote, the Florida Supreme Court upheld the referee's decision because the funds were not given "in an effort to maintain employment" but represented "essentially an act of humanitarianism."[122] The dissent argued that that Taylor's relationship to Barnes was "only because of the lawsuit" and was therefore "in connection with" litigation in violation of the rule.[123]

C. JURISDICTIONS THAT HAVE INTERPRETED AND APPLIED THE RULE STRICTLY

In addition to Maryland,[124] several jurisdictions have recently interpreted and applied their rules strictly. In Oklahoma, in the late 1990s, a lawyer named Smolen represented a client named Miles in a worker's compensation suit. He loaned Miles $1,200, interest-free, for living expenses after Miles' home was destroyed in a fire.[125] But for the loan, Miles would have had to move to Indiana and would not have had sufficient resources to appear in court, and he would not have been able to continue medical treatment.[126] Miles' inability to appear in court without the loan could have enabled the court to characterize at least part of the loan as a litigation expense. But, the court suspended Smolen for sixty days.[127] It noted the origin of the rule in the British doctrines forbidding the "evils" of champerty and maintenance and asserted that if financial assistance were allowed, clients might choose lawyers on the basis of such offers.[128] Even if lawyers like Smolen did not advertise their willingness to make loans, clients might learn of their practices from existing or past clients of those lawyers.[129]

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117. *Id.*
118. *Id.*
119. *Id.*
120. The funds were characterized as "loans" but the court found that they were actually gifts, with no expectation of repayment.
121. Florida Bar v. Taylor, 648 So. 2d 1190, 1191 (Fla. 1994).
122. *Id.* at 1192.
123. *Id.*
124. *See supra* notes 29–51 and accompanying text.
125. Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 457 (Okla. 2000).
126. *Id.*
127. *Id.* at 463.
128. *Id.* at 462. Smolen had been disciplined eight years earlier for a similar offense.
129. *Id.*

A Connecticut lawyer named Rubenstein provided his clients with bus tokens for transportation to their medical appointments and advanced funds to them for medical treatment and prescribed drugs. He was publicly reprimanded, with the court quoting approvingly from the ABA/BNA Lawyers Manual on Professional Conduct, to the effect that "the rules can also be said to protect lawyers from client requests for help, and also from the competition from other lawyers who might be willing to provide monetary assistance."[130]

In Georgia, a lawyer named Morse loaned $1,400 to a longtime acquaintance who became his personal injury client. But for the loan, the client would not have been able to avoid foreclosure and possible jail time for violating probation.[131] The lawyer was publicly reprimanded.[132] A concurring judge wrote to remind the bar that financial assistance is only prohibited when it is offered "in connection with" litigation.[133] But the example he gave of assistance that is not so connected to litigation is so far-fetched as to be unlikely to justify much financial help by generous lawyers: he pointed out that a mother representing her own seventeen-year-old son in traffic court would still be allowed to provide room and board to the child.[134]

Ohio is also unforgiving. Pheils, representing Robinson, negotiated a settlement that awarded $20,000 to his client, but he advised Robinson not to sign it because it included terms to which Robinson had not yet agreed.[135] Robinson said he needed the money.[136] Pheils arranged for his wife to lend $4,000 to Robinson.[137] Later, while the case was on appeal, Pheils' wife made another loan, for $10,500, and this time, Robinson signed a promissory note that Pheils prepared, assigning part of his eventual recovery as security.[138] After Robinson won the case, Pheils' wife sued on the note, and Robinson paid her.[139] A hearing panel found that even if his motive had been solely to benefit Robinson, Pheils had violated Rule 1.8(e) because his wife, rather than a disinterested bank, had made the loan.[140] By preparing the agreement between Robinson and his wife, Pheils had "promoted maintenance and/or champerty."[141] He was suspended for six months.[142]

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130. Rubenstein v. Statewide Grievance Comm., No. CV020516965S, 2003 Conn. Super. LEXIS 1727, at *15 (Conn. Super. Ct., 2003).

131. *In re* Morse, 748 S.E.2d 921, 921 (Ga. 2013).

132. *Id.*

133. *Id.* at 922.

134. *Id.* at 922 n.3.

135. Toledo Bar Ass'n v. Pheils, 951 N.E.2d 758, 760 (Ohio 2011).

136. *Id.* at 761.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 762.

141. *See id.* at 763.

142. *See id.* at 765–66.

In Nebraska, a lawyer named Shefren guaranteed bank loans for living expenses for twenty personal injury clients who could not obtain loans without his guarantee. Although a referee found that he did not guarantee the loans in order to induce the clients to retain him, and that no client had suffered damages as a result of his practices, he was suspended for thirty days.[143] In another Nebraska case, a client named Hill had become unable to work as a result of a personal injury. Her lawyer, Kratina, paid her taxi fare for medical treatment, her health insurance premiums, and her rent, as well as several expenses to enable her to drive: a fine so that she could have her license reinstated, the fee for the license, and a fee to recover her impounded car.[144] The total loan was $11,000, which she reimbursed him for after the case was settled.[145] Stating that Rule 1.8(e) included no exception for humanitarian acts, the court suspended Kratina for sixty days.[146]

These cases are merely representative. Courts in other states have also interpreted and enforced Rule 1.8(e) literally in recent years.[147]

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143. *See generally* State *ex rel.* Counsel for Discipline of the Neb. Supreme Court v. Shefren, 690 N.W.2d 776 (Neb. 2005).

144. State *ex rel.* Counsel for Discipline of the Neb. Supreme Court v. Kratina, 746 N.W.2d 378, 379–80 (Neb. 2008).

145. *Id.* at 380.

146. *See generally* State *ex rel.* Counsel for Discipline of the Neb. Supreme Court v. Kratina, 746 N.W.2d 378 (Neb. 2008).

147. For example, in Alaska, S.H. was evicted during the course of a personal injury suit in which she represented the interests of her minor daughter, whose father had died in an accident. At first, she and her daughters resorted to living in their car, but eventually they could not live in that manner. She and the daughters moved to Wisconsin to live with her father. Markham, who was S.H.'s lawyer, loaned her several hundred dollars. He also allowed his associate to send her money so that she could return to Alaska to be deposed, and to live in an apartment while there, and he arranged for his accountant to advance her $1,000 for living expenses (which he guaranteed) and "small amounts of money" for "items such as cigarettes and cosmetics." After the case was settled, a special master allowed Markham to recover $3,050 for the airfare for her and her daughters to return to Alaska, treating those expenditures as costs of litigation. The master disallowed a recovery for his subsidy of S.H.'s living expenses. Markham appealed, but the state's Supreme Court affirmed. Although the state bar conceded in an amicus brief that Rule 1.8(e) should be "given a review," the court accepted the bar's position that in the absence of a rule-making review, Markham should not be able to recover the remaining funds that he had advanced. *See generally In re* K.A.H., 967 P.2d 91 (Alaska 1998). The Supreme Court of South Carolina also applied Rule 1.8(e) literally, albeit in bizarre circumstances. While representing a wife in negotiations with her husband's lawyer regarding the terms of a proposed separation agreement, Hoffmeyer began a sexual relationship with her. He discussed withdrawing as her attorney with her, but she asked him to remain as her lawyer so as not to prolong the negotiations. In those negotiations, she agreed to pay her husband $3,500 as his share of the marital home. Hoffmeyer paid this sum from his own personal funds, in part to reach a prompt settlement so that "there would be less of a problem spending time with Client." In addition, when the client shortly thereafter planned to travel to New Orleans for treatment of an eating disorder, Hoffmeyer gave her $100 for expenses. After the husband confronted Hoffmeyer and his wife about the relationship, Hoffmeyer withdrew as counsel and paid the fees of her new attorney. The client obtained a satisfactory result, including primary custody of her children. A hearing panel found that Hoffmeyer's conduct did not adversely affect his client and that he had not violated Rule 1.8(e) because the funds he paid were a gift, not a loan, and Hoffmeyer had no expectation of reimbursement. The court of appeals reversed that determination, holding that Rule 1.8(e) did not distinguish between gifts and loans. For his several violations, Hoffmeyer was suspended for nine months. *See generally In re* Hoffmeyer, 656 S.E.2d 376 (S.C. 2008). In addition, a federal district court in New Mexico held that a violation of Rule 1.8(e) was a basis for disqualification. It disqualified the McKinneys from

V. WHAT CAN WE LEARN FROM THE STATE VARIATIONS AND RECENT DECISIONS?

The first thing to notice about the state variations and the recent decisions is that the rule-writers and interpreting adjudicators are primarily concerned with a problem that could arise when personal injury lawyers lend money to plaintiff-clients and make arrangements to recover their loans from the proceeds of a settlement or judgment. This application of the rule appears in the *Cockrell*, *Smolen*, *K.A.H.*, *Rubenstein*, *Morse*, *Pheils*, *Shefren*, *Kratina*, and *Rubio* cases[148]; in addition, the rules in Texas, Alabama, California, North Dakota, Mississippi, and Louisiana explicitly deal with loans or loan guarantees and regulate whether the client must or may not require repayment. This makes sense, though not necessarily for the reasons given by the courts. Lawyers are responsible adults and do not need state protection from their clients' requests for money, as the *Rubenstein* court posited.[149] Nor is competition among lawyers on the basis of their willingness to make loans to be feared, despite the misgivings of the *Smolen*[150] court and of the rule-writers who promulgated variations of the rule that explicitly barred advertising the lawyers' willingness to help their clients. Personal injury lawyers who represent clients on the basis of contingent fees can compete for clients in many other ways, such as by offering to accept lower percentages of recoveries, or to deduct expenditures before rather than after taking their percentages. And helping would-be clients to access justice through the courts—despite the labels of champerty and maintenance attached by the *Pheils* court[151]—is as American as apple pie; we encourage such assistance through stockholder derivative suits, class actions, lawyer advertising, contingent fees, legal aid programs, pro bono assistance, and many other devices.

But there is a real problem that loans repayable out of recoveries can present, and it is illustrated by the facts of the *Pheils* case—not so much by the sham through which the attorney had his wife advance the funds, but by the size of the loans, more than $14,000. A loan of that magnitude does have the possibility of making the client beholden to the lawyer, and less able to exercise independent judgment. For example, if the client wants to accept a settlement offer for less than the loan amount, and the lawyer wants to keep going with the litigation in

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representing Rubio, who had sued his employer under the Federal Employer's Liability Act. Rubio had revealed, during a deposition, that the McKinneys had loaned him money for living expenses because his disability income was insufficient to cover them. *See* Rubio v. BNSF Ry. Co., 548 F. Supp. 2d 1220, 1227 (D. N.M. 2008).

148. *Cockrell* is described in the text at *supra* notes 29–32. *Smolen*, *Rubenstein*, *Morse*, *Pheils*, *Shefren* and *Kratina* are discussed in the text at *supra* notes 128–146. *K.A.H.* and *Rubio* are summarized in *supra* note 147.

149. *See generally* Rubenstein v. Statewide Grievance Comm., 2003 Conn. Super. Ct. LEXIS 1727 (Conn. Super. Ct. 2003).

150. *See* Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 462–63 (Okla. 2000).

151. *See* Toledo Bar Ass'n v. Pheils, 951 N.E.2d 758, 763 (Ohio 2011).

the hope of recovering the full amount that she has advanced, the lawyer is likely to lean on the client quite hard to reject the offer.

Other forms of lawyer assistance to clients do not necessarily present the same problem. Although some states, such as California, require clients to promise to repay a loan from a lawyer,[152] a state may prohibit lawyers from making the obligation to repay contingent on the client's successful recovery. This is the approach taken by Alabama.[153] It presents a different problem, however; if the client's suit is not successful, the lawyer will either have to write off the loan or pressure an unsuccessful and in most cases impecunious client to repay. Alabama lawyers who lend money to their clients may state in their loan instruments that the repayment obligation is not contingent, but as a practical matter, they will collect only if they win the case.

It is also striking that none of the state rules, and none of the recent decisions, deal with pro bono cases. Although pro bono lawyers, like other lawyers, are required to obey the rule, no jurisdiction seems to distinguish between pro bono and fee-charging lawyers for purposes of the bar on assistance to clients. Pro bono lawyers are, in fact, entirely absent from the rule's published jurisprudence. One possible explanation is that the rule writers were really concerned only with curbing possible abuses of clients by contingent fee lawyers. Another is that the rule-writers may simply not have given much thought to the special considerations applicable to pro bono litigation. Pro bono lawyers may have been unrepresented on the ABA and state bar committees that wrote the rules, or the committee members may have been unwilling to break from the traditional view that, except for criminal cases in which the Sixth Amendment may impose different duties on lawyers, the ethics rules should apply uniformly to all attorneys. However, a rule barring financial assistance to clients in fee-generating cases but allowing it in pro bono cases would be reasonable. Pro bono lawyers are less likely than other lawyers to compete for clients by implicit or explicit offers to loan money to clients, because they are not in the business of providing services in exchange for fees. More important, even if they represent clients who are seeking substantial monetary awards, their own incomes do not depend on the size of the award, so they lack an incentive to lend money to a client as a means of controlling the client's decisions.

The state variations and cases also suggest that it would make sense to focus on the distinction among gifts, loans, and assistance in obtaining financial aid from third parties. The Model Rule does not distinguish between gifts and loans; both are "financial assistance," and both the Maryland State Bar opinion[154] and the *Hoffmeyer* case[155] explicitly reject any difference in the treatment of the two

152. CAL. RULES OF PROF'L CONDUCT R. 4-210(A)(2) (2012).
153. ALA. RULES OF PROF'L CONDUCT R. 1(8)(e)(3) (2008).
154. *See supra* text accompanying notes 50–51.
155. *See supra* note 147.

types of assistance. Furthermore, the *Model Rules* specify that professional misconduct includes an attempt to violate the *Rules of Professional Conduct* "through the acts of another," at least implying that a lawyer would violate the rule by arranging for a third party, such as a spouse, friend, or charitable organization to give or loan money to a client.[156] For example, when the Center for Applied Legal Studies was bound by the less strict District of Columbia rule, one of our students arranged for her mosque to support her client, who would otherwise have been homeless; this conduct is arguably prohibited by the Maryland version of the rule that now applies to representation by the clinic's students.

Florida's opinion in the *Taylor* case recognizes the distinction, refusing to find that a gift violated the rule.[157] Virginia's bar opinion was also delivered in the context of a gift rather than a loan.[158] Curiously, among states that have more lenient versions of the rule, some permit *only* loans, and not outright gifts.[159] But it is not clear why outright gifts, even from fee-charging lawyers, should be prohibited. After a genuine gift is made, the client is not obligated to the lawyer, and the lawyer therefore has little control over the client resulting from a financial bond. "Little" rather than "no" control is the operative word, of course, because the client may hope to receive additional gifts if she remains loyal to the lawyer, who may even encourage such an idea in order to keep the client and the prospect of receiving a large contingent fee.[160] Nevertheless, the hold of the lawyer is less than in the case of a loan, and it is altogether absent in the case of a gift from a pro bono lawyer.

Similarly, the possibility of abuse is less if diminished, even for loans, when the lawyer helps the client to obtain the loan from a truly independent third party rather than making the loan himself or arranging for a relative to do so. Commercial third party lending to finance litigation is already a well-established industry, and it is part of the landscape in cases running the gamut from personal injury litigation to high-stakes divorce.[161] Montana permits certain loans to clients, but they must come from regulated financial institutions.[162] Some members of the bar are skeptical about third-party financing of cases, but at least a bank that loans money to a client for living expenses is less likely than the client's lawyer to direct the litigation in which the client is involved.

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156. *See* MODEL RULES R. 8.4(a).

157. Fla. Bar v. Taylor, 648 So. 2d 1190, 1192 (Fla. 1994).

158. Va. State Bar, Legal Ethics Op. 1830 (2006).

159. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(d)(1) (2013); ALA. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2008).

160. Moliterno notes that a client who receives a gift from her lawyer may feel inhibited about making independent judgments "because of a sense of obligation" but notes that this problem could occur in any pro bono case in which the lawyer is supplying free services. *See* Moliterno, *supra* note 54, at 247.

161. *See* LERMAN & SCHRAG, *supra* note 80, at 946–47 (discussing third-party litigation financing).

162. MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2004).

The jurisprudence, though not the Model Rule, also suggests that states might reasonably pay attention to the amount of assistance provided. The Mississippi rule imposes a $1,500 limit on loans without prior approval of an ethics committee,[163] several states with lenient rules limit the amount to what is "reasonably needed" to prevent financial hardship or to amounts for "basic living expenses," and the Virginia bar's ethics opinion allows gifts of "small amounts."[164] While the limit set by Mississippi is likely too low to sustain an indigent client, even at subsistence levels, for several months or more, states might want to set some limit on the amount that lawyers could loan, or might want to permit lawyers to lend money up to the amount needed for clients' actual medical expenses, housing appropriate for low-income tenants, and a reasonable sum for food.

The cases and state variants also suggest one other factor that some officials apparently consider important: several states that are willing to consider allowing some form of lawyer assistance nevertheless appear wary of lawyers who might advertise the availability of loans as a way of enticing clients to hire them. As noted above, this concern seems misplaced because there are so many other ways in which lawyers are allowed and even encouraged to compete for clients. In addition, there is no way that a ban on advertising can be entirely effective because, as the *Smolen* court noted, news of lawyers' willingness to make loans to clients could be spread by word of mouth.[165]

VI. HOW TO FIX RULE 1.8(e)

Professors Jack Sahl and James Moliterno want the ABA and the states to abandon Rule 1.8(e). Sahl states that they should "reject the majority view that proves the adage that no good deed goes unpunished."[166] Instead, "all states [should] adopt a rule permitting attorneys to advance living expenses to clients when litigation is pending or occurring."[167] Moliterno urges that "the financial assistance . . . rules ought to be abolished or substantially amended . . . . Abolition of these rules would . . . eliminate the awkwardness of courts punishing innocent lawyer financial assistance to clients based on vacuous reasoning."[168]

Despite the advice of these professors, Rule 1.8(e) endures as the ABA Model and is the law in forty-two states (or in at least forty, as the interpretations of the Virginia bar and courts in Florida may in fact gloss the rules of those states). It is time to try another approach. I therefore propose to cut the rule back rather than to

163. MISS. RULES OF PROF'L CONDUCT R. 1.8(e)(2) (2005).

164. Va. State Bar, Legal Ethics Op. 1830 (2006).

165. Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 463 (Okla. 2000).

166. Jack Sahl, *The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment*, 34 ST. MARY'S L.J. 795, 870 (2003).

167. *Id.* at 800–01.

168. Moliterno, *supra* note 54, at 256–57.

repeal it outright. States could preserve the rule's restrictions as to certain cases in which policy makers believe that it has some arguable value, while relaxing it as to situations in which it makes the least sense. To the extent that they preserve restrictions for some types of cases, they could allow waivers or could make those restrictions less severe than they currently are.

Option 1: Apply the rule's limitations only to contingent fee cases.

As noted above, a review of the reported cases and opinions suggests that most of the concern about financial assistance to clients centers on contingent fee cases. That concern may be unjustified because it may be motivated in part by distaste for competition, and because other forms of competition among contingent fee lawyers is now the norm. But there is at least a plausible argument that the contingent fee arrangement already creates potential conflicts between lawyers and their clients, which could be exacerbated if clients are their lawyers' debtors. In some cases, clients will want to accept proffered settlements that their lawyers would prefer them to reject; the clients may have short-term needs for the money (e.g., for medical treatment), while the lawyers may see larger potential gains, for their clients and themselves, that could be obtained only after protracted pre-trial litigation, or even a trial. While the decision to accept or turn down a settlement is one that only a client can make,[169] the lawyer may subtly push the client to do what the lawyer wants, pointing out that because the lawyer is operating on a contingent fee basis, the client hasn't laid out any money. The client may feel guilty if she refuses to go along with her "free" lawyer's suggestion. If the client also owes the lawyer a substantial amount of money—especially if the amount is more than the proffered settlement—the client may think she has no "right" to accept the settlement, for to do so could prevent the lawyer from being able to recover the money that had been loaned. So a state might reasonably allow the ban on loans to stand with respect to contingent fee cases.

Option 2: Apply the bar only to loans and not gifts.

The possibility of abuse by lawyers is much diminished in the case of a gift, because the client is not legally obligated to repay the lawyer, even if the client recovers a substantial amount of money. This situation does not entirely solve the problem of lawyer pressure on clients, because the client may feel so much gratitude for the gift that she is unable to resist the lawyer's suggestions for case strategy, but at least the lawyer is not figuratively holding a promissory note over the client's head. A lawyer might claim that the funds transferred were actually a loan, not a gift, but courts could prevent such claims by refusing to enforce

169. *See* MODEL RULES R. 1.2(a).

alleged promises by clients to pay their lawyers, except to the extent of fees specified in written retainer agreements. Ethics rules already require contingent fee agreements to be in writing,[170] and the rules could be changed to require all fee arrangements to be written.

Option 3: Exempt from the rule gifts to clients in all cases in which no fee is being charged to indigent clients.

The *Model Rules* and the rules of the vast majority of states make no exception for pro bono cases, but these are the cases in which lawyers are most likely to be motivated by humanitarian impulses rather than self-interest. The rule could be amended to allow pro bono lawyers give money or in-kind assistance to help their indigent clients to meet their most urgent needs. A possible variant would be to allow assistance if the client was not paying a fee and the lawyer was the salaried employee of a tax-exempt non-profit organization. This would be a further limitation, but, like a rule that allowed a gift in any no-fee case, it would solve the kind of problem that has arisen in the clinic that I direct.[171] Another variant would allow pro bono lawyers to lend as well as give money to such clients, which of course would be repaid only if the clients eventually became wealthy enough to repay it. But that expansion of the exemption seems unnecessary, because very few pro bono lawyers would want to seek eventual remuneration, and obtaining compensation from indigent clients seems inconsistent with the very concept of pro bono representation.[172]

Option 4: Allow gifts and loans to needy civil and criminal defendants and to respondents in administrative proceedings.

Defendants and respondents include such persons as the criminal defendants referred to in the Virginia bar opinion, tenants threatened with eviction, and the respondents in immigration removal proceedings represented by lawyers and law students who work in law school clinics and other non-profit organizations. These individuals are involuntary parties to proceedings. To the extent that what states are concerned about is "champerty and maintenance," as suggested by the court in Connecticut,[173] that concern is inapplicable to them. They are not the initiators of litigation; they are its unwilling targets.

Plaintiffs' lawyers might object to all four of these options, insisting that outright repeal of the rule is the only way to assure injured clients who have

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170. MODEL RULES R. 1.5(c).

171. *See supra* text following note 5.

172. My definition of a pro bono case is one in which the lawyer does not charge a fee, but perhaps the term is more elastic than that. *See* GERALD M. STERN, THE BUFFALO CREEK DISASTER 5, 20, 272 (2d ed. 2008) (noting that a 25% contingent fee mass tort case, in which the plaintiffs were represented by Arnold & Porter, was one in which the lead lawyer was the "pro bono partner" spending all his time on a "public interest" case.).

173. *See supra* text accompanying notes 130, 141.

limited means of being able to resist, with the help of their lawyers, low-ball settlement offers that are extended with knowledge that the clients are in immediate need of cash for urgent living expenses. However, now that litigation lending by third parties is becoming more common, at least for cases that the lenders believe are meritorious,[174] the need for lawyers to lend money to personal injury clients is diminishing.

Option 5: Define indigence.

To the extent that states are reluctant to allow loans or gifts to clients because of the potential for lawyers to have too much control over decision-making in too many cases, the universe of cases in which assistance is permitted can be limited by allowing assistance only where the client is truly needy. Indigence could be measured either objectively (for example, if the client's annual income were less than 150% of the federal poverty level for a family of the client's family size), or through a case by case determination by a third party, as is done when a client makes a motion to file litigation *in forma pauperis*.[175] Third party determination, however, raises the specter of forced disclosure to a defendant when plaintiff's lawyer desires to lend money to a client. A repeat defender, such as an insurance company, could then surmise, by observing which equally needy defendants were not receiving loans from their lawyers, which cases were those in which the plaintiffs' lawyers did not have a great deal of confidence.

Option 6: Limit the amount of assistance.

A state supreme court could think that a loan of $11,000, as in the *Kratina* case,[176] created such a large debt for a client that the clients could be strongly pressured by the lawyer to make decisions in the best interest of the lawyer rather the best interest of the client. It might think assistance of a more modest nature

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174. *See* James Podgers, *Litigation Lending Makes its Case*, A.B.A. J., Mar. 1, 2011, http://www.abajournal.com/magazine/article/litigation_lending_makes_its_case/. Litigation funding of personal injury suits may not survive, however. Critics are attempting to outlaw or limit them, pointing out high interest rates that are charged to some plaintiffs. The rates are unregulated by usury laws because litigation loans in personal injury cases are typically non-recourse loans, which a plaintiff need not repay if there is no recovery. Martin Merzer, *Cash-now Promise of Lawsuit Loans Under Fire*, FOX BUSINESS, Apr. 19, 2013, http://www.foxbusiness.com/personal-finance/2013/03/29/cash-now-promise-lawsuit-loans-under-fire/. The U.S. Chamber of Commerce supports an effort to persuade state legislatures to require notification to defense counsel if a litigation lender is supporting a plaintiff, which opponents of such legislation believe could unfairly enable insurance companies to judge a plaintiff lawyer's degree of optimism about a case, and possibly even to estimate the plaintiff's litigation budget. *See* Denise Johnson, *Should Insurers Be Concerned About Litigation Funding*, CLAIMS JOURNAL, May 20, 2013, http://www.claimsjournal.com/news/national/2013/05/20/229242.htm.

175. *See* 28 U.S.C. § 1915 (2006); FED. R. APP. P. 24. Any indigent person may apply to file a federal case in *forma pauperis*; the word "prisoner" in 28 U.S.C. § 1915 is a typographical error. Floyd v. U.S. Postal Serv., 105 F. 3d 274, 275–76 (6th Cir. 1997).

176. *See supra* note 146 and accompanying text.

would be genuinely humanitarian without promoting subservience to a lawyer's desires. This is the approach taken by Mississippi, which limits assistance to a loan of $1,500.[177] Although that figure seems low (and apparently is not indexed to inflation), Mississippi does allow an application to the state bar for permission to advance a larger sum; that procedural step could discourage abuse.[178] For even greater control, a state could require that *all* loans require advance approval from some outside body, such as a bar committee or a court.

This option may not be desirable, however, because states might set the limit too low, and because a requirement for outside approval raises the same issues as disclosure of a lawyer's desire to lend to a person with income above a certain level, discussed in connection with the previous option.

Option 7: Allow a lawyer to arrange for assistance, but only if it comes from another party unrelated to the lawyer.

A client may feel less beholden to a lawyer if the funds come from a third party as, for example, when, before the Maryland ethics rules became applicable, my student arranged for the worshippers at her mosque to support her indigent client so that she would not be homeless. A state bar could, through a comment, make it clear that Rule 8.4(a), barring lawyers from violating other rules through the acts of another, does not apply to Rule 1.8(e). This is the approach of Montana, at least with respect to loans; that state allows the lawyer to arrange for a loan to a client from a regulated financial institution.[179] A state adopting this option would have to decide whether, in the case of such a loan, the lawyer would be permitted to guarantee the loan. A guarantee might be necessary for a regulated institution to extend a loan to a needy individual, but the guarantee would put the lawyer in the position of the client's creditor if the client defaulted and the institution collected from the lawyer. Another variant of this option would be to allow the lawyer to arrange for a guarantee by an unrelated person but not to guarantee such a loan herself.

This reform is weak, compared to those described above. Without the feature permitting the lawyer to guarantee a loan, it would simply make it clear that lawyers could properly be intermediaries to arrange for litigation lending, which lawyers are already doing. Permitting lawyers to guarantee third party loans, however, creates the same potential conflict between lawyer and client that courts appear to have concerns about. If a guarantee by a litigant's lawyer is permitted, states might just as well simply repeal Rule 1.8(e).

177. *See* MISS. RULES OF PROF'L CONDUCT, *supra* note 103.
178. *See* MISS. RULES OF PROF'L CONDUCT, *supra* note 103.
179. MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2004).

Option 8: Limit advertising.

Several states have tried to limit publicity about the availability of loans or gifts from lawyers, apparently out of a concern that lawyers would compete for clients with each other by offering greater assistance than other lawyers would provide. Although this concern seems misplaced, because lawyers can compete over price in other ways (such as the percentage of a contingent fee, whether expenses are deducted before or after the percentage is computed, or their hourly rates when fees are a function of time spent), it has found its way into the jurisprudence of some jurisdictions. Montana bars such advertising, and the bar to assistance in Oklahoma resulted at least in part from the concern that lawyers would advertise and that even if they did not do so, news of their generosity would spread by word of mouth. However, even if the objective were worthy and the means of achieving it were constitutional,[180] the task of limiting information about lawyers' willingness to assist clients cannot be accomplished. The Internet takes the spread of information by word of mouth to the nth degree. There is no practical way to prevent clients (or lawyers acting through their clients) from sharing with others the information about the assistance that they obtained from their legal representatives.

Option 9: Rely on waivers based on informed consent.

States could also rely on disclosures and waivers, rather than prohibitions, to allow financial assistance to clients. This is a solution proposed by Moliterno, who argues that "in [nearly] all other conflicts situations, clients are empowered to waive the conflict and go forward with the lawyers of their choice, understanding and accepting the conflict's risks in exchange for benefits they perceive from the engagement of the lawyer."[181] He advocates that in lieu of banning assistance, states should subject loans and gifts by lawyers to the regime of Model Rule 1.8(a).[182] Thus, the transaction would have to be "fair and reasonable," its terms would have to be reduced to reasonably understandable writing,[183] the client must be given the opportunity to seek independent legal advice before entering into the transaction, and must be "advised in writing of the

180. Sahl suggests that a blanket restriction, even on the lawyers themselves, that banned advertising a willingness to lend money to clients would be barred by the First Amendment. *See* Sahl, *supra* note 166, at 853 ("Lawyer advertisements about living expense advances are commercial speech and are entitled to some measure of First Amendment protection."). He acknowledges that certain restrictions designed to ensure that the information supplied to potential clients is truthful and complete would be consistent with the Constitution. *Id.* at 865–66.

181. Moliterno, *supra* note 54, at 249.

182. *Id.*

183. California requires loans to clients to be reduced to writing but does not require that the language describing the terms be reasonably understandable by the client. CAL. RULES OF PROF'L CONDUCT R. 4-210(A)(2) (2012).

desirability of seeking" such advice, and the client must give "informed consent" in writing.[184] These procedural requirements, which were designed to address potential conflicts in joint business ventures between lawyers and clients, seem a bit problematic, however, as applied to loans and gifts to clients. Loans and gifts are generally extended only to clients who are in dire need, and most often, to clients who are indigent or, in some cases, disabled, often by a personal injury. These clients are in many cases less educated than business clients, and they will often be in no position to turn down offers of largesse from their lawyers. In addition, they will usually be unable to retain a second lawyer to advise them about the risks of accepting a loan or gift from the lawyer who is already representing them.

CONCLUSION

As other commentators have noted, the bar on lawyers' loans and gifts to clients seems a holdover from an earlier age, when facilitating litigation was thought to be evil rather than a way of promoting the just resolution of disputes, and when law was thought of as a genteel profession in which it was considered normal for practitioners to avoid competing with each other.[185] In the 21st century, we are more concerned than in the past with access to justice for tort victims and others, and competition (including advertising) by lawyers is considered in the public interest because it lowers the cost of legal services. Yet the bar on lawyers' financial assistance to their clients persists, and even most jurisdictions that have opened the door to humanitarian assistance have done so in very limited ways. The restrictions have persisted despite withering academic criticism of them by leading ethics experts.

The ABA has been unwilling to withdraw Rule 1.8(e), and most state supreme courts have been unwilling to repeal or even modify it. One reason for that resistance may be a concern that in some situations, a restriction on lawyers' financial assistance to clients may serve a useful function in protecting clients from becoming heavily indebted to their lawyers and, as a result, allowing their lawyers to reduce their autonomy when given settlement offers, or to make other important litigation decisions. This article suggests that the problem, if there is one, seems to arise most often in the context of loans to clients in contingent fee cases in which the lawyer expects to be repaid out of the proceeds of a settlement to his plaintiff-client. But if that is the concern, the rule could be more narrowly written with that scenario in mind. In particular, the policy of protecting clients in

184. MODEL RULES R. 1.8(a).

185. *See* Elizabeth Lesly Stevens, *Bar Examined*, WASHINGTON MONTHLY, March/April 2013 http://www.washingtonmonthly.com/magazine/march_april_2013/on_political_books/bar_examined043320.php?page=all (reviewing Steven J. Harper's, The Lawyer Bubble: A Profession in Crisis, noting that "Harper chronicles the disruption of his once-genteel profession").

contingent fee cases has no application to pro bono cases, to the defense of cases, or to cases not involving monetary relief. In addition, even in the contingent fee situation, the prohibition is less justifiable for gifts than for loans, less justifiable where the lawyer merely arranges for a loan or gift by an unrelated third party, and less justifiable for small amounts of assistance to truly indigent clients, which appear to be humanitarian gestures by the lawyers, than to large loans to clients who are not as needy.

The ABA and the states that have simply accepted the ABA's wording should now engage in a searching reconsideration of their reasons for adopting restrictions on lawyer financial assistance to clients. In connection with their review of this rule, they should consider, individually or in combination, the options identified in this article. They should then tailor their versions of Rule 1.8(e) to impose the fewest limitations necessary to achieve the legitimate objective of preventing lawyers from dictating their clients' decisions about accepting proffered settlements. If some version of Rule 1.8(e) survives, it should avoid the contributions that the current text makes to homelessness, inadequate medical care, starvation, and, in some cases, denial of access to justice because clients are forced by their poverty to accept inadequate settlements. At the very least, the ABA and the states should eliminate the ban on outright gifts by pro bono lawyers to meet the survival needs of their indigent clients, particularly those who are involuntary parties to legal proceedings.